THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2019-CP-42-03075

Betty Nanney,
by and through her Attorney-in-Fact, Leslie Nanney,

Respondent,

v.

THI of South Carolina at Spartanburg, LLC,
d/b/a Magnolia Manor-Spartanburg, Rusty Flathmann,
Laura Anne Winn, and Olishia Gaffney,

Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

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

A. Did the circuit court err in finding that the Admission Agreement and the Arbitration Agreement 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 lacks consideration and mutuality?

C. Did the circuit court err in finding that the Arbitration Agreement lacks material terms?

D. Did the circuit court err in finding that the Arbitration

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[1] The "Facility" is Defendant-Appellant THI of South Carolina at Spartanburg, LLC, d/b/a Magnolia Manor-Spartanburg. It is a skilled nursing facility in Spartanburg County. In addition to the Facility's motion to compel arbitration, identical motions were made by Defendants-Appellants Rusty Flathmann ("Flathmann") and Olishia Gaffney ("Gaffney"). Flathmann is alleged to have been an agent of the Facility at all relevant times. (Compl. ¶ 4.) Gaffney is alleged to have been a managing employee of the Facility and a member of its governing body at all relevant times. (Compl. ¶ 6.) Flathmann and Gaffney are covered by the subject Arbitration Agreement as agents or employees of the Facility. (*See* Arbitration Agreement ("This Agreement is made between [the Facility], its agents, employees, and servants, and . . . .").) The Facility, Flathmann, and Gaffney's positions in this appeal are the same. For the sake of simplicity, the issues/arguments in this appeal are phrased in singular terms in reference to the Facility's motion to compel arbitration, but they are intended to cover—and apply with equal force to—Flathmann and Gaffney's motions, too.

[2] "Plaintiff" is Plaintiff-Respondent, Betty Nanney, by and through her Attorney-in-Fact, Leslie Nanney. "Ms. Nanney" refers to Betty Nanney herself.

[3] Out of an abundance of caution, Appellants would make clear that their issues, and corresponding arguments, go to the circuit court's ruling on the motions to compel arbitration themselves and to the court's ruling on reconsideration.

Agreement is unconscionable?

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?

III. Should the circuit court have clarified that its denial of the Facility's motion to compel arbitration did not dispose of Winn's[4] motion to dismiss and either (a) issued a separate order ruling on the motion (after hearing such oral argument and/or considering such written submissions from the parties as appropriate), (b) placed the motion back on the roster for disposition by the judge presiding over the next available term of court, or (c) simply allowed the motion to be withdrawn without prejudice?[5]

STATEMENT OF THE CASE

With the help of her son, Kaileb Horn ("Mr. Horn"), Ms. Nanney was admitted to the Facility on October 28, 2016. (*See* Admission Agreement; Pl.'s Mem. in Opp'n to Mots. to Compel Arbitration p. 2 ("[Mr. Horn,] Ms. Nanney's son, was the individual who signed all the admissions paperwork.").) In conjunction with Ms. Nanney's admission, Mr. Horn signed an Admission Agreement[6] and an

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[4] "Winn" is Defendant-Appellant Laura Anne Winn.

[5] Because Winn's motion to dismiss is referenced in the circuit court's orders, this issue, and the corresponding argument, is raised out of an abundance of caution, to guard against any potential threat of undue prejudice that might arise from any contention that the circuit court actually adjudicated Winn's motion via the appealed orders. To be clear, however, Winn submits that any such contention would be untenable—read: patently absurd and unjust—given that the circuit court made but passing mention of her motion and undertook no substantive discussion of it whatsoever.

[6] (Admission Agreement.)

Arbitration Agreement[7] on Ms. Nanney's behalf. By his signature on the Arbitration Agreement, Mr. Horn "represent[ed] that . . . he . . . ha[d] the authority to sign on [Ms. Nanney's] behalf so as to bind [Ms. Nanney] as well as [himself]." (*Id.*)

On September 4, 2019, Plaintiff commenced this nursing home malpractice action against the Facility in the Court of Common Pleas, Spartanburg County, alleging deficient care/treatment of Ms. Nanney during her residency. (*See* Summons; Compl.)[8] On November 11, 2019, the Facility, Flathmann, and Gaffney moved to compel Plaintiff's claims to arbitration, based on the above-referenced Arbitration Agreement. (Facility, Flathmann, and Gaffney's Mots. to Compel Arbitration.) Following the parties' submission of briefs[9] and a hearing on

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[7] (Arbitration Agreement.)

[8] 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 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).

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

December 16, 2019,[10] the circuit court, the Honorable Grace Gilchrist Knie presiding, denied the motions by order filed January 7, 2020. (Order Denying Defs.' Mots. to Compel Arbitration, filed January 7, 2020.)

Pursuant to Rule 59(e), SCRCP, on January 17, 2020, the Facility, Flathmann, and Gaffney 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.) The court denied the motion without a hearing by order filed February 13, 2020. (Order Regarding Defs.' Mot. to Alter, Amend, and/or Reconsider Order Denying Defs.' Mot. to Compel Arbitration, filed February 13, 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

[10] (Tr. of Mot. Hr'g held December 16, 2019.)

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 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.

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.
>
> *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,"[11] as indeed the Admission Agreement and the Arbitration Agreement were here,[12] 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.

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

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

[12] 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).

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 MTCA.) But all this means is that it did not have to be agreed to for Ms.

Nanney 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. Nanney'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. Nanney's admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Ms. Nanney'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. Nanney'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 the "traditional" six-factor test for equitable estoppel analyzed in *non*-arbitration cases. (Order Denying Motion to Compel Arbitration.) 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. Nanney 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. Nanney 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. Nanney 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.[13]

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 asserts "[Mr. Horn] had no legal authority to sign the Arbitration Agreement, and Defendant knew or should have known this fact." (Order Denying MTCA.) There is no evidence of record from which the court could reasonably draw this conclusion about what Defendants knew or should have known—in fact, the only evidence there is contradicts this conclusion—and requiring Defendants to meet the investigatory standard implicit in this conclusion violates the FAA by failing to place the Arbitration Agreement on equal footing with other contracts.

The only evidence of record on this point is in the form of the Arbitration Agreement itself, which includes (by virtue of his signature upon it) Mr. Horn's express representation that he had all due authority to sign it for his mother. There is no question raised here as to Mr. Horn's competency. He is thus "presumed to

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[13] 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.

have read, understood, and assented to [the] terms" of the Arbitration Agreement,[14] including, of course, the terms whereby he represented himself to the Facility as having authority to act on his mother's behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract,[15] and Mr. Horn is no less bound by this covenant than the Facility. To require anything more from the Facility as a contracting party just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts. *See Concepcion*, 563 U.S. at 339.

Likewise, the court's analysis improperly asserts:

> Defendants can . . . not claim to have been misled and cannot rely on equitable estoppel if they, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in questions.[] Furthermore, Defendants had the capacity to determine whether [Mr. Horn] had authority to sign the Arbitration Agreement on Ms. Nanney's behalf. Defendants are a sophisticated business entity frequently interacting with residents and their families during the nursing home admission. Defendants are familiar with the legal concepts of guardianship and powers-of-attorney and had the ability to ask [Mr. Horn] for any power of attorney documentation.

(Order Denying MTCA.)

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[14] *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.").

[15] *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995).

Here again, there is no question as to Mr. Horn's competency. He is thus "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,[16] including, of course, the terms whereby he represented himself to the Facility as having authority to act on his mother's behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract,[17] and Mr. Horn is no less bound by this covenant than the Facility. To require anything more from the Facility as a contracting party just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts. *See Concepcion*, 563 U.S. at 339.

B. The circuit court erred in finding that the Arbitration Agreement lacks consideration and mutuality.

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.

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[16] *Gibson*, 426 S.C. at 352, 827 S.E.2d at 181 ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.").

[17] *Adams*, 320 S.C. at 277, 465 S.E.2d at 86.

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.

Further still, the quote from *Thompson* that "any possible benefit emanating from the [Arbitration Agreement] alone is offset by the [Arbitration Agreement's] requirement that [the resident] waive her right to access the courts and her right to a jury trial,"[18] is plainly erroneous in that it places arbitration agreements on unequal footing from other contracts.[19] As a matter of law, it legally cannot be, the case that mutual promises constitute sufficient consideration to form a binding agreement except in the case of arbitration agreements. This is plainly improper under the FAA. Moreover, the very idea that mutual promises to arbitrate do not effect an exchange of benefits to both sides is irreconcilable with the existence of the presumption in favor of arbitration agreements that even the circuit court itself acknowledged. And there is no way to square the logic of the quote from

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[18] (Order Denying MTCA p. 11 (emphasis omitted).)

[19] *See Concepcion*, 563 U.S. at 339.

Thompson—which reflects an overtly hostile view of arbitration—with the undeniable policy preference in favor of arbitration under both South Carolina and federal law. The whole point of arbitration is to make use of an alternative—i.e., outside the traditional litigation process—form of dispute resolution. The giving up—on both sides—of this process (and all that comes along with it) in favor of the alternative of arbitration is the benefit.

Lastly, the circuit court makes reference to Plaintiff's argument that *if* the Arbitration Agreement is a precondition of admission it constitutes an improper benefit or other consideration under federal law governing Medicare/Medicaid reimbursements. This argument fails of its essential premise: namely, that the Arbitration Agreement was such a precondition, as indeed the circuit court itself recognizes that it was *not*. (Order Denying MTCA pp. 15–16.) Moreover, where the Subject Order states, "[the Facility] has admitted the Arbitration Agreement was not a condition of admission, thus, there is no separate consideration offered for the arbitration agreement," it is, most respectfully, erroneous. (*Id.*) The fact that the Arbitration Agreement is *not a precondition of admission* means that it cannot possibly violate any federal rule against the Facility accepting additional consideration *as a precondition of admission*. This does not, however, mean that there was no consideration to support the Arbitration Agreement, which their

certainly was (as explained above). It just means that the Arbitration Agreement itself did not constitute any form of unlawful consideration to the Facility.

C. The circuit court erred in finding that the Arbitration Agreement lacks material terms.

The circuit court erroneously found that the Arbitration Agreement is indefinite and/or silent as to material terms and therefore unenforceable, as there was no "meeting of the minds." (Order Denying MTCA p. 16.) Specifically, the court found that the Arbitration Agreement lacks definiteness as to: (1) arbitrator selection, (2) the rules of evidence, and (3) allowance of pre-hearing discovery. (*Id.*) This was error.

In *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 438 (2009), the arbitration agreement at issue *specifically required* a particular entity to serve as arbitrator and was silent as to any alternative, neither specifying an alternate arbitrator nor providing a mechanism to select an alternate. 383 S.C. at 128, 678 S.E.2d at 437. When the designated entity was no longer able to serve as arbitrator, a dispute arose. *Id.* Finding that the specification of the named arbitrator was a material term of the agreement and that it had been rendered ineffective, the *Grant* Court held arbitration was no longer required. *See Id.* at 128–132, 678 S.E.2d at 437–39 ("Where designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution, we believe that it is neither 'logistical' nor 'ancillary.'"). The Court

also held that the default selection mechanism in FAA § 5 was inapplicable *when the parties make a specific arbitrator an integral term*. *Id.* at 131, 678 S.E.2d at 438.[20]

Although *Grant* does require all material terms to exist within an arbitration agreement for a meeting of the minds to result, the terms that the circuit court found to be absent or unduly vague are distinguishable from the material terms required under *Grant*.

The lack of a specified arbitrator does not constitute the omission of a material term. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 82, 749 S.E.2d 139, 147 (Ct. App. 2013) ("[T]he lack of a specified arbiter is not an omission of a

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[20] FAA § 5 provides as follows:

> If in the [arbitration] agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5.

material term."). While the *Grant* Court held that a named arbitrator is a material term *when one is specified within an agreement* and that FAA § 5 does not apply *when such a specification exists*, these holdings are inapplicable when, as here, the contract *does not specify* a particular arbitrator. *Id.*

With regard to arbitrator selection, the Arbitration Agreement states as follows: "The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court." (Arbitration Agreement.) The only reasonable interpretation of this plain language is that either the parties can agree on an arbitrator or the court will decide.[21] And to be clear, if the parties cannot agree and the court is called upon to decide, this is not the court supplying omitted terms, this is the court given effect to the agreed-upon terms.

The other matters cited by the circuit court do not rise to the level of material terms but rather are mere "'ancillary logistical concerns'" that are "'not required within an arbitration agreement.'" Y*ork*, 406 S.C. at 83, 749 S.E.2d at 147

[21] Beyond the alternative arbitrator selection process expressly provided for in the Arbitration Agreement, there is also the alternative provided by FAA § 5, which applies not only "if no method [of naming or appointing an arbitrator] [is] provided [in the arbitration agreement]" but also "if a method [is] provided and any party . . . fail[s] to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy . . . ." 9 U.S.C. § 5.

(explaining that matters like discovery rules, cost allocations, or arbitration initiation procedures are not material terms but rather "'ancillary logistical' ones" that are "not required within an arbitration agreement") (citing *Grant*, 383 S.C. at 131–32, 678 S.E.2d at 439).

The Arbitration Agreement does not lack any material term or suffer from any fatal ambiguity. Provided they meet their mutual obligations of good faith and fair dealing,[22] there is no good reason why the parties cannot arbitrate the instant dispute in accordance with the Arbitration Agreement. In addition to clearly stating the parties' mutual and concurrent promises to arbitrate, the Arbitration Agreement sets out the scope of the disputes that are subject to arbitration, how the arbitrator is to either be agreed upon or alternatively selected, the applicability of both the South Carolina ADR Rules (which provides substantive and procedural rules geared "to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply," Rule 1, SCADR; *see also* Rules 2, 9, 11, 12, 13, SCADR) and the FAA, and makes clear that the arbitrator's decision is binding and enforceable in a court of competent jurisdiction. (*See* Arbitration Agreement.) To require more just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on

[22] 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).

equal footing with all other contracts. *See Concepcion*, 563 U.S. at 339.

D. The circuit court erred in finding that the Arbitration Agreement is unconscionable.

As an initial matter, although it includes the heading "E. The Arbitration Agreement should not be enforced because it is both procedurally and substantively unconscionable," the circuit court's order does not actually include any analysis leading to the conclusion that the Arbitration Agreement is unconscionable. (*See* Order Denying MTCA pp. 17–18.) After the aforementioned heading comes two paragraphs of legal citations but nowhere is it actually explained how any of them applies to this case. Additionally, the conclusion of the order makes no mention of unconscionability. In any event, though, any finding of unconscionability is, most respectfully, erroneous.

The issue of unconscionability presents a two-part test. Unconscionably requires *both* (1) an absence of meaningful choice on the part of one party due to one-sided contract provisions and (2) terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). Neither of these is present here.

The first part of the test (absence of meaningful choice) is undermined by the express acknowledgement in the Arbitration Agreement itself that the "Resident/Representative is not required to use the . . . Facility for Resident's

healthcare needs and . . . there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident." (Arbitration Agreement.) Moreover, as the Subject Order itself recognizes, the Arbitration Agreement was not a precondition of admission.

As for the second part of the test (unreasonably oppressive terms), the Arbitration Agreement simply binds the parties (both sides) to submit to arbitration. Not only is this not oppressive, "both state and federal policy favor arbitration of disputes." *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668. And there is nothing about the Arbitration Agreement that suggests it is not geared towards achieving an unbiased decision by a neutral decision-maker. *Id.* at 25, 644 S.E.2d at 668 ("In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.").

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 Mr. Horn's express representation of her authority to bind his mother, Ms. Nanney. (*See* Arbitration Agreement.) The only evidence that Mr. Horn lacked authority to bind Ms. Nanney is his own affidavit (filed just days before the hearing on the Facility's

motion to compel arbitration (*See* Aff. of Mr. Horn)) contradicting his prior representation that he had authority to sign the Arbitration Agreement on his 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,[23] estoppel,[24] or ratification,[25]

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[23] 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

each a fact-intensive inquiry), while, on the other hand, being vulnerable to 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 Mr. Horn's unchecked affidavit without allowing the Facility any opportunity to question him about it or otherwise follow pertinent evidentiary leads. The circuit court itself

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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).

[24] "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).

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

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 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.

III. The circuit court should have clarified that its denial of the Facility's motion to compel arbitration did not dispose of Winn's motion to dismiss and either (a) issued a separate order ruling on the motion (after hearing such oral argument and/or considering such written submissions from the parties as appropriate), (b) placed the motion back on the roster for disposition by the judge presiding over the next available term of court, or (c) simply allowed the motion to be withdrawn without prejudice.

In the orders on appeal, the circuit court mentioned Winn's motion to dismiss, filed October 11, 2019, alongside the Facility, Flathmann, and Gaffney's motions to compel arbitration, filed November 11, 2019, which, in full, were styled motions "to dismiss Plaintiff's complaint, compel arbitration and stay state court proceedings." (*Compare* Winn Mot. to Dismiss *with* Facility, Flathmann, and Gaffney's Mots. to Compel Arbitration.) While the latter motions included the word "dismiss" in their titles, their aim was to have this action dismissed or stayed *in favor of arbitration*. Winn's motion, on the other hand, did not seek to compel arbitration but rather sought her dismissal as a party under Rule 12(b)(6), SCRCP, on the grounds that she was "not a proper party to this action as she did not owe the Plaintiff a legal duty of care with respect to the injuries suffered in this action" because she "was not an employee or agent of [the Facility] during the time period relevant to Plaintiff's allegations, nor did she have any personal or professional relationship with the Plaintiff or any other defendant in this action during the time period at issue that could give rise to a legal duty of care[] [and,] [m]oreover, [she] did not supervise, monitor, or interact with any staff member at the Facility during

the time the alleged events occurred." (*See* Winn Mot. to Dismiss.) Quite simply, the subject matter Winn's motion to dismiss is entirely different from that of the Facility, Flathmann, and Gaffney's motions to compel arbitration, and these latter motions are the only motions the circuit court actually addressed on the merits.

To guard against any potential threat of undue prejudice that might arise from any contention that the circuit court actually adjudicated Winn's motion via the appealed orders, out of an abundance of caution, Winn *asked that the court clarify that it ruling on the Facility's motion to compel arbitration did not dispose of Winn's motion to dismiss and either (a) issue a separate order ruling on the motion (after hearing such oral argument and/or considering such written submissions from the parties as appropriate), (b) place the motion back on the roster for disposition by the judge presiding over the next available term of court, or (c) simply allowing the motion to be withdrawn without prejudice*. Most respectfully, in the interests of justice and judicial economy, the circuit court should have done so, and here again, out of an abundance of caution, Winn asks this Court to do so now.

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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August 19, 2020

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2019-CP-42-03075

RECEIVED
Aug 20 2020
SC Court of Appeals

Betty Nanney,
by and through her Attorney-in-Fact, Leslie Nanney,

Respondent,

v.

THI of South Carolina at Spartanburg, LLC,
d/b/a Magnolia Manor-Spartanburg, Rusty Flathmann,
Laura Anne Winn, and Olishia Gaffney,

Appellants.

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I, Russell G. Hines, of Young Clement Rivers, LLP, attorneys for Appellants, hereby certify that the **INITIAL BRIEF OF APPELLANTS** and **APPELLANTS' 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:	Nanney v. THI (Appellate Case No. 2020-000500) -- Initial Brief of Appellants and Appellants" Designation of Matter
Date:	Wednesday, August 19, 2020 11:56:41 PM
Attachments:	Nanney v. THI (App. Case No. 2020-000500) -- Initial Brief of Appellants" d. 8-19-20.pdf Nanney v. THI (App. Case No. 2020-000500) -- Appellants" Designation of Matter d. 8-19-20.pdf image001.png

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

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