THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2020-000501

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.

FINAL BRIEF OF RESPONDENT

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III. Alternatively, if merger did occur and the arbitration agreement is not severed, did the lower court correctly hold that Appellant failed to prove equitable estoppel?

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STATEMENT OF THE CASE

Annie Porter died after suffering pressure sores while a resident of Appellant THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center ("THI"). When her daughter, Respondent Vermell Daniels, as Personal Representative of the Estate of Annie Porter, ("the Estate"), filed a complaint against THI, it filed a motion to compel arbitration. The lower court denied the motion, and THI appealed.

On April 25, 2019, the Estate filed a complaint against THI asserting various causes of action for survival and wrongful death damages. (R. pp. 21-36). On June 5, 2019, THI filed a motion to dismiss and compel arbitration. (R. pp. 90-92). Each party filed a memorandum in support of their position, and the lower court held a hearing on August 26, 2019. (R. pp. 93-134; 53-73).

On November 6, 2019, the lower court entered an order denying THI's motion. (R. pp. 1-6). On November 18, 2019, THI filed a motion to reconsider. (R. pp. 135-142). The lower court

held a hearing on the motion on February 13, 2020, and issued an order denying it on February 24, 2020. (R. pp. 74-89; 7-19).

FACTS

Annie Porter was admitted to THI's Midlands Health and Rehabilitation Center on January 5, 2018, for rehabilitation following surgery to remove a brain tumor. (R. p. 28 ¶ 30; p. 63). Ms. Porter's daughter, Vermell Daniels, accompanied Ms. Porter to admit her to THI. Ms. Daniels was not her mother's legal guardian, power of attorney, or conservator. (R. pp. 133-134). THI presented Ms. Daniels with two separate documents—an admission agreement and an arbitration agreement.

I. The admission agreement

The admission agreement was entered into between THI and Ms. Porter. (R. pp. 115-126). There is nothing written on the line for the name of a "Representative", defined as "Resident's Durable Power of Attorney for Health Care/Resident's Legal Guardian/Resident's Responsible Party." *Id.* (internal quotation marks omitted).

The signature block is incomplete for both parties. No one signed the admission agreement for THI. (R. p. 126). There is only a name written on the line for "Printed Name of Facility Official & Title." *Id.* The resident signature block contains no signature, but "Annie Porter" is written on the line for "Printed Name of Resident." *Id.* Ms. Daniels signed the representative signature block on the line for "Signature of Representative, if any," but her signature is not witnessed. *Id.*

THI required either the resident's signature with a witness or the representative's signature with a witness. *Id.* That the witness signature is a requirement is evident from the fact that, in the representative signature block, there is a line for the representative's social security number that

says next to it "Voluntary Info.", plainly indicating all other information is necessary, not voluntary. *Id.*

The price of Ms. Porter's residency and the addresses for notices to be sent by either party are both blank. (R. pp. 119, 123).

THI did not follow its own requirements for execution of the admission agreement. THI specifies that, if a representative acts for the resident, THI will not simply accept that person's word that they legally represent the resident. The admission agreement stated: "Representative ***will*** supply Facility with a copy of any power of attorney, durable power of attorney, durable power of attorney for health care or other legal documentation permitting him or her to act on Resident's behalf." (R. p. 125) (emphasis added). THI required documentation of authority but failed to ask for or obtain it in this case. THI did not ask Ms. Daniels for a copy of any document showing her legal authority to act for Ms. Porter, and Ms. Daniels provided none. (R. p. 133).

II. The arbitration agreement

The arbitration agreement was also entered into between THI and Ms. Porter with a blank line for the resident's representative. (R. p. 92). Unlike the admission agreement, the arbitration agreement does not have separate signature blocks for the resident and the representative. *Id.* It contains one signature line for "Resident/Representative Signature", which Ms. Daniels signed with her name, and a line for "Printed name of Resident/Representative", which says "Annie Porter." *Id.* No one signed the arbitration agreement on behalf of THI. *Id.*

The agreement, drafted by THI, states "[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." *Id.* THI did not ask Ms. Daniels if she was Ms. Porter's guardian or

otherwise had legal authority to bind Ms. Porter to arbitration. *Id.* THI did not ask for and Ms. Daniels did not provide any document showing legal authority to act on behalf of Ms. Porter *Id.*

THI failed to properly care for Ms. Porter and, as a result, she developed pressure sores, including stage IV wounds, and died. (R. pp 38-39).

On April 25, 2019, the Estate filed a complaint against THI[1] asserting wrongful death and survival causes of action for negligence, negligence per se, fraudulent misrepresentation, and violation of the Unfair Trade Practices Act. (R. pp. 21-37). On June 5, 2019, THI filed a motion to compel arbitration. (R. pp. 90-92).

III. The lower court's decision to deny the motion to compel arbitration

On August 23, 2019, THI filed a memorandum in support of the motion to compel arbitration. It made three arguments—(1) Ms. Daniels had authority to enter into the arbitration agreement based on apparent authority, agency by estoppel; (2) the arbitration agreement and admission agreement merged and, based on that merger, Ms. Daniels should be equitably estopped from denying the arbitration agreement; and (3) if the court intended to deny the motion, it should allow the parties to conduct discovery on the issue of Ms. Daniels' authority. (R. pp. 93-114).

On August 23, 2019, the Estate filed a memorandum in opposition to the motion to compel arbitration and attached Ms. Daniels' affidavit. (R. pp. 127-132). Ms. Daniels stated:

> I have never been the legal guardian of Annie Porter, nor have I ever had that power conferred on to me by any Power of Attorney or Court Appointed Guardianship or Conservatorship.
>
> I was never asked by any Midlands Health & Rehabilitation employee if I was Annie Porter's legal guardian, nor if I had legal authority to bind her to arbitration, which I did not.

[1] Ms. Daniels also named Matt Stanley, the facility administrator, as a defendant but later dismissed him without prejudice.

> I was not explained by any Midlands Health & Rehabilitation employee what an arbitration agreement was.
>
> I did not have any actual or apparent legal authority to bind Annie Porter to arbitration.

(R. pp. 133-134). Although the hearing on the motion did not occur until August 26, 2019, three days after the Estate filed Ms. Daniels' affidavit, THI submitted no contrary evidence of her authority.

On August 26, 2019, the Honorable L. Casey Manning held a hearing on THI's motion. THI acknowledged that it did not have evidence of Ms. Daniels' authority to sign the arbitration agreement for Ms. Porter. Counsel stated: "until we got the opposition to our motion [with Ms. Daniels' affidavit], we had a facially valid agreement. We don't have that now." (R. p. 61 lines 11-12). Counsel stated he "could understand why the court may not be" inclined to grant the motion to compel arbitration" and asked to conduct discovery regarding Ms. Daniels' authority. (R. p. 60).

In response, the Estate argued that the arbitration agreement is invalid because Ms. Daniels did not have authority to sign it for her mother. (R. pp. 63-64, 66). While she had authority to sign the admission agreement under the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 *et seq.*, she had no authority to sign the arbitration agreement. (R. pp. 64-65). The Estate argued the admission agreement and arbitration agreement did not merge. (R. pp. 64-65). The Estate objected to discovery. (R. p. 65).

In reply, THI argued estoppel allows for enforcement of an arbitration agreement even when the signatory did not have authority. (R. pp. 67-68). THI candidly "admit[ted] to the court today that if, if – I, I am not able to prove agency, not today, not without discovery", and repeated "I'm not able to prove agency today, not under, not under a theory of actual agency or even agency, apparent agency." (R. pp. 68 lines 1-3, 69 lines 11-13). THI said that estoppel is "the only

grounds" on which it could "in fairness" "ask the court to grant" its motion "on the current record." (R. pp. 69-70). It argued the admission and arbitration agreements merged and, as such, Ms. Porter benefitted from her admission to the facility and should be estopped from denying the arbitration agreement. (R. pp. 70-71).

On November 6, 2019, the lower court filed an order denying the motion. (R. pp. 1-6). It held "Ms. Daniels did not have actual or apparent authority to sign the Arbitration Agreement on behalf of Ms. Porter." (R. p. 4). It distinguished between the authority "to handle finances or make health care decisions" and the authority "to resolve legal claims by arbitration." *Id.* The admission agreement and arbitration agreement did not merge because, under *Thompson v. Pruitt Corp.*, 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016), the authority to handle finances or make health care decisions does not include the authority to agree to arbitration. (R. p. 4).

The lower court also held THI failed to prove the elements of equitable estoppel.

> [THI] had the capacity to determine whether Ms. Daniels had authority to sign an arbitration agreement on Ms. Porter's behalf. [THI] is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. [THI] are or should be familiar with the legal concepts of guardianship and powers-of-attorney. [THI] had the ability to ask Ms. Daniels whether she was Ms. Porter's guardian or attorney-in-fact and had the ability to request supporting documentation.

(R. p. 5). Finally, the lower court held that the Federal Arbitration Act does not mandate enforcing the arbitration agreement in this case because there is no valid arbitration agreement. (R. pp. 5-6).

On November 18, 2019, THI filed a motion to reconsider. (R. pp. 135-142). The Estate filed a response in opposition to the motion. (R. pp. 143-144). On February 13, 2020, the lower court held a hearing on the motion. (R. pp. 74-89).

THI argued the court's order limited the situations in which a nonsignatory may be bound to an arbitration agreement to only actual or apparent agency. (R. pp. 79-80). THI asked the court to rule on what it referred to as a "one-two punch" merger-equitable estoppel argument that

consists of two parts—first, the court find that the arbitration and admission agreement merged into one agreement and, second, the court find that Ms. Porter received the benefit of her admission to THI's facility and is, therefore, estopped from denying the validity of the merged agreement. (R. pp. 81, 85-86).

THI conceded that legal authority to enter into arbitration is not established by the provision of the arbitration agreement that states "[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." (R. pp. 82-83; 92). "[T]hat obviously is only the representation of, of, of Ms. Daniels and not her mother, Ms. Porter." (R. pp. 82-83). It argued a "fallback position" of requesting discovery into Ms. Daniels' authority. (R. p. 83).

On February 24, 2020, the lower court filed an order denying the motion to reconsider. The court reiterated its prior rulings that Ms. Daniels lacked actual or apparent authority to agree to arbitration on Ms. Porter's behalf, the arbitration and admission agreements did not merge, and THI failed to prove equitable estoppel. (R. pp. 9-17). It made the factual findings that "[a]t no point in time did Vermell Daniels have Power of Attorney or any other legal authority that would have given Ms. Daniels the legal authority to bind Ms. Porter to arbitration," and THI has "not offered any evidence to contradict [Ms. Daniels'] affidavit, nor provide[d] any affidavits to the contrary." (R. p. 8). As to whether Ms. Daniels' signature on the arbitration agreement is evidence of authority, the lower court ruled "that in no way indicates a manifestation of authority by Ms. Porter to waive her right to a jury trial or agree to arbitration." (R. p. 12).

As to merger, the court ruled the arbitration and admission agreements "are separate contracts that do not merge" because the admission agreement contains an "Entire Agreement" clause stating it constituted the entire agreement between the parties, any ambiguity as to that

clause is construed against THI as the drafter, the agreements are separately paginated and have separate signature blocks, and assent to the arbitration agreement was not required for admission to the facility. (R. pp. 14-15).

Even if the agreements merged, the lower court held THI did not prove estoppel because it had the means to find out if Ms. Daniels had authority to agree to arbitration for Ms. Porter. (R. p. 16). Further, that Ms. Porter received the "benefit" of admission to the facility is insufficient for estoppel where the agreements did not merge.[2] (R. pp. 16-17).

THI filed a notice of appeal from the orders denying its motion to compel arbitration and motion for reconsideration. (R. pp. 148-153).

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* at 48, 790 S.E.2d at 3.

"A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion." *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 108, 727 S.E.2d 407, 416 (2012).

ARGUMENT

Ms. Daniels did not have actual or apparent legal authority to sign the arbitration agreement on behalf of Ms. Porter. The Adult Healthcare Consent Act provided Ms. Daniels authority to enter into only the admission agreement and not the arbitration agreement. Because of the absence of any authority of Ms. Daniels to bind Ms. Porter to arbitration, THI resorts to arguing that the

[2] The lower court rejected THI's arguments as to ratification by Ms. Porter's continued residency, inequity of Ms. Porter bringing a tort claim while denying the arbitration agreement, and a third-party beneficiary theory. (R. pp. 17-19). THI did not appeal those holdings.

arbitration and admission agreement merged, and the benefits Ms. Porter received from the *admission* agreement should estop her from denying the enforceability of the *arbitration* agreement. The lower court correctly found THI failed to prove merger or equitable estoppel, both of which are necessary components of its argument. The lower court also correctly exercised its discretion to deny THI's request for discovery.

For any one of the independent reasons discussed below, this Court should affirm.

I. The lower court correctly held the admission agreement and arbitration agreement did not merge.

The Court should affirm the lower court's holding that the agreements did not merge. The merger-equitable estoppel argument is not a viable legal theory in South Carolina, and our courts have never found two agreements to merge and then applied equitable estoppel. Regardless, the lower court correctly held the evidence does not support merger.

A. There is no legal authority for merging two agreements into one as a matter of law under these circumstances.

THI's merger-equitable estoppel argument is not a viable legal theory in South Carolina and has never been used by our courts.

THI's argument is that, even if the signatory to an arbitration agreement lacked authority to sign it, arbitration should still be enforceable because the arbitration agreement merges into the admission agreement; the resident got a benefit from the admission agreement simply by virtue of her admission to the facility and is estopped from denying the validity of the "merged" agreement. This argument is made only because there was no actual or apparent authority to execute the arbitration agreement. The starting point is an invalid, unenforceable agreement that THI hopes to resurrect by using a legal fiction that it merged with another agreement that THI initially chose to keep separate.

If THI wanted the authority to enter into and benefits provided from one of those agreements to apply to both, then it should have made them one agreement. The truth is that THI keeps them separate based on the belief that the separateness will make the arbitration agreement more enforceable and less likely to be found unconscionable.[3]

THI relies on *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014) as the source of its merger-equitable estoppel theory. *Coleman* does not support the existence or use of the theory because the law referred to in *Coleman* discussed a principle of contract interpretation and not the merger as a matter of law of two agreements into one.

In *Coleman*, the Supreme Court discussed (for the first time) a contract interpretation principle using language that referred to merger of contracts. *Coleman* involved separate admission and arbitration agreements that a deceased resident's sister executed on her behalf at the time of admission. *Id.* at 350, 755 S.E.2d at 452. The Court first held that the Adult Health Care Consent Act gave the sister authority to enter into the admission agreement but not the arbitration agreement. *Id.* at 353-54, 755 S.E.2d at 454. It then addressed the facility's alternative argument that the admission agreement (which she had authority to execute) and the arbitration agreement (which she did not have authority to execute) "merged" and, consequently, the sister should be estopped from denying the enforceability of the arbitration agreement. *Id.* at 354-55, 755 S.E.2d at 455.

The *Coleman* Court cited to *Klutts Resort Realty, Inc. v. Down Round Dev. Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977), for the contract interpretation principle that, "in the absence of anything

[3] *See, e.g.*, *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 357, 755 S.E.2d 450, 456 (2014) (Toal, C.J., dissenting) ("Using a separate contract for arbitration agreements is conducive to greater freedom of choice for the consumer. It also better protects the nursing home from a contention that the arbitration contract is unconscionable.").

indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, 268 S.C. at 88, 232 S.E.2d at 24). The *Coleman* Court found numerous facts indicated an intention not to merge the contracts, including an entirety-of-agreement clause that recognized the separateness of the agreements, that the arbitration agreement could be disclaimed within thirty days and the admission agreement could not, and that any ambiguity as to merger is construed against the drafter. *Coleman*, 407 S.C. at 355-56, 755 S.E.2d at 455.

Coleman did not say that the "merger" it refers to means that the two contracts become one as a matter of law. The "merger" reference comes directly after and cites as its legal support a quotation that says "'the courts will ***consider and construe*** the documents together. The ***theory*** is that the instruments are ***effectively*** one instrument or contract.'" *Id.* at 355, 755 S.E.2d at 455 (quoting *Klutts Resort Realty, Inc. v. Down Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)) (emphasis added).

Significantly, *Coleman* did **not** hold that, if the contracts did merge, then merger is a basis for an equitable estoppel argument based on benefits from the admission agreement. The Court simply stated "the predicate for appellants' argument for application of the doctrine of equitable estoppel, that the A[rbitration] A[greement] and the admission agreement were merged, is not present here." 407 S.C. at 356, 755 S.E.2d at 455-56.

The *Klutts Resort Realty* opinion, cited by *Coleman*, does not mention merger. When *Klutts* discussed the theory that "instruments are effectively one instrument or contract", it referred to a contract interpretation and construction principle and not the legal act of making two

agreements become one as a matter of law. *Klutts*, 268 S.C. at 88, 232 S.E.2d at 24. The Court referenced "[c]onstruing contemporaneous instruments together" for the purpose of determining if provisions in one agreement affect "the provisions of another" "so that the whole agreement as actually made may be effectuated." *Id.* at 88-89, 232 S.E.2d at 24.

Neither *Coleman* nor any case before or after it permitted a party to use a contract interpretation principle to legally merge two separately signed agreements into one and then use a benefit received from one to avoid the invalidity of the other.

In two subsequent opinions, this Court referred to it as a principle of contract interpretation and not a legal merger that makes two agreements become one agreement. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83-84, 749 S.E.2d 139, 147-48 (Ct. App. 2013) (referring to "intent to consider them separately" and language that precluded "construing the two contracts together"); *Harris v. Ideal Solutions, Inc.*, 385 S.C. 74, 79, 682 S.E.2d 523, 526 (Ct. App. 2009) (referring to whether agreements "should be construed as one contract and considered as a whole to determine the parties' intentions" and "reading" agreements "together because" they were executed at the same time as part of the same transaction by the same parties).

Ultimately, there is no South Carolina appellate court opinion holding that an arbitration and admission agreement merged and, as a result, the two are considered one and the benefit of admission to a facility equitably estops the plaintiff from denying the validity of the arbitration agreement.

Without merger, the parties are left with an arbitration agreement that is unenforceable because it was signed without authority. Because Ms. Daniels lacked authority to agree to arbitrate on behalf of Ms. Porter, she could not provide any consideration, *i.e.*, a promise to arbitrate, to

support the agreement. Therefore, the lower court correctly held that, under the circumstances, there is "a lack of consideration and mutuality." (R. p. 19).

There is no legal precedent for granting THI the relief that it seeks. Regardless, even if its theory is viable, it fails to satisfy it in this case.

B. Even if merger-equitable estoppel is a viable theory, the lower court correctly held merger did not occur in this case.

The Supreme Court has not addressed a merger-equitable estoppel argument since *Coleman*. However, this Court has addressed it and twice held merger did not occur. The law and record support affirming the lower court's finding that merger also did not occur in this case.

In *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), this Court addressed whether a nursing home could compel a deceased resident to arbitration where her son signed on her behalf separate admission and arbitration agreements. *Id.* at 48, 784 S.E.2d at 682. The defendant nursing home argued the admission and arbitration agreements "merged" and "thus, Son's authority to execute the Admission Agreement covered the terms of the A[rbitration] A[greement] as well." *Id.* at 52, 784 S.E.2d at 684. This Court disagreed and held the parties intended to keep the agreements separate. The indications of separateness included a thirty-day disclaimer option in the arbitration agreement that was not included in the admission agreement, that the arbitration agreement was not a condition precedent for being admitted to the nursing home, and that the agreements did not expressly incorporate one another (which is construed against the drafter). *Id.* at 53-54, 784 S.E.2d at 685.

In *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), this Court addressed whether a rehabilitation facility could compel a deceased resident to arbitration where her husband signed on her behalf separate admission and arbitration agreements. *Id.* at 550, 813 S.E.2d at 295-96. The defendant facility argued "the circuit court erred

in finding the Arbitration Agreement was separate from the Admissions Agreement because [] the two documents were merged." *Id.* at 556, 813 S.E.2d at 299. This Court disagreed and found the agreements "did not merge." *Id.* at 563, 813 S.E.2d at 302. The indications of separateness included that the admission agreement was governed by South Carolina law while the arbitration agreement was governed by federal law, the arbitration agreement referenced the two agreements as being separate, the arbitration agreement could be revoked within thirty days but the admission agreement could not, the documents were separately paginated with separate signature pages, and the arbitration agreement was not a precondition to admission to the facility. *Id.* at 562-63, 813 S.E.2d at 302.

As in *Coleman*, *Thompson*, and *Hodge*, the language of the admission and arbitration agreements in this case shows they are separate. First, the arbitration agreement refers to the agreements separately by stating the arbitration agreement "shall survive any termination or breach of ***this Agreement or the Admission Agreement***." (R. p. 92) (emphasis added). This is direct evidence of an intention to keep the agreements separate. *Hodge*, 422 S.C. at 562, 813 S.E.2d at 302; *Thompson*, 416 S.C. at 52, 784 S.E.2d at 684.

Second, the admission agreement allows for relief that the arbitration agreement prohibits. The admission agreement specifies that a resident "will present grievances" according to the "Facility's Grievance Procedure" and is not precluded "from filing a complaint with any governmental agency." (R. p. 118). This express authorization of non-arbitrated grievances and complaints related to the resident's admission is contrary to the arbitration agreement's language that it applies to "any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident." (R. p. 92).

Third, the admission agreement contains an "Entire Agreement" clause stating the admission agreement is the "entire agreement" between the parties as to admission to the facility. (R. p. 126). *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

Fourth, executing the arbitration agreement was not a precondition to admission. (R. p. 8). *Hodge*, 422 S.C. at 562-63, 816 S.E.2d at 302; *Thompson*, 416 S.C. at 53, 784 S.E.2d at 685.

Fifth, the admission agreement could be terminated by the resident "at any time, upon written notice to Facility" and by the facility with fifteen-days' notice to the resident. (R. p. 120). In contrast, the arbitration agreement "shall survive any termination or breach of this [arbitration] Agreement or the Admission Agreement." (R. p. 92).

Finally, the admission agreement and arbitration agreement are separately paginated and have separate (and differing) signature pages. *Hodge*, 422 S.C. at 562, 813 S.E.2d at 302. The admission agreement required that someone witness the resident or representative's signature, but the arbitration agreement did not require a witness. (R. pp. 126; 92). THI argues this does not indicate separateness because documents will always be separate for a merger issue to arise. (Br. of App. pp. 11-12). This misses the point. Agreements may be separate but have continuing pagination numbers or have one signature page and blanks for a signatory to initial or check that it agrees or does not agree with a certain part or provision. The separate pagination and signature pages are evidence that the parties intended for the agreements to be separate.

The lower court correctly held that merger did not occur, and the evidence cited above supports its findings.

THI argues that the admission agreement's reference to "other Admissions materials, which are made a part of this Agreement by reference" indicates an intent to merge the agreements. (Br. of App. p. 8). This argument is factually and legally incorrect.

Factually, THI is incorrect because THI expressly incorporated a specific document but did not incorporate the arbitration agreement. It expressly incorporated the admission handbook by stating in the admission agreement: "*Admission Handbook*, which is made a part of this Agreement by reference herein." (R. p. 115). In contrast, the admission agreement never mentions the arbitration agreement.

Legally, THI is incorrect because this Court already rejected its argument. In *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), the defendant nursing home argued as evidence of merger that the admission agreement "incorporates by reference all exhibits to the agreement and the A[rbitration] A[greement] is one of the exhibits." *Id.* at 53, 784 S.E.2d at 685. This Court found the reference "ambiguous" because the admission agreement did "not define the term 'exhibit' or cross-reference any specific exhibits" and the arbitration agreement did "not include any labels or other language indicating it serves as an exhibit or addendum to the Admission Agreement." *Id.* This Court construed the reference "against" the facility drafter. *Id.* at 53-54, 784 S.E.2d at 685 (citing *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355-56, 755 S.E.2d 450, 455 (2014) (stating that any ambiguity "is construed against the drafter")). The same is true in this case. The admission agreement does not define the term "Admission materials," and the arbitration agreement does not include any labels or other language indicating it is an exhibit to the admission agreement. The ambiguous reference must be construed against THI and, therefore, does not support merger.

THI goes to great lengths to establish a so-called "presumption of merger." (Br. of App. pp. 7-8, 12). Yet, it fails to cite to a case that says merger—two agreements becoming one as a matter of law—is a presumption. THI relies on the following language from *Klutts Resort Realty, Inc. v. Down Round Dev. Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977): "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 instruments together." *Id.* at 88, 232 S.E.2d at 24. This refers not to merger as a matter of law but to a contract interpretation principle. Absent anything to the contrary, a court will construe instruments together; not absent anything to the contrary two agreements become one.

Regardless, for any alleged presumption to apply, THI must prove the agreements were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. It failed to do so.

There is evidence that different parties signed the agreements. Ms. Daniels signed the arbitration agreement as "Resident/Representative" but signed the admission agreement as "Representative." (R. p. 92; 126). The agreements were not executed for the same purpose. The admission agreement was signed to effectuate the admission of Ms. Porter to the facility. The separate arbitration agreement was signed to waive a jury trial right. These are unrelated purposes.

THI argues that it proves the agreements were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction simply because it presented the documents to Ms. Daniels at the same time during the admission process and she physically signed them both (although in different capacities). (Br. of App. pp. 9, 12-13). If that is true, then an arbitration agreement and admission agreement will presumably merge every time they are given to someone at the same time to sign when admitting a resident to a facility and that person physically signs both documents. Under THI's argument, arbitration will almost universally be enforceable regardless of the legal authority of the signatory to the arbitration agreement. The

Court should reject this attempt to enforce an arbitration agreement through the back door that would never be admitted through the front door based on its invalidity.

Finally, even if there is a presumption and even if it applies, the above discussion of the evidence of the separateness of the arbitration agreement and admission agreement rebuts the presumption by demonstrating an intention contrary to merger.

The law and the evidence support the lower court's finding that the agreements did not merge, and this Court should affirm on this basis alone.

II. Even if merger occurred, the arbitration agreement should be severed as executed without authority.

The Estate maintains that merger is not a viable legal theory as THI attempts to use it and that, even if it is, the lower court correctly held merger did not occur. As an alternative argument, if the Court holds that it is a viable theory and the agreements merged, the Court may still affirm the lower court's denial of the motion to compel arbitration because the arbitration agreement should be severed.

Pursuant to Rule 220(c), SCACR, the "court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal." The admission agreement contains a severability clause that states "[i]f any provision(s) of this Agreement will be deemed to be illegal or otherwise unenforceable, all other provisions will remain in full force and effect as if the invalid provision had not been part of this Agreement." (R. p. 124).

If the agreements merged under THI's theory, the arbitration agreement becomes a provision of the whole agreement. "Because an arbitration provision is often one of many provisions in a contract, the first task of a court is to separate the arbitration provision from the rest of the contract." *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 197, 844 S.E.2d 66, 71 (Ct. App. 2020). "In deciding whether the parties have a valid agreement to arbitrate we must therefore

isolate the arbitration clause from the rest of the contract." *Id.* at 198, 844 S.E.2d at 71. Separating the arbitration provision from the rest of the agreement (although the Estate denies a single, merged agreement exists), leads to the fact that Ms. Daniels lacked authority to agree to arbitration.[4] (R. pp. 61, 68-69). Therefore, merger does not bring about the end that THI desires because the Court is still required to determine if there was authority in the first place to agree to arbitration. Because arbitration is not enforceable, the Court may sever it and affirm the lower court's denial of THI's motion to compel arbitration.

III. The lower court correctly held THI failed to prove equitable estoppel.

The Court does not need to reach this issue unless it finds that merger-equitable estoppel is a viable legal theory, the lower court erred in finding merger did not occur, and the arbitration agreement should not be severed from the "merged" agreement. Even if the Court reaches this issue, it should find that the lower court correctly held THI failed to prove equitable estoppel.

A. The lower court used the correct equitable estoppel analysis.

THI incorrectly argues that the lower court used the wrong equitable estoppel test—that it should have used the "direct benefits test" discussed in *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019), rather than the six-part test.[5] (Br. of App. pp. 13-15). The direct benefits test applies

[4] The lower court held: "At no point in time did Vermell Daniels have Power of Attorney or any other legal authority that would have given Ms. Daniels the legal authority to bind Ms. Porter to arbitration." (R. p. 8).

[5] "Under South Carolina law, the elements of equitable estoppel as to the party to be estopped are[:] (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially." *Thompson v. Pruitt Corp.*, 416 S.C. 43, 60, 784 S.E.2d 679, 688-89 (Ct. App. 2016) (internal quotation marks omitted).

only to cases that involve a nonsignatory. Here, Ms. Porter is listed as a signatory on the arbitration agreement and admission agreement. Therefore, the direct benefits test does not apply.

Wilson involved signatories attempting to enforce an arbitration provision against plaintiffs who were not signatories or parties to the agreement that contained the arbitration provision. 426 S.C. at 332, 827 S.E.2d at 171. Other arbitration cases in which this Court used the direct benefits test also involved a signatory seeking to enforce arbitration against a nonsignatory. *See Weaver v. Brookdale Senior Living, Inc.*, 847 S.E.2d 268, 272 (Ct. App. 2020) (analyzing direct benefits theory in case where granddaughter of resident brought her individual claims and facility sought to enforce arbitration in agreement between the facility and resident); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 285-86, 733 S.E.2d 597, 599 (Ct. App. 2012) (Appellant argued a nonsignatory doctor was bound by an arbitration provision in an agreement between a hospital and a medical professional placement company).

Here, Ms. Porter is listed as a signatory and a party to the arbitration agreement. Ms. Daniels did not have legal authority to bind Ms. Porter to arbitration. Direct benefits estoppel is not intended to revive an invalid agreement. The purpose of direct benefits estoppel is the inequity of allowing someone to receive direct benefits from an agreement but then claim his nonsignatory status excuses him from complying with its terms. That purpose is inapplicable to this case.

THI also argues that the six-part test is only for "*non*-arbitration cases." (Br. of App. p. 13). In *Wilson*, the party asserting estoppel made an "alternative argument on appeal" that it also satisfied the six-part estoppel test. *Wilson*, 426 S.C. at 340 n.9, 827 S.E.2d at 175 n.9. The Supreme Court said the "traditional [six-part] test . . . has been analyzed most often in non-arbitration cases" but "express[ed] no opinion on [the] alternative argument." *Id.* Therefore, there is no law mandating application of the direct benefits test in arbitration cases. Such a rule would likely

violate the Federal Arbitration Act by singling out arbitration and treating it differently than other contracts. *See Weaver v. Brookdale Senior Living, Inc.*, 847 S.E.2d 268, 271-72 (Ct. App. 2020) ("The FAA therefore places arbitration contracts on equal footing with other contracts, but it does not, as Appellants suggest, give the party seeking arbitration a leg up in the threshold determination of whether a valid arbitration agreement exists."). Arbitration is not the only context in which a signatory may attempt to enforce a contract provision against a nonsignatory.

The lower court used the correct analysis and reached the correct result.

B. Even if the direct benefits analysis applies, THI fails to satisfy it.

Even if the Court decides to apply the direct benefits test, THI fails to show it is satisfied in this case. The direct benefits theory "estops a nonsigner from refusing to comply with an arbitration provision of a contract if (1) the nonsigner's claim arises from the contractual relationship, (2) the nonsigner has 'exploited' other parts of the contract by reaping its benefits, and (3) the claim relies solely on the contract terms to impose liability." *Weaver v. Brookdale Senior Living, Inc.*, 847 S.E.2d 268, 272 (Ct. App. 2020). These elements are not met.

First, the Estate's claims do not arise from the contractual relationship. "[D]irect benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence." *Wilson v. Willis*, 426 S.C. 326, 343, 827 S.E.2d 167, 176 (2019). THI's only argument is that it admitted Ms. Porter to the facility. (Br. of App. pp. 14-15). That it admitted her because Ms. Daniels signed the admission agreement (the arbitration agreement was not required for admission) does not mean the negligence, fraud, and Unfair Trade Practice Act claims arise out of the contractual relationship.

Second, the Estate has not exploited any part of the admission agreement by reaping its benefits. THI does not argue the Estate (or Ms. Porter) exploited anything. It argues that Ms.

Porter "received the benefit of her admission to the Facility." (Br. of App. p. 14). This Court already rejected that benefit theory. In *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), this Court reasoned that "because the Facility allegedly caused [the plaintiff]'s injuries that later led to her death, we find it difficult to find she benefited even from being admitted." *Id.* at 563, 813 S.E.2d at 302.

Third, the Estate's claims do not rely on any contract terms to impose liability. The claims are based on tort law and the Unfair Trade Practices Act. (R. pp. 21-37). The Estate does not seek to enforce any provision of the admission agreement.

The record supports a decision to affirm on the basis that THI failed to show that the elements of the direct benefits test are satisfied.

Finally, THI does not challenge the lower court's findings that it failed to satisfy the six-part equitable estoppel test. (Br. of App. pp. 13-17). It challenges only the lower court's use of that test as opposed to the direct benefits test. *Id.* Therefore, if this Court determines that the lower court used the correct legal standard, then its holding that THI failed to satisfy that standard is the controlling law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

C. THI is not entitled to an equitable remedy under these circumstances.

THI knew a person executing an arbitration agreement on behalf of a resident needed legal authority to do so. Despite that knowledge, it did nothing to determine if Ms. Daniels had authority and now seeks to impose arbitration on the Estate using equitable theories. Under the circumstances of this case, THI is not entitled to an equitable remedy.

"He who seeks equity must do equity." *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 259, 715 S.E.2d 348, 358 (Ct. App. 2011) (alteration and internal quotation marks omitted).

"This principle applies to one who affirmatively seeks equitable relief. In order for justice to be done between parties, a party is required to do equity when asking the court to invoke the aid of equity." *Id.* at 259, 715 S.E.2d at 358 (internal citation omitted). THI knew that a signatory to an arbitration agreement needed authority to agree to arbitration on behalf of a resident. Despite this knowledge and its requirement of proof of authority, THI presented Ms. Daniels with the arbitration agreement and got her to sign it without any documentation proving authority. THI should not be allowed to invoke equity when it did not act equitably.

"Equitable estoppel is a theory designed to prevent injustice, and it should be used sparingly." *Weaver*, 847 S.E.2d at 274 (internal quotation marks omitted). "Born of equity, the heart of the theory is that the party entitled to invoke the principle was misled to his injury." *Id.* There is no evidence that THI was misled to any injury.

The lower court correctly held that "a review of the admissions and arbitration documents by [THI] would have informed them that Vermell 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 apparent authority to enter into contracts on behalf of her mother." (R. pp. 4; 10). The evidence that supports this finding includes Ms. Daniels' affidavit and the language of the admission agreement requiring proof of authority. (R. pp. 125; 133). THI relies on the arbitration agreement provision that says the signature of the person executing the agreement is a representation of authority to sign on the resident's behalf. (Br. of App. pp. 15-16). This is incorrect. THI already admitted to the lower court that the provision is "only the representation of [] Ms. Daniels and not her mother, Ms. Porter." (R. p. 83).

THI did not appeal the lower court's findings that it is a "sophisticated business entity frequently" dealing with the admissions process and is "or should be familiar with the legal

concepts of guardianship and powers-of-attorney." (R. p. 14); *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."). Reviewing and complying with its own requirement for documented proof of authority would have informed THI that Ms. Daniels did not have authority. (R. p. 125). The record and the law support this finding.

THI also complains that the lower court included in its analysis a finding that THI "had the capacity to determine whether Ms. Daniels had authority to sign an arbitration agreement on Ms. Porter's behalf." (Br. of App. p. 16). "[A] circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 3 (2016). THI does not dispute that it had the capacity to determine if Ms. Daniels actually had authority. It only argues that because she signed the arbitration agreement, she represented her own authority. Because it is the law of the case that THI knew about the concept of legal authority (R p. 14), it cannot rely on an argument that Ms. Daniels represented her own authority. (Br. of App. p. 17). This is not holding THI to an "elevated standard of determining Ms. Daniels's authority to contract" but, instead, holds it to the standard applicable to all contracting parties to "to ascertain the scope of the agent's authority." *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 565, 813 S.E.2d 292, 304 (Ct. App. 2018) (internal quotation marks omitted).

The record and the law do not support the use of an equitable remedy in this case. The Court should affirm the lower court's denial of arbitration.

IV. The Estate is not suing THI for breach of the admission agreement.

The Court may affirm as to merger and equitable estoppel based solely on the fact that the Estate is not suing THI for a breach of the admission agreement. In *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), this Court found an

arbitration agreement and admission agreement did not merge. *Id.* 563, 813 S.E.2d at 302. It then held that, "even if the Admission Agreement and Arbitration Agreement merged, because Respondents [plaintiffs] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement. Therefore, the circuit court did not err in finding equitable estoppel did not bar Respondents' claims." *Id.*

The same result is warranted here. The Estate does not attempt to enforce the admission agreement and is not suing for a breach of it. (R. pp 21-37). Therefore, even if there is a viable merger-equitable estoppel theory in South Carolina and even if the lower court erred in finding there is no merger, there is not a valid basis for equitable estoppel.

V. The lower court correctly denied THI's alternative request for discovery.

The lower court correctly denied THI's request for discovery. "A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion." *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 108, 727 S.E.2d 407, 416 (2012). "An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Id.* at 108, 727 S.E.2d at 416. THI does not argue or show that the lower court abused its discretion.

THI admitted at the hearing that Ms. Daniels' affidavit showed she lacked legal authority to bind Ms. Porter to arbitration. (R. pp. 60-61, 68). The lower court found that she lacked legal authority. (R. pp. 3-4; 9-13). THI did not appeal those findings. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

THI asked the lower court for leave to conduct discovery on Ms. Daniels' authority to bind Ms. Porter to arbitration if the court was "inclined" to deny its motion. (R. p. 60). Before it received Ms. Daniels' affidavit, THI relied solely on her signature on the arbitration agreement as

definitive proof of her authority to bind Ms. Porter to arbitration. *Id.* at 61. It argued that, because Ms. Daniels' affidavit disproved her authority, THI should be allowed to conduct discovery on the issue. The lower court correctly acted within its discretion to deny the request.

THI presents no argument that discovery is likely to uncover any evidence contrary to Ms. Daniels' affidavit. *See, e.g.*, *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (holding that "the nonmoving party [on summary judgment] must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition." (internal quotation marks omitted)); *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991) (discussing the necessity of party asking for more discovery before the court grants summary judgment to "demonstrate[] a likelihood that further discovery will uncover additional evidence relevant to the issue"). Therefore, there is no basis for the lower court or this Court to order discovery.

THI argues that it is "forced to take [Ms. Daniels' affidavit] at face value" regarding her authority. (Br. of App. p. 20). Its apparent surprise that Ms. Daniels lacks authority only demonstrates that it violated its own policy to require proof of authority. (R. p. 125). If THI followed its policy, it would have known Ms. Daniels lacked authority. Its failure is not a basis to find the lower court abused its discretion in denying discovery on something that THI should have already discovered.

THI suggests that it was improper for the Estate to file Ms. Daniels' affidavit three days before the hearing. (Br. of App. p. 20). The Rules of Civil Procedure expressly allow a party opposing a motion to file an affidavit three days before a hearing. Under Rule 6(d), SCRCP, "opposing affidavits may be served not later than ***two days before*** the hearing, unless the court permits them to be served at some other time. The moving party may serve reply affidavits at any

time before the hearing commences." Rule 6(d), SCRCP (emphasis added). The Estate properly filed the affidavit three days before the hearing. More importantly, THI failed to serve a reply affidavit or any other evidence to counter Ms. Daniels' affidavit.

The lower court correctly exercised its discretion to deny the request for discovery.

CONCLUSION

For any one of the reasons discussed above, Respondent requests the Court affirm the lower court's decision to deny Appellant's motion to compel arbitration.

Respectfully submitted,

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