THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2020-001143

Andrietta Atkinson and Debra Clyburn-Wilson, individually and as Personal Representatives of the Estate of Willie Mae Clyburn,	……..	Respondents
v.		
SSC Sumter East Operating Company, LLC, d/b/a Sumter East Health and Rehabilitation Center and Paul Granger,	……..	Defendants.
Of whom SSC Sumter East Operating Company LLC, d/b/a Sumter East Health and Rehabilitation Center is	…….	Appellant.

RESPONDENTS' FINAL BRIEF

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether a nursing home resident or her estate are bound to an arbitration contract to which she did not assent and that is expressly independent of the contract required for her admission to the Facility.

2. Whether a nursing home resident can be equitably estopped from opposing an arbitration contract she did not sign, from which she derives no "direct benefit," and that does not form the basis of any of her legal claims.

STATEMENT OF THE CASE

Respondent Andrietta Atkinson as power of attorney for Willie Mae Clyburn ("Mother") filed a Summons and Complaint in the Sumter County Court of Common Pleas on September 20, 2017. (R. pp. 18-34). The Complaint alleged negligence, fraud, and statutory-based claims against Appellant SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center ("the Facility") along with Paul Granger, the Facility's administrator. Id. The Facility filed an answer on November 17, 2017. (R. pp. 39-51).[1] Mother passed away on February 5, 2018.

The Facility moved to compel arbitration on May 31, 2018. Following Mother's death, the parties consented to an amended complaint that added wrongful death and survival claims and substituted in as plaintiffs Andrietta Atkinson and Debra Clyburn-Wilson in their newly appointed roles as the co-personal representatives of Mother's estate. After a period of limited discovery, the Facility filed a renewed motion to dismiss and to compel arbitration on February 27, 2020. (R. pp. 84-89). On June 25, 2020, the Honorable Kristi F. Curtis entered an order denying the motion to dismiss and compel arbitration. (R. pp. 1-14). The Facility filed a motion to alter or amend judgment on July 6, 2020, which was denied in an Order dated July 14, 2020. (R. pp. 199-208; R. pp. 15-16). Appellants served a notice of appeal on August 13, 2020. (R. pp. 209-11).

STATEMENT OF THE FACTS

Mother was admitted to the Facility on November 13, 2016. On that same date, one of her daughters Debra Clyburn-Wilson was presented with two adhesion contracts. The Facility's representative did not ask Ms. Clyburn-Wilson for proof of authority to act on Mother's behalf. Ms. Clyburn-Wilson was not empowered to act for Mother through a power of attorney or any

[1] Granger is not a party to this appeal.

other mechanism recognized under South Carolina law.[2] The first contract was the "Resident Admission Agreement" ("Admission Agreement") governing the type of care Mother would receive at the Facility and Mother's financial obligation for those services. (R. pp. 116-29). Near the bottom of the Admission Agreement," there was an "Entirety of Agreement" provision indicating the Admission Agreement "contains all of the promises and agreements between the parties" concerning Mother's admission to the Facility. (R. p. 127). Ms. Clyburn-Wilson signed the Admission Agreement on the "Responsible Party" line. (R. p. 128).

On the same day, Ms. Clyburn-Wilson signed a contract called "Agreement for Dispute Resolution Program" ("Arbitration Agreement"). (R. pp. 90-98). This contract was not part of the 9 pages comprising the Admission Agreement but was its own separate contract (labeled pages 1-9) with its own signature blocks. (R. p. 98). The Facility admits agreeing to the Arbitration Agreement was not a condition or prerequisite to admission at the Facility. Appellant's Br. at 8. The Arbitration Agreement provided for alternative dispute resolution of any claim its parties may bring against another arising out of Mother's admission in the Facility. (R. p. 93). Ms. Clyburn-Wilson signed the Arbitration Agreement on the line labeled "Legal Representative or Family Member." (R. p. 98).

During Mother's time as a Facility resident, she developed pressure ulcers that the Facility negligently failed to prevent or treat. (R. p. 22 ¶ 17). Over time, the worsening pressure sores led to "horrific, painful, disfiguring, permanent and life threatening injuries" and were ultimately responsible for Mother's death on February 5, 2018. (R. p. 60 ¶ 31; R. p. 100).

[2] In fact, Mother had no power of attorney at that time. Five months after her admission, Mother executed a Durable Power of Attorney naming a different daughter (Andrietta Atkinson) as her agent. (R. pp. 130-49).

STANDARD OF REVIEW

Appellate courts apply a *de novo* review to a circuit court's finding on whether a nonsignatory is bound to an arbitration contract. Wilson v. Willis, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) (citing Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) and Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012)). However, under a *de novo* review, the circuit court's factual findings will not be reversed so long as "any evidence reasonably supports those findings." Wilson, 426 S.C. at 335, 827 S.E.2d at 172. While the Federal Arbitration Act ("FAA") imposes a presumption favoring arbitration, the presumption does not apply to the "identity of the parties who may be bound to such an agreement." Id. at 337-38, 827 S.E.2d at 173. In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory. Id.

ARGUMENT

Mother did not agree to arbitrate her legal claims against the Facility. The Facility never even asked her to. As the circuit court found (and the Facility did not challenge on appeal)[3], Mother had the capacity to consider and decide whether to enter contracts on her own when she became the Facility's resident. (R. p. 6). Yet, the Facility chose to present the Arbitration Agreement to Ms. Clyburn-Wilson, and she had no authority to act on Mother's behalf. The circuit court correctly concluded the Arbitration Agreement is invalid because it lacks the core requirement of mutual assent to form a binding agreement. (R. pp. 3-9). The Facility's insistence that Ms. Clyburn-Wilson's signature means Mother's claims must be arbitrated is a serious distortion of contract law.

[3] Any ruling not specifically challenged on appeal is the law of the case and must be affirmed. League v. S.C. Dep't of Health & Envtl. Control, 363 S.C. 67, 76, 610 S.E.2d 482, 487 (2005).

To challenge the circuit court's finding of no valid contract, the Facility relies on a series of unsupported assertions: (1) Ms. Clyburn-Wilson had some form of unspecified authority to sign a separate Admission Agreement for Mother; (2) the Arbitration Agreement and Admission Agreement are really a single contract; and (3) Mother and Respondents are somehow estopped from opposing arbitration as a result of Ms. Clyburn-Wilson's actions. The Facility's arguments would be flawed even if the issues were novel. But, South Carolina's appellate courts have been here before and three times rejected the merger and estoppel theories the Facility needs to prevail. Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

Recently, this Court rejected the Facility's estoppel argument for a *fourth* time, reinforcing that a nursing home resident is not equitably barred from suing the home for negligent care based on a family member's signature on an admission contract. Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020). For the reasons discussed below, the Court should reject the Facility's attempts to distinguish this growing body of precedent and the multiple instances where the Facility implicitly asks the Court to overrule these cases. In the end, the Facility's pursuit of arbitration should fail for the same reason as the nursing homes in Coleman, Thompson, Hodge, and Weaver: Neither Mother nor anyone with legal authority to act on her behalf agreed to arbitration, and Mother/Respondents have taken no action that would prevent them from insisting on a judicial forum for their claims.

1. The Independently-Invalid Arbitration Agreement does not Merge with the Admission Agreement.

The Facility argues Respondents must arbitrate Mother's claims against the Facility, but there is no valid contract requiring them to do so. Mother never signed or otherwise assented to

the Arbitration Agreement on which the Facility relies to support its motion. Ms. Clyburn-Wilson's signature on the Arbitration Agreement is ineffective because she did not have authority to bind Mother to a dispute resolution contract. Moreover, as the circuit court concluded, the fact that Mother lived at the Facility as a resident does not estop her or Respondents from contesting arbitration under South Carolina or federal equitable estoppel principles.

This appeal centers on core components of contract formation. Since the Facility points only to the Arbitration Agreement as a basis for dismissing Respondents' claims, it cannot prevail without first establishing the Arbitration Agreement is a properly formed, binding contract. However, while the Facility offered the Arbitration Agreement as an alternative means for settling disputes, neither Mother nor anyone with legal authority accepted that offer. Moreover, as established in South Carolina precedent, any statutory authority Ms. Clyburn-Wilson may have had to admit Mother to the Facility does not confer authority to enter the Arbitration Agreement, a document the Facility drafted as a separate and distinct contract offered for a completely different purpose.

a. The Facility Cannot Show the Core Requirements to Form a Contract.

A contract is formed only when one party makes an offer, the other manifests acceptance, and the contract's promises are supported by valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Acceptance requires an "objective manifestation of . . . assent at the time the contract was made." Laser Supply & Services, Inc. v. Orchard Park Assoc., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009). The Arbitration Agreement was not signed by Mother or offered to her even though she had contractual capacity at the time of her admission. (R. p. 6). The Facility argues Ms. Clyburn-Wilson's signature assented on Mother's behalf, but the Facility presents nothing to show Ms. Clyburn-Wilson had

authority to contract for Mother. Instead, the Facility now seems to argue Ms. Clyburn-Wilson had statutory authority to enter Mother to the Facility and that authority either carries over to the Arbitration Agreement or equitably estops Mother/Respondents from opposing arbitration. The circuit court correctly refused both of these arguments because they have been rejected by South Carolina appellate courts four times in less than seven years.

South Carolina's Adult Health Care Consent Act ("the Act") empowers designated family members of some vulnerable adults to sign a contract admitting the vulnerable adult to a skilled nursing facility and agreeing to pay the fees imposed by that facility for its services. S.C. Code Ann. § 44-66-60(A); Coleman, 407 S.C. at 352, 755 S.E.2d at 453. But, since the Act is limited to "health care" decisions, it provides no authority for separate contracts like the Arbitration Agreement. Id. at 354, 755 S.E.2d at 454; Thompson, 416 S.C. at 51, 784 S.E.2d at 684 (Ct. App. 2016) (citing Coleman and agreeing an "Arbitration Agreement does not deal with healthcare decisions"). Additionally, a family member signing a nursing home admission contract pursuant to authority derived from the Act does not estop a later argument that the same family member lacked authority to sign a separate arbitration contract. Coleman, 407 S.C. at 354-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 60, 784 S.E.2d at 688. The Act was never meant to affect anything other than "health care" decisions, and the Arbitration Agreement was not a health care decision because Mother could get all the health care services covered in the Admission Agreement without agreeing to arbitrate. Appellants' Br. at 8 (admitting Arbitration Agreement was unnecessary to gain admission to the Facility).

Coleman did acknowledge the possibility equitable estoppel could be invoked if the disputed arbitration language was actually or effectively part of the same admission contract. 407 S.C. at 355, 755 S.E.2d at 455. This narrow path to a successful estoppel argument requires several

steps. Preliminarily, the Facility must establish the Act empowered Ms. Clyburn-Wilson to enter the Admission Agreement on Mother's behalf. See Hodge, 422 S.C. at 574, 813 S.E.2d at 308 (finding that there can be no estoppel argument where signatory family member lacked authority under Act to enter admission contract). Then, the Facility must link the admission and arbitration contracts by meeting multiple requirements to apply a common-law contract law interpretation principle by which courts interpret multiple writings as a single contract. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. This "merger" principle cannot apply unless the writings in question were executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." Id. (quoting Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Even then, merger does not apply if there is "*anything* indicating a contrary intention." Id. (emphasis added). Thus, simultaneously executed writings relating to the same general subject matter will not be viewed as a single or merged agreement if either their language or the circumstances even hint that the parties actually intended the writings to be distinct, separate contracts. Three nursing homes have previously attempted but failed to meet these requirements, and South Carolina's appellate courts have never applied merger to nursing home admission and arbitration contracts. See generally Coleman, Thompson, and Hodge.

b. The Facility Admits Ms. Clyburn-Wilson Lacked Authority under the Adult Health Care Consent Act.

The Facility cannot meet any of the requirements to support its equitable estoppel argument. First, the Facility cannot show Ms. Clyburn-Wilson had authority to enter the Admission Agreement. As Coleman and Thompson demonstrate, the Facility's merger and estoppel arguments could only be relevant to this appeal if Ms. Clyburn-Wilson had authority under the Act. Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting estoppel argument "is premised on [nursing home's] contention that, under state law, the admissions agreements and the

[arbitration contract] merge"); Thompson, 416 S.C. at 49-50, 784 S.E.2d at 683 (finding merger argument depended on notion that family member who signed contract "was authorized to execute [admission contract] under the Act"). The Facility admits it is not claiming Ms. Clyburn-Wilson had authority under the Act to enter the Admission Agreement. Appellant's Br. at 5; (R. p. 202). As this Court has held, expressly disclaiming an argument based on the Act and merger is enough to doom a merger and estoppel argument on appeal. Thompson, 416 S.C. at 50, 784 S.E.2d at 683 (finding nursing home waived merger argument through statement at circuit court).

Moreover, the Facility's concession is well supported by the record. The Act only applies to decisions made on behalf of a person "unable to consent." S.C. Code Ann. § 44-66-30(A). A person is "unable to consent" only if she is unable to (1) appreciate the nature of her condition; (2) make a reasoned decision about a proposed plan of care; or (3) communicate her desires in an unambiguous manner. S.C. Code Ann. § 44-66-20(8). Mother did not meet these requirements when she was admitted to the Facility. In fact, Mother demonstrated her competency and contractual capacity five months after her admission when she executed a durable power of attorney naming Ms. Atkinson as her agent. (R. pp. 130-49). Since the Facility has argued the Act does not apply and the evidence would not support its application, the Facility's merger and estoppel arguments fail at their initial hurdle.[4]

[4] Without the authority granted by the Act, the Facility's only remaining argument to support Ms. Clyburn-Wilson's alleged authority to execute the Admission Agreement is a double-layer estoppel argument. In short, the Facility claims (1) Mother is equitably estopped from denying the Admission Agreement because she was in fact admitted; (2) the Admission Agreement and Arbitration Agreement merged; and (3) Mother was then estopped from denying the Arbitration Agreement because it was part of the Admission Agreement. Appellant's Br. at 14 n. 12. Here again, however, the Facility's estoppel argument as to the Admission Agreement has been rejected by this Court. Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding it difficult to conclude a nursing home resident "benefited" from a nursing home admission marked by negligent care that caused her death).

c. The Admission Agreement and Arbitration Agreements Serve Different Purposes.

Second, the Facility cannot show the Admission Agreement and Arbitration Agreement were executed for the same purpose. The Admission Agreement was formed to enumerate the nursing services the Facility would provide and to define Mother's obligation to pay for those services. (R. p. 120). That purpose is borne out in the Admission Agreement's nine pages. The Facility agreed to "provide the Resident with basic room and board as well as nursing and personal care and other ancillary items and services needed for the Resident's health, safety and well-being" (R. p. 122 § IV) and, in turn, Mother agreed to "[p]ay Facility for all services and items that the Facility provides" for its services. (R. p. 124 § VI). The Admission Agreement's provisions referred to Medicaid eligibility, bed hold policies, late fees for unpaid service charges, etc. The Arbitration Agreement covers a completely different issue. It is solely devoted to directing an alternative dispute resolution method and purporting to eliminate its parties' right to seek relief through the courts. (R. p. 91). These two contracts cannot have the same purpose because, as the Facility admits, the Arbitration Agreement was not a pre-condition for admission. Appellants' Br. at 8.

d. The Terms and Context Show the Parties Intended the Admission Agreement and Arbitration Agreement to be Separate Contracts.

Third, even if the Facility had not disclaimed any reliance on the Act and even if the prerequisites to merger were present, the Facility's argument fails because the language and circumstances of the Admission Agreement and Arbitration Agreement show the parties intended they be construed as separate contracts. Coleman, Thompson, and Hodge are the key precedent here because they illustrate the type of contract language or structure showing parties do not intend multiple agreements to be interpreted as one. For example, an arbitration contract does not merge with an admission contract in which a nursing home and its resident chose to insert an "entire

agreement" or integration provision (aka "merger clause") limiting its parameters and excluding other writings. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. Coleman held one such provision proved "on its face" that merger does not apply. Id. Also, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated. Id.; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the contracts are structured, finding it is unlikely parties intended two contracts to be treated as one if they chose separate titles, required separate signatures, and numbered each contract's pages differently. Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two agreements while taking the position that agreeing to the former was not required to obtain the benefits of the latter. 422 S.C. at 562-63, 813 S.E.2d at 302.

The Facility preemptively dismisses all of these factors, arguing none of them suggest the parties intended the Admission Agreement and Arbitration Agreement stand on their own. Appellant's Br. at 7-11. However, by rejecting or discounting these factors, the Facility is arguing against well-established, recent precedent (Coleman, Thompson, and Hodge) without offering the Court any reason why it should so dramatically and quickly reverse course. All four of these factors apply to the Admission Agreement and Arbitration Agreement and provide extensive evidence to support the circuit court's finding that the contracts do not merge.

i. The Admission Agreement's "Entirety of Agreement" Provision

The Admission Agreement concludes with an "Entirety of Agreement" provision identifying the contract's limited scope. (R. p. 127). Specifically, this provision states "this Agreement . . . contains all of the promises and agreements between the parties." "Agreement" is

capitalized because it is a defined term, which the Admission Agreement's opening line limits to "This Resident Admission Agreement." (R. p. 120). Thus, the Admission Agreement's "Entire Agreement" provision is similar to the admission contracts in Coleman, Thompson, and Hodge and is just as probative against merger as those in earlier cases. It specifically limits the contract's interpretation to the "Agreement" and then defines that term narrowly in a way that does not include the Arbitration Agreement or any other writing. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. In this sense, the "Entirety of Agreement" provision is consistent with the fundamental purpose an integration provision serves in a contract. See Palmetto State Sav. Bank of S.C. v. Barr, 293 S.C. 252, 253-54, 359 S.E.2d 531, 532 (Ct. App. 1987) (finding purpose of integration provision is to create "implication the whole intentions of the parties has been expressed" in the writing containing the clause); Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984) (citing Armour Fertilizer Works v. Hyman, 120 S.C. 375, 113 S.E. 330 (1922) (the terms of a completely integrated contract "cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing")).

ii. Inconsistent Termination Provisions

Two contracts executed at the same time do not merge if they contain inconsistent terms. Coleman, Thompson, and Hodge made special note of inconsistent provisions in admission and arbitration contracts regarding when each contract may be cancelled at the resident's urging. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 551, 813 S.E.2d at 296. In each instance, the arbitration contract allowed the resident to disclaim or revoke its provisions within thirty days while the admission contract signed by a resident's family member did not include a similar right. Id. Here, the Arbitration Agreement

includes a disclaimer provision, allowing a resident to revoke her assent to arbitration within a thirty-day period. (R. p. 91). The Arbitration Agreement expressly states that revoking the Arbitration Agreement would not affect a resident's admission status. Id. As Coleman, Thompson, and Hodge demonstrate, the Arbitration Agreement's revocation option rebuts any argument the parties intended these two separate contracts merge into one.

iii. Contract Formatting and Structure

Thompson and Hodge prove it is not just specific contract language that shows a nursing home and its resident did not intend for admission and arbitration contracts to merge. Intent can be derived from the way a contract is formatted or structured. Rather than adding an arbitration provision to the admission contract or attaching that language as an exhibit, the nursing home in Thompson chose to place it in an entirely separate document with its own, distinct "Arbitration Agreement" label. 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1. That choice was in itself further proof of "the parties' intent for [the arbitration contract] to stand by itself as an independent contract." Id. The Facility did the same here, and the Arbitration Agreement announces itself as a distinctive contract from its very title. Hodge also noted the importance of formatting choices a nursing home makes when constructing its admission and arbitration contracts. 422 S.C. at 562, 813 S.E.2d at 302. An arbitration contract looks more and more like its own independent document if entering it requires a separate signature than the admission contract and the documents have separate pagination. Id. Here, the Arbitration Agreement required separate signatures. Plus, the Admission Agreement ran from page 1 to 9 while the Arbitration Agreement was on its own separate contract running from page 1 to 9.

iv. Admission is not Dependent on Arbitration Agreement

The Facility's merger argument is also rebutted by its admissions. The purported interaction between two separate contracts can be judged not only by their language but also by how their parties treat each contract. An arbitration contract is far less likely to merge with an admission contract if the nursing home admits arbitration is not required for admission. The Facility argues the fact that admission does not depend on consent to arbitrate somehow supports merger. Appellants' Br. at 9. But, in Hodge, this Court cited as further evidence against merger an arbitration contract provision stating that arbitration was not a precondition to a resident's acceptance into the nursing home. 422 S.C. at 562-63, 813 S.E.2d at 302. Similarly, the Facility does not treat the Admission Agreement and Arbitration Agreement as if they are interdependent or even as related to the same purpose. Appellants admit in their brief that executing the Arbitration Agreement was not mandatory and not a precondition to admission. Appellants' Br. at 8.

In sum, the Arbitration Agreement and Admission Agreement have the same four indicators South Carolina courts have cited in the past to find simultaneously-executed contracts were not intended to merge into one. Moreover, contrary to the Facility's arguments, any uncertainty about these four indicators must be resolved in Respondent/Mother's favor, not to their detriment. The Facility argues merger is the default position and must be applied absent an affirmative showing of contrary intent. Appellants' Br. at 11. But, that argument overlooks two key holdings from Coleman. First, to the extent merger is a presumption, it is an easily rebuttable one because "***anything*** indicating a contrary intention" means a court will not apply merger. 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts, 268 S.C. at 88, 232 S.E.2d at 24) (emphasis added). Thus, the Facility's task on appeal is not to successfully oppose one of the four indicators discussed above but to prove all four are absent here. Second, since the Facility drafted these form contracts

of adhesion, any ambiguities must be construed against it. The Facility argues that applying the ambiguity rule here "makes no sense" (Appellants' Br. at 11), but does not acknowledge the Facility's argument effectively asks the Court to reverse its own ruling on the issue and to overrule Supreme Court precedent. Coleman applied the "presumption against drafter" rule to a nursing home's quibbles over the effect of an "entire agreement" clause, and Thompson used it to reject a nursing home's argument that an arbitration contract was incorporated into an admission contract. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53-54; 784 S.E.2d at 685.

Accordingly, the Facility's merger argument is flawed not only in the specific ways described above but also in its very conception of when and how the merger doctrine operates. The circuit court properly applied extensive South Carolina law in this field and rejected the Facility's contention that the Arbitration Agreement and Admission Agreement merged.

2. Respondents are not Equitably Estopped from Opposing Arbitration.

Mother did not sign the Arbitration Agreement or authorize anyone to sign for her. Yet, the Facility argues South Carolina Supreme Court precedent suggests Mother/Respondents are equitably estopped from opposing arbitration. Appellants' Br. at 12-16 (citing Wilson). However, the Facility does not cite or attempt to apply the elements of equitable estoppel imposed by South Carolina law.[5] Plus, Wilson actually refused to compel arbitration against a non-signatory, holding

[5] As Wilson recognized, whether a non-signatory may be bound to an arbitration contract is a state law issue. 426 S.C. at 348, 827 S.E.2d at 174 (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 n. 5 (2009)). Under South Carolina law, equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id. Wilson did not dismiss or eliminate this test for equitable estoppel but only found its application was an issue that had not been preserved for appellate review. 426 S.C. at 341 n. 9, 827 S.E.2d at 175 n. 9. The Facility argues Wilson

there is a presumption *against* forcing someone to arbitrate based on a contract she did not sign. 426 S.C. at 338, 827 S.E.2d at 173. Wilson even went on record to say equitable estoppel is rarely appropriate to force arbitration. Id. at 345, 827 S.E.2d at 177 (finding equitable estoppel "should be used sparingly"). Finally, as this Court recently reaffirmed in Weaver, the Facility cannot meet the "direct benefits" test considered in Wilson because Mother's claims in no sense rely on the Arbitration Agreement's terms, and the Facility's argument to the contrary expressly links its estoppel claim to its fatally flawed merger argument.

The Facility wholly omit the fact that the "direct benefits estoppel" discussed in Wilson could only apply if Respondent has "consistently maintained that other provisions of the same contract should be enforced to benefit" her. 426 S.C. at 340, 827 S.E.2d at 175 (quoting Pearson, 400 S.C. at 290, 733 S.E.2d at 601). In other words, the Facility's burden is to show (1) Mother's claims arise from the purportedly merged Admission Agreement-Arbitration Agreement; (2) Mother/Respondents have "exploited" other parts of the contract by reaping its benefits; and (3) Mother's claims rely solely on the contract terms to impose liability. Weaver, 431 S.C. at 230, 847 S.E.2d at 272 (citing Wilson, 426 S.C. at 340-44, 827 S.E.2d at 175-77). The Facility makes no attempt to meet this burden and cannot do so. Mother's claims do not cite or rely on the Arbitration Agreement. Instead, the Facility argues Mother's alleged direct benefit was admission itself and the nursing home services she received while a Facility resident. Appellants' Br. at 13-14.

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concluded this test only applies to "non-arbitration cases." Appellant's Br. at 12 (citing Wilson, 426 S.C. at 340 n. 9, 827 S.E.2d at 175 n. 9). However, that could not have been Wilson's meaning because applying different rules to arbitration and non-arbitration contracts would violate the U.S. Supreme Court's equal-treatment principle. See Prima Paint Corp. v. Flood Conklin Mfg. Co., 388 U.S. 395, 404 n. 12 (1967) (finding intent of FAA was "to make arbitration agreements as enforceable as other contracts, but not more so").

But, this argument has two key flaws. First, the Facility expressly links its estoppel claim to a merger argument it cannot prove. Appellants' Br. at 14 (arguing estoppel applies because Admission Agreement and Arbitration Agreement merged). As discussed in Argument 1 above, there is no merger here because (1) the Facility admits Ms. Clyburn-Wilson lacked statutory authority to enter the Admission Agreement; (2) the contracts were created for different purposes; and (3) there are many indications from the contracts' language they were not intended to be construed as one. Second, Mother has not obtained a "direct benefit" from the Admission Agreement as that term is used for estoppel purposes. The complaint does not allege a breach of contract claim based on the Admission Agreement or otherwise rely on that contract to assert liability against the Facility. The mere fact that Mother's relationship with the Facility underlying the claims was memorialized in the Admission Agreement is not sufficient for the Facility to invoke estoppel. Wilson, 426 S.C. at 343, 827 S.E.2d at 176 ("direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence").

Weaver applied this principle to reject the argument that a nursing home resident receives the required "direct benefit" through her admission or "exploits" either the admission or arbitration contracts by suing for poor nursing home care. 431 S.C. at 232-33, 847 S.E.2d at 273-74. In Weaver, a granddaughter brought wrongful death and survival claims based on a nursing home's failure to supervise a resident who wandered away from the home and was killed by a wild animal. Id. at 271. Equitable estoppel did not apply because the granddaughter's claims "rely on general tort duties . . . not any provision of the residency agreement." Id. at 232, 847 S.E.2d at 273. Weaver did not create new law; it followed Hodge's lead in holding that a nursing home resident or her

family members do not "exploit" an admission contract by alleging common law negligence claims. Id. (citing Hodge, 422 S.C. at 563, 813 S.E.2d at 302).

Thompson also rejected a nursing home's attempt to use direct benefits estoppel to compel a non-signatory nursing home resident to arbitrate. Thompson, 416 S.C. at 58-59, 784 S.E.2d at 687-88; After surveying state and Fourth Circuit precedent, Thompson rejected this form of estoppel because it generally requires proof of some benefit to the party opposing estoppel in "*the contract that includes the arbitration provision*." 416 S.C. at 59, 784 S.E.2d at 688 (emphasis added). The Facility, therefore, cannot build an estoppel argument by citing benefits Mother supposedly gained in the Admission Agreement. Thompson also rejected any effort to argue Mother gained a "direct benefit" from the Arbitration Agreement. Id. at 60, 784 S.E.2d at 688 ("any possible benefit emanating from the [Arbitration Agreement alone is offset by the [Arbitration Agreement's] requirement that Mother waive her right of access to the courts . . .").

In sum, the circuit court correctly rejected the Facility's equitable estoppel argument because the Facility has not cited or applied the proper elements, cannot show Mother obtained any "direct benefit," and bases its estoppel claim on a flawed merger argument. As it did in Thompson, Hodge, and Weaver, this Court should reject this equitable estoppel argument.

CONCLUSION

Based on the arguments stated above, Respondents respectfully request the Court affirm the circuit court's order denying the Facility's motion to compel arbitration. Mother never agreed to the Arbitration Agreement, and Ms. Clyburn-Wilson lacked legal authority to bind her to arbitration. Additionally, the Facility's equitable estoppel argument fails under South Carolina and federal law since Mother did not exploit or otherwise derive any "direct benefit" from the Arbitration Agreement.

Respectfully submitted,

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February 23, 2021

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2020-001143

Andrietta Atkinson and Debra Clyburn-Wilson, individually and as Personal Representatives of the Estate of Willie Mae Clyburn,	……..	Respondents
v.		
SSC Sumter East Operating Company, LLC, d/b/a Sumter East Health and Rehabilitation Center and Paul Granger,	……..	Defendants.
Of whom SSC Sumter East Operating Company LLC, d/b/a Sumter East Health and Rehabilitation Center is	…….	Appellant.

CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), SCACR, Respondents' counsel certifies that Respondents' Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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A. Atkinson v. SSC Sumter East Operating Co., LLC (Appellate Case No. 2020-001143)

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2 attachments (261 KB)

A. Atkinson--Final Brief of Respondents FINAL.pdf; A. Atkinson--Cert of Counsel (Final Brief).pdf;

Counsel:

I am attaching Respondents' Final Brief and Certificate of Counsel that are being electronically filed today with the Court of Appeals. Pursuant to Section (g)(3) of the South Carolina Supreme Court's March 20, 2020, order (Order No. 2020-03-20-01), please consider this email as service for both documents.

Thanks,

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