THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2019-CP-22-00961
Appellate Case No. 2020-001167

Kevin Greene,
as Attorney in Fact for and on Behalf of
Eleanor Greene Wragg, Respondent,

v.

Palmetto Prince George Operating, LLC
d/b/a Prince George Healthcare Center;
Palmetto Health Care, LLC;
Murray Forman, Individually; and
Richard Porter, Individually, Defendants.

Of whom Palmetto Prince George Operating, LLC
d/b/a Prince George Health Care Center;
Palmetto Health Care, LLC; and
Richard Porter, Individually, are Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On November 27, 2017, Ms. Eleanor Wragg[1] was admitted to Prince George Healthcare Center to obtain rehabilitation services. (*See* R. pp. 60 - 72.) Her son, Mr. Wendal Greene, signed an Admission Agreement and Arbitration Agreement, purportedly on her behalf and for the purpose of securing her admission into the facility. (*See* R. pp. 30; 60 - 72.)

On October 4, 2019, Plaintiff Kevin Greene,[2] as Attorney-in-Fact for Ms. Wragg, filed an action in the Court of Common Pleas for Georgetown County, alleging negligent conduct on the part of the facility and other defendants. (*See* R. pp. 7 - 17.) Appellants[3] moved the circuit court to stay proceedings and compel arbitration of the matter. The foundation of their motion(s) was the Arbitration Agreement signed by Mr. Wendal Greene purportedly as part of the resident intake documents at the nursing home.

When Appellants filed their principal motion(s), they did not submit a memorandum in support of their positions and, other than the subject Arbitration Agreement, did not submit any other evidence supporting their positions. (*See* R. pp. 26 - 31.)

The Honorable Benjamin H. Culbertson informed counsel he would decide the Motions on briefs without oral argument, and further required that any memoranda in opposition to Appellants' motion(s) be filed on or before June 16, 2020. On June 15, 2020, Respondent filed his

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1 The term "Ms. Wragg" will refer to Eleanor Greene Wragg.

2 Hereinafter "Respondent."

3 Hereinafter, "Appellants" will refer collectively to the appealing defendants, Palmetto Health Care LLC, Prince George Operating, LLC d/b/a Prince George Healthcare Center, and Richard Porter.

Memorandum in Opposition to Appellants' various motion(s) below. Then, on June 16, 2020, at 7:15 p.m., Defendants Palmetto Prince George Operating, LLC, Palmetto Health Care, LLC, and Richard Porter filed *initial* Memoranda in Support of their respective Motions Compel Arbitration and/or to Stay, attaching various exhibits, including the Affidavit of Angela Burns, and providing argument in support of their position.

The circuit court denied Defendants' several principal motions on June 17, 2020, and subsequently denied their motion(s) to reconsider. The instant appeal followed.

[CONTINUED]

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED THE MOTIONS TO COMPEL ARBITRATION AND MOTIONS TO STAY BECAUSE THE ARBITRATION AGREEMENT IS INVALID AND UNENFORCEABLE AS AGAINST MS. WRAGG.

Contrary to Appellants' assertions, matters dealing with the Arbitration Agreement's validity – and, by extension, its enforceability as against Ms. Wragg – are the first points this Honorable Court should address. To be sure, whether "there is a valid agreement" is a threshold issue in deciding whether an arbitration provision can be enforced. *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019).

Arbitration is a matter of contract, and South Carolina courts must determine the validity or enforceability of an arbitration agreement based on the principles of state-specific contract law, even those agreements governed by the Federal Arbitration Act (FAA). *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 538, 541, 542 S.E.2d 360, 365 (2001). State-specific contract law principles "[remain] applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts, generally." *Id.* at 541, 542 S.E.2d at 365 (citing *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987)). However, "a presumption *against* arbitration arises where the party resisting arbitration is a non[-]signatory to the written agreement to arbitrate." *Wilson*, at 337-38, 827 S.E.2d at 173 (citation omitted) (emphasis in original).

Here, there is no dispute about whether Ms. Wragg signed the Arbitration Agreement. She did not. Thus, the Arbitration Agreement cannot be valid on the basis of her personal execution. Therefore, this Court must examine whether it is valid and enforceable by operation of some other state-specific law. "South Carolina has recognized several theories that could bind non[-]signatories to arbitration agreements under general principles of contract and agency law,

including . . . agency, . . . and estoppel." *Wilson*, at 339, 827 S.E.2d at 174.[4] Appellants rely on agency and estoppel theories as support for the Arbitration Agreement's enforceability (or, alternatively, for estopping Respondent from denying its enforceability), but neither theory operates to bind Ms. Wragg to the Arbitration Agreement's terms.

A. There was no agency relationship between Ms. Wragg and Mr. Wendal Greene such as would have given him authority to bind her to the Arbitration Agreement.

Appellants assert some type of agency relationship existed between Ms. Wragg and Mr. Wendal Greene, thus making his executing the Arbitration Agreement binding upon her. "'Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control.'" *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). "Actual authority" is defined as "such authority as a principal intentionally confers on the agent, or intentionally or by want of ordinary care allows the agent to believe himself to possess." *Black's Law Dictionary* 33 (5th ed. 1979). Such authority can be express or implied. *Id.*

On the other hand, an "apparent agency" may be created where, in dealing with a third party, a putative principal holds out another person as her agent. *See generally,* e.g., *Froneberger*, at 47, 748 S.E.2d at 630. Creation of apparent agency authority requires actions or conduct by the principal toward a third person such as would "cause[] the third person to believe the principal consents to have [an] act done on [her] behalf by the [agent]." *Frasier v. Palmetto Homes*, 323

[4] The *Wilson* court also noted "incorporation by reference," "assumption," and "veil piercing/alter ego" are other theories that may bind a non-signatory to an Arbitration Agreement. *See Wilson*, at 339, 827 S.E.2d at 174. Because these other theories have not been raised in Appellants' Initial Brief, they will not be addressed in Respondent's Initial Brief, either.

S.C. 240, 244-45, 473 S.E.2d 865, 868 (Ct. App. 1996) (citation omitted). However, "an agency may not be established solely by the declarations and conduct of an alleged agent." *Id*. at 245, 473 S.E.2d at 868 (citation omitted).

In any event, the "party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts." *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 565, 813 S.E.2d 292, 304 (Ct. App. 2018) (quoting *McCall v. Finley*, 294 S.C. 1, 6, 362 S.E.2d 26, 29 (Ct. App. 1987)). As discussed below, no agency relationship existed between Ms. Wragg and Mr. Wendal Greene such as would give him authority to bind her to the Arbitration Agreement.

i. No actual agency relationship existed between Mr. Wendal Greene and Ms. Wragg such as would have given him authority to bind her to the Arbitration Agreement.

In the instant case, there is no evidence suggesting Ms. Wragg intentionally conferred upon Mr. Wendal Greene the authority to act as her agent for any purpose, much less for the purpose of making decisions about her right to trial by jury. Appellants have pointed to no record evidence, no facts that "clearly establish" a true agency relationship between Ms. Wragg as principal and Mr. Wendal Greene as her agent.[5] Accordingly, no actual principal-agent relationship existed, therefore Mr. Wendal Greene did not possess authority to bind Eleanor Wragg to the terms of the Arbitration Agreement in this matter.

ii. No apparent agency relationship existed between Mr. Wendal Greene and Ms. Wragg such as would have given him authority to bind her to the Arbitration Agreement.

South Carolina law requires proof of three elements to establish apparent agency: "(1) that the purported principal consciously or impliedly represented another to be [her] agent; (2) that

[5] *See Hodge*, at 565, 813 S.E.2d at 304.

there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Froneberger*, at 47, 748 S.E.2d at 630 (quoting *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991)) (internal quotation marks omitted).

"The first element of apparent agency can be established by either: (1) affirmative conduct or (2) conscious and voluntary action." *Id*. at 47, 748 S.E.2d at 630 (citations omitted). Here, there is no evidence of Ms. Wragg's affirmatively holding Mr. Wendal Greene out as her agent. There is no evidence that Ms. Wragg made any implicit or explicit representation to Ms. Angela Burns that Mr. Wendal Greene was empowered to act on her behalf in any manner, much less for the purpose of waiving her right to a jury trial.

Moreover, a finding of apparent agency requires a party's reliance upon the principal's representation and a detrimental change in the relying party's position.[6] There is no evidence of either element in this case. Rather, Ms. Burns testifies to relying on "Mr. [Wendal] Greene's statements and actions" in forming her belief as to his authority to act on Ms. Wragg's behalf. (R. p. 105.) Similarly, Appellants note Mr. Wendal Greene signed the Arbitration Agreement and affirmed he had authority to do so. (App. Initial Brief, p. 2; *see* R. p. 30.) Neither of these items suffice to show apparent agency because, as noted above, an apparent agency cannot be based solely on the representations of the alleged agent.[7] That Mr. Wendal Greene may have represented himself as having such authority is inapposite in this context.[8]

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6 *See Froneberger*, at 47, 748 S.E.2d at 630.

7 *Frasier*, at 245, 473 S.E.2d at 868.

8 Mr. Wendal Greene's representations, such as they are, are also inapposite in the estoppel context. *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016) (holding, in a factually similar case, that a decedent's estate could not be held responsible for misrepresentations of authority made by decedent's daughter and son in their individual capacities).

Ultimately, there is no evidence Ms. Wragg conferred upon Mr. Wendal Greene any authority, either expressly, impliedly, or apparently, to act as her agent concerning decisions about dispute resolution or her rights to a jury trial. Therefore, because Mr. Wendal Greene was not vested with appropriate agency power when he executed the Arbitration Agreement, it is invalid and unenforceable as against Ms. Wragg.

iii. Ms. Wragg did not ratify Mr. Wendal Greene's execution of the Arbitration Agreement as her own act and deed.

"Ratification, as it relates to the law of agency, means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent." *Lincoln v. Aetna Casualty & Surety Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989) (citation omitted). Ratification may be found only where there is: "(1) acceptance by the principal of the benefit of the agent's acts, (2) [the principal's] full knowledge of the facts, and (3) circumstances or an affirmative election indicating [the principal's] intention to adopt the unauthorized arrangements." *Id*.

Appellants assert Ms. Wragg ratified Mr. Wendal Greene's execution of the Arbitration Agreement by adopting and confirming his act as her own, and thus Mr. Wendal Greene was Ms. Wragg's agent by ratification. This argument is erroneous for two reasons. First, to find ratification in this case would require evidence that Mr. Wendal Greene "assumed to act as" Ms. Wragg's agent. *See id.* As discussed above, Mr. Wendal Greene was not Ms. Wragg's agent for the purpose of making decisions concerning her right to trial by jury; no evidence suggests he had any reason to assume he had that authority.

Second, assuming *arguendo* that some form of agency relationship existed (or, alternatively, to the extent ratification would indicate agency by estoppel), none of the elements of ratification are met. Ms. Wragg did not accept any benefit purportedly conferred by the Arbitration

Agreement.[9] There is no evidence Ms. Wragg had any knowledge of Mr. Wendal Greene's execution of the Arbitration Agreement or of the effect its terms may have had on her ability to access the courts. Further, there is no evidence of Ms. Wragg's affirmative election or adoption of the Arbitration Agreement's terms. Rather, by challenging the assertion the Arbitration Agreement controls, Ms. Wragg is *rejecting* the notion she is bound by it.

With regard to Appellants' reliance Paragraph 15 of Ms. Burns' affidavit that "Ms. Wragg never repudiated or invalidated her son's actions," the law is clear that the "mere silence or failure of a principal to repudiate the unauthorized act of an agent does not necessarily constitute a ratification." *Stiltner v. USAA Cas. Ins. Co.*, 395 S.C. 183, 191, 717 S.E.2d 74, 78 (Ct. App. 2011) (citation omitted). Only where "the silence or acquiescence in question cannot be explained on any other theory than that of ratification" will silence suffice to constitute ratification. *Id.* at 191-92, 717 S.E.2d at 78. In this case, there are several other plausible explanations for Ms. Wragg's "silence," only one of which is that she was apparently never presented the opportunity (until she filed suit) to repudiate her son's execution of the Arbitration Agreement. Ms. Burns makes no mention of ever confronting Ms. Wragg with the Arbitration Agreement after it was executed during her residency at the subject nursing home. She details no effort on her part to ascertain whether Ms. Wragg wanted to be bound by its terms. (*See* R. pp. 103 - 105.)[10]

Finally, Ms. Wragg accepted no benefit purportedly conferred by the Arbitration Agreement itself. Even assuming *arguendo* she did accept some benefit from it, any benefit it

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[9] To the extent Appellants assert that Ms. Wragg's "acceptance" of the benefits of her residency constitute "acceptance" of the Arbitration Agreement's terms and provisions, that premise is error. *See infra*.

[10] Parenthetically, even if Ms. Burns had sought Ms. Wragg out to confront her with the Arbitration Agreement, it is exceedingly unlikely Ms. Wragg would have had the mental capacity to understand the implications of the Arbitration Agreement anyway.

conferred would be significantly outweighed by her loss of access to the courts.[11] Aside from Ms. Wragg's "failure" to notify Ms. Angela Burns of her repudiation or invalidation of Mr. Wendal Greene's execution of the Arbitration Agreement,[12] Appellants point to no other evidence in support of their ratification argument. Accordingly, Ms. Wragg did not ratify Mr. Wendal Greene's unauthorized execution of the Arbitration Agreement.

For the foregoing reasons, Appellants' contention that any sort of principal-agent relationship existed between Ms. Wragg and Mr. Wendal Greene is without merit, and the circuit court's decision should be affirmed.

B. Ms. Wragg cannot be estopped from denying the enforceability of the Arbitration Agreement because the Arbitration Agreement did not merge with the Admission Agreement.

As an alternative to their agency argument, Appellants maintain the Arbitration Agreement merged with the (assumedly valid) Admission Agreement and thus estops Ms. Wragg from denying the enforceability of the arbitration provisions. Generally, 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," unless there is "anything indicating a contrary intention" to merger. *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014). Appellants' assertion that Ms. Wragg and Respondent are estopped from denying the enforceability of the Arbitration Agreement is error because the two instruments did not merge at all.

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[11] *See Thompson v. Pruitt Corp.*, 416 S.C. at 60, 784 S.E.2d at 688 ("[A]ny possible benefit emanating from the [arbitration agreement] alone is offset by [its] requirement that Mother waive her right to access to the courts and her right to a jury trial.").

[12] (*See* R. pp. 103 - 105.)

In their Initial Brief, Appellants cursorily conclude "the merger presumption" arose in this case. The error intrinsic to Appellants' argument on this point is the assumption that merger cures invalidity. Appellants have set aside the question of the Arbitration Agreement's validity as against Ms. Wragg, relying instead upon the merger doctrine to bootstrap the demonstrably invalid Arbitration Agreement to the (assumedly valid) Admission Agreement, and then they maintain Ms. Wragg is estopped from denying the Arbitration Agreement's enforceability.[13,14] In short, Appellants attempt an end-run around the validity of the Arbitration Agreement by holding fast to the merger doctrine. Respondent contends this is error for two reasons: first, merger does not cure invalidity, thus rendering Appellants' merger and estoppel argument meritless; second, there is demonstrable intent contrary to merger, therefore, even if the elements of merger *were* present, the agreements in this case did not merge.

i. Merger cannot cure the Admission Agreement's invalidity as to Ms. Wragg.

As noted above, Appellants conclude "the merger presumption" arose in the instant case because Mr. Wendal Greene was party to both the Arbitration Agreement and the Admission Agreement, executing both at the same time, for the same purpose, and in the course of the same

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[13] As a point of clarification, Appellants note in their brief that Respondent does not contest the enforceability of the Admission Agreement. This is a mischaracterization of Respondent's position. The entirety of the footnote text in Plaintiff's Memorandum in Opposition says: "As the enforceability of the Admission Agreement is not at issue, it is assumed for the sake of argument that Wendal Greene was vested with authority under the [Adult Health Care Consent] Act to bind Eleanor Wragg to the terms of the Admission Agreement." (R. p. 42 n. 8.) Clearly, this footnote is an acknowledgement that the Admission Agreement's enforceability was not (at the time the Memorandum in Opposition was filed) an issue raised in Appellants' motion(s) below. Respondent sought only to frame the arguments that followed without conceding the same. As far as Respondent is aware, the Admission Agreement's enforceability is not at issue in the instant appeal, either, and so takes no position on the matter.

[14] Again, for the sake of argument, and without conceding same, Respondent will assume the Admission Agreement is enforceable, reserving the right to request further opportunity to contest and/or brief the issue in the event it becomes needful.

transaction. *See Coleman*, at 355, 755 S.E.2d at 455. Appellants maintain the instant case is similar to *Coleman*, relying on *Coleman* as the basis for "the merger presumption" arising.

In *Coleman*, a nursing home resident's Sister executed various documents prior to the resident's admission into a skilled nursing facility, among which were an arbitration agreement and an admission agreement. *Coleman*, at 350, 755 S.E.2d at 452. When the resident passed away, Sister brought wrongful death and survival action claims against the skilled nursing facility and other defendants. *Id.* In considering whether Sister was equitably estopped to deny the validity of the arbitration agreement in that case, the *Coleman* court noted the general rule of merger, that where documents are executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the documents merged "[u]nless there [was] a contrary intention." *Id.* at 355, 755 S.E.2d at 455. The court briefly acknowledged the arbitration agreement and admission agreement *in that case* were executed by Sister at the same time, in the course of the same transaction, and ostensibly for the purpose of admitting decedent into the nursing facility, and that "[u]nless there [was] a contrary intention, [the nursing facility was] correct that there was a merger." *Id.*

However, although the instant case is similar in many respects to *Coleman*, Respondent contends *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), provides a more apt comparison to this case on this issue. In *Thompson*, this Court addressed whether a Son's execution of an admission agreement, an arbitration agreement, and other admission documents at Mother's admission to a nursing facility sufficed to bind Daughter, who filed a wrongful death and survival action against the nursing facility after Mother died, to the terms of the arbitration agreement. *Thompson*, at 48, 784 S.E.2d at 682. The *Thompson* court found the arbitration agreement and admission agreement were not merged, in part because Mother's estate was not

bound by the arbitration agreement. *Id*. at 49-54, 784 S.E.2d at 683-85 (concluding Son did not possess requisite authority to execute arbitration agreement on Mother's behalf). Thus, while in *Coleman* the documents *would have* merged but for contrary intent, in *Thompson* the documents *did not* merge because the arbitration agreement was invalid as against Mother and therefore invalid against Daughter in her representative capacity for Mother's estate.

On the merger issue, the facts of this case align more closely with *Thompson* than with *Coleman*. Similar to Daughter and Mother in *Thompson*, neither Respondent nor Ms. Wragg signed the instant Arbitration Agreement. Further, as in *Thompson*, where the nursing facility sought to compel arbitration against non-signatory Daughter as the real party-in-interest for Mother's estate, Appellants here are attempting to compel Ms. Wragg and Respondent, both non-signatories, to arbitration. Also, like Son in *Thompson*, Mr. Wendal Greene is not a party to this instant action and otherwise possessed no authority to bind Ms. Wragg to the terms of the Arbitration Agreement.

On the other hand, and contrary to Appellants' contention, *Coleman* is readily distinguishable from the instant case: in *Coleman*, Sister was the person who signed the arbitration agreement and the admission agreement *and* was the representative plaintiff the nursing facility attempted to compel to arbitration. In the instant case, Mr. Wendal Greene signed the Arbitration Agreement and Admission Agreement, but he is not a party, representative or otherwise, in this matter. Whereas in *Coleman* the court found that, but for contrary intent, the two instruments *would have merged* because the same party sought to be compelled to arbitration (Sister) was the same party who executed both documents, the *Thompson* court found the two instruments did not merge because Son did not have authority to bind Mother or her estate to the arbitration agreement sought to be enforced against Daughter (acting in a representative capacity). Thus, *Thompson* is

clearly a better standard by which to assess whether the instruments in this case merged. As in *Thompson*, here they did not.

Furthermore, *Thompson* stands for the proposition that, as to a non-signatory, an arbitration agreement must first be independently valid before it can merge with another instrument and thereby estop a non-signatory from challenging the enforceability of the arbitration agreement. In other words, contractual invalidity cannot be cured by merging with a separate, valid contract, particularly where a non-signatory is alleged to be bound by the terms of the invalid contract. In essence, the *Thompson* court determined the arbitration agreement and admission agreement did not merge because Son *could not* execute the arbitration agreement on Mother's behalf, thus the arbitration agreement was invalid as to Mother and Daughter as her representative and could not be enforced against Daughter or against Mother's estate. *Thompson*, 416 S.C. at 49-54, 784 S.E.2d at 683-85.

In this case, then, as in *Thompson*, the Arbitration Agreement was and is invalid as to Ms. Wragg and could not have merged with the (assumedly valid) Admission Agreement: she was not a party individually to the Arbitration Agreement, nor was she made a party to the agreement by virtue of an agent's authorized act on her behalf (or her ratification thereof). The Arbitration Agreement's invalidity as to Ms. Wragg necessarily means it *could not merge at all* with the Admission Agreement so as to be legally or equitably enforceable against her. It must therefore follow that "the merger presumption" did not arise in this case.

Moreover, it is difficult to discern how the party against whom enforcement (or estoppel) is sought can possibly be "the same party" contemplated in the elements of merger. To be clear, Respondent is not disputing that Mr. Wendal Greene's signature appears to be affixed to both instruments in question. Rather, Respondent notes an inherent difference here between the party

who executed the Arbitration Agreement (Mr. Wendal Greene) and the party against whom the Arbitration Agreement is sought to be enforced (Ms. Wragg (and Respondent on her behalf)). Mr. Wendall Greene may be a "party" to the Arbitration Agreement in a technical sense, but the Appellants seek to bind Ms. Wragg, a non-party, to its terms. Thus, although Mr. Wendal Greene presumedly executed both instruments at the same time, in the course of the same transaction, and for the same purpose, it is a bridge too far to maintain that merger *as to Mr. Wendal Greene*, *individually*, suffices to render an otherwise invalid and unenforceable Arbitration Agreement legally or equitably valid *as against Ms. Wragg and/or Respondent*.

Therefore, even assuming *arguendo* the Arbitration Agreement and Admission Agreement merged insofar as Mr. Wendal Greene is concerned,[15] merger as to him does nothing to remedy the Arbitration Agreement's invalidity as to Ms. Wragg. Mr. Wendal Greene did not have the authority to act for her in that respect, and the purported merger of the two instruments *cannot* cure that lack of authority. The merger doctrine cannot and does not operate to bind Ms. Wragg to the Arbitration Agreement.

Accordingly, because the invalidity and unenforceability of the Arbitration Agreement cannot be cured by merger, and because the party against whom enforcement or estoppel is sought in this case is not the "same party" to the Arbitration Agreement and Admission Agreement, this Court should find the instruments did not merge and that no "merger presumption" arose.

ii. <u>The Arbitration Agreement and the Admission Agreement did not merge because there is a demonstrable contrary intention to merger.</u>

Alternatively, even if this Court finds "the merger presumption" arose in this case as against Ms. Wragg, the presumption is rebutted by contrary intention of the parties. As discussed

[15] Respondent does not concede this point.

briefly above, the *Coleman* court addressed an issue similar to the one presented to this Court in this case, namely whether an arbitration agreement was enforceable against the representative of a deceased former nursing home resident. During the course of its discussion, the *Coleman* court examined in substantial part whether Sister (who was the representative) was estopped from denying the enforceability of an arbitration agreement by virtue of the arbitration agreement's merger with the admission agreement. *See Coleman*, 407 S.C. 346, 755 S.E.2d 450 (2014).

In *Coleman*, after determining the admission agreement and arbitration agreement would be treated as merged absent a finding of contrary intent, the court examined the facts for incidences of contrary intent. 407 S.C. at 355, 755 S.E.2d at 455. It discussed the admission agreement's "Entirety of Agreement" section, which identified the admission agreement and arbitration agreement separately, and noted that the "clause recognize[d] the 'separatedness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts." *Id.* "Moreover," the *Coleman* court continued, "the [arbitration agreement] could be disclaimed within thirty days of signing while the admission agreement could not," further demonstrating an intent the two contracts remain separate. *Id.* "By their own terms," the court concluded, "the contracts between these parties indicated an intent that the common law doctrine of merger not apply." *Id.* Thus, the court found there was intention contrary to merger of the two documents, and the two documents were not merged. *Id.* at 356, 755 S.E.2d at 455.

Likewise, this Court in the *Thompson* case also addressed whether intent contrary to merger existed.[16] *Thompson*, 426 S.C. at 53-54, 784 S.E.2d at 685. The *Thompson* court noted the

[16] It should be noted the *Thompson* court ultimately affirmed the circuit court's conclusion that the two agreements did not merge because Son's execution of the arbitration agreement on Mother's behalf was not within the scope of Son's authority. *Thompson*, at 54, 784 S.E.2d at 685. Accordingly, Respondent contends the *Thompson* court need not have addressed contrary

separateness of the arbitration agreement and the admission agreement, highlighting the arbitration agreement contained disclaimer language whereby the arbitration agreement could be unconditionally disclaimed, yet the admission agreement contained no similar language. *Id.* at 53, 784 S.E.2d at 685. The court dismissed the *Thompson* appellants' argument that the agreements were not separate because both could be disclaimed since Mother could have disclaimed the admission agreement by simply leaving the facility. *Id.* The court found the comparison invalid, noting the inherent difference between Mother having to leave the facility entirely to disclaim the admission agreement, while the arbitration agreement could be unconditionally disclaimed. *Id.* "Therefore," the court concluded, "Mother's right to disclaim the [arbitration agreement] without having to terminate her residency at the facility indicates the parties' intent to keep the [arbitration agreement] separate from the Admission Agreement." *Id.* Moreover, as other evidence of the separateness of the two instruments, the *Thompson* court noted that execution of the arbitration agreement was not a condition precedent to admission into the facility, whereas execution of the admission agreement ostensibly was. *Id.*

Finally, the *Thompson* court treated with the argument that the instruments merged because the admission agreement incorporated the arbitration agreement by referencing "all exhibits to the agreement." *Id.* The *Thompson* appellants contended the arbitration agreement was one of the exhibits incorporated. The court disagreed, noting the admission agreement was "ambiguous on this point" in that it did not "define the term 'exhibit' or cross-reference any specific exhibits," nor did the arbitration agreement "include any labels or other language indicating it serve[d] as an exhibit or addendum to the Admission Agreement." *Id.* Accordingly, the court found "the

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intention because "merger" as to Son could not cure the invalidity of the arbitration agreement as to Mother and, by extension, Daughter. *See supra*.

Admission Agreement's provision incorporating all 'exhibits' must be construed against [the nursing facility]." *Id.* at 54, 784 S.E.2d at 685 (citing, e.g., *Coleman*, 407 S.C. at 355-56, 755 S.E.2d at 455 (concluding ambiguity in an admission agreement as to its merger with an arbitration agreement must be construed against the nursing facility as drafter)). Therefore, as did the court in *Coleman*, the *Thompson* court concluded the arbitration agreement and admission agreement did not merge. *Thompson*, 416 S.C. at 60, 784 S.E.2d at 688.

In the instant case, Appellants maintain the Admission Agreement and Arbitration Agreement, both executed by Mr. Wendal Greene at or near the time of Ms. Wragg's admission into the Prince George Health Care facility, merged into one document. They advance several different arguments in support of their position, each of which is identified (and debunked) in subheadings below.

a. Lack of Disclaimer Provision.

Appellants first note the Arbitration Agreement in this case, unlike those at issue in *Coleman* and *Thompson*, has no disclaimer or revocation provision. However, the Arbitration Agreement here contemplates its own survival in the event of "termination or breach of this Agreement or the Admission Agreement." (*See* R. p. 30.) The use of the disjunctive "or" clearly indicates the intentional separation of the Arbitration Agreement from the Admission Agreement, as does the purported survivability of the Arbitration Agreement even if the Admission Agreement is terminated. Further, it indicates the Admission Agreement may be terminated without affecting the validity of the Arbitration Agreement. If the Admission Agreement can be terminated independently of the Arbitration Agreement, then it must necessarily follow that the two instruments are separate.

b. "Entire Agreement" Clause.

Appellants also rely on the Admission Agreement's "Entire Agreement" clause and its failure to reference the Arbitration Agreement as a separate contract. (R. p. 72.) Appellants note the incorporation by reference of "other Admissions materials" into the Admission Agreement and conclude the Arbitration Agreement is part of those incorporated admissions materials. However, as in *Coleman* and *Thompson*, the indeterminate phrase "other Admissions materials" gives rise to substantial ambiguity, as there is no definition of what "other Admissions materials" means, and there is certainly no express reference to the Arbitration Agreement as being contemplated among those other admissions materials. This ambiguity should be construed against Appellants as evidence of a contrary intention to merger.

c. The Arbitration Agreement was Optional.

Appellants also note the "optional" nature of the Arbitration Agreement and argue that its being optional does not mean the Arbitration Agreement was not part of the admissions materials. Rather, they say, "[t]he two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement)." (App. Initial Brief p. 11.) Contrary to their contention, however, the optional nature of the Arbitration Agreement is further evidence of the separateness of the two instruments. While, ostensibly, the Admission Agreement must have been signed as a condition precedent to admission, the Arbitration Agreement was elective and, therefore, not necessary to Ms. Wragg's admission to the facility. If one instrument is a condition precedent to admission and the other is not, there is clearly a significant difference between them. Thus, they are by their very natures separate from one another. To borrow the metaphor, in this case a hand is a hand and a glove is a glove.

d. The Arbitration Agreement exists only because there is an Admission Agreement.

Appellants also argue the other side of their "hand-in-glove" analogy, noting "the Admission Agreement *is* necessary to the Arbitration Agreement." (*Id.* at p. 12 (emphasis in original).) Thus, they say, while "the Admission Agreement could have stood on its own," the Arbitration Agreement "only makes sense together with the Admission Agreement." (*Id.* (emphasis removed).) Stated differently, they maintain that because an Admission Agreement must exist before an Arbitration Agreement can exist, where the two exist they must be construed as being merged into one instrument. Accepting this contention as true, Appellants erroneously conflate an existential connection with a merger connection.

There is no question in this case that an Arbitration Agreement exists. There is no question in this case that an Admission Agreement also exists. However, the issue presented to this Court is not whether the two instruments *exist*; rather it is whether the two instruments are so connected that they should be considered as one merged instrument. The foregoing paragraphs demonstrate the lack of merger connection. Furthermore, in holding the same instruments in their cases were not merged, the *Coleman* and *Thompson* courts did not address the instruments' connection by the fact of their existence. Appellants' premise, correct though it may be in an existential analysis, is inapposite to the question of the instruments' separateness or connectedness in a merger analysis. This argument is a red herring. The Arbitration Agreement and the Admission Agreement are separate, not merged.

e. Lack of discrepancy between the instruments as to governing law.

Appellants go on to argue the Arbitration Agreement and the Admission Agreement in this case essentially "provide that South Carolina law applies except where displaced by federal law." (App. Initial Brief p. 13). That the two instruments are similar in the laws that govern them, they

say, is not evidence of an intention contrary to merger.

However, the Arbitration Agreement expressly provides "the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the [FAA] . . . notwithstanding any contrary provision of this Agreement or contrary state law." (*See* R. p. 30.) Conversely, the Admission Agreement states it is "governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located." (*See* R. p. 70.) So, while state-specific substantive law will govern construction of the Admission Agreement, the same cannot be said for the Arbitration Agreement. Although arbitration under the Arbitration Agreement must be conducted pursuant to "the South Carolina Alternate Dispute Resolution/Mediation Rules," these are not substantive laws that govern the construction, interpretation, and enforcement of the contract, rather they are procedural rules governing the manner and method of arbitration in the event arbitration occurs. In this respect, then, the Arbitration Agreement is separate from the Admission Agreement, and the two are not merged.

f. <u>The separate pagination, separate titling, and separate signatures of the instruments.</u>

Appellants assert the separate pagination, separate titling, and separate signatures on the two instruments give no indication of contrary intention to merger. Strangely, Appellants seem to advocate that the separateness of these elements highlight "that the Admission Agreement and the Arbitration Agreement are separate instruments," but the fact of their separateness "does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together." (App. Initial Brief, p. 14.)

On the contrary, this Honorable Court in *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, referenced the separate pagination and separate signature pages between instruments

indicated an intent contrary to merger. 422 S.C. 544, 562, 813 S.E.2d 292, 302 (Ct. App. 2018). Although true the merger question would not arise except where there are two (or more) instruments to be merged, the fact that the two instruments are separate in all respects is some indication of their separateness.

g. "Merger is the default position."

Finally, Appellants argue "merger is the default position" in that it is "presumed . . . upon the occurrence of a specific set of circumstances," those being the execution of instruments by the same parties, for the same purpose, at the same time, and during the same transaction. (App. Initial Brief, p. 14.) When the "merger presumption" arises, they say, it can only be rebutted by "evidence 'indicating [i.e., affirmatively showing)] a contrary intention.' 407 S.C. at 355, 755 S.E.2d at 455."

Setting aside the distinctions between this case and *Coleman*, respectfully, the *Coleman* court made clear that "*anything* indicating a contrary intention" to merger is considered in the merger analysis. *Coleman*, 407 S.C. 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 supplied). The term "anything" broadens the scope of items that can evidence contrary intent considerably beyond only that which "affirmatively shows" a contrary intention. Semantics notwithstanding, the items addressed in foregoing paragraphs provide plenty of ground upon which to conclude the parties did not intend for the agreements to merge in this case.

Appellants' concern about the contrary intent exception devouring the merger presumption is misplaced. First, the presumption arises only where the four elements restated by the *Coleman* court (time, parties, purpose, transaction) are established. Omit one or more of the four elements, as Respondent contends happened in this case, and merger cannot happen. Second, the merger of two independent contracts into one agreement is arguably in derogation of the foundational

principle of contract law that:

> In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed.

Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008) (quoting *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). Thus, since the contracting parties are ostensibly free to include what terms they wish in the four corners of their agreement, merger is less the rule than it is the exception. [17]

Accordingly, as discussed in the foregoing pages, *if* "the merger presumption" arose as against Ms. Wragg, the two instruments did not merge because an intention contrary to merger is patently evident in this case. Therefore, because the two did not merge, then neither Respondent nor Ms. Wragg can be estopped from denying the Arbitration Agreement's enforceability.

C. Ms. Wragg is not estopped from denying the enforceability of the Arbitration Agreement because she obtained no direct benefit from it.

For reasons discussed *supra*, the Arbitration Agreement and Admission Agreement in this case did not merge, and on that basis alone this Court should reject Appellants' estoppel contentions.[18] However, even if this Court finds the two instruments merged, and even if this Court finds no intention contrary to merger, Ms. Wragg is nevertheless *not* estopped from denying the enforceability of the Arbitration Agreement because she did not directly benefit from its

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[17] In particular, merger is less the rule than the exception in matters where a non-signatory party is alleged to be bound by terms of an arbitration agreement. *See Wilson v. Willis*, 426 S.C. at 337-38, 827 S.E.2d at 173 (2019) ("[A] presumption *against* arbitration" arises where a non-signatory is alleged to be bound to the terms of an arbitration agreement (emphasis in original)).

[18] *See Coleman*, 407 S.C. at 356, 755 S.E.2d at 455 (holding since the arbitration and admission agreements did not merge, appellants' equitable estoppel argument failed).

provisions.

Appellants rely on the "direct benefit" test set forth in *Pearson v. Hilton Head Hosp*., 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and analyzed by the South Carolina Supreme Court in *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019). Under the direct benefit test, "the doctrine recognizes that a party may be estopped from asserting [that his non-signatory status] precludes enforcement of [an] arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Wilson*, at 340, 827 S.E.2d at 175 (citation omitted) (emphasis removed). The test examines whether a non-signatory "knowingly exploit[ed] the benefits of an agreement containing an arbitration clause, and receive[d] benefits flowing directly from the agreement." *Id.* at 340-41, 827 S.E.2d at 175 (internal quotation removed).

A direct benefit analysis must "distinguish between direct benefits [and] indirect benefits because when the benefits to a non[-]signatory are merely indirect, arbitration cannot be compelled." *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 (citation omitted). "A benefit is direct if it flows directly from the agreement," whereas an indirect benefit is one "where the non[-]signatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself." *Id.* (citations omitted). In sum, a non-signatory will be estopped from denying the enforceability of an arbitration clause only where (1) the non-signatory's claim arises from the contractual relationship; (2) the non-signatory exploits other parts of the contract by reaping its benefits; and (3) the non-signatory's claim relies solely on the contract terms to impose liability. *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 230, 847 S.E.2d 268, 272 (Ct. App. 2020) (citing *Wilson*, 426 S.C. at 340-44, 827 S.E.2d at 175-77).

In the instant matter, and assuming for the sake of argument the Admission Agreement and Arbitration Agreement merged, it is undisputed that Ms. Wragg was a non-signatory to the

Admission Agreement. In her complaint, Ms. Wragg does not assert claims for breach of contract or other similar contractually-based claims. (*See* R. pp. 7 - 17.) To the contrary, her claims are grounded in South Carolina's tort law, and the breaches of duty she alleges in her complaint do not depend upon the existence of a contract, but rather they "rely on general tort duties owed by [Appellants] to everyone." *Weaver*, at 232, 847 S.E.2d at 273.

Furthermore, Ms. Wragg has not exploited the terms of the Admission Agreement, nor is she seeking to enforce the terms of the Admission Agreement to her own ends. To the extent she obtained any benefit during the course of her residency at the subject nursing facility, it was indirect and did not flow directly from the Admission Agreement itself. *See Weaver*, at 233, 847 S.E.2d at 273. Clearly, then, Ms. Wragg is not seeking to enforce the contractual provisions of the Admission Agreement and at the same time attempting to side-step the arbitration provision.

Accordingly, even assuming the two instruments merged so as to bootstrap the arbitration provisions to the Admission Agreement, because Ms. Wragg received no direct benefit from the terms of the Admission Agreement, equitable estoppel does not prevent her from denying the enforceability of the Arbitration Agreement.

II. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANTS' ALTERNATIVE REQUEST FOR LIMITED DISCOVERY.

The Arbitration Agreement is invalid and unenforceable as against Ms. Wragg. She did not sign it, did not authorize Mr. Wendal Greene to sign it as her agent, and has not ratified it since it was signed. The Arbitration Agreement did not merge with the Admission Agreement so as to bind Ms. Wragg (or Respondent) to its provisions, either in law or in equity. Other than the Arbitration Agreement attached as an exhibit to Appellants' principal motion(s) below, Appellants put forth no other evidence supporting their contentions until after Respondent filed his Memorandum in Opposition below, and, even then, Ms. Angela Burns' sworn statement fails on

its face to give grounds upon which to grant Appellants' requested relief. Frankly, nothing advanced by Appellants suggests even the possible existence of any additional, discoverable evidence germane to the questions presented to this Court. Moreover, Appellants suffer no prejudice to their rights – they still have every opportunity to defend themselves on the merits at the trial of this matter.

Therefore, based on the arguments, on the evidence presented to the trial court and to this Court for consideration, and on the factual circumstances of this matter, it is clear the circuit court correctly determined the Arbitration Agreement is ineffective as against Ms. Wragg and Respondent. Appellants have not demonstrated a likelihood that discovery on this discrete issue would uncover additional evidence relevant to the arbitration dispute, thus additional discovery on the arbitrability of this matter would amount to no more than a fishing expedition. *See Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). This Court should therefore affirm the lower court's denial of Appellants' alternative request for limited discovery.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court affirm the circuit court's denial of Appellants' Motion(s) to Compel Arbitration, Motion(s) to Stay Proceedings, and Request(s) for Limited Discovery, and for such other and further relief as this Honorable Court deems fitting.

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Respectfully submitted,
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April 12, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2019-CP-22-00961
Appellate Case No. 2020-001167

Kevin Greene,
as Attorney in Fact for and on Behalf of
Eleanor Greene Wragg, Respondent,

v.

Palmetto Prince George Operating, LLC
d/b/a Prince George Healthcare Center;
Palmetto Health Care, LLC;
Murray Forman, Individually; and
Richard Porter, Individually, Defendants.

Of whom Palmetto Prince George Operating, LLC
d/b/a Prince George Health Care Center;
Palmetto Health Care, LLC; and
Richard Porter, Individually, are Appellants.

RESPONDENT'S CERTIFICATION FOR FINAL BRIEF

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I, S. Taylor Hooven, do hereby certify that the **FINAL BRIEF OF RESPONDENT** complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

Respectfully submitted,

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