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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2020-CP-42-03593
Appellate Case No. 2021-000707

Trina Dawkins,
as Personal Representative of the Estate of William Dawkins,

Respondent,

v.

Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC;
THI of South Carolina, LLC;
THI of South Carolina at Spartanburg, LLC;
THI of South Carolina at Magnolia Manor-Spartanburg, LLC
d/b/a Magnolia Manor-Spartanburg,

Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in denying the Facility's[1] motion to compel Plaintiff's[2] claims to arbitration and, in turn, denying the Other Defendants'[3] corresponding motions to stay this lawsuit pending the outcome of the Facility's motion and any resulting arbitration between Plaintiff and the Facility?[4]

A. Did the court err in rejecting the Facility's merger/equitable estoppel argument? That is, did it err in not finding (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Dawkins effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement merged therewith?

B. Assuming, *arguendo*, it materially impacts Issue/Argument I.A., did the court err in allowing and relying on Melissa's[5] affidavit?[6]

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[1] Primarily, the "Facility" refers to Defendant/Appellant "THI of South Carolina at Spartanburg, LLC," which is the correct legal name of the entity doing business as, and the sole licensee of, the skilled-nursing facility known as Magnolia Manor-Spartanburg; however, out of an abundance of caution, it is also intended to cover, to the extent necessary, the party improperly identified in this action as Defendant/Appellant "THI of South Carolina at Magnolia Manor-Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg."

[2] "Plaintiff" is Plaintiff/Respondent, Trina Dawkins, as Personal Representative of the Estate of William Dawkins. "Mr. Dawkins" is the decedent, William Dawkins.

[3] The "Other Defendants" are Defendants/Appellants Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina, LLC, collectively. All together, the Facility and the Other Defendants are collectively referred to as "Defendants" or "Appellants."

[4] Out of an abundance of caution, to be clear, this issue, and the corresponding argument, challenges the circuit court's rulings both on Appellants' principal motions and on their subsequent motion under Rule 59(e), SCRCP.

[5] "Melissa" is Mr. Dawkins's daughter Melissa Dawkins.

[6] To be clear, Appellants' challenge to Melissa's affidavit is made out of an abundance of caution. In other words, even assuming, *arguendo*, the court's

(1) Should the court should have rejected Melissa's affidavit, or at least allowed pertinent discovery to be conducted and the record to be supplemented before ruling on the subject motions?

(2) Was it necessary for the Facility to raise arbitration as a defense in the NOI phase?

(3) Did the court err in viewing Melissa's affidavit as "the only evidence in the record concerning the circumstances of the meeting [between Melissa and the Facility's director of admissions]"?

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allowance of/reliance on Melissa's affidavit is proper, Appellants nonetheless maintain that its denial of the subject motions was improper.

STATEMENT OF THE CASE

With Melissa's help, Mr. Dawkins was admitted to the Facility in late April 2017. (*See* Compl. ¶ 12; Pl.'s Mem. in Opp'n to MTCA pp. 1–2; Pl.'s Proposed Order p. 2.) In conjunction with Mr. Dawkins's admission, Melissa signed a number of documents on his behalf, including an Admission Agreement[7] and an Arbitration Agreement.[8]

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[7] (Admission Agreement.)

[8] (Arbitration Agreement.) Without question, the Arbitration Agreement is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (the "FAA"). To begin with, it expressly states that the FAA applies (Arbitration Agreement ("The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the [FAA]")), and this must be enforced like any other contract term. *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) ("We first consider whether the FAA applies. We hold it does, for two reasons. First, the [subject contract] provides the parties 'specifically agree that this transaction involves interstate commerce.' We must enforce this agreement like any other contract term.") (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding FAA applied because parties had agreed contract involved interstate commerce)). Moreover, the FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction," *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363; *see also Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress's power under the Commerce Clause), and nursing home residency agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) ("Since the Supreme Court decided *Allied–Bruce*, many—if not all—federal and state courts have held that nursing home residency contracts similar to the one at issue here implicate interstate commerce and the FAA. Generally, these holdings center on a common theme: nursing home residency contracts usually entail providing

Melissa signed both the Admission Agreement and the Arbitration Agreement as "'Resident's [(i.e., Mr. Dawkins's[9])] Durable Power of Attorney for Health Care'/'[Mr. Dawkins's] Legal Guardian'/'[Mr. Dawkins's] Responsible Party.'" (Admission Agreement p. 1; Arbitration Agreement.) By signing the Admission Agreement, Melissa expressly acknowledged that the "promises and representations [she made therein were] in order to induce Facility to enter into th[e] Agreement" and that the "Facility [wa]s relying upon the truthfulness of the promises and representations [she] made." (Admission Agreement p. 12.) By signing the Arbitration Agreement, Melissa expressly "represent[ed] that . . . she ha[d] the authority to sign on [Mr. Dawkins's] behalf so as to bind [Mr. Dawkins] as well as [herself]." (Arbitration Agreement.)

Alleging that Mr. Dawkins received deficient care/treatment during his residency at the Facility,[10] and lumping all Defendants together as supposed

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residents with meals and medical supplies that are inevitably shipped across state lines from out-of-state vendors. We likewise find the terms of the residency agreement implicate interstate commerce and, thus, the FAA.").

[9] Both the Admission Agreement and the Arbitration Agreement refer to Mr. Dawkins as the "Resident." (Admission Agreement p. 1; Arbitration Agreement.)

[10] In particular, Plaintiff alleges that Mr. Dawkins did not receive proper wound care. (*See* Pl.'s Mem. in Opp'n to MTCA p. 1 ("This is a nursing negligence case. Mr. Dawkins was admitted to the . . . [F]acility . . . on April 25, 2017. The Plaintiff, acting on behalf of Mr. Dawkins' estate, alleges that over approximately the next two months Mr. Dawkins did not receive proper wound care which led to severe injuries to his legs. The Plaintiff has brought both survival and wrongful death causes of action.").)

owners and operators of the Facility,[11] Plaintiff filed this wrongful death and survival action on October 14, 2020, in the Court of Common Pleas, Spartanburg County. (*See* Summons; Compl.)[12]

Citing the Arbitration Agreement that Melissa signed on behalf of Mr. Dawkins, on February 12, 2021, the Facility moved to compel Plaintiff's claims to arbitration (the "Motion to Compel Arbitration"),[13] prompting each of the Other

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[11] (Compl. ¶ 8 ("Upon information and belief, the Defendants own and operate a skilled nursing facility located at 375 Serpentine Drive, Spartanburg, South Carolina.").) While it is admitted that "THI of South Carolina at Spartanburg, LLC," the correct legal name of the entity doing business as Magnolia Manor-Spartanburg, is the sole licensee of the Facility (Facility Answer ¶ 5), it is denied that the Other Defendants own or operate the Facility. (Other Defendants' Answers ¶ 6.)

[12] Defendants timely answered Plaintiff's complaint, denying liability and raising a number of affirmative defenses. (Defendants' Answers.) The Facility's answer was made "*subject to and specifically reserving its right to compel this matter to arbitration and without waiving any rights to have any and all claims dismissed*" and raised arbitration as an affirmative defense or other avoidance of litigation. (Facility Answer p. 1 (emphasis in original); *id.* at ¶¶ 17–18.)

[13] (Facility MTCA; *see also* Facility Mem. in Supp. of MTCA.) Without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement. (*See* Arbitration Agreement ("[A]any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to [Mr. Dawkins's] stay at Facility, or to the provisions of care or services to [Mr. Dawkins], including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively 'Disputes'), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration . . . .").) This plain language clearly embraces the subject matter of Plaintiff's claims against the Facility, but even if there were "any doubts concerning the scope of arbitrable

Defendants to move to stay the lawsuit pending the outcome of the Motion to Compel Arbitration and any resulting arbitration between Plaintiff and the Facility (collectively, the "Motions to Stay"). (Other Defendants Mots. to Stay; *see also* Other Defendants Mems. in Supp. of Mots. to Stay.)

Plaintiff filed a memo in opposition to the Motion to Compel Arbitration on March 12, 2021. (Pl.'s Mem. in Opp'n to MTCA.) The Facility filed a memo in support of the Motion to Compel Arbitration on March 15, 2021. (Facility Mem. in Supp. of MTCA.) And the circuit court heard the Motion to Compel Arbitration and the Motions to Stay on March 16, 2021, via Webex, the Honorable Grace Gilchrist Knie presiding. (Tr. of 3/16/21 Hr'g.)

During the hearing, the court (a) granted Plaintiff the option to file a post-hearing memo in reply to the Facility's memo in support of the Motion to Compel Arbitration and (b), whether or not Plaintiff chose to do so, directed Plaintiff and Defendants to submit proposed orders. (Hr'g Tr. pp. 34:22–36:24.)

On March 18, 2021, Plaintiff filed a reply to the Facility's memo in support of the Motion to Compel Arbitration. (Pl.'s Reply to Facility's Mem. in Supp. of MTCA.) Not only that, along with the reply, Plaintiff filed an affidavit from Melissa,[14] to which Plaintiff thereafter cited in her proposed order. (Pl.'s Proposed

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issues[,] [they] should be resolved in favor of arbitration . . . ." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999).

[14] (Aff. of Melissa Dawkins.)

Order.) By way of their proposed order, Defendants objected to and argued against the court's reliance on Melissa's unchecked affidavit. (Def.'s Proposed Order; *see also* Def.'s Sur Reply to Pl.'s Reply in Opp'n to Mot. to Reconsider; Def.'s Mem. in Supp. of Mot. to Reconsider at Exs. 1–2.)

The court denied the Motion to Compel Arbitration and the Motions to Stay by order filed April 8, 2021. (Order Denying MTCA and Motions to Stay.) Although the court did not adopt Plaintiff's proposed order verbatim, its order denying the motions did reference Melissa's affidavit. (*See* Order Denying MTCA and Motions to Stay.) Pursuant to Rule 59(e), on Monday, April 19, 2021, Defendants timely moved the court to alter, amend, and/or reconsider its decision. (Defs.' Mot. to Reconsider; *see also* Defs.' Mem. in Supp. of Mot. to Reconsider; Initial Order Regarding Mot. for Reconsideration; Def.'s Sur Reply to Pl.'s Reply in Opp'n to Mot. to Reconsider.) The court denied the motion by order filed June 1, 2021. (Order Denying Mot. to Reconsider.)

By notice served July 1, 2021, this appeal timely follows. (Notice of Appeal/Proof of Service.)

STANDARD OF REVIEW

A circuit court's determination of whether a claim is subject to arbitration is reviewed de novo on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes de novo review of the determination of whether an

arbitration agreement is enforceable against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.* Issues of law, however, are reviewed without any particular deference to the lower court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). Even where a ruling is on a matter within trial court's discretion, if the ruling is based on a misunderstanding of the law, rather than upon the exercise of discretion, the question presented on appeal is one of law. *See Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984).

ARGUMENT

I. The circuit court erred in denying the Motion to Compel Arbitration and, in turn, the Motions to Stay.

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that, insofar as the circuit court was concerned, the denial of the former mooted the latter. The fates of these motions (or, more precisely, the fates of the appeals taken from the circuit court's rulings thereon) are likewise intertwined in this Court: whether the Motions to Stay are properly viewed as moot depends on whether the Motion to Compel Arbitration was properly denied—which, most respectfully, it was not.

Accordingly, in showing that the circuit court erred in denying the Motion to Compel Arbitration, the argument below also shows the court's error in denying the Motions to Stay, which are not properly viewed as moot and should have been granted. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties."); *see also Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement.").

A. The circuit court erred in rejecting the Facility's merger/equitable estoppel argument. That is, it erred in not finding (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Dawkins effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement merged therewith.

The Facility's merger/equitable estoppel argument is not, as the circuit court called it, "essentially an apparent agency argument, arguing that because Melissa Dawkins signed the agreement, she must have held herself out as her father's agent." (Order Denying MTCA and Motions to Stay p. 5.) To be clear, the Facility's merger/equitable estoppel argument is not an argument for the *enforceability* of the Arbitration Agreement but rather an argument for Plaintiff—as personal representative of Mr. Dawkins's estate—to be *estopped to deny the enforceability* of the Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Mr. Dawkins having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any contention about the Arbitration Agreement's supposed lack of enforceability is beside the point and unavailing to refute the Facility's merger/equitable estoppel argument, which, again, turns not on the question of whether the Facility can show that the Arbitration Agreement is enforceable but whether it can show that Plaintiff should be estopped to deny that

the Arbitration Agreement is enforceable—and, most respectfully, the Facility did so.

Re: Merger

Even though Mr. Dawkins is a nonsignatory to the Arbitration Agreement, it is nonetheless enforceable against his estate, i.e., Plaintiff.

South Carolina recognizes numerous theories under which a nonsignatory can be bound to an arbitration agreement. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel."); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel).

In *Coleman*, even though our Supreme Court found against merger *on the specific facts of the case*, it nonetheless confirmed the validity of the *general proposition of law* on which the *Coleman* appellants based their merger/equitable estoppel argument:

> Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The

> circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,
>
> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
>
> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction*. *Unless there is a contrary intention, appellants are correct that there was a merger*.

407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (emphasis added).

Here, the circuit court erred in rejecting the Facility's merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed or otherwise appreciated in) *Coleman* and its progeny, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

The merger question examines whether, "where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,"[15] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[16] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties' intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .") (emphasis added). And "in attempting to ascertain th[e] [parties'] intention," our courts "endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For the merger presumption

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

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

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

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, directly contradicting the idea of "separatedness" (in

the parlance of the *Coleman* Court[17]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." (Admission Agreement p. 12.) And without question, the Arbitration Agreement is among these other materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted).

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for Mr. Dawkins to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement.

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[17] 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the "Entire Agreement" clause expressly referred to a separate arbitration agreement and, thus, "recognize[d] the '*separatedness*' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.") (emphasis added).

The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (*See* Arbitration Agreement (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

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

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 (providing "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.") *with* Arbitration Agreement (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;" but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute

Resolution/Mediation Rules").) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the termination provisions provide no evidence of "separatedness." Again, the only reason for the Arbitration Agreement is the Admission Agreement, as the point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and

the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

And to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is *presumed,* and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that

does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

Respectfully, the circuit court's finding against merger relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130. It should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Mr. Dawkins's admission to the Facility and would not have been done at all but for his admission to the Facility.

Re: Equitable Estoppel

South Carolina law undeniably recognizes the potential for equitable estoppel to be successfully invoked to enforce an arbitration agreement against a nonsignatory under the direct benefits test. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel); *id.* at 340–345, 827 S.E.2d at 175–177 (favorably discussing the framework of the so-called direct benefits test—which was the test that the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, following

its (the Court of Appeals') prior decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which test the Facility contends Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Ms. Dawkins received direct benefits (in the form of his admission and care/treatment at the Facility, to include, without limitation, room and board) from the Admission Agreement with which the Arbitration Agreement was merged); *id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added). In other words, *Wilson*—as well as logic itself—supports the use of the direct benefit test to answer the question of equitable estoppel in an arbitration case like this.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Dawkins received the benefit of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Not even Plaintiff herself alleges that every single aspect of the residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility) was deficient. (*See* Compl.)

Respectfully, the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement[18] and that Plaintiff is estopped to deny the Arbitration Agreement's enforceability, Mr. Dawkins having effectively embraced the contract with the Facility for the purpose of his admission and receipt of the benefits thereof only to later, via his estate, attempt to repudiate the Arbitration Agreement with which his Admission Agreement merged.

B. Assuming, *arguendo*, it materially impacts Issue/Argument I.A., the circuit court erred in allowing and relying on Melissa's affidavit.

(1) The circuit court should have rejected Melissa's affidavit, or at least allowed pertinent discovery to be conducted and the record to be supplemented before ruling on the Motion to Compel Arbitration and the Motions to Stay.

Pursuant to 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." Melissa's affidavit was untimely under Rule 6(d), and the permission granted Plaintiff during the motion hearing was only to file a *reply* (or other supplemental briefing), not to file an affidavit(s).

[18] To be clear, although the dispute here is about the Arbitration Agreement, as opposed to the Admission Agreement, to the extent there were any question about the enforceability of the Admission Agreement, the Facility's equitable estoppel argument applies with equal force to the Admission Agreement.

Moreover, much of the substance of the affidavit is inadmissible hearsay, wherein Melissa states what she allegedly said to Facility staff and what Facility staff allegedly said to her. *See* Rules 801–806, SCRE.

Further still, the portions of Melissa's affidavit wherein she now states—for the first time, some four years after Mr. Dawkins's admission to the Facility—what she allegedly said to Facility staff and what Facility staff allegedly said to her, contradict Melissa's own contemporaneous representations in the Admission Agreement and the Arbitration Agreement and (1) did not provide the circuit court with a meaningful and reliable evidentiary basis on which on which to make a fair factual determination as to whether Melissa's representations in the admissions documents should prevail over her self-contradictory and indeed self-serving assertions in her affidavit or vice versa and (2) any serious and even-handed effort to address Melissa's contradictions would have necessarily required allowing the Facility to supplement the evidentiary record with an affidavit from Kris Milner (the Facility's admissions director who countersigned the Admission Agreement and Arbitration Agreement), indeed, as a practical matter, for Ms. Milner to be deposed, so all sides could question her, and to engage in reasonable discovery on this subject to include, at a minimum, deposing Melissa and the other non-Facility personnel referenced in her affidavit, Plaintiff (i.e., her sister Trina Dawkins) and Mr. Dawkins's "doctors," and follow up on any appropriate evidentiary leads

arising therefrom. In fact, Plaintiff's counsel himself recognized the legitimacy of Appellants' complaint about the court relying on Melissa's unchecked affidavit without any opportunity to examine her about it when he emailed the court and Appellants' counsel as follows:

> I've had the chance to review [Defendants'] proposed order. This is unconventional for me to reply in this way but I've never been in a situation where I was completely unable to develop my response to a Defendants' arbitration argument because critical documents were only produced at the very last moment.[19] It seems from reading the Defendants' proposed order that they feel similarly about Ms. Dawkins' affidavit and would like the chance to cross-examine her and her sister about the circumstances of their father's admission to Magnolia

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[19] Appellants, of course, disagree with Plaintiff's assertion in this regard. Again, this lawsuit was filed October 14, 2020. The Facility timely answered on November 19, 2020, expressly subject to and without waiving its right to compel arbitration. The Facility moved to compel arbitration on February 12, 2021, attaching the Arbitration Agreement to the motion. The day before the March 16, 2021, motion hearing, the Facility filed its memo in support of the Motion to Compel Arbitration, attaching the Admission Agreement. The memo was not untimely under any rule of procedure or court directive, and it was proper for the Facility to attach to the Motion to Compel Arbitration the Arbitration Agreement, the provisions of which not only provided for the arbitration that the Facility sought to compel but also contained Melissa's express representation that she had all due authority to sign on behalf of her father. Any suggestion that more was required of the Facility in moving to compel arbitration pursuant to the terms of the facially valid Arbitration Agreement is without merit. This was not a case where Appellants "produced" (to use Plaintiff's counsel language) some vast trove of discovery documents at the last minute. Rather, the Facility, having already attached the Arbitration Agreement to the filed motion, attached the Admission Agreement to the supporting memo, and made an argument (based on merger/equitable estoppel) that, while the Facility contends the present circumstances should result in a different outcome than in *Coleman* and its progeny, is well known in the context of motions to compel arbitration.

> Manor. Both sides have essentially alleged that the documents produced by the other in support of their arguments are self-serving and shouldn't be relied on for that reason.[20] I would propose a simple way to resolve this: hold the record open to allow the Plaintiff to take the deposition of Kris Milner and a 30(b)(6) deposition of THI of South Carolina at Spartanburg, LLC, and to allow the Defendants to take the depositions of Melissa and Trina Dawkins. These depositions could be limited to admissions practices of the defendants and the circumstances of Mr. Dawkins' admission to the Defendants' facility in order to keep the issues narrowly focused on what will be relevant to resolving this motion. It would give both parties the right to confront and cross-examine these witnesses, and we would no longer be faced with any allegations of self-serving statements.
>
> Another option that I believe is at the Court's disposal is to refer the matter to a Special Referee under Rule 53 of the SCRCP to consider the testimony of these individuals and make a determination as to the arbitration issue. Rule 53(b) allows for the referral of the matter to a Special Referee upon the application of a party or upon the Court's own motion.

(Def.'s Mem. in Supp. of MTR at Ex. 1 pp. 3–4.) Thereafter, Appellants' counsel responded favorably to Plaintiff's counsel's proposal and suggested a plan of action for implementing it whereby the pending motions would be withdrawn without prejudice, the limited depositions would be taken, and the motions would be refiled. (*See Id.* at Ex. 1 pp. 2–3.) The court itself appeared to view the idea

[20] Appellants also disagree with Plaintiff's bothsidesism here. The Admission Agreement and the Arbitration Agreement rightfully do speak for themselves. Unlike Melissa and her untested testimony via affidavit, there can be

favorably and allowed the parties to try to iron out the details of an agreement in this regard (*see id.* at Ex. 1 p. 1), which Appellants' counsel attempted to do (*see Id.* at Ex. 2 pp. 1–4), only for that effort to come to an abrupt halt when Plaintiff's counsel broke off the discussion. (*See Id.* at Ex. 2 p. 1; *see also id.* at Ex. 1 p. 1.) Respectfully, the circuit court should have rejected Melissa's affidavit, or at least allowed pertinent discovery to be conducted and the record to be supplemented before ruling on the Motion to Compel Arbitration and the Motions to Stay.

(2) It was not necessary for the Facility to raise arbitration as a defense in the NOI phase.

In denying the Motion to Compel Arbitration and the Motions to Stay the circuit court stated, "The Plaintiff filed the Notice of Intent on April 24th, 2020, and asked the Defendants to immediately disclose any Arbitration Agreements or move to compel arbitration if the Defendants believed an arbitration defense existed. The Defendants did not, and instead engaged in NOI-phase mediation on October 12th, 2020, again without raising an arbitration defense." (Order Denying MTCA and MTS p. 3.) The NOI process is a separate, statutorily mandated process whereby the parties attempt to resolve the dispute via *mediation*, not arbitration. As Plaintiff conceded, the Facility did provide Mr. Dawkins's medical records, and the Arbitration Agreement was unnecessary to the NOI mediation

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no complaint about not being able to cross-examine the Admission Agreement and the Arbitration Agreement.

process. Indeed, logically, it was not until that process did not result in a resolution of the dispute that the question of arbitration as a means of dispute resolution became relevant. And as our Supreme Court has already explained in *Dean*, there is no waiver of arbitration rights arising out of the participation in or delay occasioned by the NOI process. 408 S.C. at 388, 759 S.E.2d at 736 ("We find that Appellants did not delay in filing their demand for arbitration. Rather, Appellants participated in the statutorily required mediation process, and after Respondent filed her formal complaint, Appellants moved to compel arbitration at their first opportunity. Further, even were we to find that Appellants should have filed the motion to compel arbitration immediately after Respondent filed the NOI, rather than after Respondent filed the complaint, Respondent has shown no prejudice or undue burden to her from the four month delay. Thus, we conclude that Respondent's argument that Appellants' waived their right to enforce the Agreement is without merit.").

(3) The circuit court erred in viewing Melissa's affidavit as "the only evidence in the record concerning the circumstances of the meeting [between Melissa and the Facility's director of admissions]."[21]

The Admission Agreement and the Arbitration Agreement are themselves evidence; indeed, the latter contains Melissa's express representation of authority to sign it on her father's behalf. Again, by signing the Arbitration Agreement,

Melissa expressly "represent[ed] that . . . she ha[d] the authority to sign on [Mr. Dawkins's] behalf so as to bind [Mr. Dawkins] as well as [herself]." (Arbitration Agreement.) There being no question as to Melissa's competency, she is thus "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,[22] including, of course, the terms whereby she represented herself to the Facility as having authority to act on Mr. Mr. Dawkins's behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract,[23] and Melissa is no less bound by this covenant than the Facility. Further still, to require anything more from the Facility as a contracting party just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts. *See AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011) ("[C]ourts must place arbitration agreements on equal footing with other contracts . . . ."); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or

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[21] (Order Denying MTCA and Mots. to Stay p. 2.)

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

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

that derive their meaning from the fact that an agreement to arbitrate is at issue.") (citing *Concepcion*, 563 U.S. at 339).

The Arbitration Agreement is valid on its face, i.e., there is nothing within the four corners of the document itself that calls its validity into question.

Besides being signed by Melissa, who expressly represented her authority to sign on Mr. Dawkins's behalf, and being duly countersigned by the Facility's director of admissions, the Arbitration Agreement sets forth all necessary terms. It contains the parties' mutual and concurrent promises to submit a certain defined scope of "Disputes" to binding arbitration,[24] before an arbitrator who is either agreed upon by the parties themselves or selected by the Court, in a proceeding to be conducted pursuant to the South Carolina ADR Rules, which will result in a decision that is enforceable in a court of competent jurisdiction. To require more just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *See Concepcion* at 339; *Kindred Nursing Centers*, 137 S. Ct. at 1423.

[24] The parties' mutual and concurrent promises to arbitrate constitute sufficient consideration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) ("A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.") (citing *Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E. 292 (1996)).

Further still, the Arbitration Agreement is not unconscionable. Unconscionability is a two-part test. There must be both (1) an absence of meaningful choice on the part of one party due to one-sided contract provisions and (2) terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). Neither of these is present here. The first part of the test (absence of meaningful choice) is undermined by the express acknowledgement in the Arbitration Agreement itself that the "Resident/Representative is not required to use the . . . Facility for Resident's healthcare needs and . . . there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident." As for the second part of the test (unreasonably oppressive terms), the agreement simply binds the parties (both sides) to submit to arbitration. Not only is this not oppressive "both state and federal policy favor arbitration of disputes." *Id.* at 24, 644 S.E.2d at 668. And there is nothing about the Arbitration Agreement that suggests it is not geared towards achieving an unbiased decision by a neutral decision-maker. *Id.* at 25, 644 S.E.2d at 668 ("In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.").

CONCLUSION

For the foregoing reasons, Appellants ask this Honorable Court to reverse the circuit court—as to its rulings on the Motion to Compel Arbitration and the Motions to Stay—and to stay this lawsuit in favor of arbitration between Plaintiff and the Facility (or to remand the case to the circuit court with instructions for it to do so) or, alternatively, to remand the case to the circuit court for it to engage in or allow any such other proceedings (including, without limitation, discovery) as may be necessary to properly determine and/or enforce the Facility's rights under the Arbitration Agreement, as well as to address the Other Defendants' Motions to Stay.

Respectfully submitted,
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