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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA**
**IN THE COURT OF APPEALS**

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Appeal from Dorchester County
Court of Common Pleas

Maite Murphy, Circuit Court Judge

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Case No. 2020-CP-18-01027
Appellate Case No. 2021-000594

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Paulette Walker
as Personal Representative of the Estate of Albert Walker,

Respondent,

v.

Hallmark Longterm Care, LLC
d/b/a Hallmark Healthcare Center
and Durena Stinson,

Defendants,

Of whom Hallmark Longterm Care, LLC
d/b/a Hallmark Healthcare Center is

Appellant.

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# INITIAL REPLY BRIEF OF APPELLANT

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The Facility[1] makes the following points in reply to Plaintiff's brief.

## ARGUMENT IN REPLY

### 1. Plaintiff does not dispute that Mr. Walker was competent at the time of his admission to the Facility, that Mr. Walker was physically present in the room with Mrs. Walker when she signed the admissions documentation on his behalf, and that Mr. Walker allowed and did not object to Mrs. Walker signing the documentation on his behalf.

Nowhere in Plaintiff's brief is it disputed that Mr. Walker was competent at the time of his admission to the Facility, that Mr. Walker was physically present in the room with Mrs. Walker when she signed the admissions documentation on his behalf,[2] and that Mr. Walker allowed and did not object to Mrs. Walker signing the documentation on his behalf. (*See generally* Br. of Resp.) Yet, Plaintiff still

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[1] Shorthand references already defined in the Facility's principal brief are continued in this reply brief (e.g., the "Facility" is Defendant/Appellant, Hallmark Longterm Care, LLC, d/b/a Hallmark Healthcare Center; "Plaintiff" is Plaintiff/Respondent, Paulette Walker, as Personal Representative of the Estate of Albert Walker; "Mrs. Walker" refers to Paulette Walker in her individual capacity; and "Mr. Walker" refers to the decedent, Albert Walker, Mrs. Walker's late husband).

[2] As explained in the Facility's principal brief, while the Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract, and indeed, it expressly contradicts the idea of its "separatedness" (in the parlance of the *Coleman* Court) by expressly stating that "other Admissions materials"—the Arbitration Agreement among them—are made a part of it by reference. (*See* Br. of App. pp. 15–16 (citing *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)).)

mistakenly attempts to analogize the present circumstances to those at issue *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), when this Court affirmed the circuit court's rejection of an argument that the resident had authorized a family member to sign an arbitration agreement on her behalf by allowing "him to procure her admission." (*See* Br. of Resp. p. 7 ("Noting Mr. Walker's competence is the Facility's way of arguing Mr. Walker conveyed apparent authority for the Arbitration Agreement simply because he allowed Wife to procure his admission. That precise argument was rejected in Hodge. Id. (affirming circuit court's rejection of argument claiming family member was authorized to sign arbitration contract because resident 'allow[ed] him to procure her admission')."") (internal citation to the Facility's principal brief omitted).)

Here, Mr. Walker did not simply allow Mrs. Walker to procure his admission to the Facility. While "competent [and] with full contractual capacity,"[3] Mr. Walker not only allowed Mrs. Walker to procure his admission to the Facility but also, in doing so, and while physically present with Mrs. Walker in the room when she was presented (by the Facility's representative) with all the documentation for signing in conjunction with his admission (which, again, included the Arbitration Agreement—and which by signing Mrs. Walker expressly

[3] (Br. of Resp. p. 1.)

"represent[ed] that . . . she ha[d] the authority to sign on [Mr. Walker's] behalf so as to bind [Mr. Walker] as well as [herself]"[4]), Mr. Walker allowed Mrs. Walker (the same Mrs. Walker who just two weeks later he would formally make his attorney-in-fact) to sign all this documentation for him without objection.

Even assuming, *arguendo*, that the above is not enough to prove that Mrs. Walker had actual authority to act for Mr. Walker, surely it suffices to prove that Mr. Walker placed Mrs. Walker in a position such that the Facility was reasonably led to believe, and to rely on the belief, that Mrs. Walker had authority to take all the acts she took for Mr. Walker in his very presence[5] and/or to prove that Mr. Walker knowingly caused or permitted Mrs. Walker to appear to the Facility to be his agent for all purposes for which she acted on Mr. Walker's behalf in his very presence, such that Plaintiff is estopped to deny Mrs. Walker's agency where the Facility reasonably dealt with her in good faith. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000).

**2. Regarding ratification of the Arbitration Agreement, Plaintiff ignores the fact that, when she became Mr. Walker's attorney-in-fact, Mrs. Walker stepped into Mr. Walker's shoes, becoming his alter ego.**

When she became Mr. Walker's attorney-in-fact, Mrs. Walker stepped into Mr. Walker's shoes, becoming his alter ego. *Bennett v. Carter*, 421 S.C. 374, 382,

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[4] (Arbitration Agreement.)

807 S.E.2d 197, 201 (2017) ("[T]he holder of [the] power of attorney steps into the shoes of the grantor and is basically the alter ego of the grantor."). Obviously, Mrs. Walker had full knowledge of all the documentation she signed on Mr. Walker's behalf in conjunction with his admission to the Facility.[6] At no time after becoming Mr. Walker's attorney-in-fact (up until the issue of arbitration was raised via the instant motion) did Mrs. Walker ever express to the Facility any complaint or other concern about any of that documentation or in any way suggest or otherwise signify to the Facility anything other than her—and, by extension, her alter ego Mr. Walker's—assent to the same.

### 3. Plaintiff mischaracterizes *Touchberry v. City of Florence*, 295 S.C. 47, 367 S.E.2d 149 (1988).

As explained in the Facility's principal brief, the circuit court erred in relying on a presumption against enforcement of arbitration agreements against nonsignatories that violates the FAA's "equal footing" rule. (*See* Br. of App. pp. 24–26.) As explained, under the FAA, there cannot be a presumption against enforcement of arbitration agreements against nonsignatories unless the same presumption also applies to enforcement of all other contracts against

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[5] *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

[6] Mrs. Walker is "presumed to have read, understood, and assented to [the] terms" of all the documents she signed for Mr. Walker. *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.").

nonsignatories, the Facility is aware of no such general presumption under South Carolina law, and the Subject Order cites none.

According to Plaintiff, however, such a presumption does exist under South Carolina's general contract law, and she cites *Touchberry* to prove it. (Br. of Resp. p. 3 n.1 (The Facility asserts that there is no South Carolina law considering this presumption outside of the arbitration context. (Appellant's Br. at 25). That assertion is false. See e.g., Touchberry v. City of Florence, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988) (discussing 'presumption that the contract is not enforceable' by third party to utility contract between city and county).").) But *Touchberry* proves no such thing. The presumption addressed in *Touchberry* is the presumption that a *public* contract (specifically at issue in *Touchberry*, a water and sewer service franchise agreement between the City of Florence and Florence County) is not enforceable by an individual, which presumption the Court held could be overcome by showing that individual was an intended third-party beneficiary of contract. Simply put, the contract and presumption at issue in *Touchberry* has nothing to do with the presumption against the enforcement of arbitration agreements that the circuit court wrongly invoked in the instant case.

**4. Coupled with the merger of the Admission Agreement and the Arbitration Agreement, equitable estoppel provides a workable theory for enforcement of an arbitration agreement against a nonsignatory, as indeed Plaintiff herself acknowledges.**

As even Plaintiff acknowledges,[7] South Carolina law recognizes the potential for equitable estoppel to be successfully invoked to enforce an arbitration agreement against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel); *see also id.* at 340–345, 827 S.E.2d at 175–177 (favorably discussing the framework of the direct benefits test[8]—which test this Court, following its earlier

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[7] (*See* Br. of Resp. p. 14 ("Coleman[v. Mariner Health Care, Inc., 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014)] *did acknowledge the possibility that equitable estoppel could be invoked if the disputed arbitration language was actually or effectively in the same admission contract*.") (emphasis added).)

[8] *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 ("Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement . . . .") (internal citations and quotation marks omitted). The key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *See Id.* at 343, 827 S.E.2d at 176 ("It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect,

decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), had applied in the decision that was before the *Wilson* Court on writ of certiorari, and under which test the Facility contends that Mr. Walker, or, more precisely, his estate, i.e., Plaintiff, is estopped to deny the validity of the instant Arbitration Agreement where Mr. Walker received direct benefits (in the form of room, board, various amenities/services, and the care/treatment he received at the Facility about which Plaintiff does not complain) from the Admission Agreement with which the Arbitration Agreement merged);[9] *id.* at 340, 827 S.E.2d at 175 n.6

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arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.") (internal citations omitted). Here, Mr. Walker was a direct beneficiary.

[9] To deny his receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of his residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff's complaint does not go nearly so far as that. (*See generally* Compl.; Am. Compl.; *see also* Br. of Resp. p. 1 (explaining that "[t]he bulk of [Plaintiff's] claims stem[] from a series of falls Mr. Walker suffered while a Facility resident" and that Plaintiff alleges "the Facility had insufficient and underqualified staff members assigned to Mr. Walker's care and that a lack of proper supervision proximately caused his falls").) And Plaintiff's reference to the skepticism expressed in *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), (*see* Br. of Resp. p. 17 n.5 ("Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding it difficult to conclude a nursing home resident 'benefited' from a nursing home admission marked by negligent care that caused her death).")) is misplaced. To rely on this sort of reasoning is to improperly prejudge Plaintiff's allegations as true—and indeed to expand/exaggerate those allegations so as to wholly discredit every single aspect of the residency where not even Plaintiff herself does so.

(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).[10]

[10] Plaintiff's incorrectly asserts that *Wilson* Court could not have meant what it said when it concluded that the traditional six-factor test for estoppel applied in non-arbitration cases. (Br. of Resp. p. 25 n. 7.) According to Plaintiff, applying different rules to arbitration and non-arbitration contracts would violate the FAA's equal treatment rule. (*Id.*) This is not so. What the FAA requires is that arbitration agreements be placed on at least equal footing with all other contracts under state law. This means that arbitration agreements cannot be singled out for *disfavored* treatment relative to other contracts; however, it does not mean that arbitration agreements cannot be *favored* relative to other contracts, which, indeed, they are. *See Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 877 (Ct. App. 2020) ("There is a "strong South Carolina and federal policy favoring arbitration . . . ."); *id.* ("[A]rbitration agreements are presumed valid."); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) ("[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

**5. It does not make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement to be separate contracts.**

**(a) The fact that the Arbitration Agreement was not a condition of or prerequisite to Mr. Walker's admission to the Facility lends no support whatsoever to the idea that the Admission Agreement and the Arbitration Agreement do not merge—indeed, Plaintiff herself even implicitly recognizes the integrated nature of the Admission Agreement and the Arbitration Agreement.**

Respectfully, this business about the Arbitration Agreement not being a requirement of admission to the Facility is a red herring. The merger question examines whether, "where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,"[11] as indeed the Admission Agreement and the Arbitration Agreement were here, there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be considered and construed together as effectively one contract.

As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and

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

transaction—a reasonable, non-speculative inference can be drawn that the parties' possessed a contrary intention.

While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement is indeed necessary to the Arbitration Agreement. So yes, the Admission Agreement *could* have stood on its own, 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, of course, and it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction. Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, 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.

As explained in the Facility's principal brief, it matters not whether the Arbitration Agreement was a condition of admission, only that it was agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement—once agreed upon, and not revoked within the 30-day revocation

period[12]—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. Walker's relationship with the Facility. (*See* Br. of Resp. pp. 2–3 (implicitly acknowledging the hand-in-glove relationship between the Admission Agreement and the Arbitration Agreement by acknowledging that the Admission Agreement "covered the Facility's obligation to provide nursing services to Mr. Walker and Mr. Walker's obligation to pay for those services," i.e., that it set forth the terms of Mr. Walker's admission, while the Arbitration Agreement "was limited to the single, distinct topic of outlining an alternative dispute resolution process" for disputes arising out of his admission—and thus implicitly acknowledging that the Admission Agreement and the Arbitration Agreement govern interrelated aspects of Mr. Walker's relationship with the Facility such that the Arbitration Agreement, if signed and not revoked, is inextricably tied to the Admission Agreement).)

[12] Likewise a red herring is Plaintiff's argument that the Admission Agreement and the Arbitration Agreement have inconsistent termination provisions because the Arbitration Agreement contains a provision making it revocable for a period of 30 days while the Admission Agreement does not. The revocation provision simply underscores the voluntary nature of the Arbitration Agreement. Again, the Admission Agreement *could* have stood on its own, either without the Arbitration Agreement ever having been executed or with the Arbitration Agreement having been executed but revoked within the 30-day window, but neither of these things happened. The Arbitration Agreement was executed and was not revoked.

**(b) The formatting and structure of the Admission Agreement and the Arbitration Agreement provide no evidence of intention contrary to merger.**

Essentially, Plaintiff's point here is that the fact that the Admission Agreement and the Arbitration Agreement were separate instruments evidences an intention contrary to merger. Respectfully, this reasoning is specious. As explained in the Facility's principal brief, for the issue of merger to even arise to begin with, there have to be separate instruments. Obviously, such a self-defeating view of the doctrine of merger cannot be correct. Moreover, regarding the "pro-merger" formatting/structure of the two instruments, as explained elsewhere, it does not make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement to be separate contracts given that the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being.

**6. The fact that Mr. Walker did not himself sign the Arbitration Agreement is beside the point.**

Plaintiff makes much of the fact that Mr. Walker did not himself sign the Arbitration Agreement. (*See, e.g.,* Br. of Resp. p. 3 ("[Mr. Walker] did not agree to arbitrate his legal claims against the Facility. The Facility never even asked him to."); *id.* at p. 12 ("[Mr. Walker] never signed or otherwise assented to the Arbitration Agreement on which the Facility relies in support of its motion.").) It

is, of course, true that Mr. Walker did not himself sign the Arbitration Agreement, but the Facility has never argued otherwise.

Without question, the Facility seeks to enforce the Arbitration Agreement against a *nonsignatory*, and again, South Carolina law recognizes several theories under which this may be done. *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.") (emphasis added).

To be sure, Mr. Walker is a nonsignatory to the Arbitration Agreement. The Facility makes no argument to the contrary. Rather, the Facility's argument is that, even as a nonsignatory, Mr. Walker, and in turn Plaintiff (his estate), is bound by the Arbitration Agreement. Thus, where Plaintiff does no more than point out that Mr. Walker is a nonsignatory to the Arbitration Agreement, she misses the Facility's point.

**7. Plaintiff is wrong to assert that the Admission Agreement and the Arbitration Agreement were not executed for the same purpose.**

As *Coleman* Court expressly observed regarding the admission agreements and arbitration agreements before it (which *in this respect* are no different than the instant agreements—though that is not the case in regard to the material facts bearing on the question of merger), "the documents were [indeed] executed at the

same time, by the same parties, *for the same purposes*, and in the course of the same transaction." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

**8. The "survival" of the Arbitration Agreement is no evidence of "separatedness" (in the parlance of the *Coleman* Court[13]).**

Contrary to Plaintiff's contention, the Admission Agreement and the Arbitration Agreement do not have inconsistent termination provisions. As explained elsewhere, the only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement covers 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. There is nothing inconsistent about this. 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

[13] 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).

duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

**9. Contrary to Plaintiff's contention, the phrase "other Admissions materials" does not give rise to ambiguity.**

In an effort to rebut the Facility's point that Arbitration Agreement is among the "other Admissions materials" that the "Entire Agreement" clause refers to as being deemed a part of the Admission Agreement,[14] Plaintiff argues that "Admissions Materials" is not a defined term and is thus ambiguous. (Br. of Resp. p. 21.) This is not so.

It must be remembered that when all the requirements for the presumption of merger are present—as they are here—*merger is presumed to be what the parties intended* unless there is evidence of a contrary intention. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. The lack of a definition of "Admissions Materials" certainly says nothing of an intention contrary to merger; indeed, the only logical inference that can be derived from the "Entire Agreement" clause's express inclusion of other undefined material is *supportive* of merger. Again, in *Stott*, this Court expressly referred to an arbitration agreement as "admission documentation." 426 S.C. at 571–72, 828 S.E.2d at 84 ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized

[14] (Admission Agreement p. 12.)

representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted).

As explained elsewhere, to say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Mrs. Walker on Mr. Walker's behalf. The hand-in-glove relationship between the Admission Agreement and the Arbitration Agreement is proof of the Arbitration Agreement's *connectedness* to the Admission Agreement. Though not a *condition* of admission, the Arbitration Agreement certainly 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. Walker's relationship with the Facility. (*Compare* Admission Agreement (setting forth the terms of Mr. Walker's admission) *with Arbitration Agreement* (providing for arbitration of disputes arising out of Mr. Walker's admission).)

**10. Despite Plaintiff's attempt to water down the standard for rebutting the merger presumption, unless the merger doctrine is to be rendered meaningless, "anything indicating a contrary intention"[15] must be at least evidence capable of supporting a reasonable, non-speculative inference that the parties' intention was contrary to merger.**

It must be remembered that the presumption of merger arises only where the

four elements of time, parties, purpose, and transaction coincide—as the all do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. If even one of these is lacking there is no merger. This is why, as explained in the Facility's principal brief, for the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—*notwithstanding the concurrence of all the particular circumstances necessary for the presumption to 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."). The merger presumption is "earned," so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

## CONCLUSION

For the foregoing reasons, together with those already set forth in its principal brief, the Facility asks this Honorable Court to reverse the circuit court

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[15] (Br. of Resp. p. 24.)

and to stay this lawsuit in favor of arbitration (or remand the case to the circuit court with instructions for it to do so).

Respectfully submitted,

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December 14, 2021

**THE STATE OF SOUTH CAROLINA**
**IN THE COURT OF APPEALS**



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Appeal from Dorchester County
Court of Common Pleas

Maite Murphy, Circuit Court Judge

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Paulette Walker
as Personal Representative of the Estate of Albert Walker,

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Hallmark Longterm Care, LLC
d/b/a Hallmark Healthcare Center
and Durena Stinson,

Defendants,

Of whom Hallmark Longterm Care, LLC
d/b/a Hallmark Healthcare Center is

Appellant.

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I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant, hereby certify that the **INITIAL REPLY BRIEF OF APPELLANT** was served on all other parties to this appeal on December 14, 2021, via email (see attached) to the following counsel of record:

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December 14, 2021

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| **Date:** | Tuesday, December 14, 2021 11:57:51 PM |
| **Attachments:** | image001.png<br>Walker v. Hallmark (2021-000594) -- Initial Reply Brief of Appellant.pdf |

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Attached regarding the above-referenced matter please find the **Initial Reply Brief Of Appellant**.

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