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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Maite Murphy, Circuit Court Judge

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

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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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A. Did the court err in not finding that the Arbitration Agreement is enforceable based on agency, i.e., in not finding that Mrs. Walker[4] validly signed the Arbitration Agreement on Mr. Walker's[5] behalf as his lawful agent acting with actual and/or apparent authority?

B. Assuming, *arguendo*, that Mrs. Walker was not acting as Mr. Walker's lawful agent when she signed the Arbitration Agreement on his behalf, did the court err in not finding that the Arbitration Agreement is enforceable based on express and/or implied ratification?

C. Is the court's merger/equitable estoppel analysis erroneous?

1. Did the court err in not finding (a) that the Admission Agreement and the Arbitration Agreement merged and (b) that, because Mr. Walker effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement merged therewith?[6]

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[1] The "Facility" is Defendant/Appellant, Hallmark Longterm Care, LLC, d/b/a Hallmark Healthcare Center. It is a skilled nursing facility in Dorchester County.

[2] "Plaintiff" is Plaintiff/Respondent, Paulette Walker, as Personal Representative of the Estate of Albert Walker.

[3] Out of an abundance of caution, to be clear, this issue, and the corresponding argument, challenges the circuit court's ruling both on the Facility's principal motion and on its subsequent motion under Rule 59(e), SCRCP.

[4] "Mrs. Walker" refers to Paulette Walker in her individual capacity.

[5] "Mr. Walker" refers to the decedent, Albert Walker, Mrs. Walker's late husband.

[6] This issue, and the corresponding argument, includes, without limitation, the court's use of the wrong test for equitable estoppel.

2. **Did the court err in finding that "the FAA[7] does not apply"?**

3. **Did the court err in relying on a "presumption against arbitration" that violates the FAA's "equal footing" rule?**

4. **Did the court err in (a) incorrectly stating that "a review of the admissions and arbitration documents by the [Facility] would have informed them that [Mrs.] Walker did not have actual authority by way of a Durable Power of Attorney, nor Court Appointed Guardianship to bind [Mr.] Walker, nor did she ever indicate that she had any apparent authority to enter contracts on behalf of Mr. Walker," and (b) violating the FAA's "equal footing" rule by charging the Facility with a heightened duty to determine the existence or scope of Mrs. Walker's authority that does not exist under South Carolina's general contract law while disregarding such law in respect of (i) the legal significance of Mrs. Walker's act of signing the Arbitration Agreement and/or (ii) Mrs. Walker's duty of good faith and fair dealing?**

D. **Out of an abundance of caution, assuming, *arguendo*, it actually made any such findings, did the court err in denying arbitration on the basis that (1) Plaintiff's claims are outside the scope of the Arbitration Agreement and/or that the Arbitration Agreement is (2) lacking in consideration, (3) lacking in material terms, and/or (4) unconscionable?**

E. **Out of an abundance of caution, assuming, *arguendo*, this might be material, did the court err in referring to both the Facility *and Ms. Stinson*[8] as movants?**

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[7] The "FAA" refers to the Federal Arbitration Act, 9 U.S.C §§ 1–16.

[8] "Ms. Stinson" is the other named defendant, Durena Stinson, who is not a party to this appeal.

STATEMENT OF THE CASE

With the help of his wife, Mrs. Walker, Mr. Walker was admitted to the Facility on January 2, 2019. (*See* R. pp. 141-152.; R. p. 27, ¶ 28; R. p. 58, ¶ 28.) In conjunction with Mr. Walker's admission to the Facility, Mrs. Walker signed an Admission Agreement[9] and an Arbitration Agreement[10] on his behalf. By her signature on the Arbitration Agreement, Mrs. Walker expressly "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]." (R. p. 98.)

This action was commenced on July 7, 2020, in the Court of Common Pleas, Dorchester County. (*See* R. pp. 20-40.) At that time, Mr. Walker was alive, and Mrs. Walker brought the suit as his attorney-in-fact. (*See* R. pp. 20-40.)

The Facility timely answered, subject to and without waiving its right to compel the matter to arbitration, denying the material allegations against it and raising a number of affirmative defenses. (*See* R. pp. 41-50.)

Following Mr. Walker's death, the current Plaintiff (Mrs. Walker as personal representative of Mr. Walker's estate) was substituted in place of the original plaintiff (Mrs. Walker as Mr. Walker's attorney-in-fact),[11] and on December 29, 2020, filed the operative complaint in the case, asserting a number of claims

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[9] (R. pp. 141-152.)
[10] (R. p. 98.)
[11] (R. pp. 1-4.)

against the Facility for damages based on allegedly deficient care/treatment Mr. Walker received during his residency. (*See* R. pp. 52-67.)

The Facility timely answered, again subject to and without waiving its right to compel this matter to arbitration, denying the material allegations against it and raising a number of affirmative defenses. (*See* R. pp. 68-78)

Based on the Arbitration Agreement Mrs. Walker signed for Mr. Walker, the Facility moved to compel Plaintiff's claims to arbitration (the "Motion to Compel Arbitration"). (R. pp. 95-104; *see also* R. pp. 105-140, 98, 141-185.)

The circuit court heard the Motion to Compel Arbitration on February 8, 2021, the Honorable Maite Murphy presiding. (*See generally* R. pp. 79-94.) It denied the Motion to Compel Arbitration by order filed March 19, 2021. (R. pp. 5-16.) Pursuant to Rule 59(e), on March 29, 2021, the Facility timely moved the court to alter, amend, and/or reconsider the decision. (R. pp. 194-214.) Plaintiff filed a response in opposition on April 6, 2021. (R. pp. 215-217.) The court then denied the motion by order filed May 5, 2021. (R. pp. 17-19.)

By notice served June 4, 2021, this appeal timely follows. (*See* R. pp. 218-223.)

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.

A. The court erred in not finding that the Arbitration Agreement is enforceable based on agency, i.e., in not finding that Mrs. Walker validly signed the Arbitration Agreement on Mr. Walker's behalf as his lawful agent acting with actual and/or apparent authority.

A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth*., 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "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)). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal may be bound by the acts of it agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and

they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

"When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." *R & G Const.*, 343 S.C. at 433, 540 S.E.2d at 118 (Ct. App. 2000).

Plaintiff admits that Mr. Walker had contractual capacity at the time of his admission to the Facility. (R. p. 87:2–16 ([Plaintiff's counsel:] "Mr. Walker was admitted to the facility on January the 2nd of 2019. When he went in there was no issues with his cognitive impairment. He did not have any altered mental status or anything like that that would prohibit him from signing any admissions paperwork or arbitration agreements. . . . Mr. Walker certainly could have signed the admission agreement. He certainly could have signed the arbitration agreement. There was nothing that kept him from writing his name on any of that sort of stuff.").) Moreover, Plaintiff admits that two weeks after he was admitted to the Facility, on January 16, 2019, Mr. Walker duly executed a power of attorney that "gave [Mrs. Walker] the authority to do a very broad number of things," including

the authority to bind him to arbitration,[12] which is, of course, something that he could not have done without contractual capacity. [13] And records reflect that Mr. Walker was present when Mrs. Walker, representing to the Facility her authority to do so without any evidence of objection from Mr. Walker, signed the admissions paperwork, including the Arbitration Agreement. (*See* R. pp. 153-154 (designating Mrs. Walker as the "Representative" and "Responsible Party" for Mr. Walker).)

The circuit court should have found that the Arbitration Agreement is enforceable because Mrs. Walker validly signed it on Mr. Walker's behalf as his lawful agent acting with actual and/or apparent authority.

B. Assuming, *arguendo*, that Mrs. Walker was not acting as Mr. Walker's lawful agent when she signed the Arbitration Agreement on his behalf, the court erred in not finding that the Arbitration Agreement is enforceable based on express and/or implied ratification.

Authority can be supplied to an agent retroactively by express or implied ratification. *See Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent."). "Ratification, as it

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[12] (R. pp. 88:19–89:5; *see also* R. pp. 169-180.)

[13] Indeed, Plaintiff admits that were Mr. Walker to have executed the power of attorney before he was admitted to the Facility, instead of two weeks thereafter, the Arbitration Agreement (signed by Mrs. Walker on his behalf) would be valid and enforceable. (R. pp. 88:23–89:4.)

relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent's act in order for him to ratify that act. *See State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905) ("The presiding judge ruled that he could ratify the act of the agent, whether he was present or not, and in this we see no error.").

Again, Plaintiff admits that Mr. Walker had contractual capacity when he was admitted to the Facility on January 2, 2019,[14] and as of at least January 16, 2019, when he executed the power of attorney, under which Mrs. Walker was in fact granted authority to bind Mr. Walker to arbitration. (R. pp. 88:19–89:5; *see also* R. pp. 169-180.) And besides reflecting Mr. Walker's presence when, without any evidence of objection from Mr. Walker, Mrs. Walker exercised her represented authority by signing the Arbitration Agreement and other admissions paperwork on his behalf, records also reflect Mr. Walker's presence at other times between January 2nd and January 16th, 2019, when Mrs. Walker likewise acted on his behalf to communicate his needs and decisions to the Facility. (*See* R. p. 155 (January 8, 2019, note stating that "[Mr. Walker] & his RR desire for Mr. Walker to be a Full

[14] (R. p. 87:2–16.)

Code status"); R. p. 156 (January 11, 2019, noted stating that "Family is very involved in [Mr. Walker's] care.").) Moreover, from January 16, 2019, onward, i.e., going forward from the time that Mrs. Walker stepped into Mr. Walker's shoes via the power of attorney, there is no evidence that Mrs. Walker ever repudiated or otherwise acted inconsistent with the adoption and confirmation of the Arbitration Agreement other admissions paperwork she had signed on Mr. Walker's behalf.

Assuming, *arguendo*, Mrs. Walker was not acting as Mr. Walker's lawful agent when she signed the Arbitration Agreement on his behalf, the circuit court should have found that the Arbitration Agreement is enforceable based on express and/or implied ratification.

C. The court's merger/equitable estoppel analysis is erroneous.

1. The court erred in not finding (a) that the Admission Agreement and the Arbitration Agreement merged and (b) that, because Mr. Walker effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement merged therewith.

First off, to be clear, the Facility's merger/equitable estoppel argument is not, strictly speaking, an argument for the enforceability of the Arbitration Agreement but rather an argument for Plaintiff to be estopped to deny its enforceability. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Mr. Walker having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny

the enforceability of the Arbitration Agreement merged therewith. Accordingly, in the face of this argument, which, again, turns not on the question of whether the Arbitration Agreement is enforceable but whether Plaintiff is estopped to deny its enforceability, any contrary argument/analysis regarding the Arbitration Agreement's supposed lack of enforceability—e.g., that, under the common law of/relating to agency[15] and/or under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80, and/or under the South Carolina Bill of Rights for Residents of Long-Term Care Facilities, S.C. Code. Ann. §§ 44-81-10 to -70,[16] and/or because Mrs. Walker did not hold power of attorney, guardianship, or conservatorship over Mr. Walker,[17] Mrs. Walker lacked authority to sign the Arbitration Agreement on behalf of Mr. Walker—is beside the point and unavailing to refute it.

Re: Merger

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

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[15] (*See, e.g.,* R. p. 7 ("Like any contract, the agreement must be valid to be enforceable, signed by the parties who had the express and legal authority to do so."); R. pp. 10-11 (regarding actual or apparent authority).)

[16] (*See, e.g.,* R. pp. 9-10 (regarding statutory authority).)

[17] (*See, e.g.,* R. p. 5 ("[Ms.] Walker did not have legal authority to contractually bind her husband to arbitration, by way of a Power of Attorney nor any Court appointed Guardianship.").)

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. at 354–355, 755 S.E.2d at 455 (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 court wrongfully concluded that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge. (R. p. 13.) 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,"[18] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[19] there is evidence to upset the *presumption in favor of*

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

[19] 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

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. The circuit court's assertion that "multiple executed writings relating to the same general subject matter will not be viewed as a single or merged agreement if either their language or the circumstances *even hint* that the parties actually intended the writings to be distinct, separate contracts"[20] is an incorrect statement of law.

For the merger presumption 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'

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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).

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* R. p. 98.) Moreover, while the instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract. (R. p. 152.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[21]), 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." (R. p. 152.) And without question, the Arbitration Agreement is

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[20] (R. pp. 14-15 (emphasis added).)

[21] 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

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. Walker 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. 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

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[arbitration agreement] and the admission agreement, not a merger of the two

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* R. p. 98 (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 . . . ."); R. p. 98 ("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. Walker'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* R. pp. 141-152 (setting forth the

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contracts.") (emphasis added).

terms of Mr. Walker's admission to the Facility) *with* R. p. 98 (providing for arbitration of disputes arising out of Mr. Walker'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* R. p. 150 (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* R. p. 98 (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. Walker's admission to the Facility and would not have been done at all but for his admission to the Facility.

Re: Equitable Estoppel

The circuit court's view of equitable estoppel misapprehends our Supreme Court's decision in *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). The *Wilson* Court favorably discussed the direct benefits test—which test this Court had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court's earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Walker received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also 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, contrary to the circuit court's analysis, *Wilson* supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, not the six-factor test. (*See* R. pp. 11-12.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Walker (who unquestionably had contractual capacity as of at least January 16, 2019, when he granted Mrs. Walker power of attorney[22]) 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* R. pp. 21-35; R. pp. 52-67.)

Respectfully, the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement (the validity of which Plaintiff does not challenge[23]) and that Plaintiff is estopped to deny the Arbitration Agreement's enforceability, Mr. Walker having effectively embraced the contract with the Facility for the purpose of his admission and receipt of the benefits thereof

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[22] (R. pp. 99-104; R. pp. 87:2–89:19.)

[23] (*See* R. pp. 87:25–88:5.) And in any event, 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.

only to later, via his estate, attempt to repudiate the Arbitration Agreement with which his Admission Agreement merged.

2. The court erred in finding that "the FAA does not apply."[24]

Without question, the Arbitration Agreement is governed by the FAA. First off, the Arbitration Agreement expressly states that the FAA applies,[25] 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 the FAA applied because parties had agreed contract involved interstate commerce)). Additionally, and in any event, 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

[24] (R. p. 15; *see also* R. pp. 6-7 (erroneously citing the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 to -240, which also does not apply).)

the Commerce Clause). And our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

3. The court erred in relying on a "presumption against arbitration"[26] that violates the FAA's "equal footing" rule.

The court cited *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019), for the proposition that, under South Carolina law, there is a presumption *against* arbitration when enforcement is sought against a non-signatory. (R. p. 6.) Again, the FAA requires arbitration agreements to be placed on equal footing with all other contracts under state law and prohibits courts from setting aside arbitration agreements based on state-law defenses "that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. Thus, 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 nonsignatories. The Facility is aware of no such general presumption under South Carolina law, and the Subject Order cites none. Indeed, in recognizing "a presumption *against* arbitration . . . where the party resisting arbitration is a

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[25] (R. p. 98.)

[26] (R. p. 6.)

nonsignatory to the written agreement to arbitrate," the *Wilson* Court cited authority, none of which was in fact South Carolina authority, that addressed arbitration in particular, not contracts generally. 426 S.C. at 337–38, 827 S.E.2d at 173 ("*Global Pac., LLC v. Kirkpatrick*, 88 N.E.3d 431, 435 (Ohio Ct. App. 2017) ('Because no party can be required to submit to arbitration when it has not first agreed to do so, in a case where the party resisting arbitration is not a signatory to any written agreement to arbitrate, a presumption against arbitration arises.'); *cf. Comer v. Micor, Inc.*, 436 F.3d 1098, 1103–04 (9th Cir. 2006) (noting 'the general rule that a nonsignatory is not bound by an arbitration clause')."). The supposed presumption against arbitration violates the FAA's equal footing rule and cannot be applied in this case.

4. The court erred in (a) incorrectly stating that "a review of the admissions and arbitration documents by the [Facility] would have informed them that [Mrs.] Walker did not have actual authority by way of a Durable Power of Attorney, nor Court Appointed Guardianship to bind [Mr.] Walker, nor did she ever indicate that she had any apparent authority to enter contracts on behalf of Mr. Walker,"[27] and

[27] (*See* R. p. 11; *see also* R. p. 8 ("The Defendant facility is a sophisticated business entity frequently interacting with residents and their families during the admission process. It should be well aware of the differences between a durable power of attorney, a healthcare power of attorney, and other forms of guardianship, or in this case, the lack thereof."); R. p. 12 ("[T]he evidence shows Defendants cannot meet possibly its burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. . . . In this case, the Defendants had the capacity to determine whether Ms. Walker had the authority to sign an arbitration agreement on Mr. Walker's behalf. Stated again, the Defendants should be familiar with these requirements as they frequently interact

(b) violating the FAA's "equal footing" rule by charging the Facility with a heightened duty to determine the existence or scope of Mrs. Walker's authority that does not exist under South Carolina's general contract law while disregarding such law in respect of (i) the legal significance of Mrs. Walker's act of signing the Arbitration Agreement and/or (ii) Mrs. Walker's duty of good faith and fair dealing.

The Arbitration Agreement itself reflects (by virtue of her signature upon it) Mrs. Walker's express representation that she had all due authority to sign it for Mr. Walker. (R. p. 98 ("By . . . her signature below, the executing party [(i.e., Mrs. Walker)] represents that . . . she has the authority to sign on [Mr. Walker's] behalf so as to bind [Mr. Walker] as well as [herself].").) There is no question raised as to Mrs. Walker's competency. She is thus "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,[28] including, of course, the terms whereby she represented herself to the Facility as having authority to act on Mr. Walker's behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract,[29] and Mrs. Walker is no less bound by this covenant than the Facility. To require anything more from the Facility as a contracting party just

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with residents and their families during the nursing home admission process. The Defendants are or should be familiar with the legal concepts of guardianship and powers-of-attorney.").)

[28] *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.").

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

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 under South Carolina law. *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 that derive their meaning from the fact that an agreement to arbitrate is at issue.") (citing *Concepcion*, 563 U.S. at 339); *see also* 9 U.S.C. § 2 ("Under the FAA, an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."); *Allied–Bruce*, 513 U.S. at 270 ("[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate").

D. Out of an abundance of caution, assuming, *arguendo*, it actually made any such findings, the court erred in denying arbitration based on any finding that (1) Plaintiff's claims are outside the scope of the Arbitration Agreement and/or that the Arbitration Agreement is (2) lacking in consideration, (3) lacking in material terms, and/or (4) unconscionable.

In denying the Motion to Compel Arbitration, the circuit court stated, "Plaintiff's claims include negligence, negligence per se, fraud and misrepresentation, violations of the South Carolina Unfair Trade Practices Act, wrongful death and survivorship. Nowhere in the Defendants' arbitration

agreement are those causes of action listed." (R. p. 15; *see also* R. p. 8 ("The Defendants' argument that all of the Plaintiff's claims are dependent on the duties which arise from the Admission Agreement is fundamentally flawed . . . .").) To the extent the court viewed Plaintiff's claims as being outside the scope of the Arbitration Agreement, it is erroneous.

Without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement. The plain language of the Arbitration Agreement clearly embraces the subject matter of Plaintiff's claims. (*See* R. p. 98 ("It is the intention of the parties to this [Arbitration] Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of [Mr. Walker]."); R. p. 98 ("It is . . . understood that in the event of any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Mr. Walker's] stay at [the] Facility, or to the provisions of care or services to [Mr. Walker] . . . and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration . . . .").) The Facility is aware of no requirement that an arbitration agreement must specifically state the causes of action that are within its scope, and the Subject Order cites none. (*See* R. p. 15.) And even were there "any doubts concerning the scope of arbitrable 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).

Moreover, and although, to be clear, the court did not expressly state that the Arbitration Agreement lacked consideration or any material terms, out of an abundance of caution, the Facility would make clear that any notion to this effect is erroneous. 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,[30] 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,[31] 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*, 563 U.S. at 339.

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[30] 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)).

[31] In this regard, the Facility would note that the South Carolina ADR Rules, which do apply to the conduct of arbitration proceedings under the Arbitration Agreement, should not be confused with the South Carolina Arbitration Act, which, as addressed above (in explaining the applicability of the FAA), does not apply here.

Further still, and although, again, to be clear, the court did not expressly state that the Arbitration Agreement is unconscionable, out of an abundance of caution, the Facility would likewise make clear that any notion to this effect is erroneous. 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."); *see also* Rule 1, SCADR ("These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply.").

E. Out of an abundance of caution, assuming, *arguendo*, this might be material, the court erred in referring to both the Facility *and Ms. Stinson* as movants.

In denying the Motion to Compel Arbitration, the court referred to the Facility *and Ms. Stinson* as movants. (R. p. 5 (emphasis added).) While she is named as a defendant, Ms. Stinson has not appeared in the case and is not a party to the appeal, and the court incorrectly referred to her as a movant. Indeed, as, on information and belief, she has not been served with the summons and complaint, neither has personal jurisdiction been obtained over her[32] nor the action commenced against her;[33] however, assuming, *arguendo*, Ms. Stinson is somehow material here, she is covered by the Arbitration Agreement as an "agent," "employee," and/or "servant" of the Facility. (*See* R. p. 98 ("This Agreement is made between [the Facility], its agents, employees, and servants, and . . . ."); *see also* R. p. 52, ¶ 3 (alleging Ms. Stinson "is the administrator of [the Facility]").)

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[32] *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006) ("A court generally obtains personal jurisdiction by the service of a summons.").

[33] *See* Rule 3(a), SCRCP (providing that a civil action is commenced when the summons and complaint are filed, so long as the summons and complaint

CONCLUSION

For the foregoing reasons, the Facility asks this Honorable Court to reverse the circuit court and to stay this lawsuit in favor of arbitration (or remand the case to the trial court with instructions for it to do so).

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February 2, 2022

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are served within the statute of limitations or, if not served within the statute of limitations, served within 120 days after they are filed).

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Maite Murphy, Circuit Court Judge

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

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.

APPELLANT'S CERTIFICATION FOR FINAL BRIEF

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I, Russell G. Hines, do hereby certify that the Final Brief of Appellant complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court's order of April 15, 2014.

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