THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Case No. 2020-CP-21-02290
Appellate Case No. 2021-000586

Mary Tisdale,
as Personal Representative of the Estate of Earlene Seabrook,

Respondent,

v.

Palmetto Lake City Operating, LLC
d/b/a Lake City-Scranton Healthcare Center
and Jeffrey Gibbs,

Defendants,

Of whom Palmetto Lake City Operating, LLC
d/b/a Lake City-Scranton Healthcare Center is the

Appellant.

FINAL BRIEF OF APPELLANT

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A. Did the circuit court err in its analysis of the Facility's merger/equitable estoppel argument?

1. Did the circuit court err in not finding (a) that the Admission Agreement and the Arbitration Agreement merged and (b) that, because Ms. Seabrook[4] effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement merged therewith?[5]

2. Did the circuit court err in finding that the FAA[6] does not apply?

3. Did the circuit court err in relying on the SCAA?[7]

4. Did the circuit court err in (a) incorrectly stating that "a review of the admissions and arbitration documents by the [Facility] would have informed them that [Ms.] Tisdale did not have actual authority by way of a Durable Power of Attorney, nor Court Appointed Guardianship to bind [Ms.

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[1] The "Facility" is Defendant/Appellant, Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center, a skilled nursing facility.

[2] "Plaintiff" is Plaintiff/Respondent, Mary Tisdale ("Ms. Tisdale") as Personal Representative of the Estate of Earlene Seabrook.

[3] This issue, and the corresponding argument, includes and challenges the circuit court's adverse rulings with respect to both the Facility's principal motion and its subsequent Rule 59(e), SCRCP, motion.

[4] "Ms. Seabrook" is the decedent, Earlene Seabrook.

[5] This issue, and the corresponding argument, specifically includes and challenges, without limitation, the circuit court's error in using the wrong test for equitable estoppel in this context.

[6] The "FAA" is the Federal Arbitration Act, 9 U.S.C §§ 1–16.

[7] The "SCAA" is South Carolina's Arbitration Act, S.C. Code Ann. §§ 15-48-10 to -240.

Seabrook], nor did she ever indicate that she had any apparent authority to enter contracts on behalf of [Ms. Seabrook]" and (b) violating the FAA's "equal footing" rule by charging the Facility with a heightened duty to determine the existence and/or scope of Ms. Tisdale'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 Ms. Tisdale's act of signing the Arbitration Agreement and/or (ii) Ms. Tisdale's duty of good faith and fair dealing?

B. Did the circuit court err in denying the Facility's motion based on any finding that Plaintiff's claims are outside the scope of the Arbitration Agreement?

C. While recognizing the binding effect (not only on the circuit court but also on this Court) of our Supreme Court's recent decision in *Arredondo v. SNH SE Ashley River Tenant, LLC,*[8] the Facility nonetheless wishes to preserve the following issue: Did the circuit court err in rejecting the Facility's argument that the Arbitration Agreement was validly executed on Ms. Seabrook's behalf by her attorney-in-fact, Ms. Tisdale, pursuant to Ms. Tisdale's authority under the HCPOA?[9] [10]

D. Out of an abundance of caution, assuming, *arguendo*, that this might be material, did the circuit court err in referring to both the Facility and Mr. Gibbs as movants?

II. At a minimum, did the circuit court err in denying the Facility's alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability?

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[8] 433 S.C. 69, 856 S.E.2d 550 (2021).

[9] The "HCPOA" is the South Carolina Health Care Power of Attorney that Ms. Tisdale held as to Ms. Seabrook.

[10] This issue, and the corresponding argument, specifically includes and challenges, without limitation, the correctness of the *Arredondo* decision.

STATEMENT OF THE CASE

With the help of her niece Ms. Tisdale, Ms. Seabrook was admitted to the Facility on or about June 25, 2019. (*See* R. pp. 133–144.) In conjunction with Ms. Seabrook's admission to the Facility, Ms. Tisdale, who handled all the paperwork, and was indeed Ms. Seabrook's attorney-in-fact pursuant to the HCPOA,[11] signed an Admission Agreement[12] and an Arbitration Agreement[13] on Ms. Seabrook's behalf.

Ms. Tisdale signed both the Admission Agreement and the Arbitration Agreement as "'Resident's [(i.e., Ms. Seabrook's[14])] Durable Power of Attorney for Health Care'/'[Ms. Seabrook's] Legal Guardian'/'[Ms. Seabrooks's] Responsible Party.'" (R. pp. 133, 98.) By signing the Admission Agreement, Ms. Tisdale 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." (R. p. 144.) By signing the Arbitration Agreement, Ms. Tisdale expressly "represent[ed] that . . . she ha[d] the authority to sign on [Ms. Seabrook's] behalf so as to bind [Ms. Seabrook] as well as [herself]." (R. p. 98.)

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11 (R. pp. 125–132.)

12 (R. pp. 133–144.)

13 (R. p. 98.)

14 Both the Admission Agreement and the Arbitration Agreement refer to Ms. Seabrook as "Resident." (R. pp. 133, 98.)

Alleging that Ms. Seabrook received deficient care/treatment during her residency at the Facility,[15] Plaintiff filed this wrongful death and survival action on October 8, 2020, in the Court of Common Pleas, Florence County. (*See* R. pp. 22–39.)[16]

Citing the Arbitration Agreement Ms. Tisdale signed for Ms. Seabrook, the Facility moved to compel Plaintiff's claims to arbitration (the "Motion to Compel Arbitration"). (R. pp. 96–97; *see also* R. pp. 99–124.)

The circuit court heard the Motion to Compel Arbitration on February 9, 2021, the Honorable William H. Seals Jr. presiding. (*See generally* R. pp. 58–94.) The court denied the motion by formal order filed March 1, 2021. (R. pp. 4–16.)[17]

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[15] In particular, Plaintiff alleges Ms. Seabrook did not receive proper care with respect to the prevention and/or treatment of pressure ulcers. (*See* R. p. 145 ("While Ms. Seabrook was a resident and under the [Facility's] care, she was allowed to develop pressure ulcers which became infected, leading to her decline and eventual death . . . on August 31, 2019."); *see also* R. p. 30, ¶ 31 ("While at the [F]acility . . . Ms. Seabrook . . . develop[ed] preventable injuries which the [Facility] had a duty to prevent, caused by a breach of that duty, including but not limited to pressure sores . . . .").)

[16] Subject to and without waiving its right to compel the matter to arbitration, the Facility timely answered Plaintiff's complaint, denying the material allegations against it and raising a number of affirmative defenses. (*See* R. pp. 47–57.)

[17] In a Form 4 order filed February 9, 2021, the court had previously stated that the Motion to Compel Arbitration was denied and that a formal order would follow. (R. pp. 1–3.)

By order filed May 4, 2021, the court thereafter denied the Facility's motion for reconsideration. (R. pp. 17–21.)[18]

By notice served and filed June 2, 2021, this appeal timely follows. (*See* R. pp. 172–177.)

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. *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). Even where a ruling is on a matter within circuit 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).

[18] Pursuant to Rule 59(e), on March 11, 2021, the Facility had timely moved the court to alter, amend, and/or reconsider its order of March 1, 2021. (R. pp. 155–171.)

ARGUMENT

I. The circuit court erred in denying the Motion to Compel Arbitration.

A. The circuit court erred in its analysis of the Facility's merger/equitable estoppel argument.

1. The circuit court erred in not finding (a) that the Admission Agreement and the Arbitration Agreement merged and (b) that, because Ms. Seabrook effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement merged therewith.[19]

First off, 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 Ms. Seabrook's estate—to be *estopped* from denying its enforceability. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Ms. Seabrook 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

[19] Again, as noted above, this argument specifically includes and challenges, without limitation, the circuit court's error in using the wrong test for equitable estoppel in this context.

whether the Facility can show that Plaintiff should be estopped to deny that it is enforceable—and, most respectfully, the Facility did so.

Re: Merger

Even though Ms. Seabrook is a nonsignatory to the Arbitration Agreement,[20] it is nonetheless enforceable against her estate, i.e., against 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."). Indeed, in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), our Supreme Court recognized the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel in the very context involved in the instant case, i.e., where an arbitration agreement is signed on behalf of someone who is being admitted to a nursing home.

[20] For present purposes, the Facility assumes, *arguendo*, that (contrary to its position in respect of Issue/Argument I.C.) the Arbitration Agreement was not validly executed by Ms. Tisdale as Ms. Seabrook's attorney-in-fact pursuant to the HCPOA.

Even though the *Coleman* Court found against merger on the *particular 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 [arbitration agreement] under the [Adult Health Care Consent] Act, she is nevertheless equitably estopped to deny the [arbitration agreement]'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 [arbitration agreement]s 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.
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> *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 354–55, 755 S.E.2d at 455 (emphasis added).

Here, the circuit court wrongly concluded that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge,[21] 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 Corporation*, 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,"[22] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[23] 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. *See Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a

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[21] (*See* R. pp. 11–14.)

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

[23] To be clear, *Coleman* unequivocally answers the question of whether the 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).

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. Thus, the question of the parties' intention turns on case-specific facts analyzed in case-specific context.

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."). 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*, *Thompson*, and *Hodge*, 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. 144.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[24]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating its own *non*-"separatedness." (R. p. 144.) And without question, the Arbitration Agreement is among these other admissions 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 Ms. Seabrook 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

[24] 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike in 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).

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).

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—and indeed, 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 . . . ."); *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 Ms. Seabrook's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* R. pp. 133–144 (setting forth the terms of Ms. Seabrook's admission to the Facility) *with* R. p. 98 (providing for arbitration of disputes arising out of Ms. Seabrook's admission in the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out regarding 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. 142 (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 it is 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—the only 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 agreements to arbitrate 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 multiple instruments are 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, as a matter of law, *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 Ms. Seabrook's admission to the Facility and would not have been done at all but for her 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 framework of 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 to deny the enforceability of the Arbitration Agreement here, where Ms. Seabrook received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement

was merged. *Wilson*, 426 S.C. at 340–45, 827 S.E.2d at 175–77; *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, *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 the circuit court relied on.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Seabrook received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she 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. 23–29.)

Respectfully, the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement (the validity of which is not challenged[25]) and that Plaintiff is estopped to deny the Arbitration Agreement's

[25] Although the dispute here is about the Arbitration Agreement, as opposed to the Admission Agreement, to the extent there were any question about

enforceability, Ms. Seabrook having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof only to later, via her estate, attempt to repudiate the Arbitration Agreement with which the Admission Agreement merged.

2. The circuit court erred in finding that the FAA does not apply.[26]

Without question, the FAA applies here. For one thing, the Arbitration Agreement expressly states that the FAA applies. (R. p. 98 ("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 the FAA applied because the parties had agreed the contract involved interstate commerce)).

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the enforceability of the Admission Agreement, the Facility's equitable estoppel argument applies with equal force to the Admission Agreement.

[26] (R. p. 14 ("[T]he FAA does not apply.").)

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). 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 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.").

3. The circuit court erred in relying on the SCAA.[27]

As explained above the FAA, not South Carolina's arbitration act, applies here; and there is no notice requirement under the FAA. *See generally* 9 U.S.C. §§ 1–16. 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." 9 U.S.C. § 2. "[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate"[28] and "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). Thus, 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." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). In other words, "courts *must* place arbitration agreements on *equal*

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[27] (R. pp. 14–15 ("Pursuant to the [SCAA] [S.C. Code Ann.] Section 15-48-10(a) for a written agreement to arbitrate to be 'valid, enforceable and irrevocable' '[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.' It is interesting to this Court that conspicuous notice is required for a person to enter a binding arbitration agreement yet Ms. Seabrook never signed the agreement to arbitrate herself.").)

[28] *Allied-Bruce*, 513 U.S. at 270.

footing with other contracts . . . ." *Concepcion* at 339 (emphasis added); *see also Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted).[29]

Accordingly, South Carolina's statutory notice requirement cannot be used to invalidate an arbitration agreement that is, like the instant Arbitration Agreement, governed by the FAA, because to apply South Carolina's rule is to violate the FAA's mandate that arbitration agreements be placed on equal footing with all other contracts under state law. *Concepcion*, 563 U.S. at 339. For that matter, by its own

[29] To be clear, what the FAA requires is for arbitration agreements to be placed on *at least* equal footing with all other contracts under state law. The FAA prohibits arbitration agreements from being singled out for *disfavored* treatment relative to other contracts, but it does not prohibit the *favored* treatment of arbitration agreements relative to other contracts. Indeed, it is not only "[t]he policy of the United States" but also "of South Carolina . . . to favor arbitration of disputes." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016); *see also Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 877 (Ct. App. 2020) (recognizing the "strong South Carolina and federal policy favoring arbitration"); *id.* at 607, 846 S.E.2d at 877 ("[A]rbitration agreements are presumed valid.").

terms, the notice requirement in § 15-48-10(a) does not apply to the instant Arbitration Agreement because the instant Arbitration Agreement does not provide for "arbitration pursuant to this chapter," i.e., pursuant to South Carolina's arbitration act, but rather for arbitration pursuant to the FAA.

4. The circuit court erred in (a) incorrectly stating that "a review of the admissions and arbitration documents by the [Facility] would have informed them that [Ms.] Tisdale did not have actual authority by way of a Durable Power of Attorney, nor Court Appointed Guardianship to bind [Ms. Seabrook], nor did she ever indicate that she had any apparent authority to enter contracts on behalf of [Ms. Seabrook]"[30] and (b) violating the FAA's "equal footing" rule by charging the Facility with a heightened duty to determine the existence and/or scope of Ms. Tisdale'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 Ms. Tisdale's act of signing the Arbitration Agreement and/or (ii) Ms. Tisdale's duty of good faith and fair dealing.

The Arbitration Agreement itself reflects (by virtue of her signature upon it) Ms. Tisdale's express representation that she had all due authority to sign it for Ms.

[30] (*See* R. p. 10; *see also* R. p. 7 ("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."); R. p. 11 ("[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. Tisdale had the authority to sign an arbitration agreement on Ms. Seabrook's behalf. Stated again, the Defendants should be familiar with these requirements as they frequently interact with residents and their families during the

Seabrook. (R. p. 98 ("By . . . her signature below, the executing party [(i.e., Ms.Tisdale)] represents that . . . she has the authority to sign on [Ms. Seabrook's] behalf so as to bind [Ms. Seabrook] as well as [herself].").) There is no question raised as to Ms. Tisdale's competency. She is thus "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,[31] including, of course, the terms whereby she represented herself to the Facility as having authority to act on Ms. Seabrook's behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract,[32] and Ms. Tisdale is no less bound by this covenant than the Facility. To require anything more from the Facility as a contracting party just because an agreement to arbitrate is involved would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts under South Carolina law. *Concepcion*, 563 U.S. at 339.

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

[31] *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.").

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

B. The circuit court erred in denying the Motion to Compel Arbitration based on any finding that Plaintiff's claims are outside the scope of the Arbitration Agreement—and for that matter based on any finding that the Arbitration Agreement is anything other than valid on its face.

According to the circuit court, "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. 14.) The circuit court erred in denying the Motion to Compel Arbitration based on any finding that Plaintiff's claims are outside the scope of the Arbitration Agreement.

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 [Ms. Seabrook]."); *id.* ("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 [Ms. Seabrook's] stay at [the] Facility, or to the provisions of care or services to [Ms. Seabrook] . . . 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. 14.) Moreover, even if there were "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); *see also 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.").

For that matter, the Arbitration Agreement is valid on its face. It is signed by Ms. Tisdale, who, again, in signing it, expressly attested to her authority to do so, and it is countersigned by the Facility's representative. (*See* R. p. 98.) It is duly supported by consideration and sets forth all necessary terms, containing, as it does, the parties' mutual and concurrent promises to submit a certain defined scope of "Disputes" to binding arbitration,[33] before an arbitrator who is either agreed upon by the parties themselves or selected by the Court, in a proceeding to be

[33] 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 Ins. Co.*, 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996) ("[T]he exchange of promises qualified as consideration."); *see also Evatt v. Campbell*, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959) ("Mutual promises also constitute a good consideration.").

conducted pursuant to the South Carolina ADR Rules,[34] which will result in a decision that is enforceable in a court of competent jurisdiction. Here again, to require more just because it is an agreement to arbitrate 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.

Further still, and although, to be clear, the circuit court did not find the Arbitration Agreement to be unconscionable, the Facility would 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."

[34] In this regard, the Facility would note that the South Carolina ADR Rules, which do apply to the conduct of arbitration proceedings under the

(R. p. 98.) 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, again, both state and federal policy favor arbitration of disputes. *Parsons*, 418 S.C. at 6, 791 S.E.2d at 131; *Doe*, 430 S.C. at 607, 846 S.E.2d at 877. And there is nothing about the Arbitration Agreement that suggests it is not geared towards achieving an unbiased decision by a neutral decision-maker. *Simpson*, 373 S.C. 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.").

Arbitration Agreement, should not be confused with the SCAA, which, as addressed above (in explaining the applicability of the FAA), does not apply here.

C. While recognizing the binding effect (not only on the circuit court but also on this Court) of our Supreme Court's recent decision in *Arredondo,*[35] the Facility nonetheless wishes to preserve the following argument: The circuit court erred in rejecting the Facility's argument that the Arbitration Agreement was validly executed on Ms. Seabrook's behalf by her attorney-in-fact, Ms. Tisdale, pursuant to Ms. Tisdale's authority under the HCPOA.[36]

As explained above, without question, the Arbitration Agreement is governed by the FAA—and thus must be placed on "equal footing" with all other contracts under state law and cannot be set aside 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" [37]—and without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement.

In *Kindred Nursing Centers*, the United States Supreme Court rejected Kentucky's "clear statement rule," which provided a power of attorney could not entitle a representative to enter into an arbitration agreement without specific language granting that authority. 137 S. Ct. at 1426–27. The Court explained, "Because that rule singles out arbitration agreements for disfavored treatment . . . it violates the FAA." *Id.* at 1425.

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[35] 433 S.C. 69, 856 S.E.2d 550.

[36] Again, as noted above in the statement of issues on appeal, this argument specifically includes, without limitation, the Facility's respectful contention that *Arredondo* was wrongly decided by our Supreme Court.

[37] *Concepcion*, 563 U.S. at 339.

South Carolina law does not require an act to be specifically enumerated in a power of attorney in order for the agent to be authorized to perform the act on behalf of the principal. *See First S. Bank v. Rosenberg*, 418 S.C. 170, 181, 790 S.E.2d 919, 925–26 (Ct. App. 2016) (rejecting appellant's contention "that an agent cannot sign a guaranty on behalf of his principal pursuant to a power of attorney unless the power of attorney specifically authorized the execution because this assertion is unsupported by South Carolina law"). Accordingly, under the FAA's "equal footing" rule, a power of attorney does not need to explicitly refer to arbitration in order to grant the agent authority to execute an arbitration agreement as long as the powers granted are broad enough to include such an act. *Concepcion*, 563 U.S. at 339.

The HCPOA is a South Carolina Statutory Health Care Power of Attorney, *see* S.C. Code Ann. §§ 62-5-500 to -518 (the "Act"). In accordance with the Act, the HCPOA granted Ms. Tisdale broad authority:

> To take *any* other action necessary to making, documenting, and assuring implementation of decisions concerning [Ms. Seabrook's] health care, *including, but not limited to*, granting *any waiver of release from liability* required by any hospital, physician, nursing care provider or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and *pursuing any legal action* in [Ms. Seabrook's] name, and at the expense of my estate to force compliance with my wishes as determined by [Ms. Seabrook's] agent.

See S.C. Code Ann. § 62-5-504 (emphasis added).

The HCPOA explicitly granted Ms. Tisdale the authority to admit Ms. Seabrook to a skilled nursing facility and to take any actions necessary to assure implementation of her health care decisions, including: (i) pursuing legal actions, (ii) settling legal actions, (iii) waiving claims and liability, and (iv) forcing compliance with Ms. Searbook's wishes.[38] No express limitation is placed upon these broad powers; indeed, to the contrary, they are expressly stated to be *without limitation*. Ms. Tisdale was duly empowered under the HCPOA to sign the Arbitration Agreement on Ms. Seabook's behalf. To read the HCPOA to the contrary is to employ an unduly restrictive reading of the HCPOA in violation of the FAA.

D. Out of an abundance of caution, assuming, *arguendo*, that this might be material, the circuit court erred in referring to both the Facility and Mr. Gibbs as movants.

In denying the Motion to Compel Arbitration, the circuit court referred to "Defendants Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center *and Jeffrey Gibbs* Motion to Dismiss and Compel Arbitration." (R. p. 4 (emphasis added).) While Mr. Gibbs is named as a defendant, he has not appeared in this case and he is not a party to this appeal, and the circuit court incorrectly referred to him as a movant. Indeed, as, on information and belief, Mr.

[38] The matter of the forum for the enforcement of compliance with Ms. Seabrook's health care wishes, and the selection thereof, is directly related to the matter of forcing compliance with Ms. Seabrook's health care wishes. And, of course, simply to agree to settle litigation (or even a claim that has not yet ripened into litigation) is to agree to forego the right to a jury trial.

Gibbs has not been served with the summons and complaint, neither has personal jurisdiction been obtained over him[39] nor has the action commenced against him;[40] however, assuming, *arguendo*, Mr. Gibbs is somehow material here, he 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. 23, ¶ 3 (alleging Mr. Gibbs "is the administrator of [the Facility]").).

II. At a minimum, the circuit court erred in denying the Facility's alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability.

The circuit court erred in finding that "the plain reading of the HCPOA is straightforward and limited discovery regarding the facts and circumstances surrounding the signing of the arbitration agreement would serve no useful purpose." (R. p. 14.) Most respectfully, the circuit court failed to appreciate that South Carolina law recognizes numerous viable theories under which a nonsignatory can be bound to an arbitration agreement[41] and, thus, regardless of the authority (or lack thereof) granted by the HCPOA, that the HCPOA was not the

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[39] *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.").

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

only pertinent area of inquiry. At a minimum, the court should have granted the Facility's alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability.

Again, the Arbitration Agreement is valid on its face, containing, among other things, Ms. Tisdale's express representation of authority to bind Ms. Seabrook. (*See* R. p. 98.) Indeed, the idea that Ms. Tisdale lacked such authority—which, of course, directly contradicts Ms. Tisdale's own prior representation that she had such authority—only came about in the context of Plaintiff's opposition to the Motion to Compel Arbitration.

Even assuming, *arguendo*, the circuit court did not err in denying the Facility's primary request for relief (to compel arbitration), the interests of justice required that it allow the Facility to conduct targeted discovery on the Arbitration Agreement's enforceability based on agency or related concepts. Otherwise, the Facility is in a Catch-22 situation: on the one hand vulnerable to Plaintiff's argument that it has not presented sufficient evidence to prove the Arbitration Agreement is enforceable (whether by true agency,[42] estoppel,[43] or ratification,[44] each a fact-

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[41] *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174.

[42] 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

intensive inquiry), while on the other vulnerable to Plaintiff's argument that it waived its arbitration rights by making use of the tools of litigation (i.e., discovery) to prove them.

It is manifestly unfair for the circuit court to have relied on Plaintiff's unchecked assertion contradicting Ms. Tisdale's representation in the Arbitration

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(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).

[43] "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.

[44] 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 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.").

Agreement without allowing the Facility any opportunity to question Ms. Tisdale about it or otherwise follow pertinent evidentiary leads. It cannot be the case that the proponent of arbitration (who, it must be remembered, may well be attempting to vindicate a valid right to arbitrate that the arbitration opponent has wrongfully denied) has the burden to establish that right in a fact-based judicial proceeding in which it is disallowed use of the fact-finding tools (discovery procedures) available in other judicial proceedings.

Obviously, if this were an action to determine the validity of a contract other than an arbitration agreement there would be no question about the Facility's ability to conduct discovery relevant to the facts/circumstances bearing on the contract's validity. To force the Facility into a situation where its arbitration rights are at the mercy of an unchecked assertion (again, an assertion directly contradicting Ms. Tisdale's own prior representation), where it cannot otherwise conduct relevant discovery to vindicate those rights without risking waiving them, is not only patently unjust but also a violation of the FAA's requirement that arbitration agreements must be placed on equal footing with other contracts. *Concepcion*, 563 U.S. at 339.

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 circuit court with instructions for it to do so) or, at a minimum, to reverse the

circuit court as to its denial of the Facility's alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability.

Respectfully submitted,

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