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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2018-CP-10-01251

Court of Appeals Case No. 2019-001413
Unpublished Opinion No. 2022-UP-169 (S.C. Ct. App. filed April 6, 2022)

Supreme Court Case No. 2022-001286

Estate of Richard Ladson, Jr.,
by and through Personal Representative
Richard Miles Ladson, Sr., POA,

Respondent,

v.

THI of South Carolina at Charleston, LLC
d/b/a Riverside Health and Rehab,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Petitioner

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CERTIFICATION OF COUNSEL

By and through its undersigned counsel, pursuant to Rule 242(d)(1), SCACR, the Facility[1] certifies that the Court of Appeals filed its opinion in this matter on April 6, 2022 (the "Subject Opinion"); that the Facility timely petitioned the Court of Appeals for rehearing;[2] and that the Court of Appeals denied the Facility's petition for rehearing by order filed August 18, 2022.

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[1] The "Facility" is Defendant/Petitioner, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab. It is a skilled nursing facility in Charleston County.

[2] Because the Subject Opinion was filed April 6, 2022, the original deadline to petition for rehearing was April 21, 2022, pursuant to Rule 221(a), SCACR (providing, "Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion . . . ."); *see also* Rule 262(a), SCACR (regarding computation of time). By order filed April 22, 2022, in response to the Facility's motion of April 21, 2022, the Court of Appeals extended the deadline until May 6, 2022. By order filed May 17, 2022, in response to the Facility's motion of May 5, 2022, the Court of Appeals extended the deadline until Monday, May 23, 2022, on which date the Facility timely served and filed its petition for rehearing.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the circuit court's denial of the Facility's motion to compel arbitration?

A. Is the Court of Appeals' analysis of the Facility's merger argument erroneous? More specifically, should the Court of Appeals have found that the circuit court erred in failing to find that the Arbitration Agreement merged with the Admission Agreement?

B. Did the Court of Appeals err in not reaching the Facility's equitable estoppel argument?

C. Provided the Court of Appeals erred in not reaching the Facility's equitable estoppel argument (as the Facility contends it did), should the Court of Appeals have found that the circuit court erred in not finding Plaintiff[3] equitably estopped to deny the enforceability of the Arbitration Agreement?

[3] "Plaintiff" is Plaintiff/Respondent, Estate of Richard Ladson, Jr., by and through Personal Representative Richard Miles Ladson, Sr., POA.

STATEMENT OF THE CASE

With the help of Julia Wright ("Ms. Wright"), his sister, Richard Ladson, Jr. ("Mr. Ladson"), was admitted as a resident of the Facility on September 20, 2010. (R. pp. 59–77.) Ms. Wright handled the paperwork in conjunction with Mr. Ladson's admission and, in so doing, signed an Admission Agreement[4] and an Arbitration Agreement on Mr. Ladson's behalf. (R. p. 71.)[5]

This nursing home malpractice action was filed March 8, 2018, in the Charleston County Court of Common Pleas. (R. pp. 3–9.)

On August 21, 2018, the Facility moved to compel arbitration, based on the Arbitration Agreement Ms. Wright signed for Mr. Ladson. (R. p. 36–38.)[6] [7]

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[4] (R. pp. 59–70.) Plaintiff does not challenge the validity of the Admission Agreement.

[5] Both the Admission Agreement and the Arbitration Agreement were countersigned by Leslie Solomon, the Facility's Director of Admissions. (R. pp. 70–71.)

[6] Prior to moving to compel arbitration, subject to and without waiving its right to compel the matter to arbitration, the Facility timely answered the complaint on June 21, 2018, denying the alleged liability and raising a number of affirmative defenses. (R. pp. 13–20.)

[7] Without question, Plaintiff's claims against the Facility are within the scope of the plain language of the Arbitration Agreement. (R. p. 71 ("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. Ladson]."); *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 [Mr. Ladson's] stay at [the] Facility, or to the provisions of care or services to [Mr. Ladson] . . . and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall

Following a hearing on November 27, 2018,[8] the circuit court, the Honorable Jennifer B. McCoy presiding, denied the Facility's motion to compel arbitration by order filed February 6, 2019. (R. p. 1.) On February 8, 2019, the Facility timely moved the circuit court to alter, amend, and/or reconsider its decision,[9] and the circuit court denied the motion by order filed July 26, 2019. (R. p. 2.)

This appeal timely followed by notice served August 20, 2019,[10] and in due course, it was fully briefed and made ready for decision by the Court of Appeals.

As explained in its principal appellate brief, and further supported in its reply brief, the Facility argued that the circuit court erred in failing to find that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff was equitably estopped to deny the validity of the Arbitration Agreement, merged as it was with the Admission Agreement under which Mr. Ladson had received direct benefits. (Br. of Appellant; Reply Br. of Appellant.)

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be resolved by arbitration . . . ."); *see also* R. pp. 4–9.) But 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.").

[8] (R. pp. 21–35.)

[9] (R. pp. 94–96.)

[10] (R. pp. 97–98.)

The case was submitted without oral argument during the March 2022 term and decided April 6, 2022, via the Subject Opinion, which affirmed the circuit court's denial of the Facility's motion to compel arbitration. The body of the Subject Opinion is brief enough to reproduce here in full:

> **PER CURIAM:** [The Facility] appeals the circuit court's order denying its motion to compel arbitration. On appeal, [the Facility] argues the circuit court erred in denying its motion because the merger of the at-issue arbitration agreement (Arbitration Agreement) with the admission agreement (Admission Agreement) equitably estopped [Mr. Ladson's] estate from denying the validity of the arbitration agreement. We affirm.
>
> The circuit court did not err in denying [the Facility's] motion to compel arbitration because the admission agreement and the arbitration agreement did not merge. *See Berry v. Spang*, 433 S.C. 1, 9, 855 S.E.2d 309, 314 (Ct. App. 2021) ("Appeal from the denial of a motion to compel arbitration is subject to de novo review." (quoting *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008))), petition for cert. filed (S.C. Apr. 23, 2021); *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) ("Whether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to de novo review by an appellate court."); *Berry*, 433 S.C. at 9, 855 S.E.2d at 314 ("[A] circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." (quoting *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009))); *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (concluding that by their own terms, language in the admission agreement that "recognize[d] the 'separatedness' of the two documents[, i.e. the arbitration agreement and the admission agreement]" and a clause allowing the

> arbitration agreement to "be disclaimed within thirty days of signing while the admission agreement could not" indicated the parties' intention "that the common law doctrine of merger not apply"); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 562-63, 813 S.E.2d 292, 302 (Ct. App. 2018) (determining an admission agreement and arbitration agreement did not merge because the fact "the Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law," "each document was separately paginated and had its own signature page," and "the Arbitration Agreement stated signing it was not a precondition to admission" evidenced the parties' intention the documents be construed as separate instruments). Because the documents did not merge, we need not address [the Facility's] equitable estoppel argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive); *Coleman*, 407 S.C. at 356, 755 S.E.2d at 455 ("Since there was no merger here, appellants' equitable estoppel argument was properly denied by the circuit court."); *Hodge*, 422 S.C. at 563, 813 S.E.2d at 302 (concluding "equitable estoppel would only apply if documents were merged").
>
> **AFFIRMED.**

As explained above, the Court of Appeals denied the Facility's timely petition for rehearing on August 18, 2022. This petition for a writ of certiorari timely follows.[11]

[11] Because the Court of Appeals denied the Facility's petition for rehearing on August 18, 2022, the original deadline for the Facility to petition this Court for a writ of certiorari was Monday, September 19, 2022, pursuant to Rule

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 circuit 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 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).

242(c), SCACR (providing, "A petition for writ of certiorari shall be served on opposing counsel and filed with proof of service with the Clerk of the Court of Appeals and the Clerk of the Supreme Court within thirty (30) days after the petition for rehearing or reinstatement is finally decided by the Court of Appeals."); *see also* Rule 262(a), SCACR. By order filed September 15, 2022, in response to the Facility's motion of even date, this Court extended the deadline until September 29, 2022. By order filed September 29, 2022, in response to the Facility's motion of September 28, 2022, the Court extended the deadline until today, October 10, 2022.

ARGUMENT

I. The Court of Appeals erred in affirming the circuit court's denial of the Facility's motion to compel arbitration.

A. Like that of the circuit court before it, the Court of Appeals' analysis of the Facility's merger argument is erroneous. The Court of Appeals should have found that the circuit court erred in failing to find that the Arbitration Agreement merged with the Admission Agreement.

In *Coleman v. Mariner Health Care, Inc.*, even though this Court found against merger on the particular *facts* before it, the Court 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 agreements] merged. In South Carolina,
>
> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.*

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

Here, the Court of Appeals, like the circuit court before it, 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 involved in) *Coleman* and its progeny *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), as well as *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016).[12]

The Subject Opinion wrongfully concludes that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge. 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,'"[13] as indeed the Admission Agreement and the Arbitration Agreement

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[12] Of these three cases (*Coleman*, *Hodge*, and *Thompson*), the Court of Appeals only cited *Coleman* and *Hodge* in the Subject Opinion, not *Thompson*, but to be clear, *Thompson* does not support the Court of Appeals' decision either.

[13] *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (quoting *Klutts*, 268 S.C. at 88, 232 S.E.2d at 24).

were here,[14] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be construed together as effectively one contract. This is a question of 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.

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

[14] To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As *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 [indeed] executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction*." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

drawn here. Indeed, under the circumstances, the idea that there would have been an intention contrary to merger does not make sense.

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*. (R. p. 71.) The Court of Appeals failed to recognize this material distinction in erroneously likening this case to *Coleman*.[15] The Court of Appeals also erred in likening this case to *Hodge*. In citing *Hodge*, the Court of Appeals noted only *some* of the factors that the *Hodge* Court relied on in finding against merger, namely, that "'the Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law;'" that "'each document was separately paginated and had its own signature page;'" and that "'the Arbitration Agreement stated signing it was not a precondition to admission' evidenced the parties' intention the

[15] Indeed, the Court of Appeals did so even while expressly recognizing as material to the *Coleman* decision the fact that there was "a clause allowing the arbitration agreement to 'be disclaimed within thirty days of signing while the admission agreement could not.'" (Subject Opinion, *supra* ("*Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (concluding that language in the admission agreement that 'recognize[d] the 'separatedness' of the [arbitration agreement] and the admission agreement' plus a clause allowing the arbitration agreement to 'be disclaimed within thirty days of signing while the admission agreement could not' indicated the parties' intention "that the common law doctrine of merger not apply'").)

documents be construed as separate instruments." (Subject Opinion, *supra* (citing *Hodge*, 422 S.C. at 562–63, 813 S.E.2d at 302).) The Court of Appeals failed to recognize that, as in *Coleman*—but, again, *not* in the instant case—the presence of a disclaimer/revocation provision in the arbitration agreement was a material fact that existed in *Hodge*, too. *See Hodge*, 422 S.C. at 562, 813 S.E.2d at 302 ("Also, the Arbitration Agreement stated it could be revoked within thirty days, whereas the Admission Agreement contained no such indication . . . ."); *id.* at 563, 813 S.E.2d at 302 ("Based on all of this, we find the Admissions Agreement and Arbitration Agreement did not merge.").

Also unlike the admission agreement at issue in *Coleman*, the "Entire Agreement" clause in the instant Admission Agreement does not reference the Arbitration Agreement as a separate contract. (R. p. 70.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[16]), 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. 70.) Without question, the Arbitration Agreement is among these other

[16] 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the "Entire Agreement" clause expressly referred to a separate arbitration agreement and, thus, "recognize[d] the '*separatedness*' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.") (emphasis added).

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); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)).

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. Ladson 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).

To say that the Arbitration Agreement was not required for admission, which it was not,[17] is not to say that it was not intended to be part of the admissions

[17] (R. pp. 31:19–32:3.)

materials in the event it was agreed to, which it was, by Ms. Wright on Mr. Ladson's behalf. While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitrations Agreement's) sole reason for being. (R. p. 71 (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be

considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Ladson'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. 59–70 (setting forth the terms of Mr. Ladson's admission to the Facility) *with* R. p. 71 (providing for arbitration of disputes arising out of Mr. Ladson'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. 68 (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. 72 (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 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 whether they were intended to 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. The very nature of *merger* is to *merge* separate documents.

And—besides the fact, explained elsewhere, that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on any 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." 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 finding against merger here relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent. It must be remembered that the presumption of merger arises only where the four elements of time, parties, purpose, and transaction coincide—as the all do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. So, again, 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. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or

speculation."). The merger presumption is "earned," so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

The Court of Appeals should have found that the circuit court erred in failing to find 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. Ladson's admission to the Facility and would not have been done at all but for his admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent.

B. The Court of Appeals erred in not reaching the Facility's equitable estoppel argument.

As explained in the Subject Opinion, the Court of Appeals did not reach the Facility's equitable estoppel argument because of its finding that the Arbitration Agreement and the Admission Agreement did not merge. (Subject Opinion, *supra* ("Because the documents did not merge, we need not address [the Facility's] equitable estoppel argument . . . .").) Therefore, for the same reasons that the

Court of Appeals erred in affirming the circuit court's finding that these documents did not merge, it likewise erred in not reaching the Facility's equitable estoppel argument.

C. Had it reached the Facility's equitable estoppel argument, as it should have, the Court of Appeals should have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the enforceability of the Arbitration Agreement.

In *Wilson v. Willis*, this Court observed that South Carolina has recognized a number of theories under which a nonsignatory can be bound to an arbitration agreement, including under the theory of estoppel. 426 S.C. at 338, 827 S.E.2d at 174. The *Wilson* Court favorably discussed the framework of the so-called direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals' 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. Ladson received direct benefits (in the form of his admission to 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, *Wilson* supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, and under that test, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement.

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

is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.") (internal citations omitted). Direct benefits estoppel recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Ladson received the benefit of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. To deny his receipt of such benefits is illogical. It would require wholly discounting every single aspect of his residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility). Not even Plaintiff has alleged this. (R. pp. 4–9.)

The Court of Appeals should have addressed the Facility's equitable estoppel argument and, in so doing, found that the circuit court erred in not finding Plaintiff estopped to deny the Arbitration Agreement's enforceability, Mr. Ladson

having effectively embraced and directly benefitted from the Admission Agreement with which the Arbitration Agreement was merged.

CONCLUSION

For the foregoing reasons, the Facility asks this Honorable Court to grant the instant petition, reverse the Subject Opinion, and either directly determine that the this lawsuit should be stayed in favor of arbitration or, alternatively, remand the matter for such further proceedings (consistent with the reversal of the Subject Opinion) as may be needed to effectuate the reversal of the Subject Opinion and the proper determination of the Facility's motion to compel arbitration.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Petitioner

Charleston, South Carolina

October 10, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2018-CP-10-01251

Court of Appeals Case No. 2019-001413
Unpublished Opinion No. 2022-UP-169 (S.C. Ct. App. filed April 6, 2022)

Supreme Court Case No. 2022-001286

Estate of Richard Ladson, Jr.,
by and through Personal Representative
Richard Miles Ladson, Sr., POA,

Respondent,

v.

THI of South Carolina at Charleston, LLC
d/b/a Riverside Health and Rehab,

Petitioner.

PROOF OF SERVICE

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Petitioner

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Petitioner, hereby certify that Petitioner's **PETITION FOR A WRIT OF CERTIORARI** was served on Respondent on October 10, 2022, by emailing (see attached) a copy of the same to Respondent's counsel of record:

Carl E. Pierce, II, Esquire
carlpierce@piercesloan.com
Carl E. Pierce, III, Esquire
treypierce@piercesloan.com
Benjamin C. Smoot, II, Esquire
bensmoot@piercesloan.com
PIERCE, SLOAN, WILSON, KENNEDY & EARLY, LLC
321 East Bay Street
Charleston, South Carolina 29401

Attorneys for Respondent

I also certify that Petitioner's **PETITION FOR A WRIT OF CERTIORARI** and **PROOF OF SERVICE** was filed with the South Carolina Court of Appeals on October 10, 2022, via email to ctappfilings@sccourts.org.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: *s/Russell G. Hines*
Russell G. Hines (SC Bar No. 72100)
Attorneys for Petitioner

Charleston, South Carolina

October 10, 2022

From:	Hines, Russell
To:	Carl Pierce (carlpierce@piercesloan.com); "treypierce@piercesloan.com"; "bensmoot@piercesloan.com"
Cc:	"Brown, Steve"; Davis, Jay; Wakeham, Rebecca (Becky); Peterson, Susan; Justman, Aimee; Bell, Pollyana (Polly)
Subject:	Ladson v. THI (Sup. Ct. 2022-001286; Ct. App. 2019-001413) -- Petition for a Writ of Certiorari
Date:	Monday, October 10, 2022 9:29:03 PM
Attachments:	image001.png Ladson v. THI (Sup. Ct. 22-1286; Ct. App. 19-1413) -- Petition for a Writ of Certiorari.pdf

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Attached please find our **Petition for a Writ of Certiorari** in the above-referenced matter.

Russell G. Hines
CLEMENT RIVERS, LLP
www.ycrlaw.com
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
Phone: (843) 720-5488
Fax: (843) 579-1327
Email: rhines@ycrlaw.com

CLEMENT RIVERS, LLP
25 Calhoun Street • Suite 400 • Charleston, SC 29401
ycrlaw.com