

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. 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Unpublished Opinion No. 2022-UP-169 (S.C. Ct.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.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY1

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2. Plaintiff is incorrect in asserting that “South Carolina appellate courts have repeatedly rejected nearly all of the legal and equitable theories the Facility now proposes to create a binding contract where there is not one” and that “[t]he Facility cannot show the Admission Agreement and the Arbitration Agreement were executed *for the same purpose.*”3

3. It is not “counterintuitive to conclude [that] the Arbitration Agreement was an ‘admissions material.’”5

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In further support of its petition for a writ of certiorari, the Facility¹ makes the following points in reply to Plaintiff’s return to the petition.

ARGUMENT IN REPLY

1. The Facility does not argue that the AHCCA gave Ms. Wright authority to bind Mr. Ladson to the Arbitration Agreement.

Argument I in Plaintiff’s return (headed, “The [AHCCA] does not apply to the Arbitration Agreement.”²) is misplaced. The Facility does not argue that the AHCCA applies to the Arbitration Agreement; rather, it argues that even though the AHCCA did not authorize Ms. Wright to bind Mr. Ladson to the Arbitration Agreement, Plaintiff should still be bound to the Arbitration Agreement through merger and equitable estoppel.

Conceptually, the Facility’s merger/equitable estoppel argument is not an argument for the *enforceability* of the Arbitration Agreement but rather for Plaintiff to be *estopped to deny the enforceability* of the Arbitration Agreement. *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354, 755 S.E.2d 450, 455 (2014) (“Appellants contend that *even if* Sister lacked capacity to execute the [arbitration agreement] under the [AHCCA], she is *nevertheless equitably estopped*

¹ Shorthand references already defined in the Facility’s petition are continued in this reply (e.g., the “Facility” refers to Defendant/Petitioner, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, and “Plaintiff” refers to Plaintiff/Respondent, Estate of Richard Ladson, Jr., by and through Personal Representative Richard Miles Ladson, Sr., POA.).

² (Return p. 7 (bold print omitted).)

to deny the [arbitration agreement's] enforceability.”) (emphasis added). In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and because Mr. Ladson effectively embraced and directly benefitted from the Admission Agreement, Plaintiff, as personal representative of Mr. Ladson’s estate, is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any contention about the Arbitration Agreement’s supposed lack of enforceability (whether because of the inapplicability of the AHCCA or Ms. Wright’s lack of authority thereunder, or, for that matter, because Ms. Lovett otherwise lacked authority, or because of another alleged defect in contract formation) is beside the point and unavailing to refute the Facility’s merger/equitable estoppel argument, which, again, turns not on the question of whether it showed that the Arbitration Agreement is enforceable but whether it showed that Mr. Ladson and, in turn, Plaintiff, as personal representative of Mr. Ladson’s estate, should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, it did so.

2. **Plaintiff is incorrect in asserting that “South Carolina appellate courts have repeatedly rejected nearly all of the legal and equitable theories the Facility now proposes to create a binding contract where there is not one”³ and that “[t]he Facility cannot show the Admission Agreement and the Arbitration Agreement were executed *for the same purpose.*”⁴**

The Facility’s argument is not an attempt “to create a binding contract where there is not one,” but rather to estop Plaintiff from inequitably denying the Arbitration Agreement’s enforceability, and Plaintiff is simply incorrect to assert that such a theory has been rejected by our State’s appellate courts. In *Coleman*, this Court confirmed the validity of “[t]he general rule . . . 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 being “that the instruments are effectively one instrument or contract.” 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014); *see also Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (observing that South Carolina has recognized a number of theories under which a nonsignatory can be bound to an arbitration agreement, including under the theory of estoppel).

Coleman concerned the enforceability of an arbitration agreement against the estate of the decedent, Ms. Brinson, the arbitration agreement, along with an

³ (Return p. 7.)

⁴ (Return p. 9 (emphasis in original); *see also id.* at pp. 9–11.)

admission agreement, having been signed on Ms. Brinson's behalf by her sister, Ms. Coleman, at the time of Ms. Brinson's admission to the facility. 407 S.C. at 352, 755 S.E.2d at 452.⁵ Although the *Coleman* Court ultimately found an intention contrary to merger on the *particular* facts before it,⁶ it first expressly found that "the documents [(i.e., the arbitration and admission agreements Ms. Coleman signed for her sister)] were executed *at the same time, by the same parties, for the same purposes, and in the course of the same transaction*[]" and that, "[u]nless there is a contrary intention, appellants are *correct* that there *was a merger*." *Id.* at 355, 755 S.E.2d at 455 (emphasis added). In this respect, the Arbitration Agreement and the Admission Agreement in the instant case are no different from those at issue in *Coleman*. They were all executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Plaintiff's contention that the Arbitration Agreement and the Admission Agreement were not executed for the same purpose is without merit.

⁵ Technically, there were two arbitration agreements and two admission agreements in the *Coleman* record, because Ms. Coleman admitted Ms. Brinson to the facility in June 2006 and later readmitted her in December 2006 and signed arbitration and admission agreements on Ms. Brinson's behalf on both occasions. *Id.* The respective terms of both arbitration and admission agreements were identical, however. *Id.* at n.1.

⁶ As explained in the Facility's petition, it is in this respect that the instant case materially differs from *Coleman*, because the record in the instant case does *not* allow for a reasonable, non-speculative inference of an intention contrary to merger.

3. It is not “counterintuitive to conclude [that] the Arbitration Agreement was an ‘admissions material.’”⁷

In an effort to rebut the Facility’s point that Arbitration Agreement is one of the “other Admissions materials” that the “Entire Agreement” clause refers to as being deemed a part of the Admission Agreement,⁸ Plaintiff argues that “Admissions Materials” is not a defined term and that “it would be counterintuitive to conclude the Arbitration Agreement was an ‘admissions material’” given that “the Facility admits [that] agreeing to arbitration was not required for admission” (Return p. 13.)

It must be remembered that when all the requirements for the presumption of merger are present—as they are here—*merger is presumed to be what the parties intended* unless there is evidence of a contrary intention. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. The lack of a definition of “Admissions Materials” certainly says nothing of an intention contrary to merger. Indeed, the only logical inference that can be derived from the “Entire Agreement” clause’s express inclusion of other undefined material is *supportive* of merger.

To say that the Arbitration Agreement was not required for admission, which it was not,⁹ is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Ms. Wright on Mr.

⁷ (Return p. 13.)

⁸ (R. p. 70.)

⁹ (R. pp. 31:19–32:3.)

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 Arbitration Agreement’s) sole reason for being. (See 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”); R. p. 71 (“This [Arbitration] Agreement shall remain in effect for all care rendered at Facility”).)

The Arbitration Agreement was not *condition* of admission, but it certainly was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the

two were effectively one instrument, governing various interrelated aspects of Mr. Ladson’s relationship with the Facility. (*Compare* R. pp. 59-79 (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). It is only natural that the Arbitration Agreement is among the 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)).

4. The termination provisions in the Arbitration Agreement and the Admission Agreement are not inconsistent.

All the *arbitration* agreements at issue in *Coleman, Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), and *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), provided that they could be disclaimed or revoked within 30 days of their signing, while the corresponding *admission* agreements did not. There is no such disclaimer/revocation provision in the instant *Arbitration* Agreement. Here, Plaintiff points to the *opposite* situation (i.e., opposite from *Coleman, Hodge*, and

Thompson)—that the instant *Admission* Agreement provides an opt-out option but the Arbitration Agreement does not—to support the same *conclusion* (as *Coleman, Hodge, and Thompson*). (See Return pp. 14–15.) Respectfully, this is illogical.

The only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement covers disputes relating to/arising out of the Admission Agreement. So, yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still tied to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. See *Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

5. Plaintiff’s argument about contract formatting and structure is specious.

As explained in the Facility’s petition, the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more

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

6. Plaintiff's argument regarding equitable estoppel is misguided.

Essentially, Plaintiff's argument here relies on two things, both of which are off base. First, Plaintiff relies on the "traditional" six-factor test for estoppel, as opposed to the direct benefits test that our Supreme Court discussed in *Wilson*, 426 S.C. 326, 827 S.E.2d 167. In *Wilson*, the Court clearly suggests (albeit without deciding) that the six-factor test should be limited to use "in *non*-arbitration cases." *Id.* at 340, 827 S.E.2d at 175 n.6 (emphasis added). Secondly, where Plaintiff does reference the direct benefits test, his argument hinges on his contention that the Arbitration Agreement and the Admission Agreement do not merge. (Return p. 15 ("Because the documents did not merge, we need not address the Facility's equitable estoppel argument."); *id.* at p. 18 ("The separateness of the two contracts in this case is an important fact further distinguishing the 'direct benefit' cases on

which Appellant relies.”.) As the Facility has already explained, this argument is without merit because the Arbitration Agreement and the Admission Agreement do merge, as the circuit court should have found.

CONCLUSION

For the foregoing reasons, in addition to those already set forth in its petition, 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.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,
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