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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2019-CP-40-02295

Court of Appeals Case No. 2020-000501
Unpublished Opinion No. 2022-UP-313 (S.C. Ct. App. filed July 27, 2022)

Supreme Court Case No. 2022-001503

Vermell Daniels,
as Personal Representative of the Estate of Annie Porter,

Respondent,

v.

THI of South Carolina at Columbia, LLC,
d/b/a Midlands Health & Rehabilitation Center,

Petitioner.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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In further support of its petition for a writ of certiorari, the Facility[1] makes the following points in reply to Plaintiff's return to the petition.

ARGUMENT IN REPLY

1. To be clear, the Facility need not show that the Arbitration Agreement is enforceable, only that Plaintiff should be estopped to deny its enforceability, which, as explained in the Facility's petition, Plaintiff should, because, Ms. Porter having effectively embraced/directly benefitted from the Admission Agreement, Plaintiff cannot deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged.

The Facility's merger/equitable estoppel argument is not an argument for the *enforceability* of the Arbitration Agreement but rather an argument for Plaintiff to be *estopped to deny the enforceability* of the Arbitration Agreement. In short, and as fully explained in the Facility's petition, the idea is that the Admission Agreement—the enforceability of which Plaintiff does not dispute—and the Arbitration Agreement merged, and Ms. Porter having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged. Accordingly, counterarguments aimed at denying the Arbitration Agreement's enforceability (e.g., that, under the common law of agency and/or under the AHCCA, Ms. Daniels lacked authority to sign the Arbitration Agreement on behalf of Ms. Porter) are beside the point and unavailing.

[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 Columbia, LLC, d/b/a Midlands Health & Rehabilitation Center, and "Plaintiff" refers to Plaintiff/Respondent, Vermell Daniels ("Ms. Daniels"), as personal representative of the estate of her later mother, Annie Porter ("Ms. Porter")).

2. Plaintiff is incorrect in asserting that the Facility's "merger-equitable estoppel argument is not a viable legal theory in South Carolina."[2]

As explained in the Facility's petition, in *Coleman v. Mariner Health Care, Inc.*, this Court acknowledged the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel[3] and confirmed the validity of "[t]he general rule" underlying the merger prong of the merger-equitable analysis, which 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 being "that the instruments are effectively one instrument or contract." *Id.* at 355, 755 S.E.2d at 455; *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); *id.* at 340–45, 827 S.E.2d at 175–77 (favorably discussing the applicability of the direct benefits test for equitable estoppel, whereby a nonsignatory is estopped from refusing to comply with an arbitration clause when they receive a direct benefit from a contract containing an arbitration clause).

Coleman concerned the enforceability of an arbitration agreement against the estate of the decedent, Ms. Brinson, the arbitration agreement, along with an admission agreement, having been signed on Ms. Brinson's behalf by her sister, Ms. Coleman, at the time of Ms. Brinson's

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[2] (Return p. 9.)

[3] *See* 407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (explaining "Appellants' equitable estoppel argument," which "[wa]s premised on [Appellants'] contention that, under state law, the admission agreements and the [arbitration agreements] *merged*," as follows: "Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped* to deny the [arbitration agreement's] enforceability.") (emphasis added).

admission to the facility. 407 S.C. at 352, 755 S.E.2d at 452.[4] Although the *Coleman* Court ultimately found an intention contrary to merger on the particular *facts* before it,[5] 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 [wa]s a contrary intention, appellants [were] *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.

The doctrine of merger is a part of South Carolina's general law of contracts, the *Coleman* Court expressly confirmed its applicability in the context of nursing home admission agreements and arbitration agreements, and, indeed, to deny its applicability in this context (i.e., the arbitration context) would violate the FAA's mandate that arbitration agreements be placed on equal footing with other contracts—as would the denial of the applicability of the direct benefits test for equitable estoppel that the Court endorsed in *Wilson*. *See AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011). Notwithstanding the existence of materially different *facts* that cut against the proponents of arbitration in *Coleman* and *Wilson*, the Facility's merger-equitable estoppel argument is a viable theory for compelling Plaintiff to arbitration under the facts of the instant case based on the principles of *law* set forth in those decisions.

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[4] 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.

[5] As explained in the Facility's petition, it is in this respect that the instant case materially differs from *Coleman*. The record in the instant case does *not* allow for a reasonable, non-speculative inference that the parties' intention was contrary to merger.

3. Contrary to Plaintiff's assertion otherwise, *Coleman* unequivocally supports the proposition that—when instruments are executed at the same time, by the same parties, for the same purpose, in the course of the same transaction—merger is presumed.

According to Plaintiff, the Facility "fails to cite to a case that says merger—two agreements becoming one as a matter of law—is a presumption." (Return p. 19.) Respectfully, Plaintiff is mistaken.

The Facility has never argued that merger is simply presumed whenever multiple instruments are involved. Rather, as clearly explained in the Facility's petition, merger is presumed *when instruments are executed at the same time, by the same parties, for the same purpose, in the course of the same transaction*. Not only does *Coleman* expressly confirm that this is the law in South Carolina, i.e., that merger is *presumed* when instruments are executed at the same time, by the same parties, for the same purpose, in the course of the same transaction, as explained in the Facility's petition, by virtue of the way that the *Coleman* Court recognized that the admission agreement and arbitration agreement then before it were indeed executed at the same time, by the same parties, for the same purpose, in the course of the same transaction, it also confirms that the Admission Agreement and Arbitration Agreement here meet these criteria, too. *See Coleman*, 407 S.C. at 354–55, 755 S.E.2d at 455 (confirming the validity of the general proposition of law on which the arbitration proponents (the appellants) based their merger/equitable estoppel argument: "Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . *[T]he 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.*") (emphasis added).

Again, while the material facts of this case are different from *Coleman* as to whether the presumption of merger is upset by evidence of a contrary intention (the facts do not support such a conclusion here), the material facts (admission agreements and arbitration agreements signed upon a resident's admission to a skilled nursing facility) are the very same as to whether the presumption of merger arises in the first place, as *Coleman* confirms it does.

4. Plaintiff's argument that—even if the Facility is correct that the Admission Agreement and the Arbitration Agreement merged—the Arbitration Agreement still should be severed is self-contradictory and without merit.

Plaintiff conflates or confuses the difference between an argument for contract enforcement and an argument, like the instant merger-equitable estoppel argument, to estop another party from denying the enforceability of the contract. The severance principles Plaintiff cites are of no consequence here. If, as the Facility contends, the Admission Agreement and the Arbitration Agreement merged, it means that these instruments were indeed executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction and that there is no evidence from which a reasonable, non-speculative inference can be drawn of an intention contrary to merger, at which point, there is no room left in the analysis for the notion of severance Plaintiff suggests.

5. Plaintiff is incorrect in asserting that "[the Facility] did not ask Ms. Daniels if she was Ms. Porter's guardian or otherwise had legal authority to bind Ms. Porter to arbitration."[6]

The Arbitration Agreement itself reflects (by virtue of her signature upon it) Ms. Daniels's express representation to the Facility that she had all due authority to sign it for Ms. Porter. (R. p. 92 ("By . . . her signature below, the executing party [(i.e., Ms. Daniels)] represents that . . . she has the authority to sign on [Ms. Porter's] behalf so as to bind [Ms.

[6] (Return p. 2.)

Porter] as well as [herself].").) Ms. Daniels is "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,[7] including, of course, the terms whereby she expressly represented herself to the Facility as having authority to act on Ms. Porter's behalf. Moreover, the covenant of good faith and fair dealing implied in every contract[8] is no less binding on Ms. Daniels than the Facility.

Accordingly, the Facility *did* ask Ms. Daniels if she had authority to bind Ms. Porter to arbitration, and in response, Ms. Daniels expressly represented to the Facility that she had such authority. And any suggestion that the Facility is undeserving of equity because it should be charged with a heightened duty to determine Ms. Daniels's authority here violates the FAA's "equal footing" rule. *See Concepcion*, 563 U.S. at 339 (Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts* . . . ."); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.") (citing *Concepcion*, 563 U.S. at 339); *Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("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

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[7] *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.").

[8] *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995) (South Carolina law implies a covenant of good faith and fair dealing in every contract).

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)).

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, to reverse the Subject Opinion, and either to directly determine that this lawsuit should be stayed in favor of arbitration or, alternatively, to 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, to include, to the extent necessary for the proper determination of the Facility's motion to compel arbitration, remand to the circuit court for the additional discovery requested by the Facility to be conducted, for additional briefing to be submitted to the circuit court in light thereof, and for the circuit court to decide the Facility's motion to compel arbitration anew with the benefit thereof.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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