THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2019-001413
Circuit Court Case No. 2018-CP-10-01251

Richard Ladson, Jr.,
by and through Richard Miles Ladson, Sr., POA,

Respondent,

v.

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

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

I. **Did the circuit court err in denying the Facility's[1] motion to compel arbitration of Plaintiff's[2] claim? More specifically, did the circuit court err in failing to find that the subject Arbitration Agreement merged with the subject Admission Agreement and that Plaintiff was equitably estopped from denying the validity of the Arbitration Agreement?**

STATEMENT OF THE CASE

With the help of his sister, Julia Wright, Mr. Ladson, who suffered from dementia,[3] was admitted to the Facility on September 20, 2010. (*See generally* R. pp. 59-77.) In conjunction with Mr. Ladson's admission to the Facility, Ms. Wright signed a number of documents on his behalf, including an Admission Agreement[4] and an Arbitration Agreement. (*See generally* R. p. 71.)[5]

The Arbitration Agreement refers to Mr. Ladson as "Resident" and to Ms. Wright as "Representative." (R. p. 71.) In pertinent part, it provides as follows:

> It is the intention of the parties to this 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 Resident.

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

[2] "Plaintiff" is Plaintiff-Respondent, Richard Ladson, Jr., by and through Richard Miles Ladson, Sr., POA.

[3] (*See* R. p. 78.)

[4] (*See generally* 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. (*Compare* R. p. 70 *with* R. p. 71.)

It is understood by Resident/Representative that he/she is not required to use the aforesaid Facility for Resident's healthcare needs and that there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident.

It is further understood that in the event 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, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

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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 is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

I understand and agree that I am giving up and waiving my right to a jury trial.

This Agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement. By his/her signature below, the executing party represents that he/she

> has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

(R. p. 71 (emphasis in original).)

Plaintiff commenced this action in the Charleston County Court of Common Pleas on March 8, 2018, asserting a claim against the Facility for its alleged negligence/gross negligence in the care/treatment of Mr. Ladson. (*See generally* R. pp. 3-9.) Subject to and without waiving its right to compel the dispute to arbitration, the Facility timely answered Plaintiff's complaint on June 21, 2018. (*See generally* R. pp. 13-20.)

On August 21, 2018, the Facility moved to compel arbitration, based on the (above-referenced/quoted) Arbitration Agreement that Ms. Wright had signed on Mr. Ladson's behalf in conjunction with his admission to the Facility,[6] again, Ms. Wright having expressly "represent[ed] that . . . she ha[d] authority to sign on [Mr. Ladson's] behalf so as to bind [Mr. Ladson] as well as [herself]." (R. p. 71.)

The parties submitted their respective briefs for[7] and against[8] the motion, and following a hearing on November 27, 2018,[9] the circuit court, the Honorable Jennifer B. McCoy presiding, denied the Facility's motion to compel arbitration by order filed February 6, 2019. (*See generally* R. p. 1.) On February 8, 2019, the

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[6] (*See generally* R. p. 36-38.)
[7] (*See generally* R. pp. 39-58.)
[8] (*See generally* R. pp. 78-80.)
[9] (*See generally* R. pp. 21-35.)

Facility timely moved the circuit court to alter, amend, and/or reconsider its decision. (R. pp. 94-96.) The court denied that motion by order filed July 26, 2019. (R. p. 2.)

By notice served August 20, 2019, this appeal timely follows. (*See generally* R. pp. 97-98.)

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.*

ARGUMENT

I. The circuit court erred in denying the Facility's motion to compel arbitration of Plaintiff's claim. More specifically, the circuit court erred in failing to find that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff was equitably estopped from denying the validity of the Arbitration Agreement.

This appeal turns on the question of whether the circuit court should have found—as the Facility argued[10]—that the Arbitration Agreement merged with the

[10] (*See* R. pp. 44-50; R. pp. 24, line 25 – p. 28, line 4.)

Admission Agreement and that Plaintiff was estopped to deny the validity of the Arbitration Agreement.[11] Most respectfully, it should have.

Re: Merger

In *Coleman v. Mariner Health Care, Inc.*, even though the 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 AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,
>
> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same

[11] Plaintiff briefed just two arguments in opposition to the Facility's motion to compel arbitration: (1) that the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (the "AHCCA"), did not give Ms. Wright authority to bind Mr. Ladson to the Arbitration Agreement and (2) that no common law agency existed to bind Mr. Ladson to the Arbitration Agreement. (*See generally* R. pp. 78-80.) The Facility does not argue otherwise; rather, it argues something entirely different, something completely unscathed by either of these arguments: that even though the AHCCA does not authorize Ms. Wright to bind Mr. Ladson to the Arbitration Agreement and even though no common law agency existed between Ms. Wright and Mr. Ladson, Mr. Ladson should still be bound to the Arbitration Agreement through merger and equitable estoppel.

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

Here, the circuit court erred in rejecting the Facility's merger/equitable estoppel argument, failing to recognize material distinctions between the facts of the instant case and those that controlled *Coleman* and its progeny, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

The 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,"[12] as indeed the Admission Agreement and the Arbitration

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

Agreement were here,[13] there is evidence to upset the *default presumption in favor of merger*, i.e., that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the particular circumstances necessary for the presumption of merger to even arise in the first place—again, same time, parties, purpose, and transaction—it is nonetheless still possible to draw a reasonable, non-speculative inference that the parties' intention was contrary to merger. No such inference can be drawn here.

Unlike all the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, 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. 71.)

Unlike the admission agreement at issue in *Coleman*, the "Entire Agreement" clause in the instant Admission Agreement does not separately

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[13] 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).

reference the arbitration agreement—in fact, the instant Admission Agreement does not refer to the instant Arbitration Agreement at all. (*See* R. p. 70.) Moreover, the "Entire Agreement" clause in the instant Admission Agreement expressly states that other admissions materials are deemed a part of the Admission Agreement. (R. p. 70.) Without question, the Arbitration Agreement is among the admissions materials.

To say that the Arbitration Agreement was not required for admission, which it was not,[14] 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. 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*

[14] (R. p. 31, line 19 – p. 32, line 3.)

makes sense together with the Admission Agreement, which is its (the Arbitrations 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. 59-70 (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 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.

Moreover, to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is presumed, and that this

presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together unless there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 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 should have found that the Arbitration Agreement merged with the Admission Agreement that Ms. Wright signed for Mr. Ladson pursuant to her authority under the AHCCA. The agreements were executed at the same time, by the same parties (Ms. Wright, for Mr. Ladson, and the Facility, by its agent Ms. Solomon), 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 relies on speculation, not evidence from which a

reliable conclusion can reasonably be drawn regarding the contracting parties' intent. *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.").

Re: Equitable Estoppel

In *Wilson v. Willis*, our Supreme 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),[15] and under which the Facility contends Mr.

[15] In *Pearson*, this Court advised that "the Federal Arbitration Act, 9 U.S.C. § 2 (1994), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, enforced by 9 U.S.C. §§ 201–08 (1994), 'create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'" 400 S.C. at 289, 733 S.E.2d at 601 (citation omitted). The Court further advised, "Because the determination of whether a nonsignatory is bound by a contract presents no state law question of contract formation or validity, the court looks to the federal substantive law of arbitrability to resolve the question." *Id.* at 289–90, 733 S.E.2d at 601. Looking to federal substantive law, the *Pearson* Court then instructed, "Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Id.* (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417–

Ladson (Plaintiff) is estopped from refusing to comply with the Arbitration Agreement here, where he 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 benefit test to answer the question of equitable estoppel in an arbitration case like this.

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

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418 (4th Cir. 2000)). "'In the arbitration context, th[is] 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.'" *Id.* (quoting *Int'l Paper* at 418) (emphasis omitted) (citation omitted). Thus, "'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.'" *Id.* (quoting *Int'l Paper* at 418) (citation omitted).

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. (*See generally* R. pp. 4-9.)

Respectfully, the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff is estopped to deny the Arbitration Agreement's enforceability, Mr. Ladson having effectively embraced/directly benefitted from the Admission Agreement for the purpose of his admission only to later, via Plaintiff, attempt to repudiate the Arbitration Agreement with which the Admission Agreement was merged.

CONCLUSION

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

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Dated: 6/23/20

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APPELLANT'S CERTIFICATION FOR FINAL BRIEF

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

Respectfully submitted,

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