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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2021-CP-15-00516
Appellate Case No. 2023-001282

Gabrielle Washington
as Personal Representative of the Estate of Walter Washington, Jr.,

Respondent,

v.

St. George Health Care, LLC, d/b/a St. George Healthcare Center and
Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center,

Defendants,

Of which St. George Health Care, LLC, d/b/a St. George Healthcare Center is

Appellant.

FINAL REPLY BRIEF OF APPELLANT

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Believing that Plaintiff's counterarguments are already amply rebutted by the analysis set forth in its principal brief, the Facility would underscore the following points in reply to Plaintiff's brief.[1]

ARGUMENT IN REPLY

1. While the Facility maintains that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement, the Facility would point out that Plaintiff's admission that "there is ambiguity" as to whether the Admission Agreement and the Arbitration Agreement merged[2] is tantamount to an admission that it is reasonable to conclude they did.

Even Plaintiff admits that there is at least ambiguity as to whether the Admission Agreement and the Arbitration Agreement merged. (Br. of Respondent p. 2 ("At its core, this Appeal presents a narrow issue that this Court . . . : whether a healthcare facility may bind a nonsignatory resident, or his estate, to an arbitration agreement *when there is ambiguity* as to whether the arbitration agreement and a separate facility admission agreement ever merged.") (emphasis added); *see also id.* at pp. 2–3 (asserting, albeit without any evidence, that the Facility purposefully "created an ambiguity" in this regard).)

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[1] Shorthand references already defined in the Facility's principal brief are continued in this reply brief (e.g., the "Facility" refers to Defendant/Appellant, St. George Health Care, LLC, d/b/a St. George Healthcare Center; "Plaintiff" refers to Plaintiff/Respondent, Gabrielle Washington as Personal Representative of the Estate of Walter Washington, Jr.; "Mr. Washington" refers to the decedent, Walter Washington, Jr.; and the "FAA" refers to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

[2] (Br. of Respondent p. 2.)

Of course, as explained in its principal brief, the Facility denies that there is any ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement, and adamantly maintains that—given the concurrence of all the particular circumstances necessary for the merger presumption even to arise in the first place (i.e., same time, parties, purpose, and transaction)—the circuit court's finding against merger relies on improper speculation, not evidence from which a reasonable, non-speculative inference can be drawn that there was an intention contrary to merger.

But the Facility would point out that, by admitting there is (in Plaintiff's view) ambiguity as to whether the Admission Agreement and the Arbitration Agreement merged, Plaintiff has effectively admitted that it is indeed reasonable to conclude they did. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation.").

This is notable because, as explained in the Facility's principal brief, to fall back on the idea that any ambiguity in regard to merger must be construed against merger makes no sense in this context. The *Coleman* Court clearly endorsed the rule of law that a presumption of merger arises where, as here, multiple instruments are executed at the same time, by the same parties, for the same

purpose, and in the course of the same transaction and that upsetting this presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014). While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter,[3] (a) it did so in dicta and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case[4]—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger—as, again, Plaintiff herself concedes is the case here.

2. Plaintiff's—and, indeed, the *Weaver* Court's—view of direct benefits estoppel is erroneous.

Citing this Court's decision in *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020), Plaintiff contends direct benefits estoppel is limited to situations where "(1) the nonsigner's claim arises from the

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[3] *Id.* at 407 S.C. at 355–56, 755 S.E.2d at 455.

[4] To be clear, none of *Coleman's* progeny has addressed this either.

contractual relationship, (2) the nonsigner has 'exploited' other parts of the contract by reaping its benefits, and (3) the claim relies solely on the contract terms to impose liability." (Br. of Respondent p. 20 (emphasis omitted) (quoting *Weaver*, 431 S.C. at 230, 847 S.E.2d at 272).). The *Weaver* Court itself cites our Supreme Court's decision in *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019), for this proposition, specifically, *Wilson*, 426 S.C. at 340–44, 827 S.E.2d at 175–77. But *Wilson*—which is binding on this Court as precedent[5]—does not actually support the proposition.

The *Weaver* Court cites *Wilson* as establishing the above-quoted three-part test for direct benefits estoppel, but *Wilson* simply does not do so. Rather, as explained in the Facility's principal brief, under *Wilson*, 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

[5] S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall

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/quotations and emphasis therein 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 simply 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. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the

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bind the Court of Appeals as precedents.").

purposes underlying enactment of the Arbitration Act.") (citation and internal quotation marks omitted).

As set forth in our Supreme Court's controlling decision in *Wilson*, and consistent with this Court's decision in *Pearson*, which the *Wilson* Court favorably cites, the essence of the test for direct benefits estoppel is simply number (2) quoted above (that "the nonsigner has 'exploited' other parts of the contract by reaping its benefits"), and neither number (1) (that "the nonsigner's claim arises from the contractual relationship") nor number (3) (that "the claim relies solely on the contract terms to impose liability") is required. Indeed, to require more than number (2)—especially to require number (3)[6]—is to invite the very sort of have-your-cake-and-eat-it-too inequity that the doctrine aims to prevent in the first place. In other words, to find against direct benefits estoppel for want of number (3) even where, as here, numbers (1) and (2) are plainly satisfied, is affirmatively to allow a plaintiff to exploit and enjoy the direct benefits of an agreement containing an arbitration clause while simultaneously avoiding the obligation to arbitrate so long as the plaintiff sues for something other than breach of contract.

[6] Number (1) is plainly satisfied here in any event, as the Admission Agreement, i.e., the instrument with which the Admission Agreement merged, was essential to the establishment of the relationship between the Facility and Mr. Washington out of which Plaintiff's claims against the Facility arise.

Neither *Wilson* nor this Court's decision in *Pearson* nor general notions of equity countenance,[7] much less call for, such a result.

3. Plaintiff is wrong in asserting that "the Facility's argument that the FAA applies to the arbitration agreement is not preserved for review."[8]

According to Plaintiff, because "[t]he Circuit Court did not specifically find in its December 7, 2022 Order that the agreements involve or affect interstate commerce and are thus governed by the FAA" and "[t]he Facility did not raise the issue in its December 19, 2022 Motion for Reconsideration and it was never ruled upon by the Circuit Court, . . . the Facility's argument that the FAA applies to the arbitration agreement is not preserved for review." (Br. of Respondent p. 4. n.2.) Plaintiff is mistaken.

As explained in the Facility's principal brief, there is no question that the FAA applies. (Br. of Appellant p. 3 n.6.) Plaintiff herself, in opposing the Motion to Compel Arbitration, did not argue that the FAA does not apply. (*See* R. pp. 50-73.) And in denying the Motion to Compel Arbitration (to include in denying the Facility's motion to reconsider its denial of the Motion to Compel Arbitration), the circuit court never ruled that the FAA did not apply. (*See* R. pp. 1-15.) No rule of issue preservation required the Facility to seek a ruling from the circuit court on an

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[7] *See Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.").

issue as to which (a) there was—and is—no dispute[9] and (b) the circuit court did not rule against it.

For that matter, the circuit court's express recognition in its order denying the Motion to Compel Arbitration that it "is . . . required to place [the] Arbitration Agreement *on equal footing* with any other contract governed by state law,"[10] is tantamount to a ruling that the FAA applies. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (Under the FAA, "courts must place arbitration agreements *on equal footing* with other contracts . . . .") (emphasis added). Accordingly, the issue/argument as to the FAA's applicability was indeed raised to and ruled on by the circuit court in favor of the Facility, and Plaintiff's preservation argument in this regard is misplaced.

And in any event, out of an abundance of caution, even assuming, *arguendo*, this issue/argument was not effectively ruled on by the circuit court, the Facility did all that was required to preserve it. The Motion to Compel itself expressly relied on the FAA. (R. pp. 47-48.) The Facility's memo in support of the Motion to Compel Arbitration expressly argued that "THE FAA GOVERNS THE ARBITRATION AGREEMENT." (R. pp. 78-79 (original bold print omitted).) The circuit court's order denying the Motion to Compel Arbitration expressly

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[8] (Br. of Respondent p. 4 n.2.)

[9] Indeed, Plaintiff's brief states, "The arbitration agreement, on the other hand, is governed by the FAA's statutes . . . ." (Br. of Respondent p. 14.)

recognized that the Motion to Compel Arbitration was made "pursuant to the Federal Arbitration Act,"[11] and as stated above, in denying the Motion to Compel Arbitration (to include in denying the Facility's motion to reconsider its denial of the Motion to Compel Arbitration), the circuit court never ruled that the FAA did not apply[12] and, indeed, expressly recognized that it was bound by the FAA's commandment that it "place [the] Arbitration Agreement on equal footing with any other contract governed by state law." (R. p. 2.) And besides expressly asking the circuit court "to (re)consider and expressly rule on each and every distinct issue/argument it raised in support of the [Motion to Compel Arbitration],"[13] which would, of course, include the Facility's aforementioned express argument that "THE FAA GOVERNS THE ARBITRATION AGREEMENT,"[14] the Facility's motion for reconsideration of the denial of the Motion to Compel Arbitration expressly argues that the circuit court's denial of the Motion to Compel Arbitration violates the FAA's "equal footing" rule, which necessarily included and sought a ruling on any threshold issue as to the applicability of the FAA.[15] *See Elam v. S.C.*

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10 (R. p. 2 (emphasis added).)

11 (R. p. 1.)

12 (*See* R. pp. 1-15.)

13 (R. p. 127.)

14 (R. pp. 78-79 (original bold print omitted).)

15 Though, again, to be clear, there was—and indeed is—no genuine issue as to whether the FAA applies (it plainly does), and the circuit court never ruled otherwise, but rather expressly recognized that it was bound by the FAA's

Dep't of Transportation, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original); *Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999) (once an issue/argument has been properly raised by a Rule 59(e), SCRCP, motion, it is preserved even if the lower court does not rule on it).

CONCLUSION

For the foregoing additional reasons, the Facility asks this Honorable Court to reverse the circuit court's denial of the Motion to Compel Arbitration and to stay this lawsuit in favor of arbitration between Plaintiff and the Facility (or to remand this matter to the circuit court with instructions that it stay the lawsuit in favor of arbitration between Plaintiff and the Facility) or, alternatively, to reverse the circuit court's denial of the Motion to Compel Arbitration and remand this matter 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 of such discovery; and, with the benefit of the same, for the circuit court to hear and decide the Motion to Compel Arbitration anew.

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commandment that it "place [the] Arbitration Agreement on equal footing with any other contract governed by state law." (R. p. 2.)

Respectfully submitted,

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APPELLANT'S CERTIFICATION FOR FINAL REPLY BRIEF

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I, Russell G. Hines, do hereby certify that the **Final Reply Brief of Appellant** complies with Rule 211(b), SCACR, and the Supreme Court's order of April 15, 2014.

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