THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Case No. 2020-CP-21-02290
Appellate Case No. 2021-000586

Mary Tisdale,
as Personal Representative of the Estate of Earlene Seabrook,

Respondent,

v.

Palmetto Lake City Operating, LLC
d/b/a Lake City-Scranton Healthcare Center
and Jeffrey Gibbs,

Defendants,

Of whom Palmetto Lake City Operating, LLC
d/b/a Lake City-Scranton Healthcare Center is the

Appellant.

FINAL REPLY BRIEF OF APPELLANT

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The Facility[1] makes the following points in reply to Plaintiff's brief.

ARGUMENT IN REPLY

1. Coupled with the merger of the Admission Agreement and the Arbitration Agreement, equitable estoppel provides a workable theory for enforcement of an arbitration agreement against a nonsignatory, as indeed Plaintiff herself acknowledges.

As even Plaintiff acknowledges,[2] South Carolina law recognizes the potential for equitable estoppel to be successfully invoked to enforce an arbitration agreement against a nonsignatory. *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 that could bind nonsignatories to arbitration agreements, including estoppel); *see also id.* at 340–45, 827 S.E.2d at 175–77 (favorably discussing the framework of the direct benefits test[3]—which test this Court, following its earlier

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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" is Defendant/Appellant, Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center; "Plaintiff" is Plaintiff/Respondent, Mary Tisdale ("Ms. Tisdale") as Personal Representative of the Estate of Earlene Seabrook; and "Ms. Seabrook" is the decedent, Earlene Seabrook).

[2] (*See* Br. of Resp. p. 13 ("Coleman [v. Mariner Health Care, Inc., 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014)] *did acknowledge the possibility equitable estoppel could be invoked if the disputed arbitration language was actually or effectively part of the same admission contract*.") (emphasis added).)

[3] *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

decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), had applied in the decision that was before the *Wilson* Court on writ of certiorari, and under which test the Facility contends that Ms. Seabrook, or, more precisely, her estate, i.e., Plaintiff, is estopped to deny the validity of the instant Arbitration Agreement where Ms. Seabrook received direct benefits (in the form of room, board, various amenities/services, and the care/treatment she received at the Facility about which Plaintiff does not complain) from the Admission Agreement with which the Arbitration Agreement merged);[4] *id.* at 340, 827 S.E.2d at 175 n.6

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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). 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. *See 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). Here, Ms. Seabrook was a direct beneficiary.

[4] To deny her receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of her residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff's complaint does not go nearly so far as that. (*See generally* R. pp. 23–39; *see also* Br. of Resp. p. 1 (explaining that Plaintiff's complaint alleges that Ms. Seabrook received deficient care/treatment at the Facility that led to her development of multiple pressure sores, one of which contributed to her death).) And Plaintiff's reference to the skepticism expressed in *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), (*see* Br. of Resp. p. 15 n.5 (citing

(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).[5]

"Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding it difficult to conclude a nursing home resident 'benefited' from a nursing home admission marked by negligent care that caused her death)")) is misplaced. To rely on this sort of reasoning is to improperly prejudge Plaintiff's allegations as true—and indeed to expand/exaggerate those allegations so as to wholly discredit every single aspect of the residency where not even Plaintiff herself does so.

[5] Plaintiff incorrectly asserts that the *Wilson* Court could not have meant what it said when it concluded that the traditional six-factor test for estoppel applied in non-arbitration cases. (Br. of Resp. p. 23 n.4.) According to Plaintiff, applying different rules to arbitration and non-arbitration contracts would violate the FAA's equal treatment rule. (*Id.*) This is not so. What the FAA requires is for arbitration agreements be placed on at least equal footing with all other contracts under state law. This means that arbitration agreements cannot be singled out for *disfavored* treatment relative to other contracts; however, it does not mean that arbitration agreements cannot be *favored* relative to other contracts, which, indeed, they are. *See Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 877 (Ct. App. 2020) ("There is a "strong South Carolina and federal policy favoring arbitration . . . ."); *id.* ("[A]rbitration agreements are presumed valid."); *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.").

2. It does not make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement to be separate contracts.

(a) The fact that the Arbitration Agreement was not a condition of or prerequisite to Ms. Seabrook's admission to the Facility lends no support whatsoever to the idea that the Admission Agreement and the Arbitration Agreement do not merge—indeed, Plaintiff herself even implicitly recognizes the integrated nature of the Admission Agreement and the Arbitration Agreement.

Respectfully, this business about the Arbitration Agreement not being a requirement of admission to the Facility is a red herring. 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,"[6] as indeed the Admission Agreement and the Arbitration Agreement were here, there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be considered and 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 circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and transaction—a reasonable, non-speculative inference can be drawn that the parties' possessed a contrary intention.

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

While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement is indeed necessary to the Arbitration Agreement. So yes, the Admission Agreement *could* have stood on its own, 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, of course, and it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction. Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, 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.

As explained in the Facility's principal brief, it matters not whether the Arbitration Agreement was a condition of admission, only that it was agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement—once agreed upon—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 Ms. Seabrook's relationship with the Facility. (*See* Br. of Resp. pp. 1–2 (implicitly acknowledging the hand-in-

glove relationship between the Admission Agreement and the Arbitration Agreement by acknowledging that the Admission Agreement "governed the type of care Ms. Seabrook would receive at the Facility and Ms. Seabrook's financial obligation to pay for those services," i.e., that it set forth the terms of Ms. Seabrook's admission, while the Arbitration Agreement "provided for alternative dispute resolution for any claim a party may bring against another arising out of Ms. Seabrook's admission in the Facility"—and thus implicitly acknowledging that the Admission Agreement and the Arbitration Agreement govern interrelated aspects of Ms. Seabrook's relationship with the Facility such that the Arbitration Agreement, if signed, is inextricably tied to the Admission Agreement).)

(b) The formatting and structure of the Admission Agreement and the Arbitration Agreement provide no evidence of intention contrary to merger.

Essentially, Plaintiff's point here is that the mere fact that the Admission Agreement and the Arbitration Agreement were separate instruments evidences an intention contrary to merger. Respectfully, this reasoning is specious. As explained in the Facility's principal brief, for the issue of merger to even arise to begin with, there have to be separate instruments. Obviously, such a self-defeating view of the doctrine of merger cannot be correct.

Moreover, the formatting/structure of the Admission Agreement and the Arbitration Agreement is indeed pro-merger. As explained in the Facility's

principal brief, while the Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract, and indeed, it expressly contradicts the idea of its "separatedness" (in the parlance of the *Coleman* Court) by expressly stating that "other Admissions materials"—the Arbitration Agreement among them—are made a part of it by reference. (*See* Br. of App. p. 12 (citing *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)).) And, again, as explained elsewhere, it does not make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement to be separate contracts given that the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being.

3. The fact that Ms. Seabrook did not herself sign the Arbitration Agreement is beside the point.

Plaintiff makes much of the fact that Ms. Seabrook did not herself sign the Arbitration Agreement. (*See, e.g.*, Br. of Resp. p. 11 ("Ms. Seabrook never signed or otherwise assented to the Arbitration Agreement on which the Facility relies to support its motion."); *id.* at p. 12 ("The Arbitration Agreement was not signed by Ms. Seabrook or offered for her signature."); *id.* at p. 23 ("Ms. Seabrook did not

sign the Arbitration Agreement or authorize anyone to sign for her. Yet, the Facility argues South Carolina Supreme Court precedent suggests Ms. Seabrook/Respondent are equitably estopped from opposing arbitration").) It is, of course, true that Ms. Seabrook did not herself sign the Arbitration Agreement, but the Facility has never argued otherwise.

Without question, the Facility seeks to enforce the Arbitration Agreement against a *nonsignatory*, and again, South Carolina law recognizes several theories under which this may be done. *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 ("South Carolina has recognized several theories that could bind *nonsignatories* to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.") (emphasis added).

To be sure, Ms. Seabrook is a nonsignatory to the Arbitration Agreement. The Facility makes no argument to the contrary. Rather, the Facility's argument is that, even as a nonsignatory, Ms. Seabrook, and in turn Plaintiff (her estate), is bound by the Arbitration Agreement. Thus, where Plaintiff does no more than point out that Ms. Seabrook is a nonsignatory to the Arbitration Agreement, she misses the Facility's point.

4. Plaintiff is wrong to assert that the Admission Agreement and the Arbitration Agreement were not executed for the same purpose.

As the *Coleman* Court expressly observed regarding the admission agreements and arbitration agreements before it (which *in this respect* are no different than the instant agreements—though that is not the case in regard to the material facts bearing on the question of merger), "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).

5. The "survival" of the Arbitration Agreement is no evidence of "separatedness" (in the parlance of the *Coleman* Court[7]).

Contrary to Plaintiff's contention, the Admission Agreement and the Arbitration Agreement do not have inconsistent termination provisions. As explained elsewhere, 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

[7] 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).

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 connected to the Admission Agreement even after the termination of the Admission Agreement. There is nothing inconsistent about this. 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.").

6. Contrary to Plaintiff's contention, the phrase "other Admissions materials" does not give rise to ambiguity.

In an effort to rebut the Facility's point that Arbitration Agreement is among 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 is thus ambiguous. (Br. of Resp. pp. 18–19.) This is not so.

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. Again, in *Stott*, this Court expressly referred to an arbitration agreement as "admission documentation." 426 S.C. at 571–72, 828 S.E.2d at 84 ("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).

As explained elsewhere, to say that the Arbitration Agreement was not required for admission, which it was not, 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. Tisdale on Ms. Seabrook's behalf. The hand-in-glove relationship between the Admission Agreement and the Arbitration Agreement is proof of the Arbitration Agreement's *connectedness* to the Admission Agreement. Though not a *condition* of admission, the Arbitration Agreement 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 Ms. Seabrook's relationship with the Facility. (*Compare* R. pp. 133-144 (setting forth the terms of Ms.

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[8] (R. p. 144.)

Seabrook's admission) *with* R. p. 98 (providing for arbitration of disputes arising out of Ms. Seabrook's admission).)

7. Despite Plaintiff's attempt to water down the standard for rebutting the merger presumption,[9] unless the merger doctrine is to be rendered meaningless, "anything indicating a contrary intention"[10] must be at least evidence capable of supporting a reasonable, non-speculative inference that the parties' intention was contrary to merger.

It must be remembered that the presumption of merger arises only where the four elements of time, parties, purpose, and transaction coincide—as they all do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. If even one of these is lacking there is no merger. This is why, as explained in the Facility's principal brief, 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."). The merger presumption is

[9] (*See* Br. of Resp. p. 13 ("Thus, simultaneously executed writings relating to the same general subject matter will not be viewed as a single or merged agreement if either their language or the circumstances *even hint* that the parties actually intended the writings to be distinct, separate contracts.") (emphasis added).)

"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.

8. A presumption against arbitration when enforcement is sought against a nonsignatory violates the FAA.

Plaintiff cites *Wilson*, 426 S.C. 326, 827 S.E.2d 167, for the proposition that, under South Carolina law, there is a presumption against arbitration when enforcement is sought against a non-signatory. (Br. of Resp. p. 3.) As explained in the Facility's principal brief, the FAA requires arbitration agreements to be placed on equal footing with all other contracts under state law and prohibits courts from setting aside arbitration agreements based on state-law defenses "that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Thus, under the FAA, there cannot be a presumption against enforcement of arbitration agreements against nonsignatories unless the same presumption also applies to enforcement of all other contracts against nonsignatories. The Facility is aware of no such general presumption under South Carolina law, and Plaintiff cites none. Indeed, where the *Wilson* Court itself referenced "a presumption *against* arbitration .

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[10] (Br. of Resp. p. 22.)

. . where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate,"[11] it cited no South Carolina authority and the authority it did cite addressed arbitration in particular, not contracts generally. *Id.* ("*Global Pac., LLC v. Kirkpatrick*, 88 N.E.3d 431, 435 (Ohio Ct. App. 2017) ('Because no party can be required to submit to arbitration when it has not first agreed to do so, in a case where the party resisting arbitration is not a signatory to any written agreement to arbitrate, a presumption against arbitration arises.'); *cf. Comer v. Micor, Inc.*, 436 F.3d 1098, 1103–04 (9th Cir. 2006) (noting 'the general rule that a nonsignatory is not bound by an arbitration clause')."). The supposed presumption against arbitration violates the FAA's equal footing rule and cannot be applied in this case.

CONCLUSION

For the foregoing reasons, together with those already set forth in its principal brief, the Facility asks this Honorable Court to reverse the circuit court and to stay this lawsuit in favor of arbitration (or remand the case to the circuit court with instructions for it to do so) or, at a minimum, to reverse the circuit court as to its denial of the Facility's alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability.

[11] 426 S.C. at 337–38, 827 S.E.2d at 173 (emphasis in original).

Respectfully submitted,

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