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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2021-CP-42-03701

Court of Appeals Case No. 2023-000432
Unpublished Opinion No. 2024-UP-083 (S.C. Ct. App. filed March 20, 2024)

Supreme Court Case No. 2024-001031

The Estate of Jo Eva Rice, deceased,
by her Personal Representative Sonya Lovett,

Respondent,

v.

Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC; and
THI of South Carolina at Magnolia Place–Spartanburg,
a/k/a Physical Rehab and Wellness of Spartanburg,

Petitioners.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Petitioners make the following points in reply to Plaintiff's brief.[1]

ARGUMENT IN REPLY

1. Unless the merger doctrine is to be rendered meaningless—and unless court orders in this regard are to be allowed to be based on nothing more than speculation—the standard for rebutting the merger presumption must at least require evidence capable of supporting a reasonable, non-speculative inference of an intention contrary to merger.

Recognizing that the facts surrounding the execution of the Admission Agreement and Arbitration Agreement clearly give rise to the presumption of merger (i.e., that these instruments were clearly executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction), Plaintiff tries to water down the standard for rebutting the merger presumption. According to Plaintiff, "[t]wo contracts do not 'merge' if their text, context, or any of the circumstances surrounding their formation indicate the parties intended they remain distinct documents." (Return p. 5.) In support of this assertion, Plaintiff cites *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), and *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). (Return p. 5.) In particular, Plaintiff cites *Klutts* for the proposition that "there is no merger if there is '*anything* indicating a contrary intention.'" (Return p. 5 (emphasis supplied by Plaintiff).)

Again, as explained in Petitioners' petition, it must be remembered that the presumption of merger arises only where the four elements of time, parties, purpose, and transaction

[1] Shorthand references already defined in Petitioners' petition are continued in this reply brief (e.g., the "Facility" refers to Defendant/Petitioner THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Physical Rehabilitation and Wellness Center of Spartanburg (misidentified in this action as "THI of South Carolina at Magnolia Place–Spartanburg, a/k/a Physical Rehab and Wellness of Spartanburg"); the "Other Defendants" refers to Defendants/Petitioners Fundamental Clinical and Operational Services, LLC, and Fundamental Administrative Services, LLC, collectively; "Petitioners" refers to the Facility and the Other Defendants, collectively; "Plaintiff" refers to Plaintiff/Respondent, The Estate of Jo Eva Rice, deceased, by her Personal Representative Sonya Lovett; "Ms. Lovett" refers to Sonya Lovett, personally; and "Ms. Rice" refers to the decedent, Jo Eva Rice).

coincide—as, of course, they do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. Thus, the merger presumption is "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). And 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.

Accordingly, unless the merger doctrine is to be rendered meaningless—and unless court orders in this regard are to be allowed to be based on nothing more than speculation—the standard for rebutting the merger presumption 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 of intention 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.").

2. Contrary to Plaintiff's assertion, the arguments that Petitioners present in support of merger/equitable estoppel have not been rejected by South Carolina's appellate courts.

According to Plaintiff, the arguments that Petitioners present in support of merger/equitable estoppel were previously rejected in *Coleman*, 407 S.C. 346, 755 S.E.2d 450; *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018); and *Solesbee v. Fundamental Clinical & Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023). (*See* Return pp. 3–10.) This is not so. As explained in Petitioners' petition, and

underscored in this reply, in this case, there are material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not involved or addressed in) *Coleman*, *Thompson*, *Hodge*, and *Solesbee*, the latter of which itself misapprehended *Coleman* and *Hodge*.

The *Coleman* Court found against merger of the admission agreement and arbitration agreement before it because the admission agreement contained language in an "Entirety of Agreement" section that referenced the arbitration agreement in a way that "recognize[d] the 'separatedness' of the [arbitration agreement] and the admission agreement" and because "the [arbitration agreement] could be disclaimed within thirty days of signing while the admission agreement could not;" thus, "[b]y their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply." 407 S.C. at 355, 755 S.E.2d at 455.

As explained in Petitioners' petition, the present case is materially different from *Coleman* because (a) the "Entire Agreement" clause in the instant Admission Agreement does not reference the Arbitration Agreement as a separate contract, but rather expressly states that "other Admissions materials" are part of the Admission Agreement,[2] thereby expressly contemplating the lack of its own supposed "separatedness," and (b) the instant Arbitration Agreement does not contain a disclaimer/revocation provision. (R. p. 133.)

As for the part of the *Coleman* decision that states, "Even if the 'Entirety' clause creates an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter, in this case, appellants,"[3] by its own terms ("Even if"), it is not essential to the Court's holding and, thus, dicta. *See Nash v. Tindall Corp.*, 375 S.C. 36, 40, 650 S.E.2d 81,

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[2] (R. p. 175.)

[3] 407 S.C. at 35–56, 755 S.E.2d at 455.

83 (2007) ("Judicial dicta is 'not essential to the decision.'") (quoting *Black's Law Dictionary* 465 (7th ed. 1999)); *id.* at 40–41, 650 S.E.2d 81, 83 ("Dicta or, as it is also known, dictum 'is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision.'") (quoting 21 C.J.S. *Courts* § 227 (2006)). And besides the fact that this language from *Coleman* is dicta—as well as, of course, Petitioners' contention, explained in their petition, that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—the *Coleman* Court's dicta did not address Petitioners' argument (set forth in their petition) that it makes no sense in this context to construe supposed ambiguity against merger because 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.

Indeed, even to say that the evidence is such as to create ambiguity as to merger is to say that the evidence is sufficient to support a reasonable conclusion in favor of merger. *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.") (emphasis added). 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." 407 S.C. at 355, 755 S.E.2d at 455. Where, as here, the particular circumstances are such as to give rise to the merger presumption (same time, parties, purpose, and transaction) it is illogical to allow 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, still supports a reasonable conclusion in favor of merger.

The *Thompson* Court's whole discussion of merger is, in fact, dicta. 416 S.C. at 49–50, 784 S.E.2d at 683 ("Appellants argue the [arbitration agreement] 'merged' with the Admission Agreement, which Son was authorized to execute under the Act, making both agreements one and the same. We disagree. Initially, we note this issue is not preserved for our review."); 416 S.C. at 50, 784 S.E.2d at 683; *id.* ("Based on the foregoing, Appellants are precluded from arguing the doctrine of merger in this appeal."); *id.* ("*Even if* Appellants' merger argument had been properly preserved, we would affirm on the merits.") (emphasis added).

Beyond this, the *Thompson* Court's dicta regarding the merits of the merger argument largely relies on the proposition in *Coleman* that separatedness is evidenced by the presence of disclaimer/revocation provision in the arbitration agreement and the lack of such a provision in the admission agreement:

> Here, as in *Coleman*, the [arbitration agreement] contained language that provided it could be disclaimed within thirty days, yet the Admission Agreement did not include such a provision. Appellants argue the Admission Agreement could have been "disclaimed" at any time by Mother leaving the facility and thus, the right to disclaim the [arbitration agreement] does not show the parties intended for the AA to be separate from the Admission Agreement. This is not a valid comparison. Because there are no provisions in the Admission Agreement allowing Mother to disclaim it, leaving the facility would be the only way she could "disclaim" the agreement, whereas the [arbitration agreement] allows the patient to disclaim the [arbitration agreement] unconditionally. Therefore, Mother's right to disclaim the [arbitration agreement] without having to terminate her residency at the facility indicates the parties' intent to keep the [arbitration agreement] separate from the Admission Agreement. This is consistent with the [arbitration agreement's] statement that its execution was not a condition precedent for being admitted to the nursing home: "The signing of this Agreement is not a precondition to admission, expedited admission, or the furnishing

> of services to the Patient/Resident by the Healthcare Center[.]" This demonstrates the parties' intent that the two agreements retain their separate identities.

Thompson, 416 S.C. at 53, 784 S.E.2d at 685.

As explained above (and elsewhere), the instant Arbitration Agreement does not contain a disclaimer/revocation provision. Thus, the critical factual premise underpinning the *Thompson* Court's reasoning—which premise the *Thompson* Court used both to liken the case before it to *Coleman* and to support its view that the lack of a disclaimer/revocation provision in the admission agreement was consistent with the arbitration agreement not being a condition precedent to admission, which, taken in tandem, the court viewed to demonstrate an intent or the two agreements to retain their separate identifies—is simply not present in the instant case.

Additionally, the *Thompson* Court, again, in dicta, rejected the appellants' argument that the admission agreement incorporated the arbitration by reference as an "exhibit," explaining that "the Admission Agreement is ambiguous on this point because (1) it does not define the term 'exhibit' or cross-reference any specific exhibits and (2) the [admission agreement] does not include any labels or other language indicating it serves as an exhibit or addendum to the Admission Agreement" and, "[t]herefore, the Admission Agreement's provision incorporating all 'exhibits' must be construed against Appellants," pursuant to *Coleman*. *Thompson*, 416 S.C. at 53–54, 784 S.E.2d at 685.[4]

As explained above, the part of the *Coleman* decision that states, "Even if the 'Entirety' clause creates an ambiguity as to merger, the law is clear that any ambiguity in such a clause is

[4] The *Thompson* Court also cited *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 94, 594 S.E.2d 485, 493 (Ct. App. 2004), but for the proposition that "[a] contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear," not for the proposition that the admission agreement must be construed against the appellants. *Thompson*, 416 S.C. at 53–54, 784 S.E.2d at 685.

construed against the drafter, in this case, appellants,"[5] by its own terms ("Even if"), it is not essential to the Court's holding and, thus, dicta. *See Nash*, 375 S.C. at 40, 650 S.E.2d at 83. Moreover, and, again, as explained above, besides the fact that this language from *Coleman* is dicta—as well as, of course, Petitioners' contention, explained in their petition, that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—the *Coleman* Court's dicta did not address Petitioners' argument (set forth in their petition) that it makes no sense in this context to construe supposed ambiguity against merger because 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 and, indeed, still supports a reasonable conclusion in favor of merger—is to allow the exception to devour the rule and illogical. Nor, of course, did the *Thompson* Court address this.

Further still, the facts are materially different from *Thompson* here. The instant Admission Agreement does not merely purport to incorporate unspecified "exhibits," but rather, as already explained in Petitioners' petition, in language directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[6]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." (R. p. 175.) And, without question, the plain and ordinary meaning of the language "other Admissions materials" is such as to embrace the Arbitration Agreement. *See*

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[5] 407 S.C. at 35–56, 755 S.E.2d at 455.

[6] 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).

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)). Even further, Petitioners' argument in favor of merger here includes pointing out the undeniable lack of "separatedness" evidenced by the fact that the instant Admission Agreement expressly incorporates "other Admissions materials" therein, and there is no indication that the *Thompson* Court considered anything of this sort.

In a footnote, the *Thompson* Court stated—in conclusory fashion (with no citation to any supporting authority)—that the fact that "the front page of the [arbitration agreement] is labeled 'Arbitration Agreement,' indicat[es] the parties' intent for it to stand by itself as an independent contract." 416 S.C. at 53, 784 S.E.2d at 685 n.1. As already explained in Petitioners' petition, to point to the fact that the Admission Agreement and the Arbitration Agreement have their own titles (or are separately paginated or signed) provides no reasonable inference of an intent contrary to merger, as 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. And aside from the decision in *Thompson* being illogical (and, again, conclusory) in this regard, here again, there is no indication that the *Thompson* Court considered any argument in challenge to the view that the mere title of the arbitration agreement constitutes probative evidence of an intent for its stand by itself.

The *Hodge* Court's finding against merger was based on a number of factors taken in totality:

> In the present case, [1] the Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. [2] Like in *Coleman*, the Arbitration Agreement recognized a separatedness as it referenced the two documents separately, stating "[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement." [3] Also, the Arbitration Agreement stated it could be revoked within thirty days, whereas the Admission Agreement contained no such indication and instead provided the Admissions Agreement could only be amended by the patient with written agreement executed by the Facility and the patient in the same manner as the Admissions Agreement was executed or if the Facility sent a notice of the amendment to the patient and the patient did not reject the amendment within thirty days. [4] Further, each document was separately paginated and had its own signature page. [5] Additionally, the Arbitration Agreement stated signing it was not a precondition to admission. *Based on all of this*, we find the Admissions Agreement and Arbitration Agreement did not merge.

422 S.C. at 562–63, 813 S.E.2d at 302 (numbering and emphasis added).

As already explained in Petitioners' petition, in respect of the five factors addressed by the *Hodge* Court, the instant case is materially different from *Hodge* on the facts and/or involves arguments that were not addressed by the *Hodge* Court. Moreover, the plain language of *Hodge* makes clear that its finding against merger is based on its assessment of a multitude of particular factors taken together and provides no support for Plaintiff's view that any of these factors

standing alone—without regard to their context or the impact of other factors—can support a reasonable, non-speculative finding against merger.

Lastly, the *Solesbee* Court likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 ("Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility's] equitable estoppel argument was properly denied.").) Respectfully, as explained in Petitioners' petition, the *Solesbee* Court's reasoning is erroneous and does not address the entirety of the arguments presented to it (nor does it address the entirety of the arguments presented in the present case), and while it is true that the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*, *Solesbee* should not control the disposition of this case. (*See* Petition pp. 4–17.)

CONCLUSION

For the foregoing additional reasons, along with any other or further reason(s) set forth in their appellate briefs already on file, the entirety of which they hereby adopt and incorporate herein by reference and reiterate/reassert in support hereof, Petitioners ask this Honorable Court to grant the instant petition, reverse the Subject Opinion, and decide this appeal anew via an opinion that reverses the Court of Appeals and the circuit court and stays Plaintiff's claims against the Facility in favor of arbitration and stays Plaintiff's claims against the Other Defendants pending the outcome of arbitration between Plaintiff and the Facility (or, alternatively, that reverses the Court of Appeals and the circuit court and remands the case to the circuit court with instructions that it stay Plaintiff's claims against the Facility in favor of

arbitration and stay Plaintiff's claims against the Other Defendants pending the outcome of arbitration between Plaintiff and the Facility, or, alternatively, that reverses the Court of Appeals on the issue of merger and remands the case to the Court of Appeals to address the arguments that it did not reach previously to determine whether the circuit court's denial of the Motion to Compel Arbitration and the Motions to Stay Should be reversed).

Respectfully submitted,

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