THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2017-CP-42-00219
Appellate Case No. 2020-001613

Jo Ann Blackwell, Michelene Brooks, and Samuel H. Owens, Jr., individually and on behalf of all others similarly situated,

Respondents,

v.

Mary Black Health System, LLC, d/b/a Mary Black Memorial Hospital; CHSPSC, LLC; Professional Account Services, Inc.,

Appellants,

APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

James Lynn Werner, (SC Bar No. 6029)
Katon E. Dawson, Jr. (SC Bar No. 101167)
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100
Columbia, SC 29201
(803) 255-8000
jimwerner@parkerpoe.com
katondawson@parkerpoe.com

STATEMENT OF POINTS OVERLOOKED OR MISAPPREHENDED

Pursuant to Rules 219(b) and 221(a), SCACR, and for the reasons below, Defendants-Appellants Mary Black Health System, LLC, d/b/a Mary Black Memorial Hospital ("Mary Black"); CHSPSC, LLC; and Professional Account Services, Inc. (collectively, "Defendants") petition the Court for rehearing and rehearing *en banc* of the September 18, 2024 panel Opinion No. 6088 (the "Panel Opinion"). Defendants request rehearing because:

I. The Panel Opinion directly conflicts with this Court's decision (by the same Panel of Judges) in *Bennett v. ACS Primary Care Physicians-Southeast P.C.*, Case No. 2021-001342, Opinion No. 6089, which concerns virtually identical allegations and legal questions. Because these two decisions are inconsistent and cannot be reconciled, Defendants request rehearing. If left unaddressed, the conflict will lead to inequitable results, sow confusion in the law of equitable estoppel and arbitration and encourage or promote gamesmanship and artful pleading.

II. The Panel Opinion misapprehends and misinterprets the applicable contract provisions reflecting the common contractual terms addressing the scope of the arbitration agreement and the class arbitration waiver. In so doing, the Panel Opinion is inconsistent with decisions by the United States Supreme Court, potentially violates the Federal Arbitration Act, and invites further gamesmanship in pleadings.

III. The Panel Opinion overlooks that, by failing to exercise its legitimate discretion in a proper case and failing to review orders denying Defendants' motions to dismiss, it failed to fully consider the nature of the claims that Defendants seek to arbitrate, contributing to the foregoing errors in the Panel Opinion.

BACKGROUND

A. Plaintiffs' Allegations.

Plaintiffs allege that Defendant Mary Black (a hospital) provided them with emergency care following motor vehicle accidents. Plaintiffs allege that Mary Black and its Co-Defendant affiliates' "contracts with patients' health insurance carriers" "required" Defendants to submit Plaintiffs' medical bills for this care "directly to the carriers." (R. 68, ¶ 28). But, according to Plaintiffs, Defendants billed them instead.

By doing so, Plaintiffs allege, Defendants tortiously interfered with certain contractual relationships and were unjustly enriched. Specifically, Plaintiffs' tortious interference theory is that (1) Plaintiffs allegedly had contractual relationships with their insurers; (2) Defendants allegedly knew or should have known of those relationships; and (3) Defendants allegedly interfered with and disrupted those relationships by preventing them from receiving the benefit of those relationships, in that Plaintiffs paid premiums but, due to Defendants' alleged billing practices, received "little to no benefit." (R. 75-76, ¶¶ 64–67). It is unclear—and Plaintiffs do not say—how any of this caused either Plaintiffs or their insurance carriers to breach any terms of the alleged contractual relationships between them. As for unjust enrichment, Plaintiffs allege that "payment for the services provided *should have come from the [Plaintiffs'] health insurance carriers*," with the amount to be paid "*determined by the contracts between Defendants and patients' health insurance carriers.*" (R. 76, ¶ 73 (emphasis added)). Thus, Plaintiffs allege, Defendants were unjustly enriched by receiving different amounts. (R. 76, ¶¶ 71–72). Plaintiffs also seek injunctive relief, alleging that Defendants "were required" to submit Plaintiffs' medical bills "directly to their health insurers for payment" and "to honor" certain "contractually agreed-upon discounts" arising from the contracts between Defendants and the Plaintiffs health insurance carriers. (R. 77, ¶¶ 76–78).

Plaintiffs style their case as a class action. In alleging the "principal common issues," however, Plaintiffs identify no common issues involving any alleged contractual agreement between themselves and their insurers. Instead, they primarily list purported violations of the specifically alleged contracts between *Defendants* and patients' insurers. (R. 72 - 73, ¶ 57(a) ("Whether Defendants entered into express and/or implied agreements with various health

insurance carriers…."); ¶ 57(b)–(e) (listing several questions about whether "Defendants violated" those alleged contracts)).

B. The Panel Opinion.

Plaintiff Samuel H. Owens, Jr. alleges that his health insurance carrier is CIGNA. (R. 71, ¶ 48). An agreement between CIGNA and Mary Black (the "CIGNA Agreement") requires any disputes arising with respect to its interpretation or performance to be resolved through individual arbitration. (R. 275–76). Based on the CIGNA Agreement, Defendants moved to compel Plaintiff Owens to the arbitration, and also moved under Rule 12(b)(6) to dismiss all claims for failure to state a claim. The circuit court denied the motions, and Defendants appealed.

On appeal, Defendants argued that the CIGNA Agreement's arbitration provision binds Plaintiff Owens, by application of the well-established principle of equitable estoppel, because he premised his suit on the theory that he should have received benefits under the CIGNA Agreement in the form of the lower health care charges that CIGNA negotiated with Defendants. Under the doctrine of equitable estoppel, Defendants explained, Owens may not claim a contractual benefit (contractually-mandated lower fees) on the one hand, while disclaiming a contractual obligation (arbitration) on the other. Relatedly, as analyzing the estoppel issue requires the Court to interrogate the nature of the claims, Defendants asked the Court to review the circuit court's denial of Defendants' motion to dismiss. Nevertheless, in the Panel Opinion, the Court affirmed the denial of Defendants' motions to compel arbitration and declined to review the motions to dismiss.

In addressing arbitration, the Panel Opinion correctly holds that the arbitration provision in the CIGNA Agreement is binding and enforceable. (Panel Op. at 9). It correctly notes that under equitable 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." (*Id*. at 9 (quoting *Wilson v. Willis*, 426 S.C. 326, 340–41, 827 S.E.2d 167, 175 (2019)). And, the Panel correctly explains that estoppel applies where "(1) the nonsigner's claim arises from the 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." (*Id.* at 10 (quoting *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 230, 847 S.E.2d 268, 272 (Ct. App. 2020)).

Nevertheless—and contrary to Plaintiffs' own allegations—the Panel held that Owens was not estopped because he "never alleged in the complaint that he received a direct benefit from the CIGNA Agreement[] and his claims for tortious interference with a contract and unjust enrichment are not pled as arising from the CIGNA Agreement." (*Id.* at 10). The Panel Opinion states that Owens' tortious interference claim "does not arise solely from or have to be determined in reference to the CIGNA Agreement" because "it arises out of tort law and does not refer or relate to the CIGNA Agreement even if it would not have arisen but for the agreement." (*Id.*). Likewise, the Panel Opinion holds that the unjust enrichment claim "does not rely on the CIGNA Agreement" because, even though it "refers to the CIGNA Agreement," "the claim does not rely upon or have to be determined by refence to the CIGNA Agreement." (*Id.* at 11). Thus, the Panel Opinion states, "the claim could be determined in reference to Owen's insurance contract with CIGNA." (*Id.*).

Additionally, while the Panel Opinion recognizes that "Owens's claim for injunctive relief does rely on the CIGNA Agreement," the Panel Opinion concludes that Owens need not arbitrate this claim because his other two claims "do not arise from the CIGNA Agreement." (*Id.* at 11–12). In addition, as an alternative ground for refusing to compel arbitration, the Panel Opinion interprets a class arbitration waiver to hold that Defendants cannot to compel a plaintiff to

arbitration if the plaintiff already joined a class action. (*Id.* at 12). Finally, the Panel Opinion declines to review any part of the denial of Defendants' Rule 12(b)(6) motions, stating that "the issues raised by [the] Rule 12(b)(6) motions would benefit from further factual development." (*See id.* at 12–13).

This Panel Opinion was not unanimous. Agreeing with Defendants, Judge Geathers wrote in dissent that Owens is equitably estopped from disclaiming the agreement to arbitrate because "the causes of action in the Amended Complaint ... invoke [Defendants'] contractual duties to the insurance carriers with which the [Plaintiffs] also had contracts." (*Id.* at 13–14).

C. The *Bennett* Opinion.

On the very same day that the Panel Opinion issued, this Court (in fact, the same Panel of Judges) also decided *Bennett v. ACS Primary Care Physicians-Southeast P.C.*, No. 2021-001342, 2024 WL 4234720 (S.C. Ct. App. Sept. 18, 2024). This case and *Bennett* are virtually identical. As here, the *Bennett* plaintiffs brought a putative class action alleging that a defendant healthcare provider improperly sent bills to patients rather than their insurers. As here, the *Bennett* plaintiffs brought unjust enrichment and injunctive claims. As here, the *Bennett* defendants moved to compel arbitration because plaintiffs were bound by an agreement to arbitrate between defendants and plaintiffs' insurers and were equitably estopped from contending otherwise. As here, the circuit court denied the motion to compel arbitration and the defendants appealed.

Unlike here, however, this Court held in *Bennett* that equitable estoppel did apply and the plaintiffs in *Bennett* were subject to the arbitration clause in their defendants' agreements with their insurance carriers. *Bennett*, 2024 WL 4234720, at *3–4. Based on the irreconcilable differences in reasoning and outcome between this case and *Bennett,* and on other critical issues

that the Court appears to have either overlooked or misapprehended, Defendants respectfully petition for rehearing and rehearing *en banc*.

ARGUMENTS

I. The Panel Opinion Risks Confusion and Encourages Gamesmanship and Artful Pleading in Future Cases.

A. The Panel Opinion Directly Conflicts with *Bennett*.

The rule of *stare decisis* is one of consistency. *Roof v. Charlotte, C. & A.R. Co.*, 4 S.C. 61, 62–63 (1872). "[W]here the same points come again in litigation, as well to keep the scale of justice even and steady," courts are "not delegated to pronounce a new law." (quoting Herbert Broom, *A Selection of Legal Maxims*)). Accordingly, where there is a "state of conflict" between decisions, "it is up to the court to 'choose ye this day whom he will serve" and "determine which doctrine best appeals to its sense of law, justice, and right." *Antley v. New York Life Ins. Co.*, 139 S.C. 23, 137 S.E. 199, 201 (1927).

The similarities between the core allegations in this case and those in *Bennett* are striking, as the following chart highlights:

***Blackwell* Amended Complaint (R. 63 *et seq.*)**	***Bennett* Complaint (Case No. 2021-001342, R. 37 *et seq.*)**
¶ 15: "[Mary Black] provided healthcare services for Plaintiffs and the general public"	¶ 8: "Defendant … provide[s] emergency medicine services."
¶ 28: "Defendants are required by their contracts with patients' health insurance carriers to submit insurance patients' medical bills directly to the carriers."	¶ 2: "Defendant … contract[ed] with [BCBS] … ([the] 'Provider Agreement'). Under the Provider Agreement, Defendant agreed to bill BCBS directly for services rendered to patients insured through BCBS ('Insureds')."
¶ 57(a): "Defendants violated their contracts with various health insurance carriers by not submitting medical bills to the carrier."	¶ 4: "Defendant refused to bill BCBS for services rendered to Insureds."
¶ 57(c): "Defendants … pursue[ed] payment directly from patients[.]"	¶ 4: "Defendant would bill Insureds directly at a rate higher than the negotiated BCBS

	rate, resulting in an increase to healthcare costs to Insureds."
¶ 67: "Defendants' actions resulted in Plaintiffs and the Class Members having paid premiums but receiving no or little benefit."	¶ 66: "Defendant's breaches have deprived Plaintiff and Class members of benefits they paid for through their health insurance with BCBS."
¶¶ 69–74: "Defendants have been unjustly enriched in that they received and retained the benefits of proceeds to which they were not entitled …. [P]ayment for the services provided should have come from the health insurance carriers … with the amount to be paid … determined by the contracts between Defendants and patients' health insurance carriers."	¶¶ 69–75: "[B]enefits were realized by Defendant through the billing of Class members directly at a rate for services that was higher than the agreed upon BCBS rate. Defendant realized the value of payments from Class members through this improper billing. Had Defendant followed the terms of the Provider Agreement, it would have received less money for these services."

Yet, in applying the doctrine of equitable estoppel to these indistinguishable allegations, the Court comes to divergent results, creating an immediate conflict in the law of equitable estoppel.

This conflict is most stark when one compares the respective treatment of the plaintiffs' unjust enrichment claims. The unjust enrichment allegations in *Bennett* are virtually identical to those here. (*Compare* R. 76 ¶¶ 69–74, *with* Case No. 2021-001342, R. 46–47 ¶¶ 69–75) (see chart above). That is, in both cases, the plaintiffs allege that the defendants were unjustly enriched because the defendants directly billed patients at a rate higher than what the defendant was contractually obligated to bill the patients' insurers. This Court nevertheless concludes in *Bennett* that the claim is "based on an alleged duty arising *solely* from the terms of the Provider Agreement" (2024 WL 4234720, at *3; *id.* at *12 (same) (Vinson J., concurring)), while simultaneously concluding here that the exact same claim "does not rely on the [the provider-insurer agreement]." (Panel Op. at 11). These divergent conclusions cannot both be correct.

When an appellate court issues conflicting decisions on the same day regarding the same fact pattern, the law becomes uncertain. Indeed such conflicting and irreconcilable decisions invite confusion and inconsistent results. Defendants urge the Court to quell the conflict and uncertainty

by rehearing this case and conforming the Panel Opinion here to the unanimous conflicting decision in *Bennett*.

B. The Panel Opinion Risks Rewarding Artful Pleading and Gamesmanship.

A primary consequence of the conflict between the Panel Opinion and the decision in *Bennett* is that it invites artful pleading and gamesmanship by instructing lower courts to elevate the form of a plaintiff's claims over substance. Indeed, it appears that artful pleading by Plaintiffs here led this Court to misapprehend the true nature of Plaintiffs' allegations, as follows.

1. The Panel Opinion risks encouraging plaintiffs to obscure the true nature of their claims and selectively omit factual allegations.

Here, the Panel Opinion holds that, by grounding his claim in tort and not contract, Owens can avoid equity. (Panel Op. at 10–11). This formalistic approach, however, overlooks the substance of Owens's claims and incites future litigants to use artful pleading to avoid arbitration.

As courts have long held, "the essential character of the cause of action, and the remedy or relief it seeks," are "shown by the allegations of the complaint," and, thus, the true nature of a claim is "unaffected by the conclusions of the pleader or by what the pleader calls it." *Bell v. Mackey*, 191 S.C. 105, 3 S.E.2d 816, 822 (1939). Thus, in the context of estoppel, while a plaintiff may assert a claim "phrased in tort," that plaintiff "may not use artful pleading to avoid arbitration" if "at root, those claims attempt to hold [the defendant] to the terms of [a contract with an arbitration provision]." *Am. Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623, 630 (4th Cir. 2006). The central question—regardless of how a plaintiff styles a claim—is "whether the plaintiff has asserted claims in the underlying suit that, either literally or obliquely, assert a breach of a duty created by the contract containing the arbitration clause." *Id.* at 629; *see also OSRX Inc. v. Anderson*, No. 22-CV-1737, 2023 WL 2472417, at *7 (D.S.C. Feb. 7, 2023) ("Although Plaintiffs' remaining claims—misappropriation of trade secrets …, intentional interference with contractual

relations, and intentional interference with prospective contractual relations—are 'phrased in tort,' the court must look to the root of the allegations in support of these claims to determine if they really arise out of the [contract]." (quoting *Long*, 453 F.3d at 630)).

Here, Owens's claims did not depend solely on a general tort obligation. Instead, as the dissent recognized, Plaintiffs "invoke[d] the [Defendants'] contractual duties to the insurance carriers with which [Plaintiffs] also had contracts." (Panel Op. at 13 (Geathers, J., dissenting)). That is because—whether they sound in tort, contract, or equity—the essential character of Plaintiffs' claims is, at root, that Defendants should be held to the terms of their contracts with Plaintiffs' health insurance carriers, including the CIGNA Agreement.

This essential character of their claims sounds throughout the allegations of the Amended Complaint. Plaintiffs allege, multiple times, that Defendants "contracted with patients' health insurance providers for a reduced compensation for treating patients with health insurance" (R. 65 ¶ 9; *see also id.* ¶ 31, 57(a)). They allege, multiple times, that Defendants are "required by their contracts with patients' health insurance carriers to submit insurance patients' medical bills directly to the carriers" and "required to honor a contractual discount with their patients' health insurance carriers." (R. 68, ¶¶ 28–29; *see also id.* ¶ 57(b)–(c)). This contractual discount *is* the benefit Plaintiffs seek in the litigation. (R. 73 at 57(d)). The first mention, on the other hand, of any alleged contractual relationship between Plaintiffs and their insurers does not appear until Plaintiffs set forth the elements of their artfully pleaded tort claim. (R. 75, ¶ 64).

And it makes sense that Plaintiffs would focus on Defendants' agreements with their insurers. They must. Under South Carolina law, a healthcare provider has no general duty to submit bills to insurance providers. *See Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 429 S.C. 502, 514–15, 839 S.E.2d 468, 474 (Ct. App. 2020), *aff'd*, 435 S.C. 594, 869 S.E.2d 812 (2022).

Instead, any affirmative duty to bill in a particular way must arise from a contract. Here, based on Plaintiffs' own allegations, the *only* contract giving rise to such a duty is an agreement like the CIGNA Agreement.[1]

Nor should a plaintiff be able to evade estoppel by simply failing to expressly allege a benefit under the operative agreement or knowledge of that agreement. (Panel Op. at 10 (holding that Owens is not estopped because he "did not benefit from the CIGNA Agreement and did not know about the agreement prior to this litigation")). As this Court held in *Bennett*, "the discounts and other provisions negotiated between [an insurer] and [a provider]" are a sufficient benefit to subject a patient to an arbitration clause in the insurer-provider contract by estoppel. 2024 WL 4234720, at *4. The Court in *Bennett* also agreed with the defendants that alleged lack of knowledge at the time of care "does not matter to the equitable estoppel analysis because [Plaintiffs] knew about the Provider Agreements when they filed their complaints." *Id.*, at *2. Thus, if the Panel Opinion stands, future litigants seeking to avoid equitable estoppel will be encouraged to strategically omit undeniable allegations from their complaints.

In short, regardless of how he styles his claim, Owens literally and explicitly asserts a breach of the CIGNA Agreement as the basis for liability and seeks the benefit of *that* contractual relationship. *See Long*, 453 F.3d at 630 (holding that whether estoppel applies turns on whether the plaintiff alleges a breach of the contract with the arbitration clause); *see also Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 (holding that equity prevents a person from avoiding arbitration if the

[1] To be sure, as the Panel Opinion acknowledges, estoppel "is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence." *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176; (Panel Op. at 10–11). However, *Wilson* does not authorize ignoring contracts whenever they are a but-for cause of a claim. Rather, the point is that it is not sufficient that a contract was a but-for cause of a plaintiff's injury. *See* 426 S.C. at 343, 827 S.E.2d at 176. Ultimately, it is "the substance of the claim" that matters. *Id.* (quoting *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 637 (Tex. 2018).

alleged liability "must be determined by reference to" the contract with the arbitration clause). Thus, because Owens premises his claims on the alleged terms of the CIGNA Agreement, he is subject to its arbitration provision and estopped from contending otherwise (just as the Court concluded in its unanimous decision in *Bennett*). Allowing him to avoid this result by obscuring the true nature of his claims works inequity and invites gamesmanship.

2. The Panel Opinion risks encouraging plaintiffs to attempt to avoid arbitration by alleging meritless non-arbitrable claims.

The Panel Opinion also risks encouraging future litigants to allege a host of non-arbitrable claims in a gambit to avoid arbitration. Specifically, the Panel Opinion correctly holds that Owens's final claim for "injunctive relief" *was* subject to arbitration because it was grounded in the CIGNA Agreement. But then the Panel Opinion nevertheless concludes that Owens does not have to arbitrate that claim, or any other, because "two of the three claims alleged do not arise from the CIGNA Agreement." (Panel Op. at 11–12). In other words, the Panel Opinion suggests that a plaintiff can avoid arbitration if an arbitrable claim is joined by some greater number of non-arbitrable claims. That is not the law.[2]

Moreover, deciding arbitrability of a claim based on the overall proportion of arbitrable and non-arbitrable claims is acutely vulnerable to gamesmanship. To promote judicial efficiency and reduce the risk of waiver, Defendants typically are forced to seek to compel arbitration early in a case, often with, or even before, a motion to dismiss, and thus typically must take the complaint

[2] Although the Panel Opinion cites *Wilson*, 426 S.C. at 342, 827 S.E.2d at 176, for this proposition, *Wilson* does not support this approach. In *Wilson*, the Supreme Court found that *none* of the claims asserted implicated direct benefits estoppel. *See id.* (noting that, while respondents "appear[ed] to rely on the fact that some of the claims asserted … would not have arisen in the absence of the [contract]," the claims did not actually arise from or need to be determined by reference to the contract). Accordingly, *Wilson* had no occasion to address what a court should do if one claim relies on a contract with an arbitration clause (and would be subject to estoppel and arbitration if brought alone), but additional claims do not.

as-pled. Under the Panel Opinion, future plaintiffs seeking to avoid arbitration may be encouraged to allege multiple non-arbitrable claims, even if those extra non-arbitrable claims lack merit. Because the Panel Opinion appears to have overlooked this concern, it warrants reconsideration.

II. The Panel Opinion Misconstrues the Plain and Unambiguous Language of the CIGNA Agreement and Is in Conflict with U.S. Supreme Court Precedent.

In holding that Owens cannot be compelled to arbitrate his individual claim because he filed a class action, the Panel Opinion misconstrues the CIGNA Agreement's plain language.

Specifically, the relevant portion of the CIGNA Agreement's arbitration clause states, "Arbitration shall be the exclusive remedy for the resolution of disputes arising under this Agreement." This unequivocal arbitration provision is not altered by any other language in the CIGNA Agreement. The CIGNA Agreement further clarifies, however, "that the arbitrator shall be without power to conduct an arbitration on a class basis." (R. 275–76).

As reflected in multiple decisions by the U.S. Supreme Court, this term—common to arbitration clauses—is there to make clear that the parties agree to resolve their disputes through *individual* arbitration and not through class arbitration. That is, the clause reflects the parties' "intention to use individualized rather than class or collective action procedures" to resolve their disputes. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 506 (2018). Such clauses are common because "classwide proceedings" " interfere[] with a fundamental attribute of arbitration"—"the traditionally individualized and informal nature of arbitration." *Id.* at 508. Allowing class arbitration thus "would sacrifice the principal advantage of arbitration—its informality—and make the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* (internal quotation marks and brackets omitted).

Yet, misapprehending the significance, purpose and meaning of this common language, the Panel Opinion seeks to read the clause to work the opposite of its intended effect; namely, to

close the door to arbitration when one party elects to allege, or even join, an alleged class action. That is, the Panel Opinion holds that this language, "interpreted in its natural and ordinary sense, prevents Owens from arbitrating his claims" because it "specifically states the arbitration provision does not apply to class actions." (Panel Op. at 12).

To begin with, in no way is that a legitimate interpretation of what the provision says. It says that (1) the parties agree that "[a]rbitration shall be the exclusive remedy for the resolution of disputes arising under the [CIGNA] Agreement" and (2) the parties agree that the arbitrator lacks "power to conduct" any such arbitration "on a class basis." (R. 275–76). To say, as the Panel Opinion does, that the arbitration provision "does not apply to class actions," therefore, gets it exactly backwards. The provision *precludes* class actions, by first requiring *all* disputes (whether styled as an individual or class action) to be arbitrated and by then making clear that those arbitrations cannot proceed on a class basis. The reading advanced by the Panel Opinion, on the other hand, defeats the purpose of the clause and, indeed, one of the fundamental reasons parties agree to arbitrate in the first place. *See Epic Sys.*, 584 U.S. at 508–09. In fact, the United States Supreme Court has gone as far as to hold that similar limitations on arbitration run afoul of the Federal Arbitration Act. *See, generally*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

III. Consideration of Defendants' Motions to Dismiss Would Have Aided the Analysis of the Other Issues.

Finally, Defendants' appeal also asked this Court to review the circuit court's denials of Defendants' motions to dismiss pursuant to Rule 12(b)(6). The Panel Opinion, however, declined to take up review of the orders, giving as its sole reason that "the issues raised … would benefit from further factual development." (Panel Op. at 13).

Defendants urge the Court to look more closely at the pleadings and consider the Rule 12(b)(6) arguments because, among other things they shed light on the ways in which the Panel

Opinion misapprehends the arbitration issue. *See Brown v. Cnty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005) (allowing review of interlocutory orders when they "are companion to issues that are [immediately] reviewable" by the appellate court). By way of example, a close analysis of whether Plaintiffs in fact stated a claim for tortious interference with a contract would aid the Court's estoppel analysis. "The elements of a cause of action for tortious interference with [a] contract" include, among other things, the wrongdoer's "intentional procurement of [the relevant contract's] breach." *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). Plaintiffs, however, do not even allege any breach of an alleged contract between themselves and their insurers, much less that Defendants intentionally procured any such breach. Indeed, the only alleged breaches to be found in the Amended Complaint concern the alleged agreements between Defendants and Plaintiffs' insurers, and those breaches are bound to arbitration by virtue of direct benefits estoppel. *See Long*, 453 F.3d at 630. As this example shows, there are legal issues in common between the immediately appealable order on arbitration and the interlocutory order on the motions to dismiss. It thus would serve judicial economy, and aid this Court's understanding of this case, if this Court reheard the Rule 12(b)(6) issues.

Furthermore, addressing the manifest insufficiency of the Plaintiffs' causes of action is necessary in this case to prevent injustice and to provide for judicial economy and efficiency. *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (allowing review of interlocutory orders when "such review would avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy)").[3] Judicial economy and the interests of justice

[3] Defendants moved to compel arbitration as to Plaintiff Owens *and* dismiss the other Plaintiffs' failed claims. When the circuit court denied the arbitration motion, Defendants immediately appealed. Although the case was filed as a unified putative class action, the circuit court refused to stay the case as to the other Plaintiffs. Instead, it pushed the case forward, issuing orders (over Defendants' strenuous objections) certifying a class and even striking Defendants' answers. Thus,

favor the Court's immediate review of the following issues and arguments raised by Defendants regarding the circuit court's error in denying the motions to dismiss: (1) Owens' claims are barred by the statute of limitations because they do not relate back to the filing of the original complaint; (2) Blackwell's claim for unjust enrichment fails because she does not allege that she conferred any benefit to Defendants; (3) Blackwell lacks standing to pursue her claims because she is not an intended third-party beneficiary under the agreement between Mary Black and her health insurer (MedCost); (4) Brooks's claims are governed by the Medicare Act and the law under that Act does not support the claims alleged; (5) Brooks and Owens' claims fail pursuant to the voluntary payment doctrine; and (6) the Amended Complaint does not state facts sufficient to constitute any viable cause of action against CHSPSC or PASI. Defendants incorporate by reference the arguments raised to the Court in support of those arguments in their Briefs and request the Court exercise its discretion to consider the merits of each of those arguments on rehearing.

Failure of this Court to exercise its clear authority to address now the errors in the circuit court's denial of the motions to dismiss is not in the interest of justice or judicial economy and efficiency. Moreover, addressing now the motions to dismiss would aid the Court in the understanding and resolution of the direct benefits estoppel issue material to the analysis of the arbitration issue.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court rehear this matter by panel or *en banc*.

s/James Lynn Werner
James Lynn Werner, S.C. Bar No. 6029
Katon E. Dawson, Jr., SC Bar No. 101167
PARKER POE ADAMS & BERNSTEIN LLP

Defendants are effectively prevented from addressing the merits of these defenses with, in Panel Opinion's words, the "benefit of further factual development." (Panel Op. at 12).

1221 Main Street, Suite 1100
Post Office Box 1509 (29202)
Columbia, South Carolina 29201
Telephone: (803) 255-8000
Facsimile: (803) 255-8017
jimwerner@parkerpoe.com
katondawson@parkerpoe.com

Attorneys for Defendant Mary Black Health System, LLC, d/b/a Mary Black Memorial Hospital; CHSPSC, LLC; Professional Account Services, Inc.

October 18, 2024
Columbia, South Carolina

RECEIVED
Oct 18 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2017-CP-42-00219
Appellate Case No. 2020-001613

Jo Ann Blackwell, Michelene Brooks, and Samuel H. Owens, Jr., individually and on behalf of all others similarly situated,

Respondents,

v.

Mary Black Health System, LLC, d/b/a Mary Black Memorial Hospital; CHSPSC, LLC; Professional Account Services, Inc.,

Appellants,

PROOF OF SERVICE

The undersigned hereby certifies that on October 18, 2024, a copy of Appellants' Petition for Rehearing and Suggestions for Rehearing En Banc was served on all counsel of record via email containing the above referenced document to counsels' individual AIS email addresses as follows:

John B. White, Jr. (S.C. Bar No. 5996)
Marghretta H. Shisko (S.C. Bar No. 100106)
Griffin L. Lynch (S.C. Bar No. 72518)
John B. White, Jr. P.A.
291 S. Pine Street
P.O. Box 2465 (29304)
Spartanburg, SC 29302
jwhite@johnbwhitelaw.com
mshisko@johnbwhitelaw.com
glynch@johnbwhitelaw.com
John S. Simmons (S.C. Bar No. 10260)

Rachel G. Peavy (S.C. Bar No. 69397)
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29201
(803) 779-4600
jsimmons@simmonslawfirm.com
rpeavy@simmonslawfirm.com

Attorneys for Respondents Jo Ann Blackwell, Michelene Brooks, and Samuel H. Owens, Jr.

s/James Lynn Werner

James Lynn Werner, S.C. Bar No. 6029
Katon E. Dawson, Jr., SC Bar No. 101167
PARKER POE ADAMS & BERNSTEIN LLP
1221 Main Street, Suite 1100
Post Office Box 1509 (29202)
Columbia, South Carolina 29201
Telephone: (803) 255-8000
Facsimile: (803) 255-8017
jimwerner@parkerpoe.com
katondawson@parkerpoe.com

Attorneys for Mary Black Health System, LLC, d/b/a Mary Black Memorial Hospital; CHSPSC, LLC; Professional Account Services, Inc.

October 18, 2024
Columbia, South Carolina

Parker Poe

Katon E. Dawson, Jr.
t: 803.253.6854
f: 803.255.8017
katondawson@parkerpoe.com

Atlanta, GA
Charleston, SC
Charlotte, NC
Columbia, SC
Greenville, SC
Raleigh, NC
Spartanburg, SC
Washington, DC

October 18, 2024

VIA HAND-DELIVERY AND E-MAIL:
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

Re: Jo Ann Blackwell, Michelene Brooks, and Samuel H. Owens, Jr., individually and on behalf of all others similarly situated, v. Mary Black Health System, LLC, d/b/a Mary Black Memorial Hospital, CHSPSC, LLC, and Professional Account Services, Inc.; Appellate Case No.: 2020-001613

Dear Mrs. Kitchings:

Enclosed for filing in the *Jo Ann Blackwell, et al v. Mary Black Health System, LLC, et al*, appeal, please find one copy of Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc and Proof of Service. Copies of same are being provided to all counsel of record via e-mail.

Additionally, Check No. 517368 in the amount of $50.00 which covers our filing fee, is being hand-delivered to your office.

Should you have any questions or need anything further, please do not hesitate to contact me.

Sincerely,

s/Katon E. Dawson, Jr.

Katon E. Dawson, Jr.

KED/tlc
Enclosures
cc: All Counsel of Record on Proof of Service