THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Heath P. Taylor, Circuit Court Judge

Case No. 2022-CP-18-01775
Appellate Case No. 2024-000914

Kevin White,
as Personal Representative of the Estate of Mary Brisbon,

Respondent,

v.

St. George Health Care, LLC, d/b/a St. George Healthcare Center and Vicki Sides,

Appellants.

APPELLANTS' RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL AND FOR SANCTIONS

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Matthew O. Riddle (SC Bar No. 76650)
T. Ashton Phillips III (SC Bar No. 104227)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
P.O. Box 993 (29402)
Charleston, South Carolina 29401
(843) 720-5488

Attorneys for Appellants

By and through their undersigned counsel, Appellants[1] submit this return in opposition to Plaintiff's[2] motion for the Court to dismiss this appeal as frivolous and sanction the Facility for taking it (the "Subject Motion").[3] Respectfully, the Subject Motion should be denied, as explained below.

BACKGROUND[4]

With Mr. White's help, Ms. Brisbon was admitted as a resident of the Facility on April 24, 2019. (**Exhibit 1** [Admission Agreement].) Mr. White handled the paperwork in conjunction with the admission, and in so doing, he signed an Admission Agreement[5] and an Arbitration Agreement[6] on Ms. Brisbon's behalf.

Plaintiff filed this wrongful death and survival action in the Dorchester County Court of Common Pleas on November 18, 2022, based on allegedly deficient care/treatment Ms. Brisbon received at the Facility. (**Exhibit 3**

---

[1] "Appellants" refers to Defendants/Appellants, St. George Healthcare, LLC d/b/a St. George Healthcare Center (the "Facility") and Vicki Sides ("Sides"), collectively. The Facility is a skilled nursing facility.

[2] "Plaintiff" refers to Kevin White ("Mr. White"), as Personal Representative of the Estate of Mary Brisbon ("Ms. Brisbon").

[3] The Subject Motion does not request sanctions against Sides. (Subject Motion p. 1 n.1.)

[4] In accordance with Rule 240(c)(3), SCACR, a number of exhibits (specifically identified below) are attached to this return because the record on appeal has not yet been filed. Please note, however, that these exhibits do not include materials that have already been filed in this Court (e.g., Appellants' notice of appeal, Appellants' initial brief, the Subject Motion, etc.).

[5] (**Exhibit 1** [Admission Agreement].)

[6] (**Exhibit 2** [Arbitration Agreement].)

[Summons; Compl.; Expert Aff.].) Appellants timely answered on March 20, 2023, denying liability, raising numerous affirmative defenses, and reserving the right to compel arbitration, which they also raised as an affirmative defense. (**Exhibit 4** [Defendants' Answers].)

Also on March 20, 2023, Appellants moved to compel Plaintiff's claims to arbitration based on the Arbitration Agreement Mr. White signed on behalf of Ms. Brisbon in conjunction with her admission to the Facility (the "Motions to Compel Arbitration"). (**Exhibit 5** [Motions to Compel Arbitration.)[7] [8]

---

[7] Without question, Plaintiff's claims against Appellants are within the scope of the Arbitration Agreement, the plain language of which calls for arbitration of "any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Ms. Brisbon's] stay at [the] Facility, or to the provisions of care or services to [Ms. Brisbon] . . . ." (Arbitration Agreement.) But even if there were "any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration . . . ." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999); *see also 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.").

[8] There is also no question that the Arbitration Agreement covers both the Facility and Sides. The Arbitration Agreement states, "It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, personal representatives, guardians, or any persons deriving their claims through or on behalf of Resident." (**Exhibit 2** [Arbitration Agreement].) By its terms, the Arbitration Agreement is binding on the Facility's "agents, employees, and servants." (**Exhibit 2** [Arbitration Agreement].) This includes Sides, whom Plaintiff sues as "the Administrator of the Facility." (**Exhibit 3** [Compl.] ¶ 3.)

Following a hearing on October 23, 2023,[9] the circuit court, the Honorable Heath P. Taylor presiding, denied the Motions to Compel Arbitration by order filed November 2, 2023. (**Exhibit 7** [Order Denying Defendants' Motions to Compel Arbitration].) Pursuant to Rule 59(e), SCRCP, on Monday, November 13, 2023, Defendants timely moved the circuit court to alter, amend, and/or reconsider its decision. (**Exhibit 8** [Defendants' Motion to Alter, Amend, and/or Reconsider].) The circuit court denied that motion by order filed May 2, 2024. (**Exhibit 9** [Order Denying Defendants' Motion for Reconsideration].)

By notice served and filed June 3, 2024, Appellants timely took this appeal. In due course, Appellants served and filed their initial brief and designation of matter to be included in the record on appeal. After first obtaining a thirty-day extension of time to serve and file his initial respondent's brief, Plaintiff made the instant motion on October 31, 2024, nearly five months after Appellants noticed this appeal.

ARGUMENT

As fully set forth in their initial brief, which is hereby incorporated herein by reference, Appellants contend that the circuit court erred in denying the Motions to Compel Arbitration. For present purposes, the most noteworthy aspect of Appellants' appeal is their contention that the circuit court erred in rejecting their

[9] (**Exhibit 6** [Hearing Transcript].)

merger/equitable estoppel argument, i.e., the argument that the circuit court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Ms. Brisbon effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith. In particular, it is the merger prong of this argument that is the basis of the Subject Motion. (*See* Subject Motion p. 1 (asserting that "the purported merger of [the] Arbitration and Admission Agreements" "is entirely unsupported by any South Carolina precedent substantiating Appellants' arguments"); *id.* at 5 ("The dispositive argument that is being raised to the Court in this Appeal is whether the Circuit Court erred in finding that the subject Agreements did not merge pursuant to *Solesbee*[10] as well as the numerous other unpublished decisions of this Court affirming *Solesbee's* conclusion that the subject Agreements do not merge.").)

According to Plaintiff, this appeal is frivolous in view of this Court's published decision in *Solesbee* and numerous other unpublished decisions. As an initial matter, the unpublished decisions to which Plaintiff refers include the following language atop the first page of each of them: "**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY**

[10] *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023).

RULE 268(d)(2), SCACR" (emphasis in original).[11] Besides being improper under Rule 268(d)(2), Plaintiff's reliance on these unpublished decisions in support of the Subject Motion is illogical. No precedential value means no precedential value, and just as the value of each of them is zero, the value of all of them adds up to zero.

This leaves *Solesbee* as the sole basis of the Subject Motion, and as set forth at length in Appellants' initial brief, most respectfully, *Solesbee* should not control the disposition of case because the *Solesbee* Court (a) erred as to those aspects of the merger argument that it addressed and (b), in any event, did not actually address all material aspects of the argument, leaving gaps in the *Solesbee* decision through which Appellants' position still fits. (*See* Initial Brief of Appellants pp. 19–28.) Plaintiff does not even recognize this, much less attempt to rebut it, in the Subject Motion, but simply asserts, in conclusory fashion, that "Appellant cannot factually distinguish between the issue's presentation in this Appeal and the twenty-one others that have come before it"—without ever actually explaining why this is supposed to be so. (Subject Motion p. 6.)

The same law firm that represents Plaintiff in this matter represents the plaintiffs/respondents in two other appeals (namely, *Kilpatrick v. Pruitthealth-*

[11] The only instance in which Rule 268(d)(2) allows citation to unpublished opinions is "in proceedings in which they are directly involved," and of course, this separate case is not such an instance.

Ridgeway, LLC, Appellate Case No. 2024-000596, and *Calloway v. Oakbrook Healthcare, LLC*, Appellate Case No. 2024-000910) wherein they have made substantially identical motions to dismiss and for sanctions. During oral argument before the circuit court on the motion to compel arbitration in *Kilpatrick*, the plaintiff's counsel actually conceded that South Carolina precedent "ha[s]n't maybe touched on the exact arguments of counsel." (**Exhibit 10** [*Kilpatrick* Hearing Transcript] p. 21:7–12.) To concede this is effectively to concede that this appeal is not frivolous. By definition, arguments that have not been "touched on," i.e., have not been addressed in the first place, have not been rejected.

Plaintiff's assertion that Appellants' merger argument "is entirely unsupported by South Carolina precedent"[12] is simply incorrect. In *Coleman v. Mariner Health Care, Inc.*, even though the Supreme Court found against merger on the particular *facts* of the case, it nonetheless confirmed the validity of the general proposition of *law* on which the *Coleman* appellants based their merger argument: instruments executed at the same time, by the same parties, for the same purpose, in the course of the same transaction merge unless there is evidence of a contrary intention. 407 S.C. at 355, 755 S.E.2d at 455. Moreover, the *Coleman* confirmed that an arbitration agreement executed contemporaneously with a nursing home admission agreement (the very situation we have here) checks all

[12] (Subject Motion p. 1.)

these boxes (time, parties, purpose, transaction) and gives rise to the presumption of merger. *Id.* ("Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.").

South Carolina precedent clearly supports the view that the presumption of merger applies to the Admission Agreement and the Arbitration Agreement here and that defeating this presumption requires 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 126, 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.").

The *Solesbee* Court's explanation of its finding against merger reads as follows:

> Here, [1] the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law. [2] The Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement "shall survive any termination or breach of this Agreement or the Admission Agreement." [3] The Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, "Resident and/or his/her legal representative may

> terminate this Agreement at any time, upon written notice to Facility." [4] The Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages. [5] Magnolia's attorney admitted at the hearing that "[i]t's perfectly true that [Dover] did not have to sign the arbitration agreement to move forward with [Solesbee] being admitted. It was voluntary ...." Thus, like the *Coleman* and *Hodge*[13] courts, we find there was no merger in this case and Magnolia's equitable estoppel argument was properly denied.

Solesbee, 438 S.C. at 648–49, 885 S.E.2d at 149.

Most respectfully, as demonstrated in the merger analysis in Appellants' initial brief, there are material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny *Hodge*, and, for that matter, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), all of which involved admission agreements and arbitration agreements with materially different language than the Admission Agreement and Arbitration Agreement at issue here.

And as for *Solesbee* in particular, even though it involved the same form documents that are at issue in the instant case, the *Solesbee* Court's above-quoted explanation of its reasoning is not only erroneous but also incomplete, leaving unanswered material questions that Appellants may now appropriately put to the

---

[13] *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

Court,[14] along with, for that matter, good faith argument for the Court to revisit the *Solesbee* Court's reasoning. *See* Rule 3.1, RPC, Rule 407, SCACR ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").[15]

---

[14] For instance, and, of course, without limitation, as further explained in Appellants' initial brief, the *Solesbee* Court never dealt with the fact that, in this case, unlike in *Coleman*, *Hodge*, and *Thompson*, the "Entire Agreement" provision in the Admission Agreement expressly contradicts the idea of its "separatedness" (in the parlance of the *Coleman* Court) by stating that "other Admissions materials" are a part of it. (**Exhibit 1** p. 12.) Without question, the plain and ordinary meaning of the language "other Admissions materials" is such as to embrace the Arbitration Agreement. *See 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)). But even if there were some ambiguity in this regard, the *Solesbee* decision (a) does not say so and (b) does not address the Facility's argument in this case that the language in *Coleman* about construing ambiguity against the drafter is, first off, *dicta* and, in any event, illogical and internally inconsistent with the *Coleman* Court's recognition that the instruments executed at the same time, by the same parties, for the same purpose, in the course of the same transaction (as, without question, the Admission Agreement and Arbitration Agreement here were) are presumed to merge absent evidence allowing for a conclusion to the contrary.

[15] To be clear, Plaintiff is incorrect in asserting that, "by repeatedly denying certiorari to review the outcome of *Solesbee* . . . , the Supreme Court has essentially conveyed that under these identical facts and Agreements, it does not see a clear legal error that necessitates reversal or an issue of sufficient importance

As an advocate, a lawyer is duty bound to "use the legal procedure for the fullest benefit of the client's cause" while at the same time "not absu[ing] legal procedure." Rule 3.1, RPC, Rule 407, SCACR, cmt. 1. The undersigned humbly submits that, in pursuing the instant appeal, Appellants' counsel honors both of these obligations and that the proof of this fact is in the pudding, i.e., Appellants' initial brief, the argument set forth in which cannot reasonably be condemned as frivolous.

CONCLUSION

For the foregoing reasons, Appellants ask that the Court deny the Subject Motion.

<SIGNED ON THE FOLLOWING PAGE>

---

to grant judicial review." (Subject Motion p. 5.) A writ of certiorari is not a matter of right but solely a matter of the Supreme Court's discretion. Rule 242(b), SCACR ("A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons."). By denying certiorari, the Supreme Court has only expressed its decision to exercise its discretion to not review the case. It has not implicitly blessed the *Solesbee* Court's analysis as correct. And in any event, by denying certiorari, the Supreme Court has neither answered any of the unanswered questions left by the *Solesbee* Court nor, for that matter, foreclosed the possibility that this Court may be persuaded to revisit the *Solesbee* Court's reasoning.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
James D. Gandy III (SC Bar No. 11925)
T. Ashton Phillips III (SC Bar No. 104227)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
P.O. Box 993 (29402)
Charleston, South Carolina 29401
(843) 720-5488

Attorneys for Appellants

Charleston, South Carolina

December 13, 2024