

RECEIVED

Jun 03 2024

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2022-CP-42-02595
Appellate Case No. 2023-001371

Steven McCarson,
as Personal Representative of the Estate of Louie Arches,

Respondent,

v.

THI of South Carolina at Magnolia Manor-Inman, LLC
d/b/a Magnolia Manor-Inman, THI of South Carolina at Inman, LLC,
THI of South Carolina, LLC, Hunt Valley Holdings, LLC,
Fundamental Administrative Services, LLC,
Fundamental Clinical and Operational Services, LLC,
THI of Baltimore, LLC, and James H. Mack,

Appellants.

FINAL REPLY BRIEF OF APPELLANTS

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
James D. Gandy, III (SC Bar No. 11925)
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY 1

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

 2. Plaintiff’s—and, indeed, the *Weaver* Court’s—view of direct benefits estoppel is erroneous. 4

 3. To the extent that Plaintiff suggests there is any question (to include any question of issue preservation) about whether the FAA applies here, Plaintiff is mistaken—without question, the FAA applies. 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Coleman v. Mariner Health Care, Inc.,
407 S.C. 346, 755 S.E.2d 450 (2014).....3, 4

Coward Hund Const. Co., Inc. v. Ball Corp.,
336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999)9

Elam v. S.C. Dep’t of Transportation,
361 S.C. 9, 602 S.E.2d 772 (2004).....9

Ex parte Dibble,
279 S.C. 592, 310 S.E.2d 440 (Ct. App. 1983)7

Pearson v. Hilton Head Hosp.,
400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012).....6, 7

S.C. Dep’t of Natural Resources v. Town of McClellanville,
345 S.C. 617, 550 S.E.2d 299 (2001)2

Weaver v. Brookdale Senior Living, Inc.,
431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020).....4

Wilson v. Willis,
426 S.C. 326, 827 S.E.2d 167 (2019)4, 5, 6, 7

Statutes

9 U.S.C. §§ 1 et seq.....1, 7, 8, 9

S.C. Code Ann. § 15-48-20.....9

Other Authorities

S.C. Const. art. V, § 95

Rules

Rule 59(e), SCRCP9

Believing that Plaintiff’s counterarguments are already amply rebutted by the analysis set forth in their principal brief, Appellants would underscore the following points in reply to Plaintiff’s brief.¹

ARGUMENT IN REPLY

1. **While the Facility maintains that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement, the Facility would point out that Plaintiff’s admission that “there is ambiguity” as to whether the Admission Agreement and the Arbitration Agreement merged² is tantamount to an admission that it is reasonable to conclude they did.**

Even Plaintiff admits that there is at least ambiguity as to whether the Admission Agreement and the Arbitration Agreement merged. (Br. of Respondent

¹ Shorthand references already defined in Appellants’ principal brief are continued in this reply brief (e.g., the “Facility” refers to Defendant/Appellant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, which is a skilled nursing facility in Spartanburg County; “Plaintiff” refers to Plaintiff/Appellant, Steven McCarson (“Mr. McCarson”), as Personal Representative of the Estate of Louie Arches; “Mr. Arches” refers to the decedent, Louie Arches; the “Other Defendants” refers to Defendants/Appellants THI of South Carolina, LLC (“THISC”); Hunt Valley Holdings, LLC (“HVH”); Fundamental Administrative Services, LLC (“FAS”); Fundamental Clinical and Operational Services, LLC (“FCOS”); THI of Baltimore, Inc., misidentified in this action as “THI of Baltimore, LLC” (“THIB”); and James H. Mack (“Mack”), collectively; “Appellants” refers to the Facility and the Other Defendants, collectively; the “Motion to Compel Arbitration” refers to the Facility’s motion to compel Plaintiff’s claims against it to arbitration; the “Motions to Stay” refers to the Other Defendants’ motions to stay the litigation pending the outcome of the Motion to Compel Arbitration and any resulting arbitration between Plaintiff and the Facility; the “Underlying Motions” refers to the Motion to Compel Arbitration and the Motions to Stay, collectively; and the “FAA” refers to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.).

² (Br. of Respondent p. 2.)

p. 2 (“At its core, this Appeal presents a narrow issue . . . : whether a healthcare facility may bind a nonsignatory resident, or his estate, to an arbitration agreement *when there is ambiguity* as to whether the arbitration agreement and a separate facility admission agreement ever merged.”) (emphasis added); *see also id.* at pp. 2-3 (asserting, albeit without any evidence, that the Facility purposefully “created an ambiguity” in this regard).)

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

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

This is notable because, as explained in Appellants’ principal brief, to fall back on the idea that any ambiguity in regard to merger must be construed against merger makes no sense in this context. The *Coleman* Court clearly endorsed the rule of law that a presumption of merger arises where, as here, multiple instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction and that upsetting this presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014). While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter,³ (a) it did so in dicta and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case⁴—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger—as, again, Plaintiff himself concedes is the case here.

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

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

Citing this Court’s decision in *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020), Plaintiff contends direct benefits estoppel is limited to situations where “(1) the nonsigner’s claim arises from the contractual relationship, (2) the nonsigner has ‘exploited’ other parts of the contract by reaping its benefits, and (3) the claim relies solely on the contract terms to impose liability.” (Br. of Respondent pp. 20-21 (emphasis omitted) (quoting *Weaver*, 431 S.C. at 230, 847 S.E.2d at 272).) The *Weaver* Court itself cites our Supreme Court’s decision in *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019), for this proposition, specifically, *Wilson*, 426 S.C. at 340-44, 827 S.E.2d at 175-77. But *Wilson*—which is binding on this Court as precedent⁵—does not actually support the proposition.

The *Weaver* Court cites *Wilson* as establishing the above-quoted three-part test for direct benefits estoppel, but *Wilson* simply does not do so. Rather, as explained in Appellants’ principal brief, under *Wilson*, the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340-41, 827 S.E.2d at 175 (“Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration

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

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 another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement’) (internal citations/quotations and emphasis therein omitted); *id.* at 343, 827 S.E.2d at 176 (“It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.”) (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying

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

that the arbitration clause is enforceable. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (“To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.”) (citation and internal quotation marks omitted).

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

bind the Court of Appeals as precedents.”).

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

containing an arbitration clause while simultaneously avoiding the obligation to arbitrate so long as the plaintiff sues for something other than breach of contract. Neither *Wilson* nor this Court’s decision in *Pearson* nor general notions of equity countenance,⁷ much less call for, such a result.

3. To the extent that Plaintiff suggests there is any question (to include any question of issue preservation) about whether the FAA applies here, Plaintiff is mistaken—without question, the FAA applies.

Plaintiff’s brief includes a footnote stating that “[t]he Circuit Court did not specifically find in its July 10, 2023 Order that the agreements involve or affect interstate commerce and are thus governed by the FAA.” (Br. of Respondent p. 4. n.2.) Plaintiff’s point here is unclear, but to the extent Plaintiff suggests that there is any question (to include any question of issue preservation) about whether the FAA applies here, Plaintiff is mistaken.

As explained in the Facility’s principal brief, there is no question that the FAA applies. (Br. of Appellant p. 3 n.13.) Plaintiff himself, in opposing the Motion to Compel Arbitration, did not argue that the FAA does not apply. (*See R.* pp. 216-243.) And in denying the Motion to Compel Arbitration (to include in denying the Facility’s motion to reconsider its denial of the Motion to Compel Arbitration), the circuit court never ruled that the FAA did not apply. (*See R.* pp.

⁷ *See Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) (“Courts have the inherent power to do all things reasonably necessary

1-9; R. pp. 11-12.) No rule of issue preservation required the Facility to seek a ruling from the circuit court on an issue as to which (a) there was no dispute and (b) the circuit court did not rule against it.

And in any event, out of an abundance of caution, even assuming, *arguendo*, this issue/argument was not effectively ruled on by the circuit court, the Facility did all that was required to preserve it. The Motion to Compel Arbitration itself expressly relied on the FAA. (R. pp. 121-122.) The Facility’s memo in support of the Motion to Compel Arbitration expressly argued that “THE FAA GOVERNS THE ARBITRATION AGREEMENT,”⁸ as, indeed, the circuit court expressly recognized. (R. p. 4 (“Defendants argue that the FAA governs the arbitration agreement.”).) Likewise, the circuit court’s order denying the Motion to Compel Arbitration expressly recognized that the Motion to Compel Arbitration was made “pursuant to the Federal Arbitration Act.” (R. p. 1.) And besides expressly asking the circuit court “to (re)consider and expressly rule on each and every distinct issue/argument it raised in support of the [Motion to Compel Arbitration],”⁹ which would, of course, include the Facility’s aforementioned express argument that “THE FAA GOVERNS THE ARBITRATION AGREEMENT,”¹⁰ the Facility’s motion for reconsideration of the denial of the Motion to Compel Arbitration

to insure that just results are reached to the fullest extent possible.”).

⁸ (R. pp. 167-168 (original bold print omitted).)

⁹ (R. p. 267.)

expressly argues that the circuit court’s improperly relied on S.C. Code Ann. § 15-48-20, because this matter is governed by the FAA, which necessarily included and sought a ruling on any threshold issue as to the applicability of the FAA.¹¹ *See Elam v. S.C. Dep’t of Transportation*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (“A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.”) (emphasis in original); *Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999) (once an issue/argument has been properly raised by a Rule 59(e), SCRCPC, motion, it is preserved even if the lower court does not rule on it).

CONCLUSION

For the foregoing additional reasons, Appellants ask that the Court reverse the circuit court’s denial of the Underlying Motions and compel Plaintiff’s claims against the Facility to arbitration and stay this lawsuit as to the Other Defendants pending the outcome of arbitration between Plaintiff and the Facility (or to remand this matter to the circuit court with instructions that it do so); or, alternatively, reverse the circuit court’s denial of the Underlying Motions and remand this matter to the circuit court for the additional discovery requested by the Facility to be

¹⁰ (R. pp. 167-168 (original bold print omitted).)

¹¹ (R. p. 295; *see also* R. pp. 288, 294 (referring to the FAA’s “equal footing” mandate.) Though, again, to be clear, there was—and indeed is—no genuine issue as to whether the FAA applies: It plainly does, and neither did Plaintiff ever argue nor the circuit court ever rule otherwise.

conducted, for additional briefing to be submitted to the circuit court in light of such discovery, and for the circuit court to hear and decide the Underlying Motions anew with the benefit of the same; and, to the extent that it may be necessary to protect Appellants against any threat of prejudice going forward, reverse the circuit court so as to eliminate any language in its principal order that is inconsistent with the Facility's admission that it operates Magnolia Manor-Inman, Mack's admission that he was the administrator of Magnolia Manor-Inman while Mr. Arches was a resident, and FAS, FCOS, HVH, THIB, and THISC's denials that they have ever operated any skilled nursing facility or provided care or treatment to Mr. Arches or had any interaction or relationship with Mr. Arches of any kind.

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)
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

June 3, 2024

RECEIVED

Jun 03 2024

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2022-CP-42-02595
Appellate Case No. 2023-001371

Steven McCarson,
as Personal Representative of the Estate of Louie Arches,

Respondent,

v.

THI of South Carolina at Magnolia Manor-Inman, LLC
d/b/a Magnolia Manor-Inman, THI of South Carolina at Inman, LLC,
THI of South Carolina, LLC, Hunt Valley Holdings, LLC,
Fundamental Administrative Services, LLC,
Fundamental Clinical and Operational Services, LLC,
THI of Baltimore, LLC, and James H. Mack,

Appellants.

APPELLANTS' CERTIFICATION FOR FINAL REPLY BRIEF

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
James D. Gandy, III (SC Bar No. 11925)
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

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

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)
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

June 3, 2024