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Nov 14 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

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.

RETURN TO PETITION FOR REHEARING

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AND

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ATTORNEYS FOR RESPONDENT

Appellants 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 have petitioned the Court for rehearing arguing that the Court erred in affirming the Circuit Court's July 10, 2023 and July 27, 2023 Orders on the ground that the Appellants' Admission and Arbitration Agreements do not merge.[1] Appellants' argument is frivolous because under this Court's prior rulings, the exact same Arbitration Agreement and Admission Agreement at issue in this Appeal have been found by this Court not to merge, and that a nonsignatory would therefore not be precluded from denying the validity of the Arbitration Agreement, in 16 unpublished decisions and one published decision, *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), and because certiorari on this exact issue has been denied by the Supreme Court fifteen times. Despite overwhelming authority revealing that Appellants' Petition for Rehearing is obviously destined for failure, Appellants' petitions to this Court and the Supreme Court continue unabated.

ARGUMENT

Because arbitration exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration (the Estate) is a

[1] Pursuant to Rule 240(a), SCACR, petitions for rehearing cannot exceed 15 pages. Appellants' Petition for Rehearing totals 25 pages of text.

nonsignatory to the written agreement to arbitrate.[2,3] *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019). State law provides when an arbitration agreement may be enforced against a nonsignatory, and South Carolina permits a nonsignatory to be bound by an arbitration agreement under several theories: incorporation by reference, assumption, agency, veil piercing/alter ego, and estoppel. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. Only two of these theories were at play before the Circuit Court, and Appellants declined to appeal any issues concerning agency. Therefore, Appellants may only prevail if they can show there is no evidence reasonably supporting that the Estate should not have been estopped from denying the validity of the Arbitration Agreement.

A nonsignatory may be estopped from denying the validity of an arbitration agreement when it receives a direct benefit from a contract containing an arbitration clause. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. It is undisputed in this case that Appellants' Arbitration Agreement was not a clause in its Admission Agreement, and neither McCarson nor the Estate have received any direct benefit from the Arbitration Agreement itself. Appellants thus argue that under a theory of merger, the Arbitration Agreement and the Admission Agreement became a unified contract

[2] Appellants' Petition for Rehearing is essentially a mirror image of their Final Brief's section concerning merger, with some minor changes made to conform to the current procedural posture and to reframe occasional arguments. Because Appellants do not raise any new arguments for rehearing or point to any overlooked evidence in the Record on Appeal, Respondent's arguments will mirror those made in his Final Brief.

[3] McCarson was acting in his individual capacity, and not in his capacity as personal representative of Arches' Estate, at the time he entered the Arbitration Agreement. *See Thompson v. Pruitt Corp.*, 416 S.C. 43, 61, 784 S.E.2d 679, 689 (Ct. App. 2016) (recognizing the concept that a person may act separately in individual and representative capacities).

once they were executed, and since Arches benefited from the terms of the Admission Agreement, his Estate is precluded from denying the validity of the Arbitration Agreement. However, the language and formatting of the Agreements serve as evidence that the two Agreements were intended to be separate documents, and at minimum, create an ambiguity as to merger that must be construed against Appellants.

> In South Carolina, "[t]he general rule is that, *in the absence of anything indicating a contrary intention*, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (emphasis added). Here, the terms of the Agreements indicate an intent that the doctrine of merger would not apply to the Agreements, and at minimum create an ambiguity as to merger. *See id.* at 355-56, 755 S.E.2d at 455 (stating that ambiguity as to merger must be construed against the drafter). Appellants make an argument that there is a presumption of merger when documents are executed at the same time and for the same purpose, and that any ambiguity in the documents demonstrative of the drafter's intent therefore cannot be construed against the drafter.[4] This makes little sense and misrepresents the language of *Coleman*, as the rule makes clear that there is an exception to any presumption of merger when *anything* exists which would indicate a contrary intention. Ambiguity in the documents as to whether they merge

[4] To be clear, South Carolina law has never stated that there is any sort of evidentiary presumption of merger.

is clearly *something* which could indicate contrary intent and cautions against a finding of merger.

In determining whether a health care facility's admission and arbitration agreements merge, this Court has looked to the following factors: (1) whether the two agreements are governed by separate bodies of law, (2) whether the language of the agreements recognizes the two agreements as separate, (3) whether the agreements contain different terms regarding revocation and termination, (4) whether the agreements are separately paginated and have their own signature pages, and (5) whether both agreements are required for the execution of the other, or whether one agreement is optional. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 562-63, 813 S.E.2d 292, 302 (Ct. App. 2018). This Court previously analyzed the exact Admission and Arbitration Agreements at issue here in *Solesbee* (and all 16 other unpublished decisions) and found the Agreements do not merge.

In *Solesbee*, the Court found that the Admission Agreement is governed by South Carolina law, while the Arbitration Agreement is governed by federal law. *Solesbee*, 438 S.C. at 648, 885 S.E.2d at 149. To be precise, the Admission Agreement is governed by "applicable Federal regulations" and South Carolina law. (R. pp. 200-211). The Arbitration Agreement, on the other hand, purports to be governed by the FAA's statutes and specifically not by South Carolina law.[5] Therefore, the two

[5] Appellants argues that both Agreements are broadly governed by South Carolina and federal law; however, the Arbitration Agreement specifically states it will only be enforced under the FAA. To the extent that the Arbitration Agreement provides that the arbitration *proceedings* will be governed by the South Carolina Alternate Dispute Resolution/Mediation Rules, these Rules only govern the proceedings and are irrelevant to the enforcement of the Arbitration Agreement and the Court's determination of merger.

Agreements are not governed by identical spheres of law: one is subject to state law and the federal code of regulations, while the other claims to be subject to the statutes contained within the FAA.

Second, the Court has previously found that the language of the Agreements recognizes that they are separate: "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.'" *Solesbee*, 438 S.C. at 648-49, 885 S.E.2d at 149. This language mirrors that addressed in *Coleman* and *Thompson*, in which the Supreme Court and this Court found such language to be proof that an admission agreement was separate and did not merge with an arbitration agreement:

> The court then explained the evidence of the parties' intent to keep the two agreements separate by highlighting the Admission Agreement's recognition of the Arbitration Agreement as a separate document, i.e., "This Agreement, including all Exhibits hereto, and the Arbitration Agreement . . . ."

Thompson, 416 S.C. at 52, 784 S.E.2d at 685.

Appellants argue that the Admission Agreement's "Entire Agreement" clause contains language indicating that the Agreements merged, specifically the statement that "[t]he undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference *herein*." (R. p. 211) (emphasis added). Problematically, there is no reference to the Arbitration Agreement anywhere within the entire Admission Agreement, and even if there was,

when viewed alongside the other details of the Agreements, there remains an ambiguity as to merger at best that must be construed against Appellants.

Appellants wholly rely on dicta from prior decisions of this Court discussing that arbitration agreements can be part of admissions documentation to support that its Arbitration Agreement was an "Admissions material" that was incorporated into its Admission Agreement, but those decisions have no evidentiary value to this Appeal. Additionally, the "Entire Agreement" provision purports to incorporate the Admissions materials by reference within the Admission Agreement itself, but nowhere within the Admission Agreement, including the "Entire Agreement" provision, does it ever refer to the Arbitration Agreement. The "Entire Agreement" provision creates at best an ambiguity as to merger when taken in context of the totality of the circumstances.

Third, the Court has found that the Arbitration Agreement contains no language indicating that it may be revoked or terminated, but the Admission Agreement provides that a resident may terminate the Admission Agreement at any time. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. Fourth, the Court has found that the Agreements at issue are separately paginated and have their own signature pages. *Id.* Since the Arbitration and Admission Agreements have different pagination with different signature pages, and the Arbitration Agreement is entitled "Arbitration Agreement" at the top of its first page, these factors further indicate the drafter's intent for the Arbitration Agreement to stand by itself as an independent contract, at least when it suits Appellants for it to do so. *See Thompson*, 416 S.C. at

53 n.1, 784 S.E.2d at 685 n.1 (noting that a separately labeled arbitration agreement indicates the drafter's intent for the agreement to stand by itself as an independent contract). Lastly, the Court has found that the Arbitration Agreement is optional and voluntary, while the Admission Agreement is required for admission. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. Appellants do not dispute in this case that the Arbitration Agreement is voluntary and optional.

In this case, the text of the Agreements constitutes "actual evidence" and at minimum creates ambiguity as to whether the Agreements merged. Appellants misconstrue that there is a legal presumption of merger, and that the above-discussed factors are not sufficient to overcome this presumption. However, the language of *Coleman* never states that there is a presumption of merger in the context of health care facility arbitration agreements, or that one interpretation as to merger or the other is favored in any way, and in fact the Court's precedents state that *there is a presumption against arbitration, and therefore merger, when an arbitration agreement is attempted to be enforced against a nonsignatory*. *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173.

Coleman dictates that the Court can assume merger only if the Agreements were made at the same time, by the same parties, for the same purpose, and in the course of the same transaction, so long as there is no language or other indications within the Agreements of a contrary intent. The fact that here there is ample evidence that the Agreements were drafted in such a manner that they could, if necessary, be construed as separate contracts only strengthens the Circuit Court's and this Court's

reasoning and cautions against a finding of merger. The language, pagination, and formatting of the Admission Agreement and Arbitration Agreement evince an intent for the Agreements to be considered separately, presumably when such a position would work to the advantage of Appellants.

Appellants argue that this evidence is not "actual evidence", and that the Circuit Court's and this Court's former decisions were based on speculation. This begs the question of what else was the Circuit Court supposed to rely on to determine if there was an intent contrary to merger that could be gleaned from the Agreements. Additionally, if the above-discussed evidence is not indicative of a contrary intent, and Appellants intended the documents to merge, then why haven't they made the Arbitration Agreement a provision of the Admission Agreement, or merged the two documents with an explicit merger provision? Why make separate documents to begin with? The answer to these questions is that for certain purposes, Appellants and other skilled nursing facilities want their agreements to be separate. The language of the Agreements purposefully creates an ambiguity that must be construed against the drafter and required the Circuit Court, and this Court, to find that in this instance there was no merger of the documents. This Court has repeatedly reached the same conclusion based on the same language and Agreements. The Court should adhere to stare decisis and uphold its recent decision in *Solesbee* by affirming the Circuit Court's Orders.

CONCLUSION

For the foregoing reasons, the Court should affirm the Circuit Court's Orders and deny the Appellants' Petition for Rehearing.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that a copy of the **Return to Petition for Rehearing** has been served upon the following counsel of record by emailing a copy of the same this 14th day of November 2024.

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