

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

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2022-CP-42-02595

Court of Appeals Case No. 2023-001371
Unpublished Opinion No. 2024-UP-320 (S.C. Ct. App. filed September 25, 2024)

Supreme Court Case No. 2025-000090

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,

Petitioners.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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 Petitioners

INDEX

ARGUMENT IN REPLY1

1. Argument I of Plaintiff’s return is not an argument against the merits of Petitioners’ petition, but rather a plea for the Court to simply ignore them.1

2. 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.2

CONCLUSION.....5

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

ARGUMENT IN REPLY

1. Argument I of Plaintiff’s return is not an argument against the merits of Petitioners’ petition, but rather a plea for the Court to simply ignore them.

Argument I of Plaintiff’s return argues that the Court should deny Petitioners’ petition for supposedly not “identify[ing] any special or important reasons justifying this Court’s review of the [Subject Opinion].” (Return p. 10.) Petitioners would point out that this is not an argument against the merits of Petitioners’ petition, but rather a plea for the Court to simply ignore them.

To be sure, as Rule 242(b), SCACR, makes expressly clear, “A writ of certiorari is not a matter of right, but of sound judicial discretion” Undoubtedly, the Court is empowered to deny this or any other petition for a writ of certiorari for no reason at all, regardless of the merits. In practice, however, it does not appear that the Court is inclined to turn a blind eye to error for no better reason than because it can. *See, e.g., Branco v. Hull Storey Retail Group, LLC*, Memorandum Opinion No. 2023-MO-009 (S.C. Sup. Ct. filed May 24, 2023) (reversing, in an unpublished decision, an unpublished decision of the Court of Appeals). The fact that the Court regularly issues unpublished memorandum opinions, which, of course, have no precedential

¹ Shorthand references already defined in Petitioners’ petition are continued in this reply (e.g., the “Facility” refers to Defendant/Appellant/Petitioner THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, which is a skilled nursing facility in Spartanburg County; the “Other Defendants” refers to Defendants/Appellants/Petitioners THI of South Carolina, LLC; Hunt Valley Holdings, LLC; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; THI of Baltimore, Inc., misidentified in this action as “THI of Baltimore, LLC;” and James H. Mack, collectively; “Petitioners” refers to the Facility and the Other Defendants, collectively; “Plaintiff” refers to Plaintiff/Respondent, Steven McCarson, as Personal Representative of the Estate of Louie Arches; “Mr. Arches” refers

value, and indeed the very existence of Rule 220(b)(1), SCACR (restricting unpublished memorandum opinions to circumstances where a published opinion would have no precedential value), shows that, as the ultimate custodian of our state’s judicial system, the Court’s interests are not confined solely to the development of our law-giving jurisprudence but in fact encompass a broader concern for the quality of justice that system produces.

Petitioners would respectfully submit that this case does indeed include substantial and important issues as to which this Court’s guidance would be of benefit to the bench and bar.² But in any event, error below is enough to warrant this Court’s attention. And, indeed, Petitioners submit that the reason why the first thing Plaintiff argues is for the Court to ignore the merits is because the last thing Plaintiff wants is for the Court to consider them.

- 2. 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.**

Even Plaintiff admits that there is at least ambiguity as to whether the Admission Agreement and the Arbitration Agreement merged. (Ct. App. Br. of Respondent p. 2 (“At its core, this Appeal presents a narrow issue . . . : whether [the Facility] may bind a nonsignatory

to the decedent, Louie Arches; the “FAA” refers to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.; the “Subject Opinion” refers to the Court of Appeals’ opinion in this matter; etc.).

² (See Petition at Argument I(A) (regarding error by the Court of Appeals, like the circuit court before it, in failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), and its progeny *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), as well as in the Court of Appeals’ more recent decision in *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E. 2d 144 (Ct. App. 2023), which, Petitioners respectfully maintain, should not control the disposition of this case because the *Solesbee* Court (a) erred as to those aspects of the Facility’s merger argument that it addressed and (b), in any event, did not

resident, or his estate, to an arbitration agreement *when there is ambiguity* as to whether the [Facility’s] 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); *id.* at p. 19 (again asserting, albeit without any evidence, that the Facility purposefully “creates an ambiguity” in this regard); Return p. 19 (again asserting, albeit without any evidence, that the Facility purposefully “creates an ambiguity” in this regard).)

Of course, as explained in Petitioners’ petition, 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 Petitioners’ petition, to fall back on the idea that any ambiguity in regard to merger must be construed against merger makes no sense in this

actually address all material aspects of the Facility’s merger argument, leaving gaps through

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 dicta⁴ and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case⁵—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.

which the Facility’s position still fits.)

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

⁴ *Id.* at 407 S.C. at 355–56, 755 S.E.2d at 455 (“By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply. *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.”) (emphasis added) (internal citation omitted); *see Nash v. Tindall Corp.*, 375 S.C. 36, 40–41, 650 S.E.2d 81, 83 (Ct. App. 2007) (“Judicial dicta is not essential to the decision. Dicta . . . is a statement on a matter not necessarily involved in the case, and is not binding as authority.”) (internal citations and quotations marks omitted).

⁵ To be clear, none of *Coleman*’s progeny has addressed this either.

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).⁶

<SIGNED ON THE FOLLOWING PAGE>

⁶ The Court of Appeals' confirmation that the circuit court's collective reference to the defendants does not constitute a determination on the merits regarding any relationship between the defendants and/or Mr. Arches (*see* Subject Opinion n.2) is appreciated and should remain in any new opinion.

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 Petitioners

Charleston, South Carolina

March 28, 2025