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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2025-000237

Joe Bryan, Respondent,

v.

THI of South Carolina at Charleston, LLC d/b/a
Riverside Health and Rehab, Appellant.

RESPONDENT'S MOTION TO DISMISS APPEAL

Respondent hereby moves the Court for an Order dismissing this appeal on the grounds that the issues raised therein are barred by the doctrine of collateral estoppel and that the appeal is frivolous in nature, such that the Court should impose sanctions, including dismissal. Pursuant to Rule 240(c)(2), SCACR, Respondent is filing a Memorandum in Support herewith.

Respondent reserves all other arguments in opposition to this appeal.

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MEMORANDUM IN SUPPORT
OF RESPONDENT'S MOTION TO DISMISS APPEAL

Pursuant to Rule 240(c)(2), SCACR, Respondent submits this memorandum in support of his Motion to Dismiss filed herewith.

BACKGROUND AND PROCEDURAL HISTORY

This is a medical malpractice action arising from Respondent's treatment at Appellant's rehabilitation facility ("Facility") following Respondent's hospitalization for a stroke in the summer of 2021. While a resident at the Facility, Respondent developed a pressure wound that resulted in an additional hospitalization and further treatment, including a surgical procedure.

Based on the content of an agreement purportedly signed by Respondent's son, Appellant moved to stay or dismiss this action and for an order compelling arbitration, claiming that "[Respondent] entered into an Arbitration agreement with the Facility."

On November 13, 2024, the circuit court held a hearing on Appellant's Motion to Dismiss and Motion to Compel Arbitration. It denied the motions in a Form 4 Order issued on December

4, 2024, and issued a formal Order denying the motions on December 13, 2024. Appellant filed a Motion to Alter, Amend, and/or Reconsider on December 23, 2024. The circuit court denied that motion on January 9, 2025. Appellant filed its Notice of Appeal on February 7, 2025, and submitted its Initial Brief on June 6, 2025, after receiving two 30-day extensions from the Court.

ARGUMENT

Despite having a total of 119 days to submit its Initial Brief specific to this appeal, Appellant has submitted a brief that is substantially identical to its Initial Brief in another case where Appellant sought to compel arbitration but lost, *Hutley v. THI of S.C. at Magnolia Manor Inman, LLC*, Appellate Case No. 2023-001612.[1] Ironically, the *Hutley* appeal appears to have been primarily used as an attempt to relitigate another matter – *Solesbee v. Fundamental Clinical & Op. Servs.*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), *cert. denied* (April 16, 2024),[2] which involved one of Appellant's "sister facilities," an identical Admission and Arbitration Agreement, and the same defense firm as both *Hutley* and the instant matter. As discussed below, Appellant is also trying to relitigate *Solesbee* in the instant appeal, dedicating ten pages of its Initial Brief to discussing that case and the circuit court's "reliance" on it, despite no indication from the circuit court that it considered the *Solesbee* case at all.[3]

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[1] "A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984). A text comparison of the Argument sections in Appellant's brief in *Hutley* and the Initial Brief in this matter reveals that 84% of the text is identical. Most of the remaining 16% is due to differences in party names and Appellant's lack of discussion of the Motion to Stay in this appeal. Appellant and its counsel also make what appear to be identical arguments in *Fernesha Mazyck v. THI of South Carolina at Charleston, LLC*, Appellate Case No. 2025-000070, which is currently before this Court. The *Mazyck* matter appears to have been recently delayed by multiple extension requests by Appellant.

[2] Although the *Solesbee* case involved a different facility than that involved here, upon information and belief, Appellant is a part of the same corporate structure.

[3] The practice of recycling briefs on the same issues does not appear to be a new tactic employed

The present appeal is the latest in a series of redundant appellate filings by Appellant and its counsel. It presents only issues that have been rejected by this Court or the South Carolina Supreme Court.[4] It does not address the arguments made by Respondent's counsel at the circuit court level; nor does it actually address that court's ruling. It attempts to relitigate identical issues – which it lost – from cases with identical subject matter (*i.e.*, identical Admission and Arbitration Agreements, which are at the heart of this appeal). It does not serve judicial economy.

This appeal serves only Appellant's interest in further delaying this case. In so doing, it perpetuates a denial of justice for an aging Plaintiff, who is apparently one of many litigants to experience the same dilatory conduct on behalf of the Appellant, its sister facilities, and its counsel.[5] Because Appellant has failed to present appealable issues to this Court, the Court should dismiss this Appeal based on the application of the doctrine of issue preclusion. Additionally, this Court should impose the sanction of dismissal (and, possibly other sanctions) on Appellant and its counsel to discourage their practice of filing repetitive, frivolous appeals.

I. <u>The Issues Raised in Appellant's Initial Brief are Barred by the Doctrine of Issue Preclusion.</u>

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by Appellant and its counsel, nor is it limited to this Court. As noted in the Respondent's Return to Petition for Writ of Certiorari in *Solesbee*, the Supreme Court denied multiple identical petitions for certiorari filed by Appellant's "sister facilities" in the three months preceding that brief.

[4] Appellant has sought certiorari in the *Hutley* case, on which the Supreme Court has yet to rule.

[5] A records search on www.sccourts.org for THI of South Carolina shows it has been listed as a defendant in 63 Charleston County Court of Common Pleas cases (excluding Notice of Intent filings) since 2004 and as a party in 25 appeals in the Court of Appeals and/or the Supreme Court since 2012. *See State v. Little*, 227 S.C. 60, 86 S.E.2d 875 (1955) (court may take judicial notice of public records); *Sloan v. Greenville Cnty.*, 380 S.C. 528, 670 S.E.2d 663 (Ct. App. 2009) (court may take judicial notice of its docket); *see also* Caitlan Bell, *North Charleston nursing home again subject of lawsuit, amongst over a dozen pending*, THE POST & COURIER, June 26, 2025 (https://www.postandcourier.com/news/crime/riverside-health-lawsuit-north-charleston/article%20%202d86b8a5-184e-4388-a482-93a71b4e6333.html).

In its Initial Brief, Appellant raises basically three arguments in support of its claim that the circuit court erred in denying its motion to compel arbitration:

A. Did the circuit court err in rejecting the Facility's merger/equitable estoppel argument? More specifically, should the circuit court have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Bryan effectively embraced and directly benefitted from the Admission Agreement, he is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith—and, thus, granted the Facility's motion?

1. Is the circuit court's merger analysis erroneous?

(a) Did the circuit court err in relying on *Solesbee v. Fundamental Clinical and Operational Services, LLC*—indeed, is the *Solesbee* Court's merger analysis itself erroneous—and should *Solesbee* control the disposition of this case?

2. Should the circuit court have found that equitable estoppel applies to prohibit Mr. Bryan from denying the enforceability of the Arbitration Agreement?

3. Did the circuit court err in stating that the Facility "had" Michael sign the Admission Agreement and/or the Arbitration Agreement?

The first argument's reference to the circuit court's "reliance" on *Solesbee* is misleading at best. The *Solesbee* case was not referenced in the circuit court's orders, nor, to the best of the undersigned's recollection, did the Court indicate at the hearing on this matter that its decision was informed by *Solesbee*. Rather, Appellant has simply copied this argument verbatim from its brief in *Hutley*, despite the fact it does not apply here. (*Hutley*, Br. of Appellant, pp. 1-2).

In light of the lack of reliance by the circuit court, the only questions properly raised in argument A.1. are: 1) Is the *Solesbee* court's merger analysis itself erroneous? and 2) Should *Solesbee* control the disposition of this case? Given that the Supreme Court denied certiorari in *Solesbee* – rejecting almost identical arguments regarding an identical purported arbitration agreement – and that this Court in *Hutley* rejected Appellant's argument regarding *Solesbee,* the answers are: 1) No; and 2) Yes. The Court should summarily dismiss argument A.1.

As the Court is aware, it need not reach argument A.2. if affirms the circuit court on the first argument.

As for argument A.3., Appellant states in its Initial Brief that "the circuit court did not actually state that [the word choice 'had'] is material to its reasoning," and admits it only raised the issue "out of an abundance of caution, to the extent that it might potentially be prejudicial" to Appellant. (Init. Br. of Appellant, p. 32). Appellant made a similar semantic argument in its brief in *Hutley*, even using the same wording as indicated in quotes above. (*Hutley*, Br. of Appellant, p. 6 n.12). Because the Court rejected this argument by Appellant in *Hutley*, it should summarily dismiss it here.

Because the Supreme Court and this Court in *Solesbee*, and this Court again in *Hutley*, have addressed and rejected Appellant's substantive arguments, this Court should apply the doctrine of issue preclusion to prevent Appellant from rehashing those arguments in the present appeal. That doctrine not only prevents a party from relitigating an issue with an opposing party but can also be applied to litigation with another party. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982 & Supp. 2012) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."); *id.,* § 29 ("A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue.").

In addition to being a blatant attempt to relitigate *Solesbee*, Appellant's arguments are also essentially identical to those asserted in its brief in *Hutley.* The *Hutley* matter was another appellate

case lost by one of Appellant's "sister facilities." Like *Solesbee*, the *Hutley* matter concerned a purported Arbitration Agreement that was identical to the one at issue in this case. On November 27, 2024, this Court held in an unpublished decision that the Admission and Arbitration Agreements at issue in *Hutley* did not merge and that it need not reach Appellant's equitable estoppel argument. As discussed below, Appellant's Initial Brief in this matter is nearly identical to its brief in *Hutley*, emphasizing the simple fact that this appeal is yet another attempt by Appellant to relitigate *Solesbee*.

The identity of the Respondents is the only relevant distinction that can be made between *Solesbee*, *Hutley*, and the instant matter; Appellant has failed to raise any legal arguments distinct from those that have already been raised and ruled upon. Therefore, the doctrine of issue preclusion should bar the current appeal.

II. The Court Should Dismiss Appellant's Appeal Because it is Frivolous and Undertaken for Delay.

In addition to dismissal on the grounds of collateral estoppel, Respondent respectfully submits that this Court should consider dismissal as a sanction to Appellant and/or its counsel. This Court has authority to do so under Rule 269, SCACR, which provides that when an appeal is frivolous or taken only for delay, a party may move to impose sanctions on offending attorneys or parties such that "the circumstances of the case and discouragement of like conduct in the future may require." This Court may also impose sanctions via its own inherent ability, the South Carolina Frivolous Civil Proceedings Sanction Action, S.C. CODE ANN. § 15-36-10 (Supp. 2012) ("FCPSA"), and/or Rule 11, SCRCP.

As previously discussed, the argument section of Appellant's Initial Brief is substantively identical to the one it filed in the *Hutley* appeal. It also contains material misrepresentations to the Court. It repeatedly asserts that the circuit court "relied on" a case that it did not even cite.

Appellant's briefing (both in the underlying matter and in its Initial Brief before this Court) is consumed in no small part by discussion of *Solesbee.* Indeed, Appellant's Initial Brief in this matter spends over ten pages discussing the circuit court's "erroneous reliance" on *Solesbee*. (Init. Br. of Appellant, pp. 19-28). However, as discussed herein, there were no references to the *Solesbee* decision in the circuit court's rulings, and the circuit court did not indicate a reliance on that decision during the hearing of this matter that took place on November 13, 2024.

It appears that, since the *Solesbee* decision, Appellant and its counsel have been on a mission to relitigate a matter that has already been decided. Although that is problematic for legal reasons (as discussed *supra*), it also demonstrates a frivolous approach that should not be tolerated by this Court. Appellant's practices put increased strain on judicial resources as well as those of opposing litigants, wasting countless hours of attorney and judicial time. Their efforts also wrongly and foreseeably prejudice litigants like Respondent – a 72-year-old patient of Appellant's skilled nursing facility who has been forced to wait for his day in court while Appellant tries for a third or fourth (or maybe fifth) bite at the apple. As previously noted, in this appeal alone, Appellant requested and received two thirty-day extensions to submit its Initial Brief, resulting in an additional sixty days of delay.

Despite receiving this additional time, Appellant has utterly failed to raise any legal arguments not barred by collateral estoppel. In fact, it barely managed to change the content of its previous unsuccessful briefs, necessarily prompting the question of why any extension was necessary in the first place. This dilatory conduct is clearly designed to harm those like Respondent by forcing them to wait through the appellate process, all while withholding (and earning interest on) compensation that rightfully belongs to them as injured parties and accusing them of "have-your-cake-and-eat-it-too inequity." (Init. Br. of Appellant, p. 30).

The Court should not tolerate or allow Appellant to perpetuate this pattern of conduct. Respondent respectfully requests that the Court impose the sanction of dismissal (as well as any other sanctions it deems appropriate) on Appellant and/or its counsel.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Court dispense with further briefing and dismiss this appeal.

Respectfully submitted,

CLAWSON FARGNOLI UTSEY, LLC

/s/ Laura Wilkes-D'Amato

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Appellate Case No. 2025-000237

Joe Bryan,

Respondent,

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THI of South Carolina at Charleston, LLC
d/b/a Riverside Health and Rehab,

Appellant.

PROOF OF SERVICE

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I, Bert G. Utsey, III , of Clawson Fargnoli Utsey, LLC attorneys for Respondent hereby certify that the **RESPONDENT'S MOTION TO DISMISS APPEAL** and **RESPONDENT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** were served on Appellant on July 7, 2025, by emailing (see attached email) a copy of the same to all counsel of record:

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Respectfully submitted,

CLAWSON FARGNOLI UTSEY, LLC

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Charleston, South Carolina

July 7, 2025

Molly Duncan

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Subject: RE: Bryan v. THI (2025-00237) -- Respondent's Motion to Dismiss and Memo in Support

Good afternoon,

Attached for filing in the above-referenced matter please find the **Respondent's Motion to Dismiss Appeal and Respondent's Memorandum in Support of Respondent's Motion to Dismiss Appeal**, and **Proof of Service**.

Thank you.

Molly E. Duncan

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