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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Vernon F. Dunbar, Circuit Court Judge

Appellate Case No. 2025-001290

Marvin Barborek,…….....Respondent,

v.

Cascades Nursing, LLC, and Cascades Retirement, LLC,……..Appellants.

INITIAL RESPONDENT'S BRIEF

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II. Whether the circuit court erred in finding that the Arbitration Agreement was not an independently valid contract.

III. Whether the circuit court erred by ruling on issues related to the Arbitration Agreement instead of delegating those decisions to an arbitrator.

COUNTERSTATEMENT OF THE CASE

This action was commenced on January 24, 2025, by filing a Summons and Complaint in the Greenville County Court of Common Pleas. (Complaint). Respondent Marvin Barborek alleged negligence and gross negligence claims against Appellants Cascades Nursing, LLC, and Cascades Retirement, LLC, as a result of the care and treatment provided to him while he was a resident at a facility located at 10 Fountainview Terrace, Greenville, South Carolina 29607 ("Facility"). Respondent properly complied with the Notice of Intent and affidavit requirements of S.C. Code Ann. §§ 15-79-125 and 15-36-100 prior to filing suit. Appellants filed a Motion to Dismiss and Compel Arbitration on February 19, 2025, arguing that "all claims be submitted to binding arbitration in accordance with the terms of the Admission Agreements and Arbitration Agreement mutually entered into between the parties on or around March 6, 2024." (Motion to Compel Arbitration). Appellants argued that Respondent signed an Admission Agreement that contained an Arbitration Agreement, and that, by signing it, Respondent agreed to submit all disputes to arbitration, including disputes as to the validity of the Arbitration Clause itself. (Motion to Compel Arbitration, pg. 2). Appellants subsequently filed an Answer wherein they denied being either the nursing or administrative company located at Facility's address. (Answer). Appellants'

Motion was set for hearing by the circuit court on May 20, 2025. Appellants did not file a memorandum in support of their Motion to Compel Arbitration.

Prior to the hearing, Respondent filed his Memorandum in Opposition to Appellants' Motion to Compel Arbitration on May 16, 2025. (Memorandum in Opposition to Motion to Compel Arbitration). Respondent argued (1) that the named defendants could not enforce the arbitration agreement because they are not parties to it, (2) that the arbitration agreement is not enforceable because it is not signed by those seeking its enforcement and because it did not merge with the admission agreement, (3) the arbitration agreement is not enforceable because there is no consideration for Mr. Barborek's signature, (4) the arbitration agreement is not enforceable because Mr. Barborek did not have the mental capacity to enter into a contract, and (5) the arbitration agreement is not enforceable because it is unconscionable. The circuit court denied Appellants' Motion to Compel Arbitration by way of a Form 4 Order filed May 30, 2025. (May 30, 2025, Order). This Appeal followed.

STATEMENT OF THE FACTS

Respondent came to Greenville, SC, in February 2024, to visit friends. On February 29, 2024, he fell on his right side while getting off the toilet. He was taken to Prisma Health Greenville Memorial Hospital where he was diagnosed with a fractured right femoral neck. On March 2, 2024, Respondent received a right hip hemiarthroplasty. He subsequently worked with physical therapy who recommended he have a post-acute stay. Therefore, on March 6, 2024, he was discharged from Greenville Memorial with numerous medications, including oxycodone, and sent to Facility.

Upon Respondent's arrival at Facility, he was presented with nearly thirty pages of intake documents to complete. Included in those intake documents were an Admission Agreement and an

Arbitration agreement. (Exhibit to Defendants' Motion to Compel Arbitration). The Admission Agreement governed the care Respondent would receive at Facility, and his financial obligations for those services. The final page of the Admission Agreement stated, "[t]his Agreement shall inure to the benefit of, and be binding upon, the heirs, successors, permitted assigns, and legal and personal representatives of the parties" and was allegedly signed by Respondent and an unidentified "community administrator or designee." The Appellants were not mentioned in the Admission Agreement.

The separate Arbitration Agreement, purportedly a contract between Facility and Respondent, provided for alternative dispute resolution for any claim Respondent, and only Respondent, may have against "Community," Maxwell Group, Inc., or Senior Living Communities. The Arbitration Agreement was not signed by Appellants or anyone affiliated with them and did not mention Appellants at all.

STANDARD OF REVIEW

An appeal from an order denying a motion to compel arbitration is subject to de novo review. *Est. of Solesbee by Bayne v. Fundamental Clinical & Operational Servs., LLC*, 438 S.C. 638, 645, 885 S.E.2d 144, 147 (Ct. App. 2023). Under de novo review, a circuit court's underlying factual findings will not be reversed on appeal if any evidence reasonably supports those findings. *Solesbee*, 438 S.C. at 645-46, 885 S.E.2d at 148.

ARGUMENT

The circuit court's May 30, 2025, Order should be affirmed by the Court because it does not contain any clear legal errors, and the factual conclusions of the circuit court are reasonably supported by the evidence in the record. Under prior rulings from both this Court and the South Carolina Supreme Court, similar admission agreements and arbitration agreements have been

found to be separate and not to merge. Standing alone, the Arbitration Agreement was not and is not a valid contract, and Appellants' Motion to Compel Arbitration was properly denied by the circuit court. For these and the following reasons, the circuit court's Order denying Appellants' Motion should be affirmed.

I. The Arbitration Agreement and Admission Agreement are separate and did not merge.

"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).

"[T]he admission agreement and arbitration agreement did not merge because: (1) the admission agreement indicated it was governed by South Carolina law, whereas the arbitration agreement stated it was governed by federal law; (2) as in *Coleman*, the arbitration agreement recognized the two documents were separate, stating '[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement'; (3) the arbitration agreement stated it could be revoked within thirty days, whereas the admission agreement contained no such indication and instead provided the admission agreement could only be amended; (4) each document was separately paginated and had its own signature page; and (5) the arbitration agreement stated that signing it was not a precondition to admission." *Solesbee*, 438 S.C. at 648, 885 S.E.2d at 149 (quoting *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 562-63, 813 S.E.2d 292, 302 (Ct. App. 2018)).

"[A]ny ambiguity in the patient's admission agreement as to its merger with the arbitration agreement was to be construed against the health care facility." *Thompson v. Pruitt Corp.*, 416 S.C. 43, 54, 784 S.E.2d 679, 685 (Ct. App. 2016) (quoting *Coleman*, 407 S.C. at 355-56, 755 S.E.2d at 455). "A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear." *Id*. (quoting *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 94, 594 S.E.2d 485, 493 (Ct. App. 2004)).

First, the Admission Agreement and Arbitration Agreement are governed by different bodies of law. In *Solesbee*, the Court found that the admission agreement was governed by South Carolina law, and the arbitration agreement was 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 "the applicable laws of South Carolina and the United States of America that are presently in effect." The Arbitration Agreement, on the other hand, purports to be governed by the Federal Arbitration Act and the Consumer Rules of the American Health Law Association and specifically not by South Carolina law. Therefore, the two agreements are not governed by identical spheres of law: one claims to be subject to both South Carolina law and the laws of the United States, while the other claims to be only subject to the laws of the FAA and the American Health Law Association.

Appellants argue in their brief that the Arbitration Agreement is subject to the FAA while the Admission Agreement is silent on the question of controlling law. They argue that this removes one of the bases for the Court's decision in *Hodge*. This is incorrect and actually quite the opposite is true. At a minimum, even if Appellants are correct and the Arbitration Agreement is subject to the FAA while the Admission Agreement is silent on the question of controlling law, this is an ambiguity that must be construed against the drafters. The distinction between the two agreements

on controlling law is evidence of separation between the two. If the two agreements were one and the same, the drafters would have clearly indicated that one body of law controls both agreements.

Second, the language and formatting of the agreements demonstrate 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 *Coleman*, the parties' intended that merger not apply as evidenced by the language in the admission agreement "recogniz[ing] the 'separatedness' of the [arbitration agreement] and the admission agreement" and by a clause allowing the arbitration agreement to "be disclaimed within thirty days of signing while the admission agreement could not." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. "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., '[t]his Agreement, including all Exhibits hereto, and the Arbitration Agreement…'" *Thompson,* 416 S.C. at 52, 784 S.E.2d at 684.

The table of contents for the Admission Agreement is separated into two sections, "Skilled Care Residency Agreement" and "Attachments." The Arbitration Agreement is not a titled section under "Skilled Care Residency Agreement" and is not a designated attachment under "Attachments." It is identified on the "Your Responsibilities as a Resident" page, which falls under the "Skilled Care Residency Agreement" section. On that page, the Arbitration Agreement is referenced by stating, *"[s]ee full 'ARBITRATION AGREEMENT attached separately*." (emphasis added).

In *Thompson*, the appellants argued the admission agreement incorporated by reference all exhibits to the agreement and the arbitration agreement is one of the exhibits. *Thompson*, 416 S.C. at 53, 784 S.E.2d at 685. "[T]he Admission Agreement is ambiguous on this point because (1) it

does not define the term 'exhibit' or cross-reference any specific exhibits and (2) the AA [arbitration agreement] does not include any labels or other language indicating it serves as an exhibit or addendum to the Admission Agreement." *Id*. "Therefore, the Admission Agreement's provision incorporating all 'exhibits' must be construed against Appellants." *Thompson*, 416 S.C. at 53-54, 784 S.E.2d at 685.

While the Arbitration Agreement is referenced, that mere reference does not tell the whole story. Consider the use of the words "full" and "separately." "[F]ull 'ARBITRATION AGREEMENT,'" in this context, implies that the Arbitration Agreement is its own complete agreement standing apart from the Admission Agreement, particularly with the use of the word "separately" to conclude this sentence. Further, "attached," in this context, does not mean the two agreements are to be considered one and the same. As previously noted, the table of contents for the Admission Agreement is split into two sections, "Skilled Care Residency Agreement" and "Attachments," neither of which mention the Arbitration Agreement. If the Arbitration Agreement was an attachment, it would be referenced in the attachments section. Rather, it was and is its own separate, "full" document.

As in *Thompson*, the Admission Agreement is, at best, ambiguous when it comes to the Arbitration Agreement. While the Admission Agreement does reference the Arbitration Agreement, it does not define the words "attached" or "attachment," and it is reasonable to conclude that, if the Arbitration Agreement were truly an attachment to the Admission Agreement, it would be referenced in the attachments section of the table of contents. Further, the use of the words "full" and "separately" in the context of the reference to the Arbitration Agreement are certainly ambiguous as to whether the Arbitration Agreement was intended to stand alone from the Admission Agreement, which must be construed against Appellants. Regardless, even if there was

some reference to the Arbitration Agreement within the Admission Agreement, when viewed alongside the other details of the agreements, there remains an ambiguity as to merger that at best must be construed against the facility.

In addition, while the Court in *Coleman* was considering an "entirety" clause, the language of the Arbitration Agreement itself reflects the "separatedness" contemplated in that opinion. The two-page alleged arbitration contract is entitled "Arbitration Agreement" at the top of both pages. 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). The Arbitration Agreement also has an "integral and essential" clause in subparagraph "(d)," which that specific clause refers to "[t]his Arbitration Agreement…and…the Residency Agreement," clearly differentiating the two. In totality, the language and formatting of the two agreements demonstrate, at most, a "separatedness" between the two and, at a minimum, an ambiguity as to their being separate that must be held against the drafter of the agreements.

Third, the Arbitration Agreement "could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. The Arbitration Agreement "contained language that provided it could be disclaimed within thirty days, yet the Admission Agreement did not include such a provision." *Thompson*, 416 S.C. at 53, 784 S.E.2d at 685. The patient's right to disclaim the arbitration agreement without having to terminate their residency indicates the drafters' intent to keep the arbitration agreement separate from the admission agreement. *Id*. "[T]he Arbitration Agreement stated it could be revoked within thirty days, whereas the Admission Agreement contained no such indication…" *Hodge*, 422 S.C. at 562, 813 S.E.2d at 302.

As in *Coleman*, *Thompson*, and *Hodge*, the Arbitration Agreement provides that "[y]ou have the right to rescind this Agreement within thirty (30) days after you sign it." While the Admission Agreement provides that a resident may vacate the facility with at least thirty (30) day's written notice, that is obviously different from the resident's right to rescind the Arbitration Agreement within the first thirty (30) days at the facility without having to terminate their residency, which, as is noted in *Thompson* above, indicates the drafters' intent to keep the Arbitration Agreement separate from the Admission Agreement.

Fourth, "[t]he Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages." *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. The Admission Agreement and Arbitration Agreement each have their own signature pages. If the two agreements were one and the same and were not separate, then there would be no reason for each of them to have separate signature pages. The agreements are, however, not separately paginated because they are not paginated at all, thus creating another ambiguity as to merger that must be construed against the drafter.

Fifth, the right to disclaim the arbitration agreement without having to terminate residency at the facility indicates the drafters' intent to keep the arbitration agreement separate from the admission agreement. *Thompson*, 416 S.C. at 53, 784 S.E.2d at 685. "This is consistent with the arbitration agreement's statement that its execution was not a condition precedent for being admitted to the nursing home: 'The signing of this Agreement is not a precondition to admission, expeditated admission, or the furnishing of services to the Patient/Resident by the Healthcare Center[.]'" *Id*. "This demonstrates the parties' intent that the two agreements retain their separate identities." *Id*. "The two agreements are independent of one another, as reflected in the language of the arbitration agreement indicating its execution is not a condition for being admitted to the

nursing home." *Id*., 416 S.C. at 60, 784 S.E.2d at 688. "[T]he arbitration agreement was separate from the Admission Agreement, and Appellants represented the arbitration agreement to be a voluntary agreement that was not a condition to Mother's admission to the facility and was unconditionally revocable within thirty days of execution." *Id*., 416 S.C. at 62, 784 S.E.2d at 689. "The Arbitration Agreement specified 'signing of this Agreement is not a precondition to admission.'" *Hodge*, 422 S.C. at 551, 813 S.E.2d at 296. The Court found that the arbitration agreement was voluntary and was not required for admission. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149.

As in *Thompson*, *Hodge*, and *Solesbee*, the Arbitration Agreement states that the resident is "not required to sign this Arbitration Agreement as a condition of Resident's admission to, or as a requirement for Resident to continue to receive care at, this facility." The ability to reject the Arbitration Agreement while proceeding with the Admission Agreement demonstrates the parties' intent that the two documents retain their separate identities and independence from one another.

Coleman dictates that the Court can assume merger only if the agreements were executed 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 indication within the agreements of a contrary intent. These two agreements were not executed by the same parties. Appellants are not referenced at all in these agreements and certainly not in the Arbitration Agreement. These two agreements were not executed for the same purpose. The Admission Agreement is for residency and healthcare related services, while the Arbitration Agreement is related to dispute resolution. Finally, as will be argued below, the Arbitration Agreement was not executed at all because it was not signed by Appellants or any of their affiliates.

Even if the agreements were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, there is evidence that the two agreements were meant to be separate and not to merge. Appellants argue that all five of the *Hodge* factors must be present in order for the Court to find merger did not occur. A review of the *Hodge* opinion indicates that the Court made its decision based on the totality of all five factors being present, but that not necessarily all five factors must be present in order to find against merger. Regardless, all five of the *Hodge* factors indicate the parties' intent for the two agreements to be separate and not merge. The fact that there is ample evidence that the agreements were drafted in such a manner that they could, if necessary, be construed as separate agreements further supports the circuit court's ruling against a finding of merger. The language, lack of 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. As noted above, the language of the agreements purposefully creates an ambiguity that must be construed against the drafter and required the circuit court to deny Appellants' Motion. The Courts in *Coleman*, *Thompson*, *Hodge*, and *Solesbee* all found that there was no merger. Based on the above, the Court should affirm the circuit court's Order.

II. The Arbitration Agreement is not an independently valid contract because there was no mutual assent or consideration for it.

"Arbitration is available only when the parties involved contractually agree to arbitrate." *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839 (Ct. App. 1999). "[A]rbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law." *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). "In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material

terms of the contract. *Id*. "The necessary elements of a contract are an offer, acceptance, and valuable consideration." *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Prestwick Golf Club v. Prestwick Ltd.*, 331 S.C. 385, 389, 503 S.E.2d 184 (Ct. App. 1998). "A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement." *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 275 (4th Cir. 1997) (citing *Rickborn v. Liberty Life Insurance Co.*, 321 S.C.291, 468 S.E.2d 292, 300 (1996)). In determining the effect of a written contract, the intention of the parties and the meaning are gathered from the four corners of the instrument. *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945). A meaning cannot be given a contract other than that expressed; that is, words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. *Id*., 206 S.C. at 204, 33 S.E.2d at 509-10.

First, there is no mutual assent or meeting of the minds in order make the Arbitration Agreement a valid contract. The Arbitration Agreement is not signed by a representative for Appellants or for any of their alleged affiliates. The Arbitration Agreement is also not a valid contract because Appellants are not parties to it and are not mentioned on either page of the Arbitration Agreement.

Further, any possible benefit emanating from the arbitration agreement alone is offset by the arbitration agreement's requirement that the resident waive their right to access to the courts and their right to a jury trial. *Thompson*, 416 S.C. at 60, 784 S.E.2d at 688. The respondents received no benefit from the arbitration agreement. *Hodge*, 422 S.C. at 563, 813 S.E.2d at 302. "The only agreement from which Respondents even arguably received a benefit was the Admission

Agreement because [decedent] was admitted to the Facility as a result of it." *Id*. "However, because the Facility allegedly caused [decedent's] injuries that later led to her death, we find it difficult to find she benefitted even from being admitted." *Id*.

The Arbitration Agreement provides that "[i]t waives certain rights that *you* may have, including *your* right to have a jury trial on any claims that *you* may have against the community or its affiliates." (emphasis added). "Any…disputes…of any kind *that Resident may have* against Community, its employees or agents, or Community's affiliates…or their employees or agents that cannot be resolved informally…shall be settled exclusively by binding arbitration…" (emphasis added). The Arbitration Agreement is not a mutual promise to arbitrate, but rather only provides for the resident to give up their rights to a jury trial. As the Court noted in *Thompson* and *Hodge*, an arbitration agreement offers no benefit to the resident in this context. Therefore, there is no consideration for the Arbitration Agreement.

Because there was no meeting of the minds via signature from Appellants or their alleged affiliates, or from Appellants even being mentioned at all in the Arbitration Agreement, and because there was no consideration for the Arbitration Agreement, the Arbitration Agreement is not an independently valid contract. The circuit court's Order should be affirmed.

III. Because the Arbitration Agreement is separate from, and did not merge with, the Admission Agreement, and because the Arbitration Agreement is not an independently valid contract, it was proper for the circuit court to rule on the enforceability of the Arbitration Agreement.

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Solesbee*, 438 S.C. at 646, 885 S.E.2d at 148 (quoting *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009)). "[T]he presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an

agreement." *Id*. (citing *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019)) (emphasis omitted) (quoting *Carr v Main Carr Dev., LLC*, 337 S.W.3d 489, 496 (Tex. App. 2011)). "The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110 (2001).

As is noted above, the Arbitration Agreement is not a valid contract. It fails for lack of consideration and lack of mutual assent. It does not reference either of the Appellants and, more importantly, is not signed by anyone associated with Appellants or any of their alleged affiliates. Appellants argue now that the circuit court erred by ruling on the Motion that they filed instead of deferring to an arbitrator to decide the enforceability of the Arbitration Agreement. Essentially, Appellants wanted the circuit court, and now this Court, to enforce a provision from an unenforceable document. They argue "*the parties agreed* that all disputes concerning the Arbitration Agreement's validity are for an arbitrator to decide." (emphasis added). This is obviously inaccurate because there is no signature from Appellants or any of their affiliates on the Arbitration Agreement reflecting that they "agreed" to anything. There is no agreement because there is no mutual assent. Per the language from *Solesbee* cited above, "a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." This is clearly not a valid contract and, therefore, the circuit court appropriately ruled on the Motion before it. The circuit court's Order should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the Circuit Court's Order denying the Appellants' Motion to Compel Arbitration.

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Respectfully submitted,

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