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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 REPLY BRIEF

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ARGUMENT

I. The common law merger rule applies in this case.

As he did in the circuit court, Barborek relies heavily on *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), and *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), to support the argument that the doctrine of merger does not apply to the facts of this case. Cascades has previously addressed, and distinguished, those cases in its primary brief, and it will not repeat that analysis here. However, Barborek cites two additional cases in its brief that Cascades will address in this reply.

The first additional case is *Estate of Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023). Barborek cites *Solesbee* mainly in support of an argument that differences in the respective applicable laws for the Admission Agreement and the Arbitration Agreement prevent any merger of those agreements. Although this Court in *Solesbee* did cite differences in applicable laws for the admission and arbitration agreements[1] as one basis for concluding that merger did not apply, the same situation does not exist in the present case.

Contrary to Barborek's assertion, the Admission Agreement is silent as to its "controlling" law – i.e. the law governing its interpretation. The Admission Agreement contains only a provision entitled "Compliance with Law," which states:

> The parties to this Agreement agree to comply with the applicable laws of South Carolina and the United States of

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[1] The opinion in *Solesbee* states that the admission agreement was governed by South Carolina law and the arbitration agreement was governed by federal law. However, the opinion does not quote the specific "controlling law" provisions for those two agreements, which makes it impossible to determine from the opinion how similar – or dissimilar – those provisions might be to the agreements at issue in this appeal.

> America that are presently in effect and that may be enacted during the term of this Agreement. Resident and Responsible Party, if any, further agree to execute, when requested by Community, any and all amendments or modifications to this Agreement if required by law.

[Admission Agreement.] This section merely requires both parties to abide by the applicable laws of South Carolina and the United States. It says nothing about what jurisdiction's laws apply to the *interpretation* of the agreement. Thus, it is not a "controlling law" provision and cannot reasonably be construed as one. This means the Admission Agreement is silent on the issue of controlling law. Even if that were not so, the provision in question references both state and federal law and does not exclude either.

The Arbitration Agreement does specify that the Federal Arbitration Act is applicable to it, but that does not create any conflict with the Admission Agreement. As previously noted, the Admission Agreement does not state any contrary controlling law. Furthermore, the Admission Agreement is not itself a contract to arbitrate, which means it would not fall under the Federal Arbitration Act in any event. The clear distinction between competing controlling laws, which this Court found and relied upon in *Solesbee*, is absent here.

This Court in *Solesbee* also relied on two additional factors that do not exist in the present case. First, the admission agreement in *Solesbee* contained an "entire agreement" provision, which purportedly excluded a separate arbitration agreement. The Admission Agreement in this case has no corresponding language. Second, the arbitration agreement in *Solesbee* included a statement that it would "survive any termination or breach of this Agreement or the Admission Agreement." 438 S.C. at 649, 885 S.E.2d at 149. Again, the Arbitration Agreement in the present case does not have any such language, and it also

does not use the conjunction "or" when referencing itself and the Admission Agreement. To the contrary, the Arbitration Agreement's only specific reference to the Admission Agreement is *inclusive*. The Arbitration Agreement refers to itself as "an integral and essential part" of the Admission Agreement. Thus, *Solesbee* is distinguishable.

The same is true of *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016). As a threshold matter, this Court's discussion of the merger doctrine in *Thompson* can only be dicta. The Court began that section of its opinion by concluding that the merger issue was "not preserved for our review." *Id.* at 49, 784 S.E.2d at 683. Although the Court proceeded to discuss the issue in more detail, the transitional sentence between the "not preserved" and "merits" discussion is significant. The Court stated, "*Even if* Appellant's merger argument had been properly preserved, we *would* affirm on the merits." *Id.* at 50, 784 S.E.2d at 683 (emphasis added). The use of the conditional tense (twice) in that sentence demonstrates that the Court's only actual holding on that issue was that the merger doctrine argument was unpreserved for review. Thus, the remainder of the discussion on that issue does not serve as controlling precedent.

Even if *Thompson* were controlling precedent on the merger issue, it would nonetheless be distinguishable. The Court in *Thompson* noted that the resident had an express right to disclaim the arbitration agreement within 30 days, whereas the admission agreement had no similar provision. Here, as discussed in Cascades' primary brief, the Admission Agreement and the Arbitration Agreement both provided methods for Barborek to terminate the agreements. That fact prevents the agreements from conflicting with one another in any meaningful way.

More significantly, though, the *Thompson* Court expressed a belief that the admission agreement was ambiguous as to whether or not it intended to include the arbitration agreement as an "exhibit" or "attachment" because it made no specific reference to the arbitration agreement in that context. Here, no such ambiguity exists. The Admission Agreement contains a section entitled "Arbitration," which references an Arbitration Agreement as an attachment. This clearly demonstrates that the Admission Agreement intended for the Arbitration Agreement to be part of overall agreement for admission to the facility, as long as the potential resident agreed to it.[2]

For these reasons, *Solesbee* and *Thompson* are distinguishable from the present case, just as *Hodge* and *Coleman* are. This means Barborek has failed to demonstrate any compelling argument as to why the doctrine of merger should not apply to the Admission Agreement and the Arbitration Agreement, which were part of the same overall contract between the parties. Therefore, to the extent the circuit court concluded the doctrine of merger does not apply in this case, it committed legal error. This Court should reverse and remand with instructions to grant Cascades' motion, compel arbitration, and dismiss this action.

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[2] Admittedly, the use of the words "attached separately" after "Arbitration Agreement" in the "Arbitration" section can be seen as awkward phrasing. But this does not mean it creates an ambiguity. The purpose for the "Arbitration" section in the Admission Agreement is still clear. The Admission Agreement contemplates an arbitration agreement, but gives the applicant a chance to reject that one term of the overall contract. That could not be accomplished if the full arbitration agreement were included in the Admission Agreement itself.

II. The second and third argument sections of Barborek's brief are irrelevant because the doctrine of merger applies to this case.

Barborek argues that a valid contract to arbitrate does not exist because no representative from Cascades signed the Arbitration Agreement and there was no consideration to support that Agreement. As Barborek tacitly acknowledges, those arguments are only relevant if the doctrine of merger does not apply. A corporate representative signed the Admission Agreement, and there is no argument that the Admission Agreement fails for lack of consideration. Thus, the application of the merger doctrine renders Barborek's other arguments moot.

Cascades has fully briefed its position on the application of the merger doctrine and will not repeat those arguments here. However, Cascades will reemphasize one point in reply to Barborek's second and third argument sections. The very deficiencies that Barborek alleges as to the Arbitration Agreement further demonstrate why that agreement and the Admission Agreement are two parts of the same whole. The reason for the lack of a corporate representative's signature on the Arbitration Agreement and the purported lack of separate consideration is obvious: The Arbitration Agreement was intended to be part of the overall agreement for admission. There is no other logical reason why Cascades presented the Arbitration Agreement in the manner it did.

To the extent a question arises as to why, in that event, Barborek needed to sign the Arbitration Agreement, the answer is again clear. Agreeing to arbitrate any disputes he might have with Cascades was a voluntary decision for Barborek to make. He was free to reject the Arbitration Agreement if he chose to do so. His signature on the Arbitration Agreement served as evidence that he made the voluntary decision to accept arbitration as

his sole recourse for disputes against the facility's owners and/or managers. No signature by a corporate representative was needed in that situation because it was solely Barborek's decision whether or not to agree to arbitration. The corporate representative's signature on the Admission Agreement was sufficient under these circumstances.

Similarly, the consideration for the overall agreement was valid and adequate for the Arbitration Agreement if Barborek chose to sign it. Although Barborek could have rejected the Arbitration Agreement and still received treatments at the facility, that does not automatically mean there could be no consideration that would cover an agreement to arbitrate. Once Barborek decided on his own to accept that agreement, it became part of his contractual relationship with Cascades. Under that relationship, he would receive treatments at the facility in exchange for the agreed-upon financial compensation. That consideration applied to all parts of Barborek's arrangement with Cascades, including the Arbitration Agreement.

For these reasons, the second and third argument sections in Barborek's brief do not provide any basis for this Court to affirm the circuit court's decision. Therefore, the Court should reverse and remand with instructions to grant Cascades' motion, compel arbitration, and dismiss this action.

III. Barborek did not challenge or dispute Cascades' arguments on the issues of mental capacity or unconscionability.

As noted in Cascades' primary brief, the specific basis for the circuit court's decision is not entirely clear. For that reason, Cascades included arguments on the issues of Barborek's mental capacity and the purported unconscionability of the Arbitration Agreement – issues that Barborek asserted in his brief and oral arguments to the circuit court. Even though it is possible the circuit court did not base its decision (in whole or in

part) on those issues, Cascades included its arguments against them in an abundance of caution.

Barborek's brief does not include any substantive arguments on lack of mental capacity or unconscionability. This Court can treat that failure to address those issues as an admission by Barborek that Cascade's positions are correct. *See Turner v. S.C. DHEC*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008) (citing *First Union Nat'l Bank v. FCVS Communications*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *reversed on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997)).

Thus, even if the Court affirms the result below on some other ground, it should nevertheless reverse or vacate the circuit court's order to the extent it could be construed as concluding that the Arbitration Agreement was unenforceable due to Barborek's mental capacity or unconscionability. This is not an insignificant point, because without such a qualification of an affirmance, there would be a risk of a future argument by Barborek that the Arbitration Agreement's unenforceability due to mental capacity and/or unconscionability became the law of the case. Any such result would be prejudicial and unfair to Cascades, especially in this situation, where Barborek did not even dispute Cascades' arguments on that issue during this appeal.

CONCLUSION

Barborek has not presented any legitimate basis for this Court to affirm the result below. The circuit court committed legal error in failing to enforce the Arbitration Agreement, which merged with the Admission Agreement and became part of the overall contractual relationship between Barborek and Cascades. Therefore, this Court should

reverse the circuit court's order and remand with instructions for the circuit court to grant Cascades' motion, compel arbitration, and dismiss this action.

Respectfully submitted,

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