THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Case No. 2018-CP-46-01459

Teresa Murphy, as Personal Representative for the Estate of Isaac Strong,

Respondent,

v.

Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Care Holdings, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Consulting, LLC; Fundamental Administrative Services, LLC; THI of Baltimore, Inc.; THI of South Carolina, LLC; THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill; and Amisub of S.C., Inc. d/b/a Piedmont Medical Center,

Defendants,

Of whom Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina, LLC; and THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill are

Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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Appellants would make the following points in reply to Ms. Murphy's brief.[1]

ARGUMENT IN REPLY

1. As Ms. Murphy herself acknowledges, when coupled with the merger of the admission and arbitration agreements, equitable estoppel provides a workable theory for enforcement of an arbitration agreement against a nonsignatory.

To be clear, as even Ms. Murphy acknowledges,[2] South Carolina law recognizes the potential for equitable estoppel to be successfully invoked to enforce an arbitration agreement against a nonsignatory. *See also Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel); *id.* at 340–345, 827 S.E.2d at 175–177 (favorably discussing the framework of the so-called direct benefits test—which test this Court had applied in the decision then before the *Wilson* Court on writ of certiorari, following this Court's prior decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Mr. Strong (his estate) is estopped from refusing to comply with the arbitration agreement here where he received direct benefits (in the form of his admission and

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[1] Shorthand references defined in Appellants' principal brief are continued herein.

[2] (*See* Resp's Br. p. 7 ("Coleman[v. Mariner Health Care, Inc., 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014)] *did acknowledge the possibility that equitable estoppel could be invoked if the disputed arbitration language was actually or effectively in the same admission contract.*") (emphasis added).)

care/treatment at the Facility) from the admission agreement with which the arbitration agreement was merged); *id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added).

2. It does not make sense that the parties would have intended the admission agreement and arbitration agreement to be separate contracts.

(a) Ms. Murphy herself recognizes the integrated nature of the admission agreement and the arbitration agreement.

In discussing the supposed separateness of the admission agreement and the arbitration agreement, Ms. Murphy actually helps to make the Facility's point to the contrary. In her own words, she describes the arbitration agreement as "provid[ing] for alternative dispute resolution for any claim a party may bring against another *arising out of Mr. Strong's admission*." (Resp's Br. p. 2 (emphasis added).)

(b) The fact that the arbitration agreement was not a condition or prerequisite to Mr. Strong's admission to the Facility lends no support whatsoever to the idea that admission and arbitration agreements do not merge.

Respectfully, this business about the arbitration agreement not being a requirement of admission to the Facility is a red herring. The merger question examines whether, "where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,"[3] as indeed the admission and arbitration agreements were here, there is evidence to upset the default presumption that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and transaction—a reasonable, non-speculative inference can be drawn that the parties' possessed a contrary intention.

While it is true that the arbitration agreement is not necessary to the admission agreement, the converse is not true; the admission agreement is indeed necessary to the arbitration agreement. So yes, the admission agreement *could* have stood on its own, without the arbitration agreement ever having been

[3] *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

executed, in which case no question of merger would have even arisen to begin with; but that is not what happened.

The arbitration agreement was in fact executed, of course, and it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction. Unlike the admission agreement, however, which is capable of making sense either standing alone or, alternatively, together with the arbitration agreement, the arbitration agreement only makes sense together with the admission agreement, which is its (the arbitrations agreement's) sole reason for being.

As explained in Appellants' principal brief, it matters not whether the arbitration agreement was a condition of admission, only that it was agreed to in conjunction with admission; and, here, there can be no question that the arbitration agreement—once agreed upon—was intended to be considered and construed together with the admission agreement, such that the two were effectively one instrument, governing various interrelated aspects of Mr. Strong's relationship with the Facility. (*See* Resp's Br. p. 2 (implicitly acknowledging the hand-in-hand relationship between the admission and arbitration agreements, with the admission agreement "govern[ing] the type of care Mr. Strong would receive from Defendants and Mr. Strong's financial obligation to pay for those services" and the arbitration agreement "provid[ing] for alternative dispute resolution for any claim a

party may bring against another arising out of Mr. Strong's admission in the facility").) Indeed, this conclusion finds direct support in admission agreement's "Entire Agreement" provision, which states, "The 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." (Admission Agreement p. 12 (emphasis added).) Had the arbitration agreement not been executed, it would not constitute admissions material, but, of course, it was executed, and it does constitute admissions material; most respectfully, to conclude otherwise simply does not make sense.

(c) The termination provisions of the admission agreement and the arbitration agreement are not inconsistent.

It is logic, not any intent contrary to merger, which dictates that the arbitration agreement survives termination or breach of the admission agreement. Consider, for example, the circumstances of this very case, a suite alleging wrongful death and survival. Obviously, Mr. Strong was deceased and no longer a resident of the Facility by the time this action was commenced. If the arbitration agreement ceased to be operative when his residency ended, the instant claims—claims which, in Ms. Murphy's own words, are of exactly the sort that the arbitration agreement was intended to cover, i.e., "claim[s] a party may bring

against another *arising out of Mr. Strong's admission*"[4]—would not be subject to arbitration. In other words, the arbitration agreement's effectiveness has to extend beyond that of the admission agreement because if it did not, claims brought after the conclusion of residency would not be subject to arbitration even if they were the very sort of claims intended to be arbitrated, i.e., "claim[s] a party may bring against another arising out of [the resident's] admission."

(d) The formatting and structure of the admission agreement and arbitration agreement provide no evidence of intention contrary to merger.

Essentially, Ms. Murphy's point here is that the fact that the admission agreement and arbitration agreement were separate instruments evidences an intention contrary to merger. Respectfully, her reasoning is specious. For the issue of merger to even arise to begin with, there have to be separate instruments. Obviously, such a self-defeating view of the doctrine of merger cannot be correct. Moreover, regarding the "pro-merger" formatting/structure of the two instruments, see 2 (a) and (b) above.

3. The fact that that Mr. Strong did not himself sign the arbitration agreement is beside the point.

Ms. Murphy makes much of the fact that Mr. Strong did not himself sign the arbitration agreement. (*See, e.g.,* Resp's Br. p. 3 ("Relying on the Arbitration Agreement Mr. Strong did not sign, Magnolia Manor argues Plaintiff must

[4] (Resp's Br. p. 2 (emphasis added).)

arbitrate rather than litigate her claims."); *id.* at p. 4 ("Mr. Strong was not even at Magnolia Manor when its employee presented the Arbitration Agreement for signature . . . ."); *id.* at p. 6 ("The Arbitration Agreement was not signed by Mr. Strong . . . .").) It is, of course, true that Mr. Strong did not himself sign the arbitration agreement, but the Facility has never argued otherwise.

Without question, the Facility seeks to enforce the arbitration agreement against a *nonsignatory*, i.e., Mr. Strong (his estate), and, again, South Carolina law recognizes several theories under which this may be done. *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel."). Ms. Murphy's repeated reference to the fact that Mr. Strong (his estate) is a nonsignatory to the arbitration agreement should not be confused for actual argument. Mr. Strong (his estate) is indeed a nonsignatory to the arbitration agreement; the Facility makes no argument to the contrary. The Facility's argument is that, even as a nonsignatory, Mr. Strong (his estate) is bound by the arbitration agreement; where she does no more than point out that Mr. Strong (his estate) is a nonsignatory to the arbitration agreement, it is Ms. Murphy who makes no argument to the contrary, i.e., to the contrary of

the Facility's argument for enforcement against Mr. Strong (his estate) as a non-signatory.

4. The Facility would clarify its position regarding Ms. Murphy's authority under the AHCA.

Ms. Murphy is correct that the Facility's position does not recognize that Mr. Strong was incapacitated at the relevant time,[5] and the Facility did not intend to suggest otherwise in its principal brief. The Facility's point, which it now clarifies, is that there is, in any event, no dispute about the admission agreement. Either Mr. Strong had capacity to know and understand and authorize (whether actually or apparently) Ms. Murphy to act as his agent to admit him to the Facility, and/or to knowingly ratify the same thereafter or, alternatively, even under Ms. Murphy's view that he was incapacitated, the AHCA authorized Ms. Murphy to enter into the admission agreement on Mr. Stong's behalf.

5. Ms. Murphy is wrong to assert the admission agreement and the arbitration agreement were not executed for the same purpose.

As *Coleman* Court expressly observed regarding the admission agreements and arbitration agreements before it (which *in this respect* are no different than the instant agreements—though that is not the case in regard to the material facts bearing on the question of merger), "the documents were [indeed] executed at the

[5] (*See* Resp's Br. pp. 8–9; *see also* Tr. of Hr'g held December 5, 2018, p. 9:3–6, p. 12:5–16, p. 14:3–8.)

same time, by the same parties, *for the same purposes*, and in the course of the same transaction." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

6. The Facility did not "chose to forego discovery,"[6] as Ms. Murphy claims; and her very argument about factual matter the Facility did not establish ("[The Facility] Did Not Establish a Principal-Agent Relationship Between Mr. Strong and Ms. Murphy"[7]) only underscores the fact that the Facility never had a fair chance to do so.

As the Facility's counsel argued to the trial court, "you can't have it both ways to diminish the record to determine these issues and then argue waiver when we explore them." (Tr. of Hr'g held December 5, 2018, p. 12:16–18.) Most respectfully, the Facility submits the logic—and fairness—of this point cannot reasonably be denied.

The Facility moved to compel arbitration under a facially valid arbitration agreement, which was not called into question until Ms. Murphy, acting on behalf of Mr. Strong's estate, disavowed her own prior express representations of authority to oppose arbitration. The Facility had no reason to conduct discovery until this dispute arose, and even then, it still maintained its primary position that the arbitration agreement was enforceable based on the record as is. It was its alternative position to be allowed discovery, and what it wanted was not simply the right to conduct discovery, but to protect its client's legitimate interests by seeking

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[6] (Resp's Br. p. 3.)
[7] (*Id.* at p. 16.)

to avoid the undeniable Catch-22 (the existence of which even the circuit court itself observed) of being accused of waiving its arbitration rights simply by endeavoring to prove them.

CONCLUSION

For the foregoing reasons, together with those already set forth in their principal brief, Appellants ask this Honorable Court to reverse the circuit court and stay this lawsuit in favor of arbitration or, alternatively, to remand this case to the circuit court with instructions for it to do so, or for it to engage in or allow any such other proceedings (including discovery) as may be necessary to properly determine and enforce the Facility's rights under the arbitration agreement, and in so doing, protect the Other Appellants' rights by "staying [any] trial of th[is] action until such arbitration has been had in accordance with the terms of the [subject arbitration] agreement," as required by 9 U.S.C. § 3.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Dated: 5/15/19

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Defendants,

Of whom Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina, LLC; and THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill are

Appellants.

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Appellants, hereby certify that the foregoing **Initial Reply Brief of Appellants** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on September 19, 2019, properly posted for delivery to the following addressees:

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September 19, 2019

VIA US MAIL AND FASCIMILE
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Re: Teresa Murphy, as Personal Representative for the Estate of Isaac Strong v. Hunt Valley Holdings, LLC, et al
Case No.: 2018-CP-46-01459
Claim No.: HBLM# 1727638
YCR File: 14347-20170985

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of our Motion for Acceptance of Initial Brief of Appellants, the original and one (1) copy of the Proof of Service of same, the original and one (1) copy of Initial Reply Brief of Appellants and the original and one (1) copy of the Proof of Service of Same. Also enclosed is our firm's check in the amount of $50.00 representing the filing fee for the motion. Please file the originals and return a court-stamped copy of each to me in the enclosed envelope.

With best wishes and kindest regards, I am,

Sincerely,

YCRLAW, LLP

Kathleen B. Barnes
Secretary

Enclosure
(all via US Mail and email)
cc: Chad A. McGowan Esquire, McGowan, Hood & Felder, LLC
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