

**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. 2019-001413
Circuit Court Case No. 2018-CP-10-01251

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MAY 07 2020

SC Court of Appeals

Richard Ladson, Jr.,
by and through Richard Miles Ladson, Sr., POA,

Respondent,

v.

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

Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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The Facility¹ would make the following points in reply to Plaintiff's responsive brief.

ARGUMENT IN REPLY

1. **The Facility does not argue that the AHCCA gave Ms. Wright authority to bind Mr. Ladson to the Arbitration Agreement.**

Argument I in Plaintiff's responsive brief (headed, "The [AHCCA] does not apply to the Arbitration Agreement."²) is misplaced. As explained in the Facility's principal brief (indeed expressly in footnote 11), "The Facility does not argue [that the AHCCA applies to the Arbitration Agreement]; rather, it argues . . . that even though the AHCCA d[id] not authorize Ms. Wright to bind Mr. Ladson to the Arbitration Agreement . . . Mr. Ladson should still be bound to the Arbitration Agreement through merger and equitable estoppel." (Br. of App. p. 5 n.11.)

2. **Plaintiff is incorrect in asserting that "South Carolina appellate courts have repeatedly rejected nearly all of the legal and equitable theories the Facility now proposes to create a binding contract where there is not one"³ and that "[t]he Facility cannot show the Admission Agreement and the Arbitration Agreement were executed for the same purpose."⁴**

The Facility's argument is not an attempt "to create a binding contract where there is not one," but rather to estop Plaintiff from inequitably denying the

¹ Shorthand references already defined in the Facility's principal brief (e.g., the "Facility" is Defendant-Appellant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab) are continued in this reply brief.

² (Br. of Resp. p. 8 (bold print omitted).)

³ (Br. of Resp. p. 8.)

⁴ (Br. of Resp. p. 10; *see also id.* at pp. 11–12.)

Arbitration Agreement's enforceability, and Plaintiff is simply incorrect to assert that such a theory has been rejected by our State's appellate courts. As explained in the Facility's principal brief, in *Coleman v. Mariner Health Care, Inc.*, our Supreme Court confirmed the validity of "[t]he general rule . . . 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 being "that the instruments are effectively one instrument or contract." 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014); *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 under which a nonsignatory can be bound to an arbitration agreement, including under the theory of estoppel).

Coleman concerned the enforceability of an arbitration agreement against the estate of the decedent, Ms. Brinson, the arbitration agreement, along with an admission agreement, having been signed on Ms. Brinson's behalf by her sister, Ms. Coleman, at the time of Ms. Brinson's admission to the facility. 407 S.C. at 352, 755 S.E.2d at 452.⁵ Although the *Coleman* Court ultimately found an

⁵ Technically, there were two arbitration agreements and two admission agreements in the *Coleman* record, because Ms. Coleman admitted Ms. Brinson to the facility in June 2006 and later readmitted her in December 2006 and signed arbitration and admission agreements on Ms. Brinson's behalf on both occasions.

intention contrary to merger on the *particular* facts before it,⁶ it first expressly found that “the documents [(i.e., the arbitration and admission agreements Ms. Coleman signed for her sister)] were executed *at the same time, by the same parties, for the same purposes, and in the course of the same transaction*[[” and that, “[u]nless there is a contrary intention, appellants are *correct* that there *was a merger.*” *Id.* at 355, 755 S.E.2d at 455 (emphasis added). In this respect, the Arbitration Agreement and the Admission Agreement in the instant case are no different from those at issue in *Coleman*; they were all executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Plaintiff’s contention that the Arbitration Agreement and the Admission Agreement were not executed for the same purpose is without merit.

3. It is not “counterintuitive to conclude [that] the Arbitration Agreement was an ‘admissions material.’”⁷

In an effort to rebut the Facility’s point that Arbitration Agreement is one of the “other Admissions materials” that the “Entire Agreement” clause refers to as being deemed a part of the Admissions Agreement,⁸ Plaintiff argues that

Id. The respective terms of both arbitration and admission agreements were identical, however. *Id.* at n.1.

⁶ As explained in the Facility’s principal brief, it is in this respect that the instant case materially differs from *Coleman*; the record in the instant case does *not* allow for a reasonable, non-speculative inference that the parties’ intention was contrary to merger.

⁷ (Resp. Br. p. 15.)

⁸ (Def.’s Mem. in Supp. of Mot. to Compel Arbitration Ex. 1 at p. 12.)

“Admissions Materials” is not a defined term and that “it would be counterintuitive to conclude the Arbitration Agreement was an ‘admissions material’” given that “the Facility admits [that] agreeing to arbitration was not required for admission” (Br. of Resp. p. 15.)

It must be remembered that when all the requirements for the presumption of merger are present—as they are here—*merger is presumed to be what the parties intended* unless there is evidence of a contrary intention. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. The lack of a definition of “Admissions Materials” certainly says nothing of an intention contrary to merger; indeed, the only logical inference that can be derived from the “Entire Agreement” clause’s express inclusion of other undefined material is *supportive* of merger.

As explained in the Facility’s principal brief, to say that the Arbitration Agreement was not required for admission, which it was not,⁹ is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Ms. Wright on Mr. Ladson’s behalf. While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of

⁹ (Tr. of Mot. Hr’g held November 27, 2018, pp. 11:19–12:3.)

merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement’s) sole reason for being. (See Def.’s Mem. in Supp. of Mot. to Compel Arbitration Ex. 2 (providing for arbitration of “any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement, or breach thereof, or relating in any way to Resident’s stay at Facility, or to the provisions of care or services to Resident”); *id.* (“This [Arbitration] Agreement shall remain in effect for all care rendered at Facility”).)

The Arbitration Agreement was not *condition* of admission, but it certainly was agreed to in *conjunction* with admission; whereupon, it 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. Ladson’s relationship with the Facility. (*Compare Id.* at Ex. 1 (setting forth the terms of Mr. Ladson’s admission to the Facility) *with Id.* at Ex. 2 (providing for arbitration of disputes arising out of Mr. Ladson’s admission in the Facility).)

4. The termination provisions in the Arbitration Agreement and the Admission Agreement are not inconsistent.

All the *arbitration* agreements at issue in *Coleman, Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), and *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), provided that they could be disclaimed or revoked within 30 days of their signing, while the corresponding *admission* agreements did not. There is no such disclaimer/revocation provision in the instant *Arbitration* Agreement. Here, Plaintiff points to the *opposite* situation (i.e., opposite from *Coleman, Hodge*, and *Thompson*)—that the instant *Admission* Agreement provides an opt-out option but the *Arbitration* Agreement does not—to support the same *conclusion* (as *Coleman, Hodge*, and *Thompson*). Respectfully, this is illogical.

The only reason for the *Arbitration* Agreement is the *Admission* Agreement, i.e., the *Arbitration* Agreement covers disputes relating to/arising out of the *Admission* Agreement. So, yes, the *Arbitration* Agreement would remain in effect after termination of the *Admission* Agreement, but all this means is that any claims relating to/arising out of the *Admission* Agreement would still have to be arbitrated even if they are not asserted until after termination of the *Admission* Agreement. In other words, the *Arbitration* Agreement is still tied to the *Admission* Agreement even after the termination of the *Admission* Agreement.

5. Plaintiff's argument about contract formatting and structure is specious.

As explained in the Facility's principal brief, the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

6. Plaintiff's argument regarding equitable estoppel is misguided.

Essentially, Plaintiff's argument here relies on two things, both of which are off base. First, Plaintiff relies on the "traditional" six-factor test for estoppel, as opposed to the direct benefits test that our Supreme Court discussed in *Wilson*, 426 S.C. 326, 827 S.E.2d 167. In *Wilson*, the Court clearly suggests (albeit without deciding) that the six-factor test should be limited to use "in *non*-arbitration cases." *Id.* at 340, 827 S.E.2d at 175 n.6 (emphasis added). Secondly, where Plaintiff does reference the direct benefits test, his argument hinges on his contention that the

Arbitration Agreement and the Admission Agreement do not merge. (Resp. Br. p. 19 (“The separateness of the two contracts in this case is an important fact further distinguishing the ‘direct benefit’ cases on which Appellant relies.”).) As the Facility has already explained, this argument is without merit because the Arbitration Agreement and the Admission Agreement do merge, as the circuit court should have found.

CONCLUSION

For the foregoing reasons, as well as those already set forth in their principal brief, Appellant asks 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.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Dated: 5/4/20

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Appellant, hereby certify that the foregoing **INITIAL REPLY BRIEF OF APPELLANT** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on May 4, 2020, properly posted for delivery to the following addressees:

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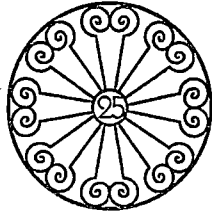
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SC Court of Appeals

Re: Richard Ladson v. THI of South Carolina at Charleston
Appellate Case No. 2019-001413
Case No.: 2019-001413
Claim No.: 1725747
YCR File: 14347-20170914

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of Appellants' Initial Reply Brief as well as the original and one (1) copy of the proof of service regarding the same. Kindly return one (1) court stamped copy of each document to us in the pre-stamped envelope provided.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Pollyana Bell
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Enclosures

cc: Benjamin C. Smoot II, Pierce Sloan Kennedy & Early, LLC
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