THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No. 2017-CP-43-01740
Appellate Case No. 2020-001143

Andrietta Atkinson and Debra Clyburn-Wilson, individually and as Personal Representatives of the Estate of Willie Mae Clyburn, — Respondents,

v.

SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center and Paul Granger, — Defendants.

Of whom SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center is — Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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The Facility makes the following points in reply to Plaintiffs' brief.[1]

ARGUMENT IN REPLY

1. As Plaintiffs themselves acknowledge, coupled with the merger of the Admission Agreement and the Arbitration Agreement, equitable estoppel provides a workable theory for enforcement of an arbitration agreement against a nonsignatory.

To be clear, as even Plaintiffs acknowledge,[2] South Carolina law recognizes the potential for equitable estoppel to be successfully invoked to enforce an arbitration agreement against a nonsignatory. *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); *see also 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

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[1] Shorthand references defined in the Facility's principal brief are continued herein, e.g., the "Facility" is Defendant-Appellant, SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center, and "Plaintiffs" are Plaintiffs-Respondents, Andrietta Atkinson and Debra Clyburn-Wilson, individually and as Personal Representatives of the Estate of Willie Mae Clyburn ("Ms. Clyburn").

[2] (*See* Respondents' 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).)

Plaintiffs, i.e., Ms. Clyburn's estate, are estopped to deny the validity of the instant Arbitration Agreement where Ms. Clyburn received direct benefits (in the form of room, board, and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement 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 the Arbitration Agreement to be separate contracts.

(a) Plaintiffs themselves recognize the integrated nature of the Admission Agreement and the Arbitration Agreement.

In discussing the supposed separateness of the Admission Agreement and the Arbitration Agreement, Plaintiffs actually help make the Facility's point to the contrary. In their own words, Plaintiffs describe the Arbitration Agreement as "provid[ing] for alternative dispute resolution of any claim . . . *arising out of [Ms. Clyburn's] admission*." (Respondents' Br. p. 2 (emphasis added).)

(b) The fact that the Arbitration Agreement was not a condition of or prerequisite to Ms. Clyburn's admission to the Facility lends no support whatsoever to the idea that the Admission Agreement and the Arbitration Agreement 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 Agreement and the Arbitration Agreement 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

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

could have stood on its own, without the Arbitration Agreement ever having been 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 Arbitration Agreement's) sole reason for being.

As explained in the Facility's 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, and not revoked within the 30-day revocation period[4]—was intended to be considered and construed together with the Admission

[4] Likewise a red herring is Plaintiffs' argument that the Admission Agreement and the Arbitration Agreement have inconsistent termination provisions because the Arbitration Agreement contains a provision making it revocable for a period of 30 days while the Admission Agreement does not. The revocation provision simply underscores the voluntary nature of the Arbitration Agreement. Again, the Admission Agreement *could* have stood on its own, either without the Arbitration Agreement ever having been executed or with the Arbitration Agreement having been executed but revoked within the 30-day

Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Ms. Clyburn's relationship with the Facility. (*See* Respondents' Br. p. 2 (implicitly acknowledging the hand-in-glove relationship between the Admission Agreement and the Arbitration Agreement, with the Admission Agreement "governing the type of care [Ms. Clyburn] would receive at the Facility and [Ms. Clyburn's] financial obligation for those services" and the Arbitration Agreement "provid[ing] for alternative dispute resolution of any claim . . . arising out of [Ms. Clyburn's] admission in the Facility").)

(c) The formatting and structure of the Admission Agreement and the Arbitration Agreement provide no evidence of intention contrary to merger.

Essentially, Plaintiffs' point here is that the fact that the Admission Agreement and the Arbitration Agreement were separate instruments evidences an intention contrary to merger. Respectfully, this reasoning is specious. As explained in the Facility's principal brief, 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, as explained elsewhere, it does not make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement to be separate contracts given that the

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window, but neither of these things happened. The Arbitration Agreement was

Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being.

3. The fact that that Ms. Clyburn did not herself sign the Arbitration Agreement is beside the point.

Plaintiffs make much of the fact that Clyburn did not herself sign the Arbitration Agreement. (*See, e.g.*, Respondents' Br. p. 3 ("[Ms. Clyburn] did not agree to arbitrate her legal claims against the Facility."); *id.* at p. 5 ("[Ms. Clyburn] never signed or otherwise assented to the Arbitration Agreement on which the Facility relies in support of its motion."); *id.* at pp. 17–18 ("[Ms. Clyburn] never agreed to the Arbitration Agreement[.]").) It is, of course, true that Ms. Clyburn 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., Ms. Clyburn's 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.").

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executed and was not revoked.

To be sure, Ms. Clyburn is a nonsignatory to the Arbitration Agreement. The Facility makes no argument to the contrary. Rather, the Facility's argument is that, even as a nonsignatory, Ms. Clyburn, and in turn her estate, is bound by the Arbitration Agreement. Thus, where Plaintiffs do no more than point out that Ms. Clyburn is a nonsignatory to the Arbitration Agreement, it is Plaintiffs who make no argument to the contrary, i.e., to the contrary of the Facility's argument for enforcement against Ms. Clyburn (her estate) as a non-signatory.

4. Plaintiffs are wrong to assert that 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 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).

CONCLUSION

For the foregoing reasons, together with those already set forth in its principal brief, the Facility asks this Honorable Court to reverse the trial court and stay this lawsuit in favor of arbitration, or remand the case to the trial court with instructions that it to do so.

Respectfully submitted,

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January 19, 2021

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I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant, hereby certify that the **INITIAL REPLY BRIEF OF APPELLANT** was served on all other parties to this appeal on January 19, 2021, via email (see attached) to the following counsel of record:

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January 19, 2021

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Attached for service in the above-referenced matter please find the **Initial Reply Brief of Appellant**.

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