THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2019-CP-40-02295

Vermell Daniels
as Personal Representative of the Estate of Annie Porter,

Respondent,

v.

THI of South Carolina at Columbia, LLC
d/b/a Midlands Health & Rehabilitation Center,

Appellant.

FINAL REPLY BRIEF OF APPELLANT

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The Facility[1] makes the following points in reply to Plaintiff's responsive brief.

ARGUMENT IN REPLY

1. Plaintiff misunderstands the nature of the Facility's merger/equitable estoppel argument. The Facility need not show that the Arbitration Agreement is enforceable, only that Plaintiff should be estopped to deny its enforceability, which, as explained in the Facility's principal brief, Plaintiff should, because, Ms. Porter having effectively embraced/directly benefitted from the Admission Agreement, Plaintiff cannot deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged.

The Facility's merger/equitable estoppel argument is not an argument *for the enforceability* of the Arbitration Agreement but rather an argument *for Plaintiff to be estopped to deny the enforceability* of the Arbitration Agreement. In short, and as fully explained in the Facility's principal brief, the idea is that the Admission Agreement—the enforceability of which Plaintiff does not dispute—and the Arbitration Agreement merged, and Ms. Porter having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged. Accordingly, counterarguments by Plaintiff aimed at denying

[1] Shorthand references already defined in the Facility's principal brief (e.g., the "Facility" is Defendant-Appellant, THI of South Carolina at Columbia, LLC d/b/a Midlands Health & Rehabilitation Center and "Plaintiff" is Plaintiff-Respondent, Vermell Daniels ("Ms. Daniels") as personal representative of the estate of her late mother, Annie Porter ("Ms. Porter")) are continued in this reply brief.

the Arbitration Agreement's enforceability (e.g., that, under the common law of agency and/or under the AHCCA, Ms. Daniels lacked authority to sign the Arbitration Agreement on behalf of Ms. Porter) are beside the point and unavailing.

2. Plaintiff is incorrect in asserting that "[t]here is no legal authority for merging two agreements into one as a matter of law under these circumstances."[2]

Respectfully, Plaintiff is simply mistaken here. 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

[2] (Br. of Resp. p. 11.)

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.[3] Although the *Coleman* Court ultimately found an intention contrary to merger on the *particular* facts before it,[4] 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 [wa]s a contrary intention, appellants [were] *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.

The doctrine of merger is a part of South Carolina's general law of contracts, the *Coleman* Court expressly confirmed its applicability in the context of nursing

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

[4] 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.

home admission agreements and arbitration agreements, and, indeed, to deny its applicability in this context (i.e., the arbitration context) would violate the FAA's mandate that arbitration agreements be placed on equal footing with other contracts. *See AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011).

3. Contrary to Plaintiff's assertion otherwise, *Coleman* unequivocally supports the proposition that—when instruments are executed at the same time, by the same parties, for the same purpose, in the course of the same transaction—merger is presumed.

According to Plaintiff, the Facility "fails to cite to a case that says merger—two agreements becoming one as a matter of law—is a presumption." (Br. of Resp. p. 19.) Respectfully, Plaintiff is mistaken here, too.

The Facility has never argued that merger is simply presumed whenever multiple instruments are involved. Rather, as clearly explained in the Facility's principal brief, merger is presumed *when instruments are executed at the same time, by the same parties, for the same purpose, in the course of the same transaction*. Not only does *Coleman* expressly confirm that this is the law in South Carolina, i.e., that merger is *presumed* when instruments are executed at the same time, by the same parties, for the same purpose, in the course of the same transaction, as explained in the Facility's principal brief, by virtue of the way that the *Coleman* Court recognized that the admission agreement and arbitration agreement then before it were indeed executed at the same time, by the same

parties, for the same purpose, in the course of the same transaction, it also confirms that the Admission Agreement and Arbitration Agreement here meet these criteria, too. *See Coleman*, 407 S.C. at 354–55, 755 S.E.2d at 455 (confirming the validity of the general proposition of law on which the arbitration proponents (the appellants) based their merger/equitable estoppel argument: "Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . *[T]he documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.*") (emphasis added).

While the material facts of this case are different from *Coleman* as to whether the presumption of merger is upset by evidence of a contrary intention (the facts do not support such a conclusion here), the material facts (admission agreements and arbitration agreements signed upon a resident's admission to a skilled nursing facility) are the very same as to whether the presumption of merger arises in the first place, as *Coleman* confirms it does.

4. Plaintiff's argument that—even if the Facility is correct that the Admission Agreement and the Arbitration Agreement merged—the Arbitration Agreement still should be severed is self-contradictory and without merit.

Here, again, Plaintiff conflates or confuses the difference between an argument for contract enforcement and an argument, like the instant

merger/equitable estoppel argument, to estop another party from denying the enforceability of the contract. The severance principles Plaintiff cites are of no consequence here. If, as the Facility contends, the Admission Agreement and the Arbitration Agreement merged, it means that these instruments were indeed executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction and that there is no evidence from which a reasonable, non-speculative inference can be drawn of an intention contrary to merger, at which point, there is no room left in the analysis for the notion of severance Plaintiff suggests.

CONCLUSION

For the foregoing reasons, along with those in its principal brief, the Facility asks this Honorable Court to reverse the circuit court and stay this lawsuit in favor of arbitration (or remand the case to the trial court with instructions for it to do so) or, alternatively, to remand the case to the trial court for it to engage in or allow any such other proceedings (including, without limitation, discovery) as may be necessary to properly determine and/or enforce the Facility's rights under the Arbitration Agreement.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Dated: 2/2/21

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APPELLANT'S CERTIFICATION OF FINAL REPLY BRIEF

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I, Russell G. Hines, do hereby certify that the **Final Reply Brief of Appellant** complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

Respectfully submitted,
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