RECEIVED
Mar 10 2021
SC Court of Appeals

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.

FINAL BRIEF OF APPELLANT

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
Kate C. Mettler (SC Bar No. 103762)
Alexandra J. Ginsberg (SC Bar No. 102251)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

STATEMENT OF THE ISSUE ON APPEAL

I. Did the circuit court err in denying the Facility's[1] motion to compel Plaintiffs'[2] claims to arbitration? In particular, did the court err in rejecting the Facility's merger/equitable estoppel argument, i.e., did it err in failing to find that the Admission Agreement and the Arbitration Agreement merged and that Plaintiffs are equitably estopped to deny the Arbitration Agreement's enforceability?[3]

STATEMENT OF THE CASE

With the help of her daughter Ms. Clyburn-Wilson, Ms. Clyburn was admitted to the Facility on October 13, 2016. (*See* R. pp. 116–29.) In conjunction therewith, Ms. Clyburn-Wilson signed an Admission Agreement[4] and an Arbitration Agreement[5] on her mother's behalf. By her signature on the Arbitration Agreement,

---

[1] The "Facility" is Defendant-Appellant, SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center. It is a skilled nursing facility in Sumter County.

[2] "Plaintiffs" are Plaintiffs-Respondents, Andrietta Atkinson ("Ms. Atkinson") and Debra Clyburn-Wilson ("Ms. Clyburn-Wilson"), individually and as Personal Representatives of the Estate of Willie Mae Clyburn ("Ms. Clyburn").

[3] Out of an abundance of caution, the Facility would make clear that this issue, and the corresponding argument, goes to the denial of its principal motion and the denial of its subsequent motion to alter, amend, and/or reconsider the denial of its principal motion.

[4] The "Admission Agreement" refers to the instrument entitled Resident Admission Agreement. (R. pp. 116–29.)

[5] The "Arbitration Agreement" refers to the instrument entitled Dispute Resolution Program, pursuant to which the "Parties" (which, as defined therein, unquestionably include Plaintiffs and the Facility) agreed to forego litigation and, instead, resolve all "Disputes" (which, as defined therein, unquestionably include Plaintiffs' claims against the Facility in this action) through various steps of alternative dispute resolution, culminating in binding arbitration. (R. pp. 90–98.)

Ms. Clyburn-Wilson attested that she "ha[d] the authority to sign the agreement on [Ms. Clyburn's] behalf." (R. pp. 90–98.)

This action was commenced on September 20, 2017, in the Court of Common Pleas, Sumter County. (*See* R. pp. 18–34.) At that time, Ms. Clyburn was alive, and her daughter Ms. Atkinson brought the suit as her attorney-in-fact. (*See* R. pp. 18–34.)

The Facility timely answered, subject to and without waiving its right to compel the matter to arbitration, denying the material allegations against it and raising a number of affirmative defenses. (R. pp. 39–51.)[6]

Following Ms. Clyburn's death, the current Plaintiffs (Ms. Atkinson and Ms. Clyburn-Wilson, as personal representatives of Ms. Clyburn's estate) were substituted in place of the original plaintiff (Ms. Atkinson, as Ms. Clyburn's attorney-in-fact), and on June 22, 2019, they filed the operative complaint in this case (the "Complaint"), alleging wrongful death and survival claims against the Facility. (R. pp. 52–69.) The gravamen of the Complaint is that the Facility's deficient care/treatment of Ms. Clyburn during her residency allowed her to

[6] As for the other named Defendant, Paul Granger, he is not a party to this appeal. Indeed, he has not been served and, thus, the action has not been commenced against him. *See* Rule 3(a), SCRCP (providing that a civil action is commenced when the summons and complaint are filed, so long as the summons and complaint are served within the statute of limitations or, if not served within the statute of limitations, served within 120 days after they are filed).

develop pressure sores, which resulted in her decline and eventual death. (*See* R. pp. 53–69.)[7]

The Facility timely answered, again subject to and without waiving its right to compel this matter to arbitration, denying the material allegations against it and raising a number of affirmative defenses. (R. pp. 70–83.)

The parties agreed to conduct limited discovery and to engage in mediation without waiver of the Facility's arbitration rights. Mediation proved unsuccessful, and the Facility filed the subject motion to compel arbitration on February 27, 2020. (R. pp. 84–89.)

Following the parties' submission of briefs,[8] the circuit court, the Honorable Kristi F. Curtis presiding, denied the Facility's motion by order filed June 25, 2020. (R. pp. 1–14.) On July 6, 2020, the Facility timely moved the circuit court to alter, amend, and/or reconsider its decision, pursuant to Rule 59(e), SCRCP. (R. pp. 199–208.) The court denied the motion by order filed July 14, 2020. (R. pp. 15–17.)

---

[7] Again, there is no dispute here about whether Plaintiffs' claims against the Facility are within the scope of the Arbitration Agreement, they are. (*See* R. p. 93 (defining "Dispute").) But even if there were "any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration . . . ." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999).

[8] (R. pp. 99–115, 153–92.)

By notice served August 13, 2020, this appeal timely follows. (R. pp. 209–13.)

STANDARD OF REVIEW

A circuit court's determination of whether a claim is subject to arbitration is reviewed de novo on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes de novo review of the determination of whether an arbitration agreement is enforceable against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.* Issues of law, however, are reviewed without any particular deference to the lower court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). Even where a ruling is on a matter within trial court's discretion, if the ruling is based on a misunderstanding of the law, rather than upon the exercise of discretion, the question presented on appeal is one of law. *See Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984).

ARGUMENT

I. The circuit court erred in denying the Facility's motion to compel arbitration. In particular, the court erred in rejecting the Facility's merger/equitable estoppel argument, i.e., it erred in failing to find that the Admission Agreement and the Arbitration Agreement merged and that Plaintiffs are equitably estopped to deny the Arbitration Agreement's enforceability.

The circuit court's analysis touches on issues relating to agency (not only of true agency but also of agency by estoppel, as well as the concept of ratification); third-party beneficiaries; and the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80. (*See* R. pp. 1–14.) To be clear, however, these issues have no bearing on the Facility's merger/equitable estoppel argument. Most respectfully, the circuit court's merger/equitable estoppel analysis is erroneous, to include the court's use of the wrong test for equitable estoppel.

Re: Merger

South Carolina recognizes numerous potentially viable theories under which a nonsignatory can be bound to an arbitration agreement. *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.").

In *Coleman v. Mariner Health Care, Inc.*, even though our Supreme Court found against merger on the *particular facts* before it, the Court nonetheless

confirmed the validity of the general proposition of *law* on which the *Coleman* appellants based their merger/equitable estoppel argument:

> Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,
>
> > The general rule is 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 is that the instruments are effectively one instrument or contract.
>
> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the 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.*

407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (emphasis added).

In the instant case, the circuit court erred in rejecting the Facility's merger argument, failing to recognize material distinctions between the facts of this case and those that controlled (and/or were not addressed in) *Coleman* and its progeny,

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).

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,"[9] as indeed the Admission Agreement and the Arbitration Agreement were here,[10] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties' intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . ."). (emphasis added). "[I]n attempting to ascertain th[e] [parties'] intention," the Court "endeavor[s] to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

For the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the

---

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

[10] As the *Coleman* Court expressly observes regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), "the documents were [indeed] executed at *the same time, by the same parties, for the same purposes, and*

concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). No such inference can be drawn here. Indeed, it does not even make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement not to merge.

While it is true that the Arbitration Agreement is unnecessary to the Admission Agreement,[11] 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 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, and it was executed under the unique circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction.

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be

---

in the course of the same transaction." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Ms. Clyburn's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* R. pp. 116–29 (setting forth the terms of Ms. Clyburn's admission to the Facility) *with* R. pp. 90–98 (providing for arbitration of disputes arising out of Ms. Clyburn's admission in the Facility).)

Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement). 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. The fact that the Arbitration Agreement was not required for admission does not mean that it was not intended to be part of the admissions materials intended to be construed together. To say that the Arbitration Agreement is not essential to admission is not the same as saying it was not part of the admissions paperwork once it was in fact voluntarily

---

[11] (*See* R. p. 91 ("YOUR PARTICIPATION IN [THE DISPUTE

agreed to and signed in conjunction with Ms. Clyburn's admission. In other words, it did not have to be agreed to, in which case it would not have been included in the admissions paperwork, or anywhere else, as it simply would not have existed. But it was agreed to, as part and parcel of the admissions paperwork, Ms. Clyburn's admission to the Facility being the express—and only—reason why the parties chose to enter into the arbitration agreement to begin with.

Superficial matters like the fact that Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and separately signed are immaterial. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and 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.

And to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must

---

RESOLUTION PROGRAM] IS VOLUNTARY . . . .").)

be remembered that merger is the default position, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all of these align—same time, same parties, same purpose, same transaction—our courts *will* consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." To allow the merger presumption to be upset, as, respectfully, the Court has done here, based on evidence that does not even go so far as to clearly indicate a contrary intention, but at most *might* (or might not) reflect a contrary intention, is to allow the exception to devour the rule.

Respectfully, the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Ms. Clyburn's admission to the Facility and would not have been done at all but for her admission to the Facility. Any finding against merger improperly relies on speculation, not

evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent.

Re: Equitable Estoppel

The circuit court's discussion of equitable estoppel misapprehends or overlooks South Carolina's favorable view of the applicability of the direct benefits test for equitable estoppel in arbitration cases.

The circuit court cites only the "traditional" six-factor test for equitable estoppel analyzed in *non*-arbitration cases. (R. p. 10.) South Carolina law, however, recognizes the potential for equitable estoppel to be successfully invoked to enforce an arbitration agreement against a nonsignatory under the direct benefits test. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel).

The *Wilson* Court favorably discussed the framework of the so-called direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals' earlier 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 Plaintiffs are estopped from refusing to comply with the Arbitration Agreement here, where Ms. Clyburn received direct benefits (in the form of her admission and care/treatment at the

Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also 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). In other words, *Wilson*—as well as logic itself—supports the use of the direct benefit test to answer the question of equitable estoppel in an arbitration case like this, not the six-factor test relied on by the circuit court.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Clyburn (who was, according to Ms. Clyburn-Wilson herself, competent and possessed contractual capacity at all relevant times) received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. To deny her receipt of such benefits is illogical. It would require wholly discounting every single aspect of her residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility). Plaintiffs themselves do not even allege this. (*See* R. pp. 53–69.)

Respectfully, the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement and that Plaintiffs are estopped to deny the Arbitration Agreement's enforceability, Ms. Clyburn having effectively embraced/directly benefitted from the Admission Agreement for the purpose of her admission only to later, via Plaintiffs, attempt to repudiate the Arbitration Agreement with which the Admission Agreement was merged.[12]

Lastly, out of an abundance of caution, to the extent it may be relevant in regard to the circuit court's treatment of the Facility's equitable estoppel argument, the court's analysis improperly includes the assertion that the Facility "had the capacity to determine whether [Ms. Clyburn-Wilson] had authority to sign the Arbitration Agreement on [Ms.] Clyburn's behalf" and, indeed, could have simply asked Ms. Clyburn-Wilson whether she had such authority. (R. p. 11.) This is erroneous and unsupported by any evidence in the record.

The circuit court overlooks or misapprehends (a) the duty of good faith and fair dealing implied in every contract, (b) that one who has signed a contract is presumed to have read, understood, and assented to its terms, and (c) the fact that, by way of the Arbitration Agreement itself, the Facility did in fact inquire of Ms.

[12] Although the dispute here is about the Arbitration Agreement, as opposed to the Admission Agreement, to the extent there were any question about the enforceability of the Admission Agreement, the Facility's equitable estoppel argument applies with equal for to the Admission Agreement.

Clyburn-Wilson as to her authority to bind her mother, and Ms. Clyburn-Wilson expressly represented to the Facility that she had such authority.

There is, of course, an implied covenant of good faith and fair dealing in every contract. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995). Moreover, "one who has signed a contract is presumed to have read, understood, and assented to its terms." *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019). And, again, when she signed the Arbitration Agreement, Ms. Clyburn-Wilson expressly represented that she had authority to sign on her mother's behalf. The circuit court wrongfully overlooked all this, unjustly disregarding Ms. Clyburn-Wilson's false representations, while at the same time punishing the Facility for supposedly failing to meet some unspecified duty to investigate them. No such duty is in fact recognized under South Carolina law—and, indeed, no legal authority is cited by the circuit court.

Moreover, because the Arbitration Agreement is covered by the FAA,[13] it "must [be] place[d] . . . on equal footing with other contracts . . . and enforce[d] . . . according to [its] terms[.]" *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011). By holding the Facility to an elevated standard of determining Ms.

[13] The Arbitration Agreement expressly states that the FAA applies. (R. p. 95.) Moreover, our Supreme Court has held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

Clyburn-Wilson's authority to contract, the circuit court fails to place the Arbitration Agreement on equal footing with other contracts and, thus, violates the FAA.

CONCLUSION

For the foregoing reasons, 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 circuit court with instructions that it to do so.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
Kate C. Mettler (SC Bar No. 103762)
Alexandra J. Ginsberg (SC Bar No. 102251)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellant

Charleston, South Carolina

March 10, 2021