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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2019-CP-22-00961
Appellate Case No. 2020-001167

Kevin Greene,
as Attorney in Fact for and on Behalf of
Eleanor Greene Wragg, Respondent,

v.

Palmetto Prince George Operating, LLC
d/b/a Prince George Healthcare Center;
Palmetto Health Care, LLC;
Murray Forman, Individually; and
Richard Porter, Individually, Defendants.

Of whom Palmetto Prince George Operating, LLC
d/b/a Prince George Healthcare Center;
Palmetto Health Care, LLC; and
Richard Porter, Individually, are Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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Appellants make the following points in reply to Plaintiff's responsive brief.[1]

ARGUMENT

1. The "presumption *against* arbitration"[2] that Plaintiff cites violates the FAA's "equal footing" rule.

Plaintiff cites *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019), for the proposition that, under South Carolina law, there is a presumption *against* arbitration when enforcement is sought against a non-signatory. (Br. of Respondent p. 3.) The FAA, however, requires arbitration agreements to be placed on equal footing with all other contracts under state law and prohibits courts from setting aside arbitration agreements based on state-law defenses "that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Thus, under the FAA, there cannot be a presumption against enforcement of arbitration agreements against nonsignatories unless the same presumption also applies to

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[1] Shorthand references already defined in Appellants' principal brief are continued in this reply brief (e.g., the "Facility" is Defendant-Appellant Palmetto Prince George Operating, LLC d/b/a Prince George Healthcare Center; "Porter" is Defendant-Appellant Richard Porter; "PHC" is Defendant-Appellant Palmetto Healthcare LLC; collectively, the Facility, Porter, and PHC are "Appellants;" "Plaintiff" is Plaintiff-Respondent, Kevin Greene, as Attorney-in-Fact for and on behalf of Eleanor Greene Wragg ("Ms. Wragg"); and "Mr. Greene" is Ms. Wragg's son Wendal Greene, who signed the Admission Agreement and Arbitration Agreement on her behalf.

[2] (Br. of Respondent p. 3 (emphasis in original).)

enforcement of all other contracts against nonsignatories. Appellants are aware of no such general presumption under South Carolina law. Indeed, in recognizing "a presumption *against* arbitration . . . where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate," the *Wilson* Court cited authority, none of which was in fact South Carolina authority, that addressed arbitration in particular, not contracts generally. 426 S.C. at 337–38, 827 S.E.2d at 173 ("*Global Pac., LLC v. Kirkpatrick*, 88 N.E.3d 431, 435 (Ohio Ct. App. 2017) ('Because no party can be required to submit to arbitration when it has not first agreed to do so, in a case where the party resisting arbitration is not a signatory to any written agreement to arbitrate, a presumption against arbitration arises.'); *cf. Comer v. Micor, Inc.*, 436 F.3d 1098, 1103–04 (9th Cir. 2006) (noting 'the general rule that a nonsignatory is not bound by an arbitration clause')."). The presumption against arbitration that Plaintiff cites violates the FAA's equal footing rule and cannot be applied in this case.

2. To be clear, Appellants' Argument I.A. does not rely on the existence of any agency relationship between Ms. Wragg and Mr. Greene or on ratification.

Appellants' merger/equitable estoppel argument is not, strictly speaking, 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 Appellants' principal brief, the idea

is that the Admission Agreement and the Arbitration Agreement merged, and Ms. Wragg 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 the Arbitration Agreement's enforceability (e.g., arguments relying on Mr. Greene's alleged lack of authority to sign the Arbitration Agreement on behalf of Ms. Wragg) are beside the point and unavailing.

3. Regarding Appellants' Argument I.B., which does rely on the law of agency (whether of true agency of or agency by estoppel) and/or ratification, in applying these principles to the facts here, the only evidence in the record is in Appellants' favor.

The Arbitration Agreement is valid on its face, containing Mr. Greene's express representation of authority to bind his mother. And Plaintiff's opposition the Motions to Compel Arbitration included no affidavits, declarations, or *evidence* of any kind to call into question facial validity of the Arbitration Agreement. *See Sessions v. Withers*, 327 S.C. 409, 414, 488 S.E.2d 888, 891 (Ct. App. 1997) ("On appeal, Sessions contends that Withers is not entitled to an award under Rule 37(c) because Withers never proved the issue that was the subject of the request to admit. At the motions hearing, counsel for Withers submitted an affidavit outlining the requested costs. Attached to the affidavit were portions of Sessions's deposition dealing with her TMJ claims. *While Withers's attorney told the court about Dr.*

Barkin's opinion of Sessions's TMJ claim, no portion of Dr. Barkin's deposition was presented to the court. Thus, in this case, it cannot be said that Withers proved, either at trial or at the post-trial motions hearing, that Sessions's TMJ problems were not aggravated by the accident.") (emphasis added) (citing *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); *Bowers v. Bowers*, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991) (arguments of counsel are not evidence); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986) (trial court properly disregarded the statements of counsel that he claimed reflected testimony appearing in depositions not otherwise entered into evidence)). Consequently, as to Appellant's Argument I.B., the only evidence in the record is in Appellants' favor.

4. The distinction Plaintiff attempts to draw between *Coleman*[3] and *Thompson*[4] is unavailing.

First off, as explained in Appellants' principal brief, in *Coleman*, 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

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[3] *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014).

[4] *Thompson v. Pruitt Corp.*, 417 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016).

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. at 355, 755 S.E.2d at 455.

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 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 [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

[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. *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

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 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 Concepcion*, 563 U.S. at 339.

While Plaintiff recognizes that "the instant case is similar in many respects to *Coleman*"[7] and that "in *Coleman* the documents *would have* merged but for contrary intent,"[8] and thus implicitly recognizes as correct Appellants' point that the *Coleman* Court confirmed the validity of the legal premise underlying the *Coleman* appellants' (and likewise the instant Appellants') merger/equitable estoppel argument, according to Plaintiff, the instant case is more closely aligned with *Thompson* than *Coleman*, because unlike in *Coleman*, where the person who signed the arbitration agreement on behalf of the resident was a party to the case, the person who signed the Arbitration Agreement for Ms. Wragg here, Mr. Greene,

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not allow for a reasonable, non-speculative inference that the parties' intention was contrary to merger.

[7] (Br. of Respondent p. 12).

is not a party to this case. (*See* Br. of Respondent pp. 12–13.) Nowhere in *Coleman* or *Thompson* is this point—about whether the person who signed the arbitration agreement on behalf of the nonsignatory resident against whom (or against the estate of whom) enforcement is sought is a party to the proceedings—said to be of any consequence. Plaintiff's contention that "in *Coleman* the court found that, but for contrary intent, the two instruments *would have merged* because the same party sought to be compelled to arbitration (Sister) was the same party who executed both documents"[9] is simply incorrect. In the eyes of the law, the Ms. Coleman who signed the admission agreement and arbitration agreement at issue in *Coleman* was not the same Ms. Coleman who brought the *Coleman* litigation: though she signed admission agreement and arbitration agreement for Ms. Brinson, she was then acting in her *individual* capacity, but later, after Ms. Brinson passed away, when Ms. Coleman brought the *Coleman* wrongful death and survival litigation, she was acting in her capacity as *the personal representative of Ms. Brinson's estate*. *See Thompson*, 417 S.C. at 62, 784 S.E.2d at 690 (recognizing distinction between daughter in her individual capacity and daughter as personal representative of her mother's estate).

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[8] (Br. of Respondent p. 11).

[9] (Br. of Respondent p. 12 (italics in original) (emphasis added via underline)).

5. Our Supreme Court has already confirmed that, insofar as the question of merger is concerned, the Admission Agreement and the Arbitration Agreement constitute documents executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, giving rise to the presumption of merger.

Plaintiff's contention that the Admission Agreement and the Arbitration Agreement were not executed on behalf of the same party[10] has already been debunked by our Supreme Court. *See Coleman*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 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.

6. The "survival" of the Arbitration Agreement is no evidence of "separatedness" (in the parlance of the *Coleman* Court[11]).

Plaintiff contends the fact that "the Arbitration Agreement . . . contemplates its own survival in the event of 'termination or breach of this Agreement or the Admission Agreement'"[12] is evidence of "separatedness." It does not. 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 connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13(D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

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[10] (Br. of Respondent p. 13.)

[11] 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the "Entire Agreement" clause expressly referred to a separate arbitration agreement and, thus, "recognize[d] the '*separatedness*' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.") (emphasis added).

7. Contrary to Plaintiff's contention, the phrase "other Admissions materials" does not give rise to ambiguity.

In an effort to rebut Appellants' point that Arbitration Agreement is among the "other Admissions materials" that the "Entire Agreement" clause refers to as being deemed a part of the Admission Agreement,[13] Plaintiff argues that "Admissions Materials" is not a defined term and is thus ambiguous. (Br. of Respondent p. 18.) This is not so.

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. In fact, in *Stott v. White Oak Manor, Inc.*, this Court expressly referred to an arbitration agreement as "admission documentation." 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission*

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12 (Br. of Respondent p. 17.)

13 (R. p. 72.)

documentation—including the Arbitration Agreement.") (emphasis added) (internal footnote omitted).

As explained in Appellants' principal brief, to say that the Arbitration Agreement was not required for admission, which it was not, 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 Mr. Greene on Ms. Wragg's behalf. The hand-in-glove relationship between the Admission Agreement and the Arbitration Agreement is not, as Plaintiff suggests, mere proof of the Arbitration Agreement's *existence*[14] but, as explained in Appellants' principal brief, of the Arbitration Agreement's *connectedness* to the Admission Agreement. Though not a *condition* of admission, the Arbitration Agreement 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 Ms. Wragg's relationship with the Facility. (*Compare* R. pp. 61-72 (setting forth the terms of Ms. Wragg's admission to the Facility) *with* R. p. 30 (providing for arbitration of disputes arising out of Ms. Wragg's admission in the Facility).)

[14] (Br. of Respondent p. 19.)

8. Despite Plaintiff's attempt to water down the standard for rebutting the merger presumption, unless the merger doctrine is to be rendered meaningless, "anything indicating a contrary intention" must be at least evidence capable of supporting a reasonable, non-speculative inference that the parties' intention was contrary to merger.

As even Plaintiff recognizes, "the presumption [of merger] arises only where the four elements restated by the *Coleman* court (time, parties, purpose, transaction) are established. Omit one or more of the four elements . . . and merger cannot happen." (Br. of Respondents p. 21.) This is exactly Appellants' point when they argue, as they did in their principal brief, that 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 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."). As Plaintiff says, omit even one of these four elements and there is not only no merger *presumption*, there is no merger period. The merger presumption is "earned," so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of

this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

9. Plaintiff's citation to *Weaver*[15] (for the proposition that direct benefits estoppel only applies where the nonsignatory's claim relies solely on contract terms to impose liability) is unavailing.

As an initial matter, *Wilson*, 426 S.C. 326, 827 S.E.2d 167, which controls over *Weaver*, does not endorse such a limitation. In any event, obviously unlike Plaintiff in the instant case, the plaintiff in *Weaver* was a complete stranger to any admission agreement or arbitration agreement with the defendant facility and her claims had nothing whatsoever to do with any contractual relationship between herself and the defendant facility.

CONCLUSION

For the foregoing reasons, along with those set forth in their principal brief, Appellants ask this Honorable Court to reverse the circuit court, specifically, to compel Plaintiff's claims against the Facility and Porter to arbitration (or, alternatively, to remand the case to the circuit court with instructions that it do so) and to stay this action as to PHC until any and all arbitration proceedings are completed (or, alternatively, remand the case to the circuit court with instructions

[15] *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020).

that it either do so or conduct any further proceedings necessary to decide the PHC's motion to stay on the merits).

Respectfully submitted,

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APPELLANTS' CERTIFICATION FOR FINAL REPLY BRIEF

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

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