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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Calhoun County
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2019-CP-09-00220
Appellate Case No. 2021-000700

Jeffery White,
individually and as Personal Representative
of the Estate of Lizzie White,

Respondent,

v.

St. Matthews Healthcare, LLC,
d/b/a Calhoun Convalescent Center,

Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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

ARGUMENT IN REPLY

1. 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, as indeed Plaintiff himself acknowledges.

As even Plaintiff acknowledges,[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 340–45, 827 S.E.2d at 175–77 (favorably discussing the framework of the direct benefits test—which test this Court, following its earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), had applied in the decision that was before the *Wilson* Court on writ of certiorari, and under which test the Facility contends that Ms. White, or, more precisely, her estate, i.e., Plaintiff, is estopped to deny the validity of the instant

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[1] Shorthand references already defined in the Facility's principal brief are continued in this reply brief (e.g., the "Facility" is Defendant/Appellant, St. Matthews Healthcare, LLC, d/b/a Calhoun Convalescent Center; "Plaintiff" is Plaintiff/Respondent, Jeffery White, individually and as Personal Representative of the Estate of Lizzie White; "Ms. White" is the decedent, Lizzie White; and "Ms. Nunnally" is Ms. White's daughter Darlene Nunnally, who signed the Admission Agreement and the Arbitration Agreement on behalf of Ms. White).

[2] (*See* Br. of Resp. p. 10.)

Arbitration Agreement where Ms. White received direct benefits (in the form of room, board, various amenities/services, and the care/treatment she received at the Facility about which Plaintiff does not complain) 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. The key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability or whether the party asserting estoppel was misled but whether benefits to the nonsignatory are direct or indirect.

"Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" *Wilson*, 426 S.C. at 340, 827 S.E.2d at 175 (quoting *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000))). "'In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently

maintained that other provisions of the same contract should be enforced to benefit him.'" *Id.* "Stated another way, '[u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement . . . .'" *Id.* at 340–41, 827 S.E.2d at 175 (quoting *Belzberg v. Verus Invs. Holdings Inc.*, 21 N.Y.3d 626, 977 N.Y.S.2d 685, 999 N.E.2d 1130, 1134 (2013)).

Contrary to Plaintiff's contention,[3] the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability or whether the party asserting estoppel was misled but whether the contractual benefits flowing to the nonsignatory, i.e., the party to be estopped, are direct or indirect. *See Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 ("It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.") (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able

[3] (*See* Br. of Resp. pp. 16–17.)

to enjoy direct benefits under an agreement containing an arbitration clause while at the same time denying that the arbitration clause is enforceable.

3. Ms. White's receipt of direct benefits under the Admission Agreement (with which the Arbitration Agreement merged) cannot reasonably be denied.

Undoubtedly, Ms. White received direct benefits (in the form of room, board, various amenities/services, and the care/treatment she received at the Facility about which Plaintiff does not complain) from the Admission Agreement with which the Arbitration Agreement merged. To deny her receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of her residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff's complaint does not go nearly so far as that. (*See generally* Compl.; *see also* Br. of Resp. p. 5 (explaining that Plaintiff's complaint alleges that Ms. White received deficient care/treatment at the Facility that led to her development of a sacral pressure ulcer).) And Plaintiff's reference to the skepticism expressed in *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018) (finding it difficult to conclude a nursing home resident benefited from a nursing home admission marked (*allegedly*) negligent care that (*allegedly*) caused her death),[4] is misplaced. To rely

[4] (*See* Br. of Resp. p. 15.)

on this sort of reasoning is to improperly prejudge Plaintiff's allegations as true—and indeed to expand/exaggerate those allegations so as to wholly discredit every single aspect of the residency where not even Plaintiff herself does so.

4. It does not make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement to be separate contracts.

(a) The fact that the Arbitration Agreement was not a condition of or prerequisite to Ms. White'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. (*See, e.g.,* Br. of Resp. p. 6 ("Notably, [the Facility] conceded in its memo that the Arbitration Agreement was not required or necessary for admission . . . .").) 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,"[5] as indeed the Admission Agreement and the Arbitration Agreement were here, there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be considered and construed together as effectively one contract.

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

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 *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—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. White's relationship with the Facility.

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

Essentially, Plaintiff's point here is that the mere fact that the Admission Agreement and the Arbitration Agreement were separate instruments evidences an intention contrary to merger. (*See, e.g.,* Br. of Resp. p. 13 ("The documents bore separate titles, were separately paginated, and each had its own signature space.").) 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, the formatting/structure of the Admission Agreement and the Arbitration Agreement is indeed *pro*-merger. As explained in the Facility's principal brief, while the Admission Agreement does contain an "Entire

Agreement" clause, it does not reference the Arbitration Agreement as a separate contract, and indeed, it expressly contradicts the idea of its "separatedness" (in the parlance of the *Coleman* Court) by expressly stating that "other Admissions materials"—the Arbitration Agreement among them—are made a part of it by reference. (*See* Br. of App. p. 12 (citing *Stott v. White Oak Manor, Inc.*, 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 documentation—including the Arbitration Agreement.") (emphasis added) (internal footnote omitted)).) And, again, 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 Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being.

5. The fact that Ms. White did not herself sign the Arbitration Agreement is beside the point.

It is, of course, true that Ms. White did not herself sign the Arbitration Agreement, but the Facility has never argued otherwise. Without question, the Facility seeks to enforce the Arbitration Agreement against a *nonsignatory*, 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.") (emphasis added).

To be sure, Ms. White 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. White, and in turn Plaintiff (her estate), is bound by the Arbitration Agreement. Thus, where Plaintiff does no more than point out that Ms. White is a nonsignatory to the Arbitration Agreement, he misses the Facility's point.

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

Contrary to Plaintiff's contention,[7] the survival of the Arbitration Agreement beyond any termination of the Admission Agreement is not evidence of separatedness. As explained elsewhere, 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

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[6] 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] (*See* Br. of Resp. p. 13.)

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. There is nothing inconsistent about this. 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.").

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

In an effort to rebut the Facility's 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,[8] Plaintiff argues that this language is at most ambiguous. (*See* Br. of Resp. pp. 13–14.) 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. Indeed, the only logical inference that can be derived from

the "Entire Agreement" clause's express inclusion of other "other Admissions materials" is *supportive* of merger. Again, in *Stott*, this Court expressly referred to an arbitration agreement as "admission documentation." 426 S.C. at 571–72, 828 S.E.2d at 84 ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted).

As explained elsewhere, 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 Ms. Nunnally on Ms. White's behalf. The hand-in-glove relationship between the Admission Agreement and the Arbitration Agreement is proof 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. White's relationship with the Facility. (*Compare* Admission Agreement (setting forth the terms of Ms.

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[8] (Admission Agreement p. 12.)

White's admission) *with Arbitration Agreement* (providing for arbitration of disputes arising out of Ms. White's admission).)

8. Despite Plaintiff's attempt to water down the standard for rebutting the merger presumption,[9] unless the merger doctrine is to be rendered meaningless, "anything indicating a contrary intention"[10] must be at least evidence capable of supporting a reasonable, non-speculative inference that the parties' intention was contrary to merger.

It must be remembered that the presumption of merger arises only where the four elements of time, parties, purpose, and transaction coincide—as the all do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. If even one of these is lacking there is no merger. This is why, as explained in the Facility's principal brief, 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."). The merger presumption is "earned," so to speak, by the fact that for it even to arise in the first place there

[9] (Br. of Resp. p. 11 (emphasizing the "in absence of anything indicating a contrary intention" language in *Coleman*).)

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. A presumption against arbitration when enforcement is sought against a nonsignatory violates the FAA.

Plaintiff cites *Wilson*, 426 S.C. 326, 827 S.E.2d 167, for the proposition that, under South Carolina law, there is a presumption against arbitration when enforcement is sought against a non-signatory. (Br. of Resp. p. 9.) As explained in the Facility's principal brief, the FAA 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 enforcement of all other contracts against nonsignatories. The Facility is aware of no such general presumption under South Carolina law, and Plaintiff cites none. Indeed, where the *Wilson* Court itself referenced "a presumption *against* arbitration . . . where the party resisting arbitration is a nonsignatory to the written

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[10] (Br. of Resp. p. 22.)

agreement to arbitrate,"[11] it cited no South Carolina authority and the authority it did cite addressed arbitration in particular, not contracts generally. *Id.* ("*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 supposed presumption against arbitration violates the FAA's equal footing rule and cannot be applied in this case.

CONCLUSION

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

[11] 426 S.C. at 337–38, 827 S.E.2d at 173 (emphasis in original).

Respectfully submitted,

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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 Respondent on February 11, 2022, by emailing (see attached) a copy of the same to Respondent's counsel of record:

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Attachments: White v. St. Matthews Healthcare (2021-000700) -- Initial Reply Brief of Appellant.pdf

Attached regarding the above-referenced case, please find the **Initial Reply Brief Of Appellant**.

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