RECEIVED
May 23 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2019-001413
Circuit Court Case No. 2018-CP-10-01251

Estate of Richard Ladson, Jr.,
by and through Personal Representative
Richard Miles Ladson, Sr., POA,

Respondent,

v.

THI of South Carolina at Charleston, LLC
d/b/a Riverside Health and Rehab,

Appellant.

APPELLANT'S PETITION FOR REHEARING

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)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellant

NOW COMES the Facility[1], by and through its undersigned counsel, pursuant to Rule 221(a), SCACR, following the filing on April 6, 2022, of this Honorable Court's Unpublished Opinion No. 2022-UP-169 affirming the circuit court's denial of the Facility's motion to compel Plaintiff's[2] claims to arbitration (the "Subject Opinion"), and hereby timely petitions for rehearing of this matter,[3] contending, most respectfully, that the Court misapprehended or overlooked the material points set forth below (in the Argument section of this petition).

BACKGROUND

With the help of his sister, Julia Wright ("Ms. Wright"), Richard Ladson, Jr. ("Mr. Ladson"), was admitted as a resident of the Facility on September 20, 2010. (*See generally* R. pp. 59–77.) Ms. Wright handled the paperwork in conjunction

---

[1] The "Facility" is Defendant/Appellant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab. It is a skilled nursing facility in Charleston County.

[2] "Plaintiff" is Plaintiff/Respondent, Estate of Richard Ladson, Jr., by and through Personal Representative Richard Miles Ladson, Sr., POA.

[3] Because the Subject Opinion was filed April 6, 2022, the original deadline to petition for rehearing was April 21, 2022, pursuant to Rule 221(a) (providing, "Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion . . . ."). By order filed April 22, 2022, in response to the Facility's motion of April 21, 2022, the Court extended the time for serving and filing the petition for rehearing until May 6, 2022. By order filed May 17, 2022, in response to the Facility's motion of May 5, 2022, the Court extended the time for serving and filing the petition for rehearing until today, May 23, 2022.

with Mr. Ladson's admission and, in so doing, signed an Admission Agreement[4] and an Arbitration Agreement on his behalf. (*See generally* R. p. 71.)[5]

This nursing home malpractice action was filed March 8, 2018, in the Charleston County Court of Common Pleas. (*See generally* R. pp. 3–9.)

On August 21, 2018, the Facility moved to compel arbitration, based on the Arbitration Agreement that Ms. Wright had signed on Mr. Ladson's behalf in conjunction with his admission to the Facility. (*See generally* R. p. 36–38.)[6] [7]

---

[4] (*See generally* R. pp. 59–70.) Plaintiff does not challenge the validity of the Admission Agreement.

[5] Both the Admission Agreement and the Arbitration Agreement were countersigned by Leslie Solomon, the Facility's Director of Admissions. (*Compare* R. p. 70 *with* R. p. 71.)

[6] Prior to moving to compel arbitration, subject to and without waiving its right to compel the matter to arbitration, the Facility timely answered the complaint on June 21, 2018, denying the alleged liability and raising a number of affirmative defenses. (*See generally* R. pp. 13–20.)

[7] To be clear, without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement. The plain language of the Arbitration Agreement clearly embraces the subject matter of Plaintiff's claims. (*See* R. p. 71 ("It is the intention of the parties to this [Arbitration] Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of [Mr. Ladson]."); *id.* ("It is . . . understood that in the event of any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Mr. Ladson's] stay at [the] Facility, or to the provisions of care or services to [Mr. Ladson] . . . and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration . . . .").) Moreover, 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); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001)

The parties submitted their respective briefs for[8] and against[9] the motion, and following a hearing on November 27, 2018,[10] the circuit court, the Honorable Jennifer B. McCoy presiding, denied the Facility's motion to compel arbitration by order filed February 6, 2019. (*See generally* R. p. 1.) On February 8, 2019, the Facility timely moved the circuit court to alter, amend, and/or reconsider its decision. (R. pp. 94–96.) The court denied that motion by order filed July 26, 2019. (R. p. 2.)

This appeal timely followed by notice served August 20, 2019,[11] and in due course, it was fully briefed and made ready for decision.

As explained in its principal appellate brief, and further supported in its reply brief, the Facility argued that the circuit court erred in failing to find that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff was equitably estopped from denying the validity of the Arbitration Agreement, merged as it was with the Admission Agreement under which Mr. Ladson had received direct benefits. (*See generally* Br. of Appellant; Reply Br. of Appellant.)

("[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

[8] (*See generally* R. pp. 39–58.)

[9] (*See generally* R. pp. 78–80.)

[10] (*See generally* R. pp. 21–35.)

[11] (*See generally* R. pp. 97–98.)

The case was submitted on the record on appeal and briefs during the March 2022 term without oral argument and decided April 6, 2022, via the Subject Opinion, which affirmed the circuit court. The body of the Subject Opinion is brief enough to reproduce in full below:

> **PER CURIAM:** [The Facility] appeals the circuit court's order denying its motion to compel arbitration. On appeal, [the Facility] argues the circuit court erred in denying its motion because the merger of the at-issue arbitration agreement (Arbitration Agreement) with the admission agreement (Admission Agreement) equitably estopped [Mr. Ladson's] estate from denying the validity of the arbitration agreement. We affirm.
>
> The circuit court did not err in denying [the Facility's] motion to compel arbitration because the admission agreement and the arbitration agreement did not merge. *See Berry v. Spang*, 433 S.C. 1, 9, 855 S.E.2d 309, 314 (Ct. App. 2021) ("Appeal from the denial of a motion to compel arbitration is subject to de novo review." (quoting *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008))), petition for cert. filed (S.C. Apr. 23, 2021); *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) ("Whether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to de novo review by an appellate court."); *Berry*, 433 S.C. at 9, 855 S.E.2d at 314 ("[A] circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." (quoting *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009))); *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (concluding that by their own terms, language in the admission agreement that "recognize[d] the 'separatedness' of the two documents[, i.e. the arbitration agreement and the admission agreement]" and a clause allowing the

> arbitration agreement to "be disclaimed within thirty days of signing while the admission agreement could not" indicated the parties' intention "that the common law doctrine of merger not apply"); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 562-63, 813 S.E.2d 292, 302 (Ct. App. 2018) (determining an admission agreement and arbitration agreement did not merge because the fact "the Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law," "each document was separately paginated and had its own signature page," and "the Arbitration Agreement stated signing it was not a precondition to admission" evidenced the parties' intention the documents be construed as separate instruments). Because the documents did not merge, we need not address [the Facility's] equitable estoppel argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive); *Coleman*, 407 S.C. at 356, 755 S.E.2d at 455 ("Since there was no merger here, appellants' equitable estoppel argument was properly denied by the circuit court."); *Hodge*, 422 S.C. at 563, 813 S.E.2d at 302 (concluding "equitable estoppel would only apply if documents were merged").
>
> **AFFIRMED.**

This petition for rehearing timely follows.

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

1. Misapprehending or overlooking a number of material points, the Court has erroneously affirmed the circuit court's denial of the Facility's motion to compel arbitration.

(a) Like that of the circuit court before it, this Court's analysis of the Facility's merger argument is erroneous. The Court should have found that the circuit court erred in failing to find that the Arbitration Agreement merged with the Admission Agreement.

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, 354–355, 755 S.E.2d 450, 455 (2014) (emphasis added).

Here, this Court, like the circuit court before it, has erred in rejecting the Facility's merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply 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), as well as *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016).[12]

The Subject Opinion wrongfully concludes that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge. 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,"[13] as indeed the Admission Agreement and the Arbitration Agreement were here,[14] there is evidence to upset the *default presumption in favor of merger*, i.e., 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). And "in attempting to ascertain th[e] [parties'] intention," our

---

[12] The Court only cited *Coleman* and *Hodge* in the Subject Opinion, not *Thompson*, but to be clear, *Thompson* does not support the Court's decision either.

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

[14] To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As *Coleman* Court expressly observed 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 in the course of the same transaction*." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

courts "endeavor 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 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.

Unlike all the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), *the instant Arbitration Agreement has no such disclaimer/revocation provision*. (*See* R. p. 71.) Accordingly, at the same time, the Subject Opinion both erred in likening the instant case to *Coleman* in this regard and in failing to cite (i.e., recognize) the presence of such a disclaimer provision in the arbitration agreement in *Hodge*, which was a material fact

underlying not only *Coleman* but *Hodge*, too. 422 S.C. at 562, 813 S.E.2d at 302 ("Also, the Arbitration Agreement stated it could be revoked within thirty days, whereas the Admission Agreement contained no such indication . . . ."); *id.* at 563, 813 S.E.2d at 302 ("Based on all of this, we find the Admissions Agreement and Arbitration Agreement did not merge.").

Also unlike the admission agreement at issue in *Coleman*, the "Entire Agreement" clause in the instant Admission Agreement does not reference the Arbitration Agreement as a separate contract. (*See* R. p. 70.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[15]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." (R. p. 70.) Without question, the Arbitration Agreement is among these other Admissions materials. *See 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*.")

[15] 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).

(emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)).

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for Mr. Ladson to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. 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).

To say that the Arbitration Agreement was not required for admission, which it was not,[16] 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. Wright on Mr. Ladson's behalf. While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could*

[16] (R. pp. 31:19–32:3.)

have stood on its own, i.e., 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 particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or 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. (*See* R. p. 71 (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . . ."); R. p. 71 ("This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .").)

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 considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Ladson's relationship with the Facility: the Admission Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of

disputes arising out of his admission. (*Compare* R. pp. 59–70 (setting forth the terms of Mr. Ladson's admission to the Facility) *with* R. p. 71 (providing for arbitration of disputes arising out of Mr. Ladson's admission in the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* R. p. 68 (providing "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.") *with* R. p. 72 (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;" but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the 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. The very nature of *merger* is to *merge* separate documents.

And—besides the fact, explained elsewhere, that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on any idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must 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 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 based on evidence that is merely ambiguous—i.e., 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 finding against merger here relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent. 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, 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. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 ("[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 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.

This Court should have found that the circuit court erred in failing to find 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 Mr. Ladson's admission to the Facility and would not have been done at all but for his 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.

(b) The Court erred in not reaching the Facility's equitable estoppel argument.

As explained in the Subject Opinion, the Court did not reach the Facility's equitable estoppel argument because of its finding that the Arbitration Agreement and the Admission Agreement did not merge. Therefore, for the same reasons that the Court erred in affirming the circuit court's finding that these documents did not merge, it likewise erred in not reaching the Facility's equitable estoppel argument.

(c) Had it reached the Facility's equitable estoppel argument, as it should have, the Court should have found that the circuit court erred in not finding Plaintiff equitably estopped to deny the enforceability of the Arbitration Agreement.

In *Wilson v. Willis*, our Supreme Court observed 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. 426 S.C. at 338, 827 S.E.2d at 174. 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),[17] and under which the Facility contends

[17] In *Pearson*, this Court advised that "the Federal Arbitration Act, 9 U.S.C. § 2 (1994), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, enforced by 9 U.S.C. §§ 201–08 (1994), 'create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'" 400 S.C. at 289, 733 S.E.2d at 601 (citation omitted). The Court further advised, "Because the determination of whether a nonsignatory is bound by a contract presents no state law question of contract formation or validity, the court looks to the federal substantive law of arbitrability to resolve the question." *Id.* at 289–90, 733 S.E.2d at 601. Looking to federal substantive law, the *Pearson* Court then instructed, "Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Id.* (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417–418 (4th Cir. 2000)). "'In the arbitration context, th[is] 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.* (quoting *Int'l Paper* at 418) (emphasis omitted)

Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Ladson received direct benefits (in the form of his admission to 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* supports the use of the direct benefit test to answer the question of equitable estoppel in an arbitration case like this.

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 but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 ("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. In the arbitration context, the

---

(citation omitted). Thus, "'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.'" *Id.* (quoting *Int'l Paper* at 418) (citation omitted).

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. 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 . . . .") (internal citations and quotation marks omitted); *id.* 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 to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Ladson received the benefit of his admission to the Facility,

including, without limitation, the room, board, care, and treatment he received therein. To deny his receipt of such benefits is illogical. It would require wholly discounting every single aspect of his residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility). Not even Plaintiff has alleged this. (*See generally* R. pp. 4–9.)

Respectfully, this Court should have found that the circuit court erred in not finding that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff is estopped to deny the Arbitration Agreement's enforceability, Mr. Ladson having effectively embraced/directly benefitted from the Admission Agreement for the purpose of his admission only to later, via Plaintiff, attempt to repudiate the Arbitration Agreement with which the Admission Agreement was merged.

CONCLUSION

For the foregoing reasons, along with any other or further reason(s) set forth in its appellate briefs already on file, the entirety of which it hereby adopts and incorporates herein by reference and reiterates/reasserts in support hereof, the Facility asks this Honorable Court to grant the instant petition, to rehear this matter, to withdraw the Subject Opinion, and to decide this appeal anew via an opinion that reverses the circuit court and stays this lawsuit in favor of arbitration

or, alternatively, to remands this case to the circuit court with instructions for 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)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellant

Charleston, South Carolina

May 23, 2022

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2019-001413
Circuit Court Case No. 2018-CP-10-01251

Estate of Richard Ladson, Jr.,
by and through Personal Representative
Richard Miles Ladson, Sr., POA,

Respondent,

v.

THI of South Carolina at Charleston, LLC
d/b/a Riverside Health and Rehab,

Appellant.

PROOF OF SERVICE

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)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellant

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant, hereby certify that **APPELLANT'S PETITION FOR REHEARING** was served on Respondent, on May 23, 2022, by emailing (see attached) a copy of the same to Respondent's counsel of record:

Carl E. Pierce, II, Esquire
Benjamin C. Smoot, II, Esquire
PIERCE, HERNS, SLOAN & WILSON, LLC
321 East Bay Street
Charleston, South Carolina 29401
carlpierce@piercesloan.com
bensmoot@piercesloan.com

Attorneys for Respondent

Respectfully submitted,

CLEMENT RIVERS, LLP

By: *s/Russell G. Hines*
Russell G. Hines (SC Bar No. 72100)

Attorneys for Appellant

Charleston, South Carolina

May 23, 2022

From:	Hines, Russell
To:	bensmoot@piercesloan.com; carlpierce@piercesloan.com; treypierce@piercesloan.com
Cc:	plantiffparalegals@phswlaw.com; Peterson, Susan; Bell, Pollyana (Polly); Davis, Jay; Brown, Stephen L.; Justman, Aimee; "bensmoot@piercesloan.com"; "carlpierce@piercesloan.com"; "treypierce@piercesloan.com"
Subject:	Richard Ladson v. THI of South Carolina (2019-001413) -- Appellant"s Petition for Rehearing
Date:	Monday, May 23, 2022 11:29:58 PM
Attachments:	image001.png Ladson v. THI (2019-001413) -- Petition for Rehearing.pdf

Attached regarding the above-referenced case please find **Appellant's Petition for Rehearing**.

Russell G. Hines
CLEMENT RIVERS, LLP
www.ycrlaw.com
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
Phone: (843) 720-5488
Fax: (843) 579-1327
Email: rhines@ycrlaw.com