

RECEIVED

Aug 01 2022

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

R. KEITH KELLY, CIRCUIT COURT JUDGE

CASE No. 2019-CP-42-03709

Kenneth Pace, Individually and as Personal
Representative of the Estate of Earl E. Pace,

Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina
at Camp Care, LLC; THI of South Carolina, LLC; THI
of Baltimore, Inc.; Fundamental Administrative
Services, LLC; Fundamental Clinical and Operational
Services, LLC; Fundamental Clinical Consulting,
LLC; Fundamental Long Term Care Holdings, LLC,
and Kerry L. Wheeler, DO,

Defendants,

Of which Lake Emory Post Acute Care; THI of
South Carolina at Camp Care, LLC; THI of South
Carolina, LLC; THI of Baltimore, Inc.; Fundamental
Administrative Services, LLC; Fundamental Clinical
and Operational Services, LLC; Fundamental
Clinical Consulting, LLC; Fundamental Long Term
Care Holdings, LLC, are

Appellants.

RESPONDENT'S MOTION TO DISMISS APPEAL

**Counsel identified on following page.*

Jennifer Spragins Burnett (SC Bar No. 69617)
Harbin & Burnett, LLP
2124 Highway 81 North
Anderson, South Carolina 29621
Ph: 864-964-0333 Fax: 864-964-0930
Attorneys for Respondent

Other Counsel of Record:
Russell G. Hines
D. Jay Davis
Clement Rivers, LLP
25 Calhoun Street
Suite 400
Charleston, South Carolina 29401
Attorneys for Appellants

Russell W. Harter
Chapman, Harter & Harter, PA
14 Lavinia Avenue
Greenville, South Carolina 29601
Attorney for Kerry L. Wheeler, DO

Respondent, Kenneth Pace, Individually and as Personal Representative of the Estate of Earl E. Pace respectfully moves this Court for an Order dismissing the Appeal filed by Appellants Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Clinical Consulting, LLC; Fundamental Long Term Care Holdings, LLC. This Motion is filed pursuant to South Carolina Appellate Court Rules 240, 260 and 203(b).

SCACR 203(b) provides, in pertinent part, “[a] notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.” SCACR 203(b)(1).

It is anticipated that Appellants will assert that they did not receive written notice of the entry of Judge Kelly’s Order in this case until June 27, 2022. The above captioned matter is the Wrongful Death Action filed by Kenneth Pace. (CA No. 2019-CP-42-03709). Mr. Pace has also filed a Survival Action matter (CA No. 2019-CP-42-03708) against the Appellants. All parties filed pleadings bearing both case numbers and the matters were argued in one hearing. Judge Kelly issued an Order denying the Appellants’ motion that bore both case numbers on June 23, 2022. This Appeal was filed by the Appellants on July 27, 2022 – thirty-four days after the entry of the Judge’s Order. *June 23, 2022 Order* attached as Exhibit A and the first page of which is pasted into the body of this Motion below.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Kenneth Pace, Individually and as Personal
Representative of the Estate of Earl E.
Pace,

2019-CP-42-03709
2019-CP-42-03708

Plaintiff,

v.

Lake Emory Post Acute Care; THI of South
Carolina at Camp Care, LLC; THI of South
Carolina, LLC; THI of Baltimore, Inc.;
Fundamental Administrative Services, LLC;
Fundamental Clinical and Operational
Services, LLC; Fundamental Clinical
Consulting, LLC; Fundamental Long Term
Care Holdings, LLC, and Kerry L. Wheeler,
DO,

**ORDER DENYING THE MOTION
TO ALTER, AMEND AND/OR
RECONSIDER BY THE
DEFENDANTS**

Defendants.

This matter is before the Court upon motions filed by the Defendants to stay the underlying state court litigation and compel the above-captioned matters to arbitration. The parties submitted written memoranda in support and opposition to the motions and the Court heard oral argument of counsel for both parties on January 20, 2021. This Court denied the Defendants' motion in an Order filed April 8, 2021. Defendants' subsequently filed a Motion to Alter, Amend or Reconsider. The parties submitted written memoranda in support and opposition to the motion. This Court carefully considered arguments of both parties.

For the reasons set forth below, the Defendants' motions are hereby DENIED.

1 | Page

Judge Kelly's Order was served on the parties through the E-Filing system of the South Carolina Courts. The Certificate of Electronic Notification reveals that counsel for Appellants received the Order on June 23, 2022 at 4:31 PM. *See Certificate of Electronic Notification* attached as Exhibit B and pasted into the body of this Motion below.

Certificate of Electronic Notification

Recipients

Russell Harter - Notification transmitted on 06-23-2022 04:31:03 PM.

Donald Davis - Notification transmitted on 06-23-2022 04:31:02 PM.

Kate Mettler - Notification transmitted on 06-23-2022 04:31:06 PM.

Anthony Harbin - Notification transmitted on 06-23-2022 04:31:05 PM.

Jennifer Burnett - Notification transmitted on 06-23-2022 04:31:02 PM.

This Court has held that service of an order through the email address in AIS (Attorney Information System) constitutes notice of the entry of an order. *See Wells Fargo Bank, NA v. Fallon Properties SC, LLC*, 413 S.C. 642, 643-45, 776 S.E..2d 575, 576-77 (Ct. App. 2015). An email providing written notice of the entry of an order triggers the time for appeal. *See id* at 217.

While the Respondent concedes that the Order Denying the Motion to Alter, Amend and/or Reconsider was entered *in the above captioned* case on July 27, 2022 – Appellants certainly had notice that the Order was entered in both cases on June 23, 2022 by the entry of the Order denying their motion that bore both case numbers 2019-CP-42-03708 and 2019-CP-42-03709. It would be disingenuous to assert that the Appellants were not aware that the Order was being entered in both cases.

On June 23, 2022, Appellants received written notice of the entry of an Order denying their motion. The Order they received on June 23rd – on its face – revealed that the court was denying their motion in both civil actions. The time to serve notice of appeal commences at the time the party first receives notice of the entry of an order. *See id.*

Respondent respectfully asserts that the Appellants' Appeal is not timely and must be dismissed.

s/ Jennifer Spragins Burnett
Jennifer Spragins Burnett (SC Bar No. 69617)
Harbin & Burnett, LLP
2124 Highway 81 North
Anderson, South Carolina 29621
Ph: 864-964-0333 Fax: 864-964-0930
Attorneys for Respondent

Anderson, South Carolina
August 1, 2022

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

R. KEITH KELLY, CIRCUIT COURT JUDGE

CASE No. 2019-CP-42-03709

Kenneth Pace, Individually and as Personal
Representative of the Estate of Earl E. Pace,

Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina
at Camp Care, LLC; THI of South Carolina, LLC; THI
of Baltimore, Inc.; Fundamental Administrative
Services, LLC; Fundamental Clinical and Operational
Services, LLC; Fundamental Clinical Consulting,
LLC; Fundamental Long Term Care Holdings, LLC,
and Kerry L. Wheeler, DO,

Defendants,

Of which Lake Emory Post Acute Care; THI of
South Carolina at Camp Care, LLC; THI of South
Carolina, LLC; THI of Baltimore, Inc.; Fundamental
Administrative Services, LLC; Fundamental Clinical
and Operational Services, LLC; Fundamental
Clinical Consulting, LLC; Fundamental Long Term
Care Holdings, LLC, are

Appellants.

PROOF OF SERVICE

I, Jennifer Spragins Burnett, of Harbin & Burnett, LLP, attorneys for Respondent, hereby certify that Respondent's Motion to Dismiss Appeal was served on counsel for Appellants and counsel for Kerry L. Wheeler, DO by emailing a copy of the same to the email address of record on file with the AIS system, as required by this Court's May 6, 2022 Order regarding Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules.

Russell G. Hines
D. Jay Davis
Clement Rivers, LLP
25 Calhoun Street
Suite 400
Charleston, South Carolina 29401
Attorneys for Appellants
rhines@ycrlaw.com
jdavis@ycrlaw.com

and

Russell W. Harter
Chapman, Harter & Harter, PA
14 Lavinia Avenue
Greenville, South Carolina 29601
Attorney for Kerry L. Wheeler, DO
rwjhr@chhlaw.net

s/ Jennifer Spragins Burnett
Jennifer Spragins Burnett (SC Bar No. 69617)
Harbin & Burnett, LLP
2124 Highway 81 North
Anderson, South Carolina 29621
Ph: 864-964-0333 Fax: 864-964-0930
Attorneys for Respondent

Anderson, South Carolina
August 1, 2022

Exhibit A

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Kenneth Pace, Individually and as Personal
Representative of the Estate of Earl E.
Pace,

Plaintiff,

v.

Lake Emory Post Acute Care; THI of South
Carolina at Camp Care, LLC; THI of South
Carolina, LLC; THI of Baltimore, Inc.;
Fundamental Administrative Services, LLC;
Fundamental Clinical and Operational
Services, LLC; Fundamental Clinical
Consulting, LLC; Fundamental Long Term
Care Holdings, LLC, and Kerry L. Wheeler,
DO,

Defendants.

IN THE COURT OF COMMON PLEAS

2019-CP-42-03709
2019-CP-42-03708

**ORDER DENYING THE MOTION
TO ALTER, AMEND AND/OR
RECONSIDER BY THE
DEFENDANTS**

This matter is before the Court upon motions filed by the Defendants to stay the underlying state court litigation and compel the above-captioned matters to arbitration. The parties submitted written memoranda in support and opposition to the motions and the Court heard oral argument of counsel for both parties on January 20, 2021. This Court denied the Defendants' motion in an Order filed April 8, 2021. Defendants' subsequently filed a Motion to Alter, Amend or Reconsider. The parties submitted written memoranda in support and opposition to the motion. This Court carefully considered arguments of both parties.

For the reasons set forth below, the Defendants' motions are hereby DENIED.

I. FACTUAL & PROCEDURAL HISTORY

This Court finds that on or about July 10, 2014, Mr. Pace was taken into the protective custody of the South Carolina Department of Social Services, (hereafter “DSS”). A Guardian *ad Litem*, (hereafter “GAL”), and an attorney were appointed for Mr. Pace by the family court. Thereafter, Mr. Pace was admitted to Lake Emory Post Acute Care, (hereafter “Lake Emory”), for care and supervision. At the time Mr. Pace was admitted to Lake Emory, he was under the custody of DSS. A DSS employee executed Mr. Pace’s admission paperwork. The paperwork executed by the DSS employee, Calvin Hill, (hereafter “Mr. Hill”), included an admission agreement and a separate arbitration agreement. It is undisputed that Mr. Hill was the only signer of the admission paperwork and the arbitration agreement. DSS subsequently petitioned the court to be relieved of custody and recommended that Lake Emory designate the Plaintiff as Mr. Pace’s representative. DSS, with the consent of the Guardian *ad litem*, the attorney for the Guardian *ad litem*, and the court appointed attorney for Mr. Pace, submitted a consent order seeking to relieve DSS of custody of Mr. Pace, as well as relieving from their appointments the attorneys and Guardian *ad litem*. The Laurens County Family Court entered an Order April 24, 2015 relieving DSS of custody of Mr. Pace and also relieving the court appointed Guardian *ad litem*, the attorney appointed for the Guardian *ad litem*, as well as the attorney appointed for Mr. Pace.

The Plaintiff in this action is Kenneth Pace, the son of the Decedent. Plaintiff filed his Summonses and Complaints alleging a Survival Action and a Wrongful Death Action on or about October 21, 2019. Defendants filed motions to dismiss and compel arbitration on April 13, 2020. Defendants alleged that they were entitled to compel this matter to

arbitration pursuant to the aforementioned arbitration agreement and sought a stay of these proceedings. Defendants assert Mr. Hill was acting pursuant to “court ordered powers” and alleges that South Carolina Code Ann. § 43-35-10 provides authority for DSS to execute an arbitration agreement on behalf of an individual in their custody. This Court disagrees and finds the arbitration agreement unenforceable as a matter of law.

II. LAW/ANALYSIS

A motion under Rule 59(e) has long been viewed as "motion for reconsideration" despite the absence of those words from the rule. *See Elam v. S.C. DOT*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-79 (2004). A party is permitted to ask the court to reconsider its decision “even if it means rehashing all or part of an argument previously presented *See id.* This Court finds that the Defendants’ motions are based on the same grounds set forth in Defendants’ original Motions to Dismiss and Compel Arbitration and therefore adopts and incorporates by reference the reasoning set forth in this Court’s April 8, 2021 Order denying the Defendants’ motions.

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *See New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (S.C. Ct. App. 2008). The arbitration agreement presented by the Defendants is not enforceable because the arbitration agreement was executed by someone that did not possess the authority to execute such an agreement on behalf of Mr. Pace.

In order for a court to compel arbitration pursuant to the Federal Arbitration Act, a litigant must demonstrate a valid arbitration agreement that purports to cover the

dispute. *See Aiken v. World Finance Corp. of S.C.*, 373 SC 144, 149, 644 SE2d 705, 708 (2007). Where one party denies the existence of a valid arbitration agreement, a court must immediately determine whether the agreement exists in the first place. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 SC 14, 644 SE2d 663, 667 (2007). If no agreement is found to exist, the court must deny the request to arbitrate. *See id.* Whether a valid arbitration agreement exists is a matter for judicial determination. *See York v. Dodgeland of Columbia, Inc.*, 406 SC 67, 749 SE2d 139, 144 (Ct. App. 2013).

Although there is public policy favoring arbitration – it is applied only as an aid in interpreting the scope and enforcement of validly entered arbitration agreements. *See Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020). The FAA does not give the party seeking arbitration a “leg up in the threshold determination of whether a valid arbitration agreement exists.” *Id.*, 431 S.C.at 229, 847 S.E.2d at 271.. The “first principle that underscores all [] arbitration decisions is that [a]rbitration is strictly a matter of consent.” *Id.* quoting *Lamps Plus, Inc., v. Varela*, 139 S.Ct. 1407, 1415 (2019).

Because it is undisputed that Mr. Pace did not execute the arbitration agreement himself, Mr. Hill must have had the appropriate legal authority to execute the arbitration agreement for it to be enforceable.

Defendants have argued in both their original motion and in the Motion to Reconsider that Mr. Hill was granted agency authority to act on Mr. Pace’s behalf. This Court finds that this argument continues to be without merit.

DSS Representative Calvin Hill lacked common law agency authority to execute an arbitration agreement for Mr. Pace. Agency is a fiduciary relationship that results when

one person consents to be subject to the control of the other and to act on his behalf. *See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 540 S.E.2d 113 (S.C. Ct. App. 2000). It is undisputed that Mr. Pace was diagnosed with dementia, was incompetent, and unable to provide consent or acquiesce to Mr. Hill's actions. Furthermore, the authority conveyed to an agent does not encompass executing an agreement to resolve legal claims through arbitration. *See Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), citing *Dickerson v. Longoria*, 995 A.2d 721, 736-37 (Md. 2010).

Defendants assert that Mr. Hill was acting pursuant to "court ordered powers" and the "actual authority" provided by the Adult Protection Act. These arguments are similarly without merit.

The Adult Protection Statute codified at § 43-35-5 *et seq.* sets forth the authority and procedure for the State of South Carolina to take a vulnerable adult into protective custody. The duties and responsibilities to the vulnerable adult under the Adult Protective Services program are set forth in § 43-35-45. The other provisions of the Adult Protective Services Program relate entirely to the duties and responsibilities of the GAL. This Court finds that while the statutes authorizing the Adult Protective Services Program would permit DSS to hire a doctor or medical facility for Mr. Pace, and would authorize DSS to hire an attorney to provide legal services for Mr. Pace, the statutes do not authorize DSS to perform legal services and do not provide any authority for DSS to execute an arbitration agreement that waives Mr. Pace's constitutional right to a jury trial.

Defendants argue that the "definitions" section of the Adult Protective Services statute grants authority in defining protective service. "Protective services" means those

services whose objective is to protect a vulnerable adult from harm caused by the vulnerable adult or another. These services include, but are not limited to, evaluating the need for protective services, securing and coordinating existing services, arranging for living quarters, obtaining financial benefits to which a vulnerable adult is entitled, and securing medical services, supplies, and legal services.” See S.C. Code Ann. § 43-35-10(9). Defendants place particular emphasis on the words “legal services.” Defendants argue that this Court has erred in failing to consider the language “include, but are not limited to” in determining that the protective services would give to DSS the authority to execute the arbitration agreement. This argument is without merit.

This Court interprets the statute, and every portion thereof, as permitting DSS to arrange for living quarters, secure medical care, and hire an attorney for the vulnerable adult if one is needed. The statute does not authorize DSS to provide legal services to Mr. Pace or waive his constitutional right to a jury trial. Similarly, the family court order provides no such authority.

Defendants further argue that Kenneth Pace should be estopped from denying the arbitration agreement under the doctrine of equitable estoppel. In order for equitable estoppel to apply to the case at hand, there must have been a merger of the admission agreement and the arbitration agreement.

The Defendants argue that the court erred in failing to accept their argument that the documents were executed at the same time and by the same parties and therefore, constituted one transaction. Defendants argue that the Court has failed to consider the parties’ intentions.

In this case the Court looked carefully at the documents in question to determine

whether the parties *intended* the documents to be construed together. There is no reference whatsoever within the 12 pages of the admission agreement regarding arbitration. The admission agreement refers to a “Grievance Procedure” that is included in the admission handbook and is incorporated by reference. There is no reference to arbitration and the admission agreement does not state anywhere that admission is contingent upon execution of an arbitration agreement.

The admission agreement provides expressly that it will be governed by the laws of the State in which “Facility” is located – South Carolina. Finally, the Admission Agreement provides an “Entire Agreement” or merger clause. The merger clause provides:

I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties...

Id.

Defendants argue that the “entire agreement” clause should be interpreted to include documents that were not, in fact, included in the admission agreement. This argument is simply without merit.

In contrast, the arbitration agreement is governed by federal law and the Federal Arbitration Act.¹ Moreover, the arbitration agreement, on its face, is separate from the admission agreement. Finally, there is no language in the arbitration agreement that

¹ See *Hodge, supra* wherein the Court found that the admission agreement and arbitration provisions were not merged, in part because state law governed the admission agreement and federal law the arbitration agreement. The *Hodge* court determined that plaintiff would not be equitably estopped from denying arbitration noting that “... even if the Admission Agreement and Arbitration Agreement [were] merged, because [plaintiffs] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement. See *id.*”

execution of the same was required for admission to Defendants' facility.

The admission agreement and the arbitration agreement were wholly independent and this Court holds that they shall not be construed together. *See Hodge v. Unihealth Post-Acute Care of Bamberg, LLC.*, 422 SC 544, 813 S.E.2d 292 (Ct. App. 2018). Because the admission agreement is not merged with the arbitration agreement, Defendants' equitable estoppel argument is without merit.

Defendants further argue that Mr. Pace is a third-party beneficiary to the arbitration agreement. For all the reasons set forth above, this Court has found that the arbitration agreement in this matter is not valid. Without a valid arbitration agreement, there can be no third-party beneficiary. *See Thompson, supra*. This argument is without merit.

Therefore, this Court finds that DSS did not have the authority to execute an arbitration on behalf of Mr. Pace. Because the arbitration agreement was executed by a person without authority, it cannot be enforced.

IT IS HEREBY ORDERED that the Adult Protective Services Statute does not permit DSS to execute an arbitration agreement on behalf of a vulnerable adult. However, this Court does find that the Adult Protective Services Statute does provide for DSS to arrange for legal services to be provided for a vulnerable adult.

IT IS FURTHER ORDERED that the arbitration agreement presented by the Defendants is not enforceable under theories of equitable estoppel or third party beneficiary.

IT IS FURTHER ORDERED that the Defendants' Motion to Alter, Amend or Reconsider is hereby denied.

IT IS FURTHER ORDERED that the Defendants' Motion to Stay are moot in light of this Court's rulings and are hereby denied.

IT IS SO ORDERED.

Hon. R. Keith Kelly
Circuit Court Judge

June _____, 2022
Gaffney, South Carolina



Spartanburg Common Pleas

Case Caption: Kenneth Pace VS Lake Emory Post Acute Care , defendant, et al
Case Number: 2019CP4203708
Type: Order/Other

It is so Ordered.

s/ R. Keith Kelly - 2165

Exhibit B

Certificate of Electronic Notification

Recipients

Russell Harter - Notification transmitted on 06-23-2022 04:31:03 PM.

Donald Davis - Notification transmitted on 06-23-2022 04:31:02 PM.

Kate Mettler - Notification transmitted on 06-23-2022 04:31:06 PM.

Anthony Harbin - Notification transmitted on 06-23-2022 04:31:05 PM.

Jennifer Burnett - Notification transmitted on 06-23-2022 04:31:02 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2019CP4203708

Official File Stamp: 06-23-2022 04:30:51 PM
Court: CIRCUIT COURT
Common Pleas
Spartanburg
Case Caption: Kenneth Pace VS Lake Emory Post Acute Care ,
defendant, et al
Document(s) Submitted: Order/Other Order/Other
Filed by or on behalf of: R. Keith Kelly

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

Anthony Lee Harbin for Kenneth Pace
Russell W. Harter, Jr. for Kerry L. Wheeler, Do
Kate Mettler for Fundamnetal Long Term Care
Holdings, Llc, Lake Emory Post Acute Care,
Fundamental Clinical And Opertational Services,
Llc, Fundamental Administrative Services, Llc, Thi
Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi
Of South Carolina At Camp Care, Llc
Donald Jay Davis, Jr. for Fundamnetal Long Term
Care Holdings, Llc, Lake Emory Post Acute Care,
Fundamental Clinical And Opertational Services,
Llc, Fundamental Administrative Services, Llc, Thi
Of Baltimore, Inc, Thi Of South Carolina, Llc, Thi
Of South Carolina At Camp Care, Llc
Jennifer Spragins Burnett for Kenneth Pace

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

ELECTRONICALLY FILED - 2022 Jun 23 4:31 PM - SPARTANBURG - COMMON PLEAS - CASE#2019CP4203708