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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2019-001731

The Estate of Mary Solesbee, by her personal representative Connie Bayne,	……..	Respondent
v.		
Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Manor-Inman d/b/a Magnolia Manor-Inman; Inpatient Consultants of North Carolina, P.C.; and Angela Brown ACNP,	……	Defendants,
Of which Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, THI of South Carolina at Magnolia Manor-Inman d/b/a Magnolia Manor-Inman are the	……..	Appellants.

RETURN TO PETITION FOR REHEARING

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PROCEDURAL HISTORY

Connie Bayne, appointed as personal representative of the Estate of her mother Mary Solesbee, filed a Summons and Complaint in the Spartanburg County Court of Common Pleas on December 27, 2018. (R. p. 12 ¶ 1). The Complaint alleged wrongful death and survival claims against THI of South Carolina at Magnolia Manor—Inman, LLC d/b/a Magnolia Manor of Rock Inman ("the Facility") along with related entities the Complaint alleged to have operational or managerial control over the Facility. (R. pp. 12-14; 17-19 ¶¶ 2-3; 21-25). The Facility moved to compel arbitration and to stay court proceedings on February, 22, 2019. (R. pp. 101-03). Motions to stay were filed by Defendants Fundamental Administrative Services, LLC and Fundamental Clinical and Operational Services, LLC on August 9, 2019. On September 11, 2019, the circuit court entered an order denying the Facility's motion to compel arbitration and dismissing as moot the other Appellants' motions to stay. (R. pp. 1-8). The Facility, Fundamental Administrative Services, LLC, and Fundamental Clinical and Operational Services, LLC served a notice of appeal on October 11, 2019. The South Carolina Court of Appeals affirmed the circuit court's ruling in a unanimous reported opinion issued on January 25, 2023. Solesbee v. Fundamental Clinical & Operational Servs., LLC, Op. No. 5963 (Howard Adv. Sh. No. 4 at 21) (S.C. Ct. App. Jan. 25, 2023). Appellants filed a petition for rehearing on March 13, 2023.

ARGUMENT

On three prior occasions, South Carolina's appellate courts have rejected the arguments Appellants offer in support of merger and estoppel involving a purported nursing home arbitration contract. Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018). Each time, the court recognized

an arbitration contract does not merge with a nursing home's admission agreement when the contracts include any of a number of textual or contextual indications of "separateness." See e.g. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. Coleman, Thompson, and Hodge also rejected any form of equitable estoppel as a means for binding a nursing home resident to an arbitration contract she did not sign. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 58-59, 784 S.E.2d at 687-88; see also Hodge, 422 S.C. at 556-57, 813 S.E.2d at 299-300 (applying Thompson).

The Court was correct in relying on this recent, extensive, and directly applicable line of precedent to find no binding arbitration contract in this case. Solesbee, Op. No. 5963, at 8 ("like in Coleman and Hodge, we find there was no merger in this case and Magnolia's equitable estoppel argument was properly denied"). Appellants' petition merely rehashes the same flawed arguments from their briefs. First, Appellants claim the Arbitration Agreement here is different from the contracts at issue in Coleman and Hodge, but the truth is the contracts are functionally indistinguishable for purposes of the merger and estoppel analysis. Second, Appellants implicitly ask the Court to overrule Coleman, Thompson, and Hodge by baldly asserting that the evidence against merger identified in those cases should not count. None of these arguments are supported by the law or the record, and the petition for rehearing should be denied.

1. **The Court correctly applied Coleman and Hodge to reject Appellants' merger argument.**

Two contracts do not "merge" if their text, context, or any of the circumstances surrounding their formation indicate the parties intended they remain distinct documents. Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977) (stating that there is no merger if there is "*anything* indicating a contrary intention.") (emphasis added)). Starting with Coleman, South Carolina's appellate courts

have identified five attributes of nursing home admission and arbitration contracts as evidence against merger:

- When one of the contracts refers to the other as a distinct document;[1]
- Inconsistent termination provisions;[2]
- Inconsistent governing law provisions;[3]
- Admission by nursing home that agreeing to arbitration is not required to obtain a resident's admission to the facility; and[4]
- When the contracts are titled and paginated separately and call for separate signatures.[5]

All five of these are present here. Solesbee, Op. No. 5963, at 7-8. There is no legal basis for Appellants' attempts to distinguish or reject the Court's accurate application of precedent.

a. Inconsistent governing law provisions

Two contracts should not be considered as one when the parties chose to apply different governing law for each contract. As the Court recognized, the Arbitration Agreement (R. p. 104) and Admission Agreement (R. p. 165-76) do not apply the same substantive law. Solesbee, Op. No. 5963, at 7. The Admission Agreement adopts South Carolina law. (R. p. 174) ("those laws of the State in which Facility is located"). In contrast, the Arbitration Agreement is to be interpreted consistently with substantive federal law. (R. p. 104) ("governed by the Federal Arbitration Act" ("FAA")). Appellants argue these governing law provisions are not inconsistent (Pet. at 18-19), but Hodge rejected that argument based on functionally identical contract language. 422 S.C. at 562, 813 S.E.2d at 302. The Hodge arbitration contract was different than its admission contract because the arbitration contract not only adopted the FAA but also specifically declined to apply the South Carolina Uniform Arbitration Act ("SCUAA"). Id. at 552, 813 S.E.2d at 296. That is

[1] Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Hodge, 422 S.C. at 562, 813 S.E.2d at 302.
[2] Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562, 813 S.E.2d at 302.
[3] Hodge, 422 S.C. at 562, 813 S.E.2d at 302.
[4] Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.
[5] Hodge, 422 S.C. at 562, 813 S.E.2d at 302.

precisely what the Arbitration Agreement does here. It both affirmatively states that it is governed by the FAA and specifically declines to apply the SCUAA. (R. p. 104) ("the enforcement of this Arbitration Agreement is not subject to the" SCUAA). The Arbitration Agreement goes on to reiterate its choice not to use South Carolina substantive law. Id. (choosing FAA "notwithstanding any . . . contrary state law"). Thus, the Court correctly applied Hodge in finding the Admission Agreement and Arbitration Agreement do not merge because they contain inconsistent termination provisions.

b. References to one another as distinct documents

Dating back to Coleman, South Carolina appellate courts have held that a nursing home admission contract does not merge with an arbitration contract when either refers to the other as a distinct document. 407 S.C. at 355, 755 S.E.2d at 455. Here, the Arbitration Agreement refers to the Admission Agreement as a separate and distinct document when discussing its term. Solesbee, Op. No. 5963, at 7 (citing R. p. 104) (Arbitration Agreement "shall survive any termination or breach of . . . the Admission Agreement"). Appellants' objection to this application of Coleman and Hodge seems to be based on where these distinct references are located in the contracts. (Pet. at 20). Appellants claim distinct references only matter if they are in an admission contract's integration or "Entire Agreement" provision. Id. Appellants never explain why the location of the distinct references make a substantive difference. More importantly, case law rejects their argument. The distinct references cited by Hodge were not limited to an integration provision in the admission agreement but also distinct references to the admission contract in the arbitration contract's scope provision. Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Therefore, the Court's opinion accurately applied Coleman and Hodge in rejecting merger based on the Arbitration Agreement's reference to the Admission Agreement in distinct terms.

c. Inconsistent termination provisions

This factor is based on the commonsense notion that parties likely did not intend for two contracts to merge if they specifically stated that one will live on even when the other ends. Here, the Arbitration Agreement claims it will "remain in effect" even after the "termination" of the Admission Agreement. (R. p. 104). Plus, while the Arbitration Agreement contains no option for revocation, the Admission Agreement plainly states Ms. Solesbee could revoke its terms at any time. (R. p. 170). Appellants argue this factor only applies if an arbitration agreement contains a 30-day opt-out provision and claims there is a substantive difference between "terminating" and "revoking" a contract. (Pet. at 20-21). However, it is hard to imagine a clearer rebuttal to merger than for the drafter of the contracts to give the contracts different and inconsistent lifespans. Since the Arbitration Agreement supposedly lives on even after the Admission Agreement ends, the Court correctly considered this factor as further evidence against merger. Solesbee, Op. No. 5963, at 7-8.

d. Separate pagination and signature pages

Following the precedent set in Hodge, the Court cited the Admission Agreement and Arbitration Agreement's varying structure and formatting as further evidence against merger. Solesbee, Op. No. 5963, at 8; see also Hodge, 422 S.C. at 562, 813 S.E.2d at 302 (noting "each document was separately paginated and had its own signature page"). On this point, Appellants simply ask the Court to ignore or even overrule Hodge. Notwithstanding Hodge's clear holding, Appellants insist this factor "provides no reasonable inference of an intent contrary to merger." (Pet. at 22). An unsubstantiated argument against precedent is not a valid ground for rehearing. Moreover, this factor does provide evidence of the parties' intent. The Facility did not just choose to give the Admission Agreement and Arbitration separate pagination, it also used the pagination

to define each document's limits. The Admission Agreement, consisting of 12 pages, ended not just with page 12 but with page "12 of 12." (R. p. 176). The Arbitration Agreement's single page was "Page 1 of 1." (R. p. 104). These formatting choices offer further support for the many other indicators that these two contracts do not merge.

e. Arbitration not required to obtain admission

As a final indicator against merger, the Court faithfully adhered to precedent by citing the Facility's concession that Ms. Solesbee did not have to agree to arbitration to gain admission to the Facility. Solesbee, Op. No. 5963, at 8. In other words, these two contracts were not tied together because Ms. Solesbee could gain the benefit of one without accepting the burden of the other. By conceding this was true, Appellants were admitting evidence that the Court has twice deemed as strong evidence against merger. Thompson, 416 S.C. at 53, 784 S.E.2d at 685 ("[t]his demonstrates the parties' intent that the two agreements retain their separate identities"); Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Here again, Appellants' only argument is one that is effectively against precedent. Notwithstanding the holding of Thompson (that was bolstered by Hodge), Appellants contend this factor "provides no reasonable inference of an intent contrary to merger." (Pet. at 23). This argument is procedurally improper and substantively flawed for the reasons discussed above. This factor, like the four cited above, is probative on the merger question and was properly applied to reject Appellants' merger argument.

2. The Court correctly applied Coleman and Hodge to reject Appellants' estoppel argument.

Appellants' estoppel argument fails both because it is inextricably linked to their flawed merger argument and for independent reasons. Appellants' briefing effectively acknowledges their estoppel assertion depends on a court first accepting their merger argument. See e.g. App. Br. at 14. Appellants do not argue Ms. Solesbee received some benefit from the Arbitration Agreement

that would estop her estate from opposing arbitration. Instead, they argue she received some "direct benefit" from the Admission Agreement that estops the estate from contesting the Arbitration Agreement. That argument could only prevail if the Court first found the Admission Agreement and Arbitration Agreement merged. Since the Court correctly determined there was no merger, it was also correct in finding no substantive analysis of estoppel was necessary. Solesbee, Op. No. 5963, at 8 ("we find that there was no merger in this case and Magnolia's equitable estoppel argument was properly denied").

Moreover, even if Appellants could prove merger, they still could not make the necessary showing to prevail on equitable estoppel. Appellants completely overlook the governing standard for applying the "direct benefit" form of equitable estoppel in nursing home arbitration cases. While South Carolina law recognizes the possibility that a nonsignatory may be required to arbitrate under a contract she did not sign, the party asserting estoppel must make three distinction showings. Weaver v. Brookdale Sr. Living, Inc., 431 S.C. 223, 230 847 S.E.2d 223 (Ct. App. 2020). Appellants would have to show (1) Ms. Solesbee's claim arose from a contractual relationship; (2) Ms. Solesbee "exploited" other parts of the contract by reaping its benefits; and (3) her claim "relies solely on the contract terms to impose liability. Id. (citing Wilson v. Willis, 426 S.C. 326, 340-44, 827 S.E.2d 167, 175-77 (2019)).

Applying these elements, Weaver found a nursing home's resident does not gain a "direct benefit" for estoppel purposes simply by accepting the services obtained upon admission to the home. 431 S.C. at 230-31, 847 S.E.2d at 272-73. The estate's personal injury claims also do not "arise from" the Admission Agreement. There is no breach of contract claim, and the Admission Agreement is not referenced at all in the Complaint. Id. at 231, 847 S.E.2d at 272 (finding "arising from" requirement is not met just because claim would not exist "but for" a contract's existence).

Instead, the estate grounds its claims in duties arising from common law with no reference to any contract. Id. at 232, 847 S.E.2d at 273 (finding nursing home resident's claims "rely on general tort duties . . . not any provision of the residency agreement"). Under those circumstances, estoppel cannot apply because the claims do not "arise from" a contract and certainly do not "rely solely" on a contract's terms. Id. at 232-33, 847 S.E.2d at 273 (citing Hodge as further support to show "direct benefit" estoppel does not apply to nursing home resident's common law tort claim). Appellants point to nothing to distinguish Weaver or to address its holding which forecloses their estoppel argument. Thus, the Court correctly rejected Appellants' attempt to apply equitable estoppel because Appellants cannot first prove merger to then pursue estoppel. Even if the Court were to consider the merits of estoppel, Weaver is strong precedent against applying estoppel in this context.[6]

3. The Court correctly applied Hodge in rejecting Appellants' nonjusticiable discovery argument.

Appellants claim the court should "allow the Facility to conduct" discovery under circumstances where they will not be "vulnerable to [Respondent's] argument that [the Facility] waived its arbitration rights." (Pet. at 34-36). But, as the Court correctly noted, the Facility never even attempted discovery and did not need a court's permission to pursue it. Solesbee, Op. No. 5963, at 9-10; see also Rule 30(a)(1), SCRCP (permitting depositions "[a]fter commencement of an action"); Rule 33(a), SCRCP (same for serving interrogatories); Rule 34(b), SCRCP (same for serving requests for production). What Appellants actually seek is not permission to conduct discovery but a court's assurance that pursuing discovery will not constitute waiver of arbitration.

[6] In light of its correct rulings on merger and estoppel, the Court correctly declined to address Appellants' attempt to apply the Arbitration Agreement to a wrongful death claim. Solesbee, Op. No. 5963, at 9. To the extent the Court considers the merits of that argument, Respondent incorporates by reference Respondent's Brief pages 19-32.

(Pet. at 34-36). A court could not issue the ruling Appellants seek because Appellants lack standing and the issue is not yet ripe. See Resp't Br. at 34-37. No court can rule on the effect discovery will have on waiver before the discovery is performed. Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty., 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006) (finding claim is not ripe if it is "contingent, hypothetical, or abstract"). Moreover, the Court properly relied on precedent in finding potential discovery would be futile. Solesbee, Op. No. 5963, at 9-10 (citing Hodge, 422 S.C. at 579, 813 S.E.2d at 311; Thompson, 416 S.C. at 55, 784 S.E.2d at 686). While Appellants argue they seek discovery to prove an apparent agency relationship between Ms. Solesbee and her family members, apparent agency cannot be based on the representations of the purported agent, only the principal. Cowburn v. Leventis, 366 S.C. 20, 39-40, 619 S.E.2d 437, 448 (Ct. App. 2005). For all these reasons, the Court's ruling on Appellants' discovery request is consistent with South Carolina law, and the petition for rehearing should be denied.

CONCLUSION

Based on the arguments state above and those in her brief, Respondent respectfully requests the Court deny the petition for rehearing.

Respectfully submitted,

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Rock Hill, SC
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Of which Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, THI of South Carolina at Magnolia Manor-Inman d/b/a Magnolia Manor-Inman are the	……..	Appellants.

CERTIFICAT OF SERVICE

The undersigned hereby certifies that, on March 27, 2023, he served Appellants' counsel with the Return to Petition for Rehearing at the email addresses listed below pursuant to Rule 262(c)(3), SCACR and Section (d)(1) of the South Carolina's Supreme Court's August 25, 2021 order (Order No. 2021-08-25-02):

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Estate of Mary Solesbee v. Fundamental Clinical & Operational Servs., LLC (Appellate Case No. 2019-001731)

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1 attachments (124 KB)

M. Solesbee--Return to Petition for Rehearing FINAL PDF.pdf;

Counsel:

I am attaching a Return to Petition for Rehearing that is being electronically filed today with the South Carolina Court of Appeals. Pursuant to Rule 262(c)(3), SCACR and Section (d)(1) of the South Carolina Supreme Court's August 25, 2021, order (Order No. 2021-08-25-02), please consider this email as service for the Return.

Thanks,

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