

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SPARTANBURG COUNTY S.C. SUPREME COURT
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Supreme Court Case No. 2023-001605

Estate of Barbara Owens, Respondent
by and through her Personal
Representative, Mary Jane
McCraw, Individually and on
behalf of Statutory Beneficiaries,

v.

Fundamental Clinical and Operational
Services, LLC, Fundamental Administrative
Services, LLC, THI of South Carolina, LLC,
THI of South Carolina at Spartanburg, LLC
d/b/a Magnolia Manor-Spartanburg, Petitioners.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly applied precedent by finding no merger of a nursing home's admission and arbitration contracts that contain inconsistent terms and otherwise affirmatively identify themselves as distinct legal instruments.
2. Whether the Court of Appeals properly determined the Fundamental petitioners' motions to stay were moot since there was no binding arbitration contract between Respondent and the Facility.
3. Whether the Court of Appeals properly refused to address Petitioners' estoppel argument that was wholly dependent on its flawed merger argument.
4. Whether the Court of Appeals correctly applied precedent in dismissing Petitioners' appeal of an interlocutory discovery order.

STATEMENT OF THE CASE

Decedent Barbara Owens was admitted to THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg ("Facility") on July 23, 2015. (R. p. 54 ¶ 45). While Ms. Owens was being settled into her room, Respondent Mary Jane McCraw was in a separate location at the Facility where she was presented with two adherence contracts. The first was an "Admission Agreement" that governed the type of care Ms. Owens would receive at the Facility and Ms. Owens's financial obligation to pay for those services. (R. pp. 357-68). On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement" provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Ms. Owens's admission to the Facility. (R. p. 368). Ms. McCraw signed the Admission Agreement on the "Signature of Representative" line. The Facility did not ask Ms. McCraw for proof of authority to act on Ms. Owens's behalf, and Ms. Owens had not executed a power of attorney naming Ms. McCraw as her agent. (E. p. 331 ¶ 3).

On the same day, Ms. McCraw signed a contract called "Arbitration Agreement." This contract was not part of the 12 pages comprising the Admission Agreement but was its own

separate contract (labeled “Page 1 of 1”) with its own signature blocks. (R. p. 280). The Arbitration Agreement, purportedly a contract between the Facility and Ms. Owens, provided for alternative dispute resolution for any claim a party may bring against another arising out of Ms. Owens’s admission in the Facility. Id. Ms. McCraw signed the Arbitration Agreement on the line labeled “Resident/Representative Signature.” Id. Petitioners admit Ms. McCraw agreeing to arbitrate was not a condition or prerequisite to Ms. Owens’s admission to the Facility. (Pet. at 12).

When Ms. Owens was admitted to the Facility, Petitioners undertook a duty to monitor the condition of her skin. (R. p. 54 ¶ 50). However, for months, there is no evidence Petitioners monitored Ms. Owens’s skin as her care plan required. (R. pp. 54-55 ¶¶ 51-56). Due to Petitioners’ failures in these and many other areas, Ms. Owens suffered dehydration, malnutrition, a urinary tract infection with sepsis, and pressure injuries. (R. p. 54 ¶ 49). Her condition continued to worsen leading to a hospitalization in November 2015 and Ms. Owens’s wrongful death on December 7, 2015. (R. p. 55-56 ¶¶ 60-67). At the time of her death, Ms. Owens suffered from a host of conditions including dehydration, malnutrition, a urinary tract infection, sepsis, and pneumonia. (R. p. 56 ¶ 67).

Ms. McCraw initiated this action as the personal representative for Ms. Owens’s estate. The Complaint alleges wrongful death and survival claims arising from Petitioners corporate negligence, professional malpractice, and custodial neglect including failure to adequately treat Ms. Owens’s skin condition causing his wrongful and premature death. The claims against Petitioners Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI of South Carolina, LLC centered on activities related to their oversight of the Facility’s operations. Ms. McCraw alleges these Petitioners underfunded the Facility which

negatively affected the Facility's staffing levels, the skilled nursing services the Facility offered, and resident outcomes.

On November 12, 2018, the Facility filed a motion to compel arbitration and petition to stay state court proceedings (R. pp. 277-79). The remaining Respondents filed motions seeking a stay of all proceedings against them should arbitration be ordered on Ms. McCraw's claims against the Facility. (R. pp. 281-86). Relying on the Arbitration Agreement that Ms. Owens did not sign, the Facility argued Respondent must arbitrate rather than litigate her claims. The circuit court denied the motion to compel arbitration and motions to stay (as moot) and a later motion to reconsider filed by all Petitioners. (R. pp. 4-17; 29-43). Petitioners timely noticed an appeal. On July 19, 2023, the Court of Appeals issued an unpublished per curiam opinion affirming the circuit court's denial of the motions to compel arbitration and to stay as well as dismissing Petitioners' appeal of the confidentiality order. Owens v. Fund. Clinical & Op. Servs., LLC, Op. No. 2023-UP-272 (S.C. Ct. App. filed July 19, 2023). A petition for writ of certiorari was filed on November 6, 2023.

ARGUMENT

On several prior occasions, South Carolina's appellate courts have rejected Petitioners' arguments offered 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 of Appeals rejected all of Petitioners' merger and estoppel arguments again earlier this year. Solesbee v. Fund. Clinical & Op. Servs., LLC, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023). Solesbee, which Petitioners ignore entirely, is important because it involved another nursing home under the THI/Magnolia Manor banner which means Solesbee considered precisely the same form Admission Agreement and Arbitration Agreement at issue here. Thus, all of the flawed arguments in the Petition claiming the facts here are different than Coleman and Hodge amount to nothing without also addressing Solesbee.

The Court of Appeals was correct in relying on this recent, unbroken, and directly applicable line of precedent to find no binding arbitration contract in this case. Solesbee, 438 S.C. at 649, 885 S.E.2d at 149 ("like in Coleman and Hodge, we find there was no merger in this case and Magnolia's equitable estoppel argument was properly denied"). Petitioners fails to state any sufficient grounds for further review. In fact, ***the Court has denied nearly identical cert petitions by Facility's sibling nursing homes in Columbia and Charleston in just the last year.*** Daniels v. THI of S.C. at Columbia, Case No. 2022-001503, *cert denied* May 24, 2023; Ladson v. THI of S.C. at Charleston, Case No. 2022-001286, *cert denied* Apr. 18, 2023.

Just like those cases, Petitioners' arguments here are at odds with a long standing and well-reasoned line of precedent. First, Petitioners 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, Petitioners implicitly

ask the Court to overrule Coleman, Thompson, Hodge, and Solesbee 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 writ of certiorari should be denied. At this point, the petitions THI/Magnolia Manor facilities (and their corporate affiliates) continue to file in this Court amount to little more than copying-and-pasting the same oft-rejected arguments from old briefs in unsuccessful appeals over the last few years. There is no South Carolina law to support their arguments, and no basis for devoting further appellate court resources to this matter.

1. The Court of Appeals correctly applied Coleman and Hodge to reject Petitioners' 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; and⁴
- When the contracts are titled and paginated separately and call for separate signatures.⁵

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.

At least three of these are present here. Owens, Op. No. 2023-UP-272, at 3. There is no legal basis for Petitioners’ attempts to distinguish or reject the Court of Appeals’ accurate application of these precedents.

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 of Appeals recognized, the Arbitration Agreement (R. p. 280) and Admission Agreement (R. pp. 357-68) do not apply the same substantive law. Owens, Op. No. 2023-UP-272, at 3. The Admission Agreement adopts South Carolina law. (R. p. 366) (“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. 280) (“governed by the Federal Arbitration Act” (“FAA”)). Petitioners argue these governing law provisions are not inconsistent (Pet. at 10-11), 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 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. 280) (“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 of Appeals correctly applied Hodge in finding the Admission Agreement and Arbitration Agreement do not merge because they contain inconsistent termination provisions.

b. Separate pagination and signature pages

Following the precedent set in Hodge, the Court of Appeals cited the Admission Agreement and Arbitration Agreement’s varying structure and formatting as further evidence against merger. Owens, Op. No. 2023-UP-272, at 3; 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, Petitioners simply ask the Court to ignore or even overrule Hodge. Notwithstanding Hodge’s clear holding, Petitioners insist this factor “provides no reasonable inference of an intent contrary to merger.” (Pet. at 11). An unsubstantiated argument against precedent is not a valid ground for Supreme Court review. 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. 368). The Arbitration Agreement’s single page was “Page 1 of 1.” (R. p. 280). These formatting choices offer further support for the many other indicators that these two contracts do not merge.

c. Arbitration not required to obtain admission

As a final indicator against merger, the Court of Appeals faithfully adhered to precedent by citing the Facility’s concession that Ms. Owens did not have to agree to arbitration to gain admission to the Facility. Owens, Op. No. 2023-UP-272, at 3. In other words, these two contracts were not tied together because Ms. Owens could gain the benefit of one without accepting the burden of the other. By conceding this was true, Petitioners 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, Petitioners’ only argument is one that is

effectively against precedent. Notwithstanding the holding of Thompson (that was bolstered by Hodge), Petitioners contend this factor provides no reasonable inference of an intent contrary to merger. (Pet. at 17). This argument is procedurally improper and substantively flawed for the reasons discussed above. This factor, like the two others cited above, is probative on the merger question and was properly applied to reject Petitioners' merger argument.⁶

2. The Court of Appeals correctly applied Coleman and Hodge to reject Petitioners' estoppel argument.

Petitioners' estoppel argument fails both because it is inextricably linked to their flawed merger argument and for independent reasons. Petitioners effectively acknowledge their estoppel assertion depends on a court first accepting their merger argument. (Pet. at 16). Petitioners do not argue Ms. Owens 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 of Appeals correctly determined there was no merger, it was also correct in finding no substantive analysis of estoppel was necessary. Owens, Op. No. 2023-UP-272, at 3 ("Because we find the documents did not merge, we need not address [Petitioners'] equitable estoppel argument").

Moreover, even if Petitioners could prove merger, they still could not make the necessary showing to prevail on equitable estoppel. Petitioners completely overlook the governing standard for applying the "direct benefit" form of equitable estoppel in nursing home arbitration cases.

⁶ The Court should deny review on Petitioners' question presented I(B)-(C) because any challenge to the denial of a stay is expressly linked to a finding that the Admission Agreement and Arbitration Agreement merged (Pet. at 15-16).

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). Petitioners would have to show (1) Ms. Owens’s claim arose from a contractual relationship; (2) Ms. Owens “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). Petitioners point to nothing to distinguish Weaver or to address its holding which forecloses their estoppel argument. Thus, the Court correctly rejected Petitioners attempt to apply equitable estoppel because Petitioners 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.

3. The Court of Appeals correctly dismissed Petitioners’ appeal of a discovery order.

Petitioners’ appeal of the circuit court’s Confidentiality Order asked the Court of Appeals to wade into a discovery matter. The Court of Appeals correctly applied a long line of precedent in declining that request. Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep’t of Health & Env’tl. Control, 387 S.C. 380, 387, 692 S.E.2d 920, 924 (2010) (“Our willingness to review a discovery order by way of a writ of certiorari will be as rare as the proverbial ‘hen’s tooth.’”). There are important reasons for that rule. For one, resolving discovery disputes is a heavily fact-specific task requiring a circuit court to consider both the broad parameters of parties’ claims as well as the narrow, idiosyncratic, and often complex facts bearing on the discoverability of the information in question. Discovery practice also requires circuit courts to use prudential considerations, weighing the available means by which the parties may achieve their fact-finding objectives. See Oncology & Hematology Associates, 387 S.C. at 388, 692 S.E.2d at 924 (“We have no desire to micromanage discovery orders”). When, as frequently is true, a discovery order turns on the circuit court’s factual findings, those findings are largely immune from appellate review even on an extraordinary writ. Hollman v. Woolfson, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) (citing S.C. Bd. of Exam’rs in Optometry v. Cohen, 256 S.C. 13, 180 S.E.2d 650 (1971)). Even when a discovery order does not turn on factual conclusions, this Court recognizes the need for affording circuit courts the discretion necessary to resolve the case-specific discovery disputes before them. Hollman, 384 S.C. at 577, 683 S.E.2d at 498 (citing Dunn v. Dunn, 298 S.C. 499, 381 S.E.2d 734 (1989)).

Moreover, Petitioners take issue with a matter that really is not a live dispute. Petitioners decry the text of the Confidentiality Order’s “sharing provision” as too broad. But, as agreed on the record during the circuit court proceedings, none of the items covered by the Confidentiality Order will be shared beyond Ms. McCraw’s attorneys.

THE COURT: I mean, you don’t have any – as you stated, you have other cases involving these types of facilities, so you don’t have any objections to what generally [Petitioners] asked for confidentiality on, from not sharing it with third parties.

RESPONDENT’S COUNSEL: Yeah, no problem with that. I mean, I think they overly designate things, but we don’t really mind, as long as I can share it with myself and my co-counsel.

(R. p. 257, lines 17-25). There simply is no dispute over the Confidentiality Order provision to which Petitioners object. In the absence of a genuine dispute, there is no basis for discretionary review of the Confidentiality Order, especially in light of South Carolina’s extensive line of precedent against discretionary review of discovery orders.

CONCLUSION

Based on the arguments stated above, Ms. McCraw respectfully requests the Court deny the petition for writ of certiorari.

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