THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Supreme Court Case No. 2023-001644

Armando J. Acevedo through his Attorney-in-Fact Marianne Acevedo, …….. Respondent

v.

Hunt Valley Holdings, LLC; THI of South Carolina, LLC; and THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, …… Petitioners.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied this Court's recent ruling in Arredondo v. SNH SE Ashley River Tenant, LLC to find a "health care agent" lacks authority to execute a voluntary, standalone, pre-dispute nursing home arbitration contract.

2. Whether the Court of Appeals correctly concluded Ms. Acevedo's lack of authority to execute the arbitration contract mooted other contract formation issues and a motion to stay.

3. Whether the Court of Appeals correctly applied South Carolina law in finding the denial of a personal jurisdiction-based motion to dismiss was interlocutory and not immediately appealable.

STATEMENT OF THE CASE

Respondent Marianne Acevedo initiated this civil action after her husband Armando Acevedo suffered a preventable fall while a resident at Appellant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post-Acute Care ("Facility"). (R. pp. 172-77). Mr. Acevedo spent just four days as the Facility's resident but suffered permanent injuries caused by poor nursing care. (R. p. 43 ¶¶ 50-51; R. p. 209). Mr. Acevedo was admitted on July 12, 2017, and the Facility presented to Ms. Acevedo a document entitled "Facility-Resident/Representative Arbitration Agreement" ("Arbitration Agreement"). (R. p. 43 ¶ 50; R. p. 183). While purporting to require arbitration for "any controversy or dispute" between Mr. Acevedo and the Facility, the Arbitration Agreement provided few details on how or by whom an arbitration proceeding would be conducted. (R. p. 183). Proceedings were to be conducted by three arbitrators, each of whom was selected from an unspecified "panel having experience and knowledge of the health care industry." Id. The Arbitration Agreement also failed to establish procedural rules for arbitration proceedings. Instead, it purported to adopt the "South Carolina Alternate Dispute Resolution/Mediation Rules" even though the only procedural provisions of those rules cannot apply to Respondents' claims. Id.; Rule 12(a), SCADR (limiting procedural provisions to non-binding arbitration proceedings).

Ms. Acevedo was not Mr. Acevedo's conservator or guardian when the Arbitration Agreement was presented to her. Her only authority to act on Mr. Acevedo's behalf was pursuant to a "South Carolina Health Care Power of Attorney" ("HCPOA") form Mr. Acevedo executed in August 2010. (R. p. 199-204). In the HCPOA, Ms. Acevedo was appointed as Mr. Acevedo's "health care agent" for the limited purpose of making "health care decisions" in Mr. Acevedo's stead. (R. p. 200). All of the enumerated powers Ms. Acevedo was granted were limited to "health care" matters or to decisions "necessary" to implementing health care decisions. (R. p. 201 § 4). While the HCPOA authorized Ms. Acevedo to admit Mr. Acevedo to a skilled nursing facility, it did not grant any powers relating to arbitration.

Mr. Acevedo's admission paperwork included a note to Facility staff members indicating he posed a high risk of falls. (R. p. 43 ¶ 50). The Complaint alleges that two days into his admission, Facility personnel acted improperly in their attempt to transfer Mr. Acevedo from his bed to a wheelchair. (R. p. 43 ¶ 51). These Facility employees did not utilize any available safety devices (e.g. wheelchair alarm) to prevent falls or to warn that a fall was imminent. (R. p. 43 ¶ 51). The resulting fall broke Mr. Acevedo's hip. (R. p. 43 ¶ 51). Though just 55-years-old, the injury and resulting course of treatment cause permanent damage. (R. p. 209). Mr. Acevedo was hospitalized and has become permanently disabled. Id. The resulting lawsuit alleges the Facility failed to properly supervise Mr. Acevedo, especially given its knowledge of his fall risk. (R. pp. 83-84 ¶ 269). Ms. Acevedo also alleges the incident leading to Mr. Acevedo's injury was caused by more systemic issues with how the Facility was funded and staffed. (R. pp. 85-86 ¶ 277). In short, she alleges Mr. Acevedo's fall was attributable in part to financial decisions by Hunt Valley and THI that meant Mr. Acevedo did not have properly qualified or trained medical personnel at his side at the crucial moment. (R. pp. 50, 83-86 ¶¶ 92-93; 269; 277).

Ms. Acevedo alleged the care the Facility offered was a joint enterprise among the Facility and two other entities: Petitioners Hunt Valley Holdings, LLC ("Hunt Valley") and THI of South Carolina, LLC ("THI"). (R. pp. 175-76). Following an unsuccessful pre-suit mediation, Ms. Acevedo filed a Summons and Complaint in the Spartanburg County Court of Common Pleas. The Complaint named as defendants Petitioners as well as Rusty Flathmann, an employee of one of the Facility's parent companies. (R. p. 39 ¶ 30). Mr. Flathmann was dismissed by stipulation on January 15, 2019. The Complaint alleged six causes of action including negligence/recklessness, corporate negligence, and neglect of a vulnerable adult in violation of the Omnibus Adult Protection Act (S.C. Code Ann. § 43-35-5 to -90). (R. pp. 83-90 ¶¶ 267-305).

Petitioners responded to the Complaint on November 8, 2018, in three different ways. The Facility filed a motion to dismiss, compel arbitration, and stay state court proceedings. (R. pp. 180-82). Hunt Valley filed a motion to dismiss claiming the circuit court lacked personal jurisdiction. (R. pp. 178-79). THI served an answer which purported to reserve the right to assert arbitration later and pled arbitration as an affirmative defense. (R. p. 101 ¶ 65). Four days later, Hunt Valley filed a motion to stay, asking the circuit court to suspend proceedings against it including discovery obligations pending resolution of the Facility's arbitration-related motion. (R. pp. 184-85). Ms. Acevedo opposed Hunt Valley and the Facility's motions in memoranda filed in January 2019. (R. pp. 208-34). The Honorable J. Derham Cole heard oral arguments on the motions on February 1, 2019 (R. pp. 124-55) and entered an order denying the Facility's motion on October 21, 2019. (R. p. 1-13).

Petitioners filed a motion to alter or amend judgment pursuant to Rule 59(e), SCRCP on October 31, 2019, challenging the circuit court's ruling on arbitration and seeking clarification on Hunt Valley and THI's motions. (R. pp. 242-52) The circuit court partially granted the motion in

a Form 4 order that affirmed the court's ruling on arbitration but agreed a clarification was needed on the reasons for denying Hunt Valley and THI's motions. (R. pp. 14-16). One month later, the circuit court issued its final order (1) denying the Facility's arbitration motion; (2) denying as moot THI's motion to stay based on the court's rejection of the Facility's arbitration claim; and (3) denying Hunt Valley's motion to dismiss after finding Respondents made a prima facie showing of personal jurisdiction. (R. pp. 17-30). This order expressly replaced the original October 21, 2019 order. Id.

Petitioners served their notice of appeal on August 10, 2020. The appeal was submitted without oral argument on June 1, 2023. On August 2, 2023, the Court of Appeals issued an unpublished memorandum opinion affirming the circuit court's rulings. Acevedo v. Hunt Valley Holdings, LLC, Opinion No. 2023-UP-281, at * 2-3 (S.C. Ct. App. Aug. 2, 2023).

ARGUMENT

The Court of Appeals correctly ruled the Facility may not compel its resident (Armando Acevedo) to arbitrate his personal injury claims against the Facility in the absence of a valid contract where he (or a legal representative) agreed to do so. Acevedo, Opinion No. 2023-UP-281, at * 2-3. Specifically, the court held the signature of Mr. Acevedo's wife lacked authority to sign a proposed arbitration contract because she had been named Mr. Acevedo's agent only in a ***health care***[1] power of attorney. Id. That holding closely tracks this Court's ruling in Arredondo v. SNH SE Ashley River Tenant, LLC, 433 S.C. 69, 856 S.E.2d 550 (2021), decided as the parties briefed this appeal below.

[1] Petitioners falsely identified this document as a "General Durable Power of Attorney" in the Record on Appeal. (R. p. ii). The document is plainly titled as "South Carolina Health Care Power of Attorney." (R. p. 199).

What is odd about the Petition is that it ignores Arredondo entirely. Petitioners seek discretionary review of a unanimous, per curiam memorandum opinion explicitly applying Arredondo without ever discussing or even once citing that opinion. It is difficult to deduce what about the Court of Appeals' application of Arredondo Petitioners find objectionable. Instead, Petitioners rely on a plainly false claim that Ms. Acevedo conceded in this litigation her authority to sign for her husband. There is simply nothing in the record to support this charge. At bottom, the Petition fails in its fundamental purpose of explaining the "special and important reasons" why the court of appeals' straight forward application of Arredondo is wrong and warrants further review. Rule 242(b), SCACR.

1. **The Court of Appeals correctly ruled Mr. Acevedo's "Health Care Power of Attorney" did not empower his wife to enter an arbitration contract on his behalf.**

This appeal turns on the interpretation of the statutory "Health Care Power of Attorney" (R. p. 199-204) ("HCPOA") Mr. Acevedo signed in which he named his wife as "health care agent." See S.C. Code Ann. § 62-5-WifeW (providing full text of form). Arredondo considered the same form HCPOA and ruled it does not empower a nursing home resident's family member to sign a voluntary, standalone, and pre-dispute arbitration contract. The use of Arredondo here does not require any deductions, analogies, or interpretations. The Court of Appeals simply applied the exact legal reasoning this Court unanimously espoused in Arredondo to precisely the same HCOPA language considered in Arredondo.

In both Arredondo and this case, the nursing home resident used an HCPOA to grant a "health care agent" like Ms. Acevedo authority

> To take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and

> pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to see actual or punitive damages for the failure to comply.

(R. p. 201 § 4(D); Arredondo, 433 S.C. 80-81, 856 S.E.2d at 556-57. None of the clauses in this provision authorize a health care agent to sign a document like the Arbitration Agreement.

Arredondo first interpreted the phrase "action necessary to making, documenting, and assuring implementation of decisions concerning [a nursing home resident's] health care. Arredondo, 433 S.C. at 81-83, 856 S.E.2d at 557-58. The only health care decision at issue is the nursing home resident's admission to a nursing facility. Id. at 81, 856 S.E.2d at 557. A proposed arbitration contract is not "necessary" to that health care decision when the resident can be admitted to a facility without agreeing to arbitration. Id. at 82, 856 S.E.2d at 557. The same principle applies here. Since the Arbitration Agreement was not a precondition to Mr. Acevedo's admission, this portion of the HCPOA did not authorize his health care agent (Ms. Acevedo) to execute the Arbitration Agreement. The circuit court concluded the Arbitration Agreement was not required for Mr. Acevedo's admission. (R. p. 1) (finding Arbitration Agreement "was not a condition of admission"). Petitioners do not dispute this point. (R. p. 134, lines 8-9) ("arbitration is not a precondition for admission"); (R. p. 165, lines 18-19) (describing Arbitration Agreement as "voluntary and not a precondition of admission").

Similarly, a health care agent's authority to "grant[] any waiver or release . . . required by" any health care provider did not empower a nursing home resident's family member to execute a voluntary arbitration agreement. Arredondo, 433 S.C. at 83-84, 856 S.E.2d at 558. If entering such an agreement is not a precondition to admission, its proposed waiver of the right to a jury trial is not "required" by the nursing home. Id. at 84, 856 S.E.2d at 558. Finally, there are two reasons the authority to "pursu[e] any legal action" also does not apply to the execution of a document like the

Arbitration Agreement. First, that authority only applies to the pursuit of legal action "to force compliance with [the principal's] wishes as determined by" the health care agent. Id. at 84, 856 S.E.2d at 558-59. Arbitrating Mr. Acevedo's personal injury claims is not consistent with Mr. Acevedo's wishes as determined by Ms. Acevedo. Second, as other courts have recognized, executing a *pre-dispute* arbitration contract takes place before there is any legal claim to pursue and, therefore, consideration of such a document has nothing to do with instituting legal proceedings. Id. at 84-85, 856 S.E.2d at 559 (citing Kindred Nursing Ctrs. Ltd. P'ship v. Wellner, 533 S.W.3d 189, 193-94 (Ky. 2017)). Ms. Acevedo was presented with the Arbitration Agreement when Mr. Acevedo entered the Facility on July 12, 2017, before he suffered the fall on which his current legal claims are based. (R. p. 43 ¶ 50; R. p. 183); (R. p. 43 ¶ 51) (noting fall on July 14, 2017). Just as in Arredondo, the HCPOA provided no authority for Ms. Acevedo to enter this pre-dispute arbitration contract.

In short, the Court of Appeals correctly applied Arredondo in finding Ms. Acevedo lacked authority to sign the Arbitration Agreement and, as a result, the circuit court correctly denied the Facility's motion to compel arbitration. Acevedo, Opinion No. 2023-UP-281, at * 2-3. Since Arredondo and this case address functionally identical HCPOAs, Petitioners could only avoid the outcome reached there if Arredondo were overruled. There is no basis for overturning this recent, unanimous ruling, and Petitioners do not even offer one.

2. Ms. Acevedo never conceded the notion that she had authority to execute the Arbitration Agreement for Mr. Acevedo.

Rather than addressing the decisive holdings in Arredondo, Petitioners argue the dispute over Ms. Acevedo's alleged authority was already settled when Ms. Acevedo conceded earlier in this litigation she was empowered to sign the Arbitration Agreement. (Pet. at 6-7). Nothing in the record supports this contention.

Petitioners offer just two citations in support of their concession argument. (Pet. at 6). One is a statement from their own attorneys during a circuit court motion hearing. Id. (citing R. p. 129, lines 6-14). Petitioners never explain how their flawed argument during that hearing counts as a concession by their opponent. The second citation references Ms. Acevedo's circuit court memorandum in which she admitted she "has power of attorney" for her husband. (Pet. at 6) (citing R. p. 209). But, that statement is nothing more than an acknowledgment of the HCPOA, which is also a part of the Record on Appeal. For all the reasons discussed in Argument No. 1, acknowledging the HCPOA's existence in no way concedes the notion that the HCPOA authorized Ms. Acevedo to enter a voluntary, standalone, pre-dispute arbitration contract for Mr. Acevedo.

The dispute over Ms. Acevedo's alleged authority to enter the Arbitration Agreement was raised as an additional sustaining ground and extensively briefed at the Court of Appeals. (Resp't Br. at 15-20). Under established South Carolina appellate practice, a respondent may raise an issue on appeal as an additional sustaining ground even if the issue was not raised and ruled on at the trial court level. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 420-21, 526 S.E.2d 716 (2000) (citing Rule 220, SCACR). The Court of Appeals correctly applied these principles in citing Ms. Acevedo's lack of authority to affirm the circuit court's ruling in this case. Acevedo, Opinion No. 2023-UP-281, at * 2 (citing Rule 220(c), SCACR). Plus, while Mc. Acevedo's Court of Appeals' briefing did not rely on Arredondo, that was only because it was pending at the time. Ms. Acevedo did cite to the Court of Appeals multiple cases that ultimately formed the basis for Arredondo's holding. Compare Resp't Br. at 19 (citing Miller v. Life Care Ctrs. of Am., Inc., 478 P.3d 164 (Wyo. 2020) and Life Care Ctrs. of Am. v. Smith, 681 S.E.2d 182, 185-86 (Ga. App. 2009) with Arredondo, 433 S.C. at 83, 856 S.E.2d at 558 (citing Miller and Smith).

In sum, there is no merit in Petitioner's concession argument. Neither record citation offered in support of it even suggests Ms. Acevedo had authority under the HCPOA to execute the Arbitration Agreement. The Court of Appeals properly cited Ms. Acevedo's lack of authority as an additional sustaining ground to affirm the circuit court's ruling.

3. Since Ms. Acevedo lacked authority to execute the Arbitration Agreement, the Court of Appeals correctly declined to address Petitioners' other challenges to its enforcement.

The Court of Appeals' ruling on Ms. Acevedo's lack of authority to execute the Arbitration Agreement is sufficient to dispose of Petitioner's entire appeal. Since Ms. Acevedo lacked authority, the Arbitration Agreement is not a valid contract. In the absence of a valid contract, the Facility has no basis for compelling Mr. Acevedo to arbitrate his claims. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001) ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit"). Accordingly, the Court of Appeals correctly declined to address Petitioners' appeal of the other basis for invalidating the Arbitration Agreement cited in the circuit court's order (e.g. unconscionability and lack of material terms). Acevedo, Opinion No. 2023-UP-281, at * 3 (citing Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). Moreover, for the reasons stated in earlier briefing, the circuit court's ruling on these grounds follow substantial South Carolina precedent, and there is no basis for further review on these issues. See Resp't Br. at 5-14. The Court of Appeals was also correct in refusing to address THI's motion to stay. This motion was expressly linked to and dependent on the motion to compel arbitration. See e.g. (R. p. 101 ¶ 65) (arguing "[t]his matter must be stayed . . . pending the result of arbitration . . ."). Since there is no valid arbitration contract, there was no basis for considering the motion for a stay.

4. The Court of Appeals correctly declined to address Hunt Valley's appeal of the denial of a motion to dismiss.

The circuit court denied Hunt Valley's motion to dismiss for lack of personal jurisdiction. (R. pp. 30, 178). For more than thirty years, this Court has recognized "the denial of a motion to dismiss under Rule 12(b)(2), SCRCP, is interlocutory and not directly appealable. Mid-State Distribs., Inc. v. Century Imps., Inc., 310 S.C. 330, 426 S.E.2d 777 (1993). The Court of Appeals properly applied this precedent (Acevedo, Opinion No. 2023-UP-281, at * 3) and there is no basis for further review on this issue.

CONCLUSION

For all these reasons, Ms. Acevedo respectfully requests the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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