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

Grace Gilchrist Knie, Circuit Court Judge

Supreme Court Case No. 2023-001815

Betty Nanney, by and through her Attorney-in-Fact, Leslie Nanney, …….. Respondent

v.

THI of South Carolina at Spartanburg, LLC, d/b/a Magnolia Manor-Spartanburg, Rusty Flathmann, Laura Anne Winn, and Olishia Gaffney, …….. 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 refused to address Petitioners' estoppel argument that was wholly dependent on its flawed merger argument.

3. Whether the Court of Appeals correctly determined Petitioners were not denied the opportunity to conduct discovery and that additional discovery would not affect arbitrability.

STATEMENT OF THE CASE

Respondent Leslie Nanney ("Daughter"), in the role as attorney-in-fact for her mother Betty Nanney, filed a Summons and Complaint in the Spartanburg County Court of Common Pleas on September 4, 2019. (R. p. 26 ¶¶ 1-2). The Complaint alleged negligence, reckless, and statutory-based claims against Appellant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg ("the Facility") along with Appellants Rusty Flathmann, Laura Anne Winn, and Olishia Gaffney, i.e. individuals the Complaint alleged to have operational or managerial control over the Facility. (R. pp. 27-28 ¶¶ 3-8).

Ms. Nanney was admitted to the Facility on October 28, 2016, to recover from emergency surgery following a ruptured brain aneurysm. (R. p. 28 ¶ 12). On that same date, her son Kaileb Horn ("Son") was presented with two adhesion contracts at the Facility. The Facility's representative did not ask Son for proof of authority to act on Ms. Nanney's behalf. Son was not empowered to act for Ms. Nanney through a power of attorney or any other mechanism recognized under South Carolina law. Ms. Nanney was not present during this process. (R. p. 193 ¶ 3). The first contract was an "Admission Agreement" governing the type of care Ms. Nanney would receive at the Facility and Ms. Nanney's financial obligation for those services. (R. pp. 232-43). 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. Nanney's admission to the Facility. (R. p. 243). Son signed the Admission Agreement on the "Signature of Representative" line. Id.

On the same day, Son 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. 151). Appellants admit agreeing to the Arbitration Agreement was not a condition or prerequisite to admission at the Facility. Appellants' Br. at 8; R. p. 121, lines 8-10. The Arbitration Agreement, purportedly a contract between the Facility and either Ms. Nanney ***or*** Son, provided for alternative dispute resolution of any claim its parties may bring against another arising out of Ms. Nanney's admission in the Facility. (R. p. 151). Son signed the Arbitration Agreement on the line labeled "Resident/Representative Signature." Id.

When Ms. Nanney arrived in the Facility, she suffered from partial paralysis and posed a substantial risk of falling if not properly assisted. (R. p. 28 ¶¶ 12-13). The complaint alleges the Facility's poor care led Ms. Nanney to suffer several damaging falls. (R. pp. 28-30 ¶¶ 13-23). Petitioners' failure to properly manage and care for her medical conditions were a direct and proximate cause of the fall and the resulting injuries. (R. pp. 30-31 ¶¶ 24-29).

The Facility, Flathmann, and Gaffney each moved to compel arbitration and to stay court proceedings on November 11, 2019. (R. pp. 149-55). A hearing on the motions was held before the Honorable Grace Gilchrist Knie on December 16, 2019. (R. pp. 102-46). On January 7, 2020, the circuit court entered an order denying the motions to compel arbitration. (R. pp. 1-19). Petitioners filed a consolidated motion to alter or amend judgment on January 17, 2020, which was denied in an Order dated February 13, 2020. (R. pp. 20-23; 257-74). Petitioners served a notice

of appeal on March 16, 2020. (R. pp. 275-79). The Court of Appeals heard oral arguments on March 16, 2023, and unanimously affirmed (as modified)[1] the circuit court's order in an unpublished per curiam opinion issued on August 23, 2023. Nanney v. THI of S.C. at Spartanburg, LLC, Op. No. 2023-UP-299 (S.C. Ct. App. filed Aug. 23, 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 a few months ago. Solesbee v. Fund. Clinical & Op. Servs., LLC, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023). Solesbee is crucial because it involved another nursing home under the THI/Magnolia

[1] The only modification was a clarification that Petitioner Laura Anne Winn's non-arbitration based motion to dismiss should be addressed on the merits by the circuit court. Nanney, Op. No. 2023-UP-299, at 11. The parties agree on this point (Id. at 5), and the Winn motion is not at issue in this appeal.

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 are even further undermined by Solesbee, from which Petitioners cannot offer any meaningful factual distinction.

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, Hodge and Solesbee, 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, Hodge, and Solesbee 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;[2]
- Inconsistent termination provisions;[3]
- Inconsistent governing law provisions;[4]
- Admission by nursing home that agreeing to arbitration is not required to obtain a resident's admission to the facility; and[5]
- When the contracts are titled and paginated separately and call for separate signatures.[6]

At least three of these are present here. Nanney, Op. No. 2023-UP-299, at 7-10. There is no legal basis for Petitioners' attempts to distinguish or reject the Court of Appeals' accurate application of these precedents.

[2] Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Hodge, 422 S.C. at 562, 813 S.E.2d at 302.
[3] 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.
[4] Hodge, 422 S.C. at 562, 813 S.E.2d at 302.
[5] 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.
[6] Hodge, 422 S.C. at 562, 813 S.E.2d at 302.

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. 151) and Admission Agreement (R. pp. 232-43) do not apply the same substantive law. nanney, Op. No. 2023-UP-299, at 9. The Admission Agreement adopts South Carolina law. (R. p. 241) ("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. 151) ("governed by the Federal Arbitration Act" ("FAA")). Petitioners argue these governing law provisions are not inconsistent (Pet. at 11-12), but Hodge rejected that argument based on functionally identical contract language. 422 S.C. at 562, 813 S.E.2d at 302. Solesbee then rejected that argument based on precisely the same contract language at issue here. 438 S.C. at 648, 885 S.E.2d at 149. 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. 151) ("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 and Solesbee in finding the Admission Agreement and Arbitration Agreement do not merge because they contain inconsistent governing law 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. Solesbee applied this principle to the contract language at issue in this case. 438 S.C. at 648, 885 S.E.2d at 149. Here, the Arbitration Agreement refers to the Admission Agreement as a separate and distinct document when discussing its term. Nanney, Op. No. 2023-UP-299, at 7. (citing R. p. 151) (Arbitration Agreement "shall survive any termination or breach of . . . the Admission Agreement"). Petitioners' objection to this application of Coleman, Hodge, and Solesbee seems to be based on where these distinct references are located in the contracts. (Pet. at 15-16). Petitioners claim distinct references only matter if they are in an admission contract's integration or "Entire Agreement" provision. Id. Petitioners 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 of Appeals accurately applied Coleman, Hodge and Solesbee 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. 151). 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. 237). Petitioners 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 8, 16). 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 of Appeals correctly applied Solesbee in finding this factor as further evidence against merger. Nanney, Op. No. 2023-UP-299, at 8 (citing Coleman, 407 S.C. at 355, 755 S.E.2d at 455); Solesbee, 438 S.C. at 649, 885 S.E.2d at 149.

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. (App. Br. at 14). Petitioners do not argue Ms. Nanney 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. Nanney, Op. No. 2023-UP-299, at 10.

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.

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. Nanney's claim arose from a contractual relationship; (2) Ms. Nanney "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 of Appeals correctly rejected Petitioners' attempt to apply equitable estoppel because Petitioners cannot first prove merger to then pursue estoppel. Even if

the Court of Appeals had considered the merits of estoppel, Weaver is strong precedent against applying estoppel in this context.

3. The Court of Appeals correctly applied Hodge in rejecting Petitioners' nonjusticiable discovery argument.

Petitioners 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 21). Petitioners go on to claim, without any citation to the record, that they were "disallowed use of the fact-finding tools" discovery offers. (Pet. at 23). But, as the Court correctly noted, Petitioners never even attempted discovery and did not need a court's permission to pursue it. Nanney, Op. No. 2023-UP-299, at 10 (citing Solesbee, 438 S.C. at 650-51, 885 S.E.2d at 150 ("the record does not contain any discovery requests [the resident's estate] ignored . . ."); 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 Petitioners actually seek is not permission to conduct discovery but a court's assurance that pursuing discovery will not constitute waiver of arbitration. (Pet. at 34-36). A court could not issue the ruling Petitioners seek because Petitioners lack standing and the issue is not yet ripe. See Resp't Br. at 21-23. 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 of Appeals properly relied on precedent in finding potential discovery would be futile. Nanney, Op. No. 2023-UP-299, at 10 (citing Solesbee, 438 S.C. at 651, 885 S.E.2d at 150. That holding was perfectly in line with the Court of Appeals' prior ruling. Hodge, 422 S.C. at 579, 813 S.E.2d at 311. While Petitioners 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 of Appeals' ruling on Petitioners' discovery request is consistent with South Carolina law, and the petition for writ of certiorari should be denied.

CONCLUSION

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

Respectfully submitted,

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