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Feb 15 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable Courtney Clyburn Pope, Circuit Court Judge

Appellate Case No. 2020-001441

Thelma Rudd, as Personal Representative of the Estate of Charles S. Rudd., Respondent,

v.

Pepper Hill Nursing & Rehab Center, LLC d/b/a Pepper Hill Nursing & Rehab Center, The Place at Pepper Hill, LLC, Pepper Hill Senior Properties, LLC, n/k/a The Place at Pepper Hill, LLC, and Shiloh Management Company, Inc., Defendants,

of which Shiloh Management Company, Inc. and Pepper Hill Nursing & Rehab Center, LLC d/b/a Pepper Hill Nursing & Rehab Center are the Appellants.

APPELLANTS' PETITION FOR REHEARING

Mark V. Gende, SC Bar No. 72835
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Attorneys for Appellants

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellants Pepper Hill Nursing & Rehab Center, LLC d/b/a Pepper Hill Nursing & Rehab Center and Shiloh Management Company, Inc. (collectively, “Pepper Hill” or “Appellants”) respectfully petition the Court for rehearing and a new order with regard to Court of Appeals Opinion No. 2024-UP-040 (S.C. Ct. App., Filed January 31, 2024) (Op. No. 2024-UP-040).

Appellants respectfully request this Court to rehear this matter and issue a new order because Appellants contend the Court overlooked or misapprehended the following particularly stated points :

1. The Court of Appeals overlooked or misapprehended Appellants’ arguments before the Circuit Court when it found the Appellants third-party beneficiary argument was not preserved for appeal. Op. No. 2024-UP-040 at p. 4. The Circuit Court specifically preserved this argument, addressing the third-party beneficiary argument by name and ruling on the issue. R. pp. 129 (stating “Defendants asserted the affirmative defenses of equitable estoppel, ratification, and *third-party beneficiary* theories” but that “the Court finds it lacks evidence to apply these defenses at this time”) (emphasis added). Likewise, Appellants’ Motion to Reconsider again argues the third-party beneficiary theory. *See, e.g.*, R. pp. 136-137 (arguing that “Mr. Rudd received extensive direct benefits under the Admission Agreement” and that Mr. Rudd’s estate thus “assumed the Agreement”). This argument is the epitome a third-party beneficiary argument. *See THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at *3 (D.S.C. Oct. 31, 2014) (“A third-party beneficiary is a party that the contracting parties intend to directly benefit.”). Accordingly, Appellants request rehearing and issuance of a new order.

2. The Court of Appeals overlooked or misapprehended Appellants' arguments before the Circuit Court when it found that "the evidence in the record does not support the existence of an agency relationship." Op. No. 2024-UP-040 at p. 2. Appellants' Brief and Reply Brief lists extensive evidence of an agency relationship, including Ms. Rudd's own signed representations contained in the arbitration agreement, Mr. Rudd's acceptance of services from the facility for many months, the fact that Ms. Rudd has never contested that she was Mr. Rudd's agent, and the fact that Ms. Rudd is Mr. Rudd's personal representative in this very action, among other things. *See, e.g.*, Appellant's Final Brief at pp. 9-12, Appellant's Reply Brief at pp. 5-10. The Court of Appeals does not address this evidence. Moreover, Respondent asks the Court to accept the illogical position that, on the one hand, Mr. Rudd was so incompetent that he did not realize that his placement at Pepper Hill arose out of an agreement, such that he did not ratify the contract by accepting its benefits, while arguing on the other hand that Mr. Rudd was sufficiently competent that Ms. Rudd—his wife of many years and personal representative in this suit—did not have authority to act on his behalf under the AHCCA or other agency principles. As a result, Appellants request rehearing and issuance of a new order.

3. The Court of Appeals overlooked or misapprehended Appellants' arguments when it found that the "direct benefits estoppel theory does not operate to estop the Estate from opposing arbitration... because the claims do not arise from the contractual relationship nor is there evidence to support Charles *knowingly* exploited other parts of the Admission Agreement." As an initial matter, Respondent's argument that the Estate's claims do not arise out of the contractual relationship should be rejected for what it is: an artful attempt to evade a bargained-for condition in the form of the arbitration contract. Absent the Admission Agreement, Mr. Rudd would not have been in Pepper Hill's care, nor would Pepper Hill have owed him any duty. *See,*

e.g., Appellant’s Reply Brief at pp. 9-10. Moreover, the Court should reject Respondent’s suggestion that there is no evidence to support that Mr. Rudd “knowingly” exploited other partes of the Admission Agreement. Mr. Rudd remained at the facility and accepted the benefits set forth in the Admission Agreement for many months. *See, e.g.*, Appellant’s Brief at pp. 13-15. Either Mr. Rudd was competent, such that his presence and acceptance of these benefits was knowing, or he was incompetent, such Ms. Rudd was authorized to act on his behalf under the AHCCA or other agency principles. The Court should reject Respondent’s request to have it both ways. Multiple well-reasoned decisions argued by Appellants, which were not addressed by the Court of Appeals’ opinion, also directly support Appellants’ position that direct benefits estoppel is directly applicable under similar facts. *See, e.g., THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, 2015 WL 1268185, at *2 (D.S.C. Mar. 19, 2015); *THI of South Carolina at Columbia, LLC v. Wiggins*, 2011 WL 4089435 (D.S.C. 2011).

CONCLUSION

Based on the above, Appellants seek rehearing of and a revised order on the Court’s rulings as to the issues set forth above. As to the third-party beneficiary issue, Appellants request an order finding that the issue was preserved, finding that the third-party beneficiary theory applies, and reversing the trial court’s order denying Appellant’s Motion to Compel Arbitration. As to the agency issue and the direct benefits estoppel issues, Appellants request a hearing and/or an order finding these theories apply and reversing the trial court’s order denying Appellant’s Motion to Compel Arbitration.

Signature Page to Follow

February 15, 2024

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Appellate Case No. 2020-001441

The Estate of Charles S. Rudd, deceased, through the duly appointed
Personal Representative, Thelma Rudd, individually and on behalf of
statutory beneficiaries,Respondent,

v.

Pepper Hill Nursing & Rehab Center, LLC d/b/a Pepper Hill Nursing
& Rehab Center n/k/a The Place at Pepper Hill, LLC; and Shiloh
Management, Inc.Appellants.

PROOF OF SERVICE

I certify that I have served Appellants' Petition for Rehearing, by depositing a copy of it
in the United States Mail, postage prepaid, on February 15, 2024, addressed to Respondent's
attorneys of record, Gary W. Poliakoff, and Ray Mullman, Esqs, 215 Magnolia Street, P.O. Box
1571, Spartanburg, SC 29304 and Jordan Calloway, Esquire, 1539 Health Care Drive, Rock Hill,
SC 29732. Respondent's attorneys of record were also served by email.

February 15, 2024

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