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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Supreme Court Case No. 2024-000615

Mary Tisdale, as Personal Representative of the Estate of Earlene Seabrook,	……..	Respondent
v.		
Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center and Jeffrey Gibbs,	……	Defendants,
Of which Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center d/b/a is the	……..	Petitioner.

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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 the Facility's estoppel argument that was wholly dependent on its flawed merger argument.

3. Whether the court of appeals correctly applied recent South Carolina Supreme Court precedent in finding the state's standardized health care power of attorney form does not authorize its designated agent to enter a nursing home arbitration contract.

4. Whether the court of appeals correctly determined the Facility was not denied the opportunity to conduct discovery and that additional discovery would not affect the existence of a valid arbitration contract.

STATEMENT OF THE CASE

Respondent Mary Tisdale initiated this action by filing a Notice of Intent to File Suit ("NOI") in the Florence County Court of Common Pleas on May 18, 2020. (R. pp. 20-21). Respondent filed the NOI in her appointed role as personal representative for the estate of her aunt Earlene Seabrook. Id. Respondent's action arose from tortious conduct leading to Ms. Seabrook's death following her time as a resident at Appellant Palmetto Lake City Operating, LLC d/b/a Lake City-Scranton Healthcare Center ("the Facility"). (R. pp. 23-24 ¶¶ 1-8). The NOI also named as a defendant the Facility's administrator Jeffrey Gibbs. (R. p. 23 ¶ 3). Following an unsuccessful pre-suit mediation, Respondent filed a Summons and Complaint on October 8, 2020, alleging wrongful death and survival actions based on the Facility and Gibbs' negligence, negligence per se, fraud and misrepresentation, and violations of the South Carolina Unfair Trade Practices Act. (R. pp. 31-38 ¶¶ 40-73). Specifically, the Complaint alleged the Facility's poor care, administrative mismanagement, staffing shortages, and training issues resulted in Ms. Seabrook developing multiple pressure sores. (R. pp. 30-31 ¶¶ 31-38). One of the sores was allowed to develop to a Stage IV wound that directly contributed to Ms. Seabrook's death. (R. p. 31 ¶ 39).

When Ms. Seabrook was admitted on August 7, 2019, the Facility presented two adhesion contracts to Ms. Tisdale. The first was an "Admission Agreement" that governed the type of care Ms. Seabrook would receive at the Facility and Ms. Seabrook's financial obligation to pay for those services. (R. pp. 133-44). 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. Seabrook's admission to the Facility. (R. p. 144). Ms. Tisdale signed the Admission Agreement on the "Signature of Representative" line. Id. While Ms. Seabrook had previously executed an "Advance Health Care Directive" including a "Health Care Power of Attorney" ("HCPOA") naming Ms. Tisdale as her "health care agent," the HCPOA was not properly executed and limited its purported authority to "health care" matters. (R. pp. 125-32).

On the same day, Ms. Tisdale 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. 98). The Arbitration Agreement, purportedly a contract between the Facility and Ms. Seabrook "or" Ms. Tisdale, provided for alternative dispute resolution for any claim a party may bring against another arising out of Ms. Seabrook's admission in the Facility. Id. Ms. Tisdale signed the Arbitration Agreement on the line labeled "Resident/Representative Signature." Id. The Facility admits Ms. Seabrook agreeing to arbitrate was not a condition or prerequisite to her admission at the Facility. (Appellant's Br. at 13).

The Facility answered the Complaint on November 23, 2020. (R. pp. 47-57). On December 30, 2020, the Facility filed a motion to stay the action and to compel arbitration. (R. pp. 96-97). The Facility and Respondent filed supporting memoranda, and the Honorable William H. Seals,

Jr. heard oral arguments on February 9, 2021. Judge Seals denied the Facility's motion in an order entered on March 1, 2021. The order stated in pertinent part that (1) the HCPOA did not authorize Ms. Tisdale to execute the Arbitration Agreement on Ms. Seabrook's behalf (R. pp. 6-8); (2) South Carolina law holds that "health care" matters do not include execution of an arbitration contract (R. pp. 8-9); (3) Ms. Tisdale was not otherwise authorized to sign the Arbitration Agreement (R. pp. 9-10); (4) Respondent was not equitably estopped from opposing arbitration (R. pp. 10-11); (5) the Admission Agreement and Arbitration Agreement did not merge to form a single contract (R. pp. 12-14); and (6) the Facility's request for limited jurisdictional discovery was improper. (R. p. 14).

The Facility filed a motion to alter or amend judgment on March 11, 2021, which the circuit court denied on May 4, 2021. (R. pp. 155-71; R. pp. 17-19). The Facility filed and served its Notice of Appeal on June 3, 2021. (R. pp. 172-78). Pursuant to Rule 220(b)(1), SCACR, this court issued a memorandum opinion affirming the circuit court order on January 3, 2024. Tisdale v. Palmetto Lake City Op., LLC, Unpublished Op. No. 2024-UP-005 (S.C. Ct. App. Jan. 3, 2024). After receiving two deadline extensions, The Facility filed a petition for rehearing on February 20, 2024, which the court denied on March 18, 2024. After receiving an additional two deadline extensions, the Facility filed a petition for writ of certiorari on May 9, 2024.

ARGUMENT

On four prior occasions, South Carolina's appellate courts have rejected the Facility's arguments 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); Estate of Solesbee v. Fund. Clinical & Op. Servs., 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018);

Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016). 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). This Court also recently rejected the Facility's argument that the authority granted to a nursing home resident's family member in the HCPOA extends to a distinct arbitration contract. Arredondo v. SNH SE Ashley River Tenant, LLC, 433 S.C. 69, 856 S.E.2d 550 (2021), *cert. denied*, 142 S.Ct. 584 (Dec. 6, 2021).

The court of appeals was correct in relying on this recent, extensive, and directly applicable line of precedent to find no binding arbitration contract in this case. Tisdale, Unpublished Op. No. 2024-UP-005, at 3-4 (citing Solesbee). The Facility's petition merely rehashes the same flawed arguments from its briefs. First, the Facility claims 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, the Facility implicitly asks the Court to overrule Solesbee, Coleman, Thompson, and Hodge by baldly asserting that the evidence against merger identified in those cases should not count. Third, the Facility explicitly asks the Court to overrule Arredondo without offering any legitimate basis for questioning its holding. None of these arguments are supported by the law or the record, and the petition for writ of certiorari should be denied.

1. The court of appeals correctly applied Coleman and Hodge to reject the Facility's 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]

Four of these are present here. Tisdale, Unpublished Op. No. 2024-UP-005, at 3-4. There is no legal basis for the Facility's attempts to distinguish or reject the court of appeals' 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. 98) and Admission Agreement (R. p. 133-44) do not apply the same substantive law. Tisdale,

[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.

Unpublished Op. No. 2024-UP-005, at 3. The Admission Agreement adopts South Carolina law. (R. p. 142) ("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. 98) ("governed by the Federal Arbitration Act" ("FAA")). The Facility argues these governing law provisions are not inconsistent (Pet. at 10-12), 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. 98) ("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. Tisdale, Unpublished Op. No. 2024-UP-005, at 4 (citing R. p. 98) (Arbitration Agreement "shall survive any termination or breach of . . . the Admission Agreement"). The Facility's objection to this application of Coleman and Hodge seems to be based on where these distinct references are located

in the contracts. (Pet. at 13-14). The Facility claims 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. 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. Tisdale, Unpublished Op. No. 2024-UP-005, at4; 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, the Facility 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 12-13). 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 Agreement 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. 144). These formatting choices offer further support for the many other indicators that these two contracts do not merge.

d. 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. Seabrook did not have to agree to arbitration to gain admission to the Facility. Tisdale, Unpublished Op. No. 2024-UP-005, at 4. In other words, these two contracts were not tied together because Ms. Seabrook could gain the benefit of one without accepting the burden of the other. By conceding this was true, the Facility 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 14-16). 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 of appeals correctly applied Coleman and Hodge to reject Appellants' estoppel argument.

The Facility's estoppel argument fails both because it is inextricably linked to their flawed merger argument and for independent reasons. The Facility's briefing effectively acknowledges their estoppel assertion depends on a court first accepting their merger argument. See e.g. App. Br. at 17. The Facility does not argue Ms. Seabrook 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. Tisdale, Unpublished Op. No. 2024-UP-005, at 4.

Moreover, even if the Facility could prove merger, it still could not make the necessary showing to prevail on equitable estoppel. The Facility completely overlooks 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). The Facility would have to show (1) Ms. Seabrook's claim arose from a contractual relationship; (2) Ms. Seabrook "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). The Facility points to nothing to distinguish Weaver or to address its holding which forecloses their estoppel argument. Thus, the Court correctly rejected the Facility's attempt to apply equitable estoppel because the Facility 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 ruled Ms. Seabrook's "Health Care Power of Attorney" did not empower Ms. Tisdale to enter an arbitration contract on her behalf.

The court of appeals correctly determined the South Carolina statutory "Health Care Power of Attorney" ("HCPOA") form's language did not authorize Ms. Tisdale to execute the Arbitration Agreement for Ms. Seabrook. Tisdale, Unpublished Op. No. 2024-UP-005, at 3. 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 the South Carolina Supreme 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. Tisdale 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. 129 § 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 Ms. Seabrook's admission, this portion of the HCPOA did not authorize his health care agent (Ms. Tisdale) to execute the Arbitration Agreement. The circuit court concluded the Arbitration Agreement was not required for Ms. Seabrook's admission. (R. p. 13). The Facility does not dispute this point. (Pet. at 14).

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 Ms. Seabrook's personal injury claims is not consistent with Ms. Seabrook's wishes as determined by Ms. Tisdale. 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. Tisdale was presented with the Arbitration Agreement when Ms. Seabrook entered the Facility on August 7, 2019, before she suffered the injuries on which her current legal claims are based. Just as in Arredondo, the HCPOA provided no authority for Ms. Tisdale to enter this pre-dispute arbitration contract.

In short, the court of appeals correctly applied Arredondo in finding Ms. Tisdale lacked authority to sign the Arbitration Agreement and, as a result, the Facility's motion to compel arbitration was correctly denied. Tisdale, Unpublished Op. No. 2024-UP-005, at 3. Since Arredondo and this case address functionally identical HCPOAs, the Facility could only avoid the outcome reached there if Arredondo were overruled. There is no basis for overturning this recent, unanimous ruling, and the Facility does not even offer one.

4. The court of appeals correctly applied Hodge in rejecting the Facility's nonjusticiable discovery argument.

The Facility claims 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, the Facility never even attempted discovery and did not need a court's permission to pursue it. 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 the Facility actually seeks is not permission to conduct discovery but a court's assurance that pursuing discovery will not constitute waiver of arbitration. A court could not issue the ruling the Facility seeks because the Facility lack standing and the issue is not yet ripe. See Resp't Br. at 26-30. 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. Tisdale, Unpublished Op. No. 2024-UP-005, at 4 (citing Solesbee, 438 S.C. at 651, 885 S.E.2d at 150); see also Thompson, 416 S.C. at 55, 784 S.E.2d at 686). While the Facility argues it seeks discovery to prove an agency relationship between Ms. Seabrook 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 the Facility's discovery request is consistent with South Carolina law, and the Facility's discovery argument does not merit further review.

CONCLUSION

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

Respectfully submitted,

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