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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Supreme Court Case No. 2024-001031

The Estate of Jo Eva Rice, deceased by her personal representative Sonya Lovett,	……..	Respondent
v.		
Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, THI of South Carolina at Magnolia Manor-Spartanburg a/k/a Physical Rehab and Wellness of Spartanburg	……..	Petitioners.

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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.

STATEMENT OF THE CASE

Sonya Lovett, appointed as personal representative of the Estate of her mother Jo Eva Rice, filed a Summons and Complaint in the Spartanburg County Court of Common Pleas on October 28, 2021. (R. p. 20 ¶ 1). The Complaint alleged wrongful death and survival claims against THI of South Carolina at Magnolia Place—Spartanburg a/k/a Physical Rehab and Wellness of Spartanburg ("the Facility") along with related entities (Appellants Fundamental Clinical and Operational Services, LLC ("FCOS") and Fundamental Administrative Services, LLC ("FAS")) the Complaint alleged to have operational or managerial control over the Facility. (R. pp. 20-21 ¶¶ 2-3; 31).

Jo Eva Rice was admitted to the Facility on December 30, 2017, following a hospitalization for a stroke. (R. p. 22 ¶ 6(a)). On January 5, 2018, her daughter Sonya Lovett was presented with two adhesion contracts at the Facility. (R. p. 145). The first contract was an "Admission Agreement" governing the type of care Ms. Rice would receive at the Facility and Ms. Rice's financial obligation to pay for those services. (R. pp. 163-75). 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. Rice's admission to the Facility. Ms. Lovett signed the Admission Agreement on the

"Representative" signature line. (R. p. 175). The Facility's representative did not ask Ms. Lovett for proof of authority to act on Ms. Rice's behalf, and Ms. Lovett had never been named Ms. Rice's power of attorney or held any other legal authority to act on Ms. Rice's behalf. (R. p. 145 ¶¶ 3-4).

On the same day, Ms. Lovett 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. 133). The Arbitration Agreement, purportedly a contract between the Facility and either Ms. Rice or Ms. Lovett, provided for alternative dispute resolution for any claim a party may bring against another arising out of Ms. Rice's admission in the Facility. Ms. Lovett signed the Arbitration Agreement on the line labeled "Resident/Representative Signature." Appellants admit agreeing to the Arbitration Agreement was not a condition or prerequisite to admission at the Facility. (App. Br at 31).

The Complaint alleges Ms. Rice received substandard care at the Facility in several respects. For example, the Facility's failure to properly meet Ms. Rice's daily needs, she developed multiple advance-stage decubitus ulcers. (R. p. 22 ¶ 6(g)). Ms. Rice also had history of seizure disorder which the Facility failed to properly monitor and treat. (R. p. 22 ¶ 6(c)-(e)). On June 17, 2018, Ms. Rice suffered from seizure-like tremors and was found unresponsive at the Facility. (R. p. 23 ¶ 6(j)). While Ms. Rice was transferred to a hospital, she passed away from her injuries. (R. p. 23 ¶ 7). The Complaint alleges the Facility, under the control of FCOS and FAS, were liable for Ms. Rice's decubitus ulcers because they failed to properly turn and reposition Ms. Rice on a regular basis and in their failure to use pressure-relieving devices specifically designed to prevent bedsore development. (R. pp. 24-25 ¶ 8(c)-(n)). The Complaint further alleges the Facility failed to timely and properly respond to Ms. Rice's June 2018 seizure event. (R. p. 25 ¶ 8(r)-(u)).

Relying on the Arbitration Agreement Ms. Rice did not sign, the Facility's motion to compel arbitration argued her estate must arbitrate rather than litigate its claims. (R. pp. 130-32) The circuit court denied the motion, finding Ms. Lovett lacked authority to enter the Arbitration Agreement on Ms. Rice's behalf. (R. pp. 1-16). The order also found the Facility failed to prove Ms. Rice or her estate is estopped from opposing arbitration. (R. pp. 7-12). The circuit court went on to hold that, even if the Arbitration Agreement was generally valid, it could not be enforced for the wrongful death claim brought for the benefit of Ms. Rice's statutory beneficiaries. (R. pp. 13-14). In light of these rulings, the FCOS and FAS motions to stay were denied as moot. (R. p. 15). Appellants filed a motion to alter or amend judgment on December 1, 2022, which the circuit court denied on March 1, 2023. (R. pp. 17-18). On March 20, 2024, the Court of Appeals issued an unreported memorandum opinion affirming the circuit court. Rice v. Fund. Clinical & Op. Servs., LLC, Op. No. 2024-UP-083 (S.C. Ct. App. filed Mar. 20, 2024).

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 just last year. Solesbee v. Fund. Clinical & Op. Servs., LLC, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), *cert denied* Apr. 16, 2024. Solesbee 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 are even further undermined by the Court of Appeals' recent ruling in 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. Rice, Op. No. 2024-UP-083, at 2 ("as in Solesbee and Hodge . . . the Admission Agreement and Arbitration Agreement do not merge."); 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 Spartanburg, Columbia, and Charleston in just the last two years***. Owens v. Fund. Clinical & Op. Servs., LLC, Case No. 2023-001605, *cert denied* Apr. 16, 2024; 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 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; and[4]

[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.

- When the contracts are titled and paginated separately and call for separate signatures.[5]

At least four of these are present here. Rice, Op. No. 2024-UP-083, at 2. 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. 133) and Admission Agreement (R. pp. 164-75) do not apply the same substantive law. Rice, Op. No. 2024-UP-083, at 2. 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

[5] Hodge, 422 S.C. at 562, 813 S.E.2d at 302.

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. Rice, Op. No. 2024-UP-083, at 2.; 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 12). 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. 175). The Arbitration Agreement's single page was "Page 1 of 1." (R. p. 133). These formatting choices offer further support for the many other indicators that these two contracts do not merge.

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. 133). Plus, while the Arbitration Agreement contains no option for revocation, the Admission Agreement plainly states Mr. Walker could revoke its terms at any time. (R. p. 169). 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 correctly considered this factor as further evidence against merger.

d. 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. Rice, Op. No. 2024-UP-083, at 2. 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 14-15). 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

[6] The Court should deny review on Petitioners' question presented I(D) 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 18-19).

assertion depends on a court first accepting their merger argument. (Pet. at 17). Petitioners do not argue Ms. Rice 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. Rice, Op. No. 2024-UP-083, at 3 ("Because we find the documents did not merge, a controlling consideration of whether the Arbitration Agreement bound Rice, we decline to reach the Facility's remaining arguments").

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. Rice's claim arose from a contractual relationship; (2) Ms. Rice "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.

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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