THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court Of Common Pleas
Carmen T. Mullen, Circuit Court Judge

Case Nos. 2010-CP-25-491 and 2010-CP-25-492
South Carolina Court of Appeals No. 2012-207308

CHERRY SCOTT, as Personal Representative of the Estate of ELIZABETH JONES, Respondent,

v.

HERITAGE HEALTHCARE OF ESTILL, LLC, d/b/a Heritage of the Lowcountry and/or Uni-Health Post Acute Care of the Lowcountry, UNITED CLINICAL SERVICES, INC., UNITED REHAB, INC., and UHS-PRUITT CORPORATION, Appellants.

PETITION FOR REHEARING AND INCORPORATED MEMORANDUM IN SUPPORT

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INTRODUCTION

By unpublished opinion (2014-UP-317), this Court affirmed the decision of the trial court that Ellen Jenkins did not have "authority to sign the Arbitration Agreement on Elizabeth Jones' behalf when Jones was competent at the time she was admitted to Heritage, and Jenkins did not possess a health care power of attorney to sign either contract on Jones' behalf." *Scott v. Heritage Healthcare of Estill, LLC*, No. 2014-UP-317 at 2 (S.C. Ct. App. Aug. 6, 2014). The Court's decision applied an overly-deferential "any evidence" standard even though there were no factual disputes, and the agency issue was purely one of law.[1] In addition, the decision overlooked the undisputed evidence that Jones specifically authorized her sister, Ms. Jenkins, to act on her behalf, focusing instead on the irrelevant *post hoc* opinion testimony of an admissions director regarding whether she believed "it would have been more appropriate for Jones to sign the contract herself because she was competent." *Id.*

Further, the decision did not follow the Supreme Court's recent directive in the nursing home arbitration case of *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014). In *Coleman*, the Supreme Court held that when, as here, a nursing home admission agreement and an arbitration agreement are signed by the same person at the same time, then there is a merger and both agreements are enforceable absent some contrary intent reflected in the agreements. 407 S.C. at 355, 755 S.E.2d at

[1] "When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. *In re Estate of Boynton,* 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct.App.2003); *WDW Props. v. City of Sumter,* 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). In such cases, the appellate court owes no particular deference to the trial court's legal conclusions. *Boynton,* 355 S.C. at 301-02, 584 S.E.2d at 155; *J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth.,* 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999)." *Boyd v. Liberty Life Ins. Co.*, 399 S.C. 401, 406, 732 S.E.2d 180, 183 (Ct. App. 2012).

455 (where "the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction," then "[u]nless there is a contrary intention ... , there [is] a merger."). In this case, it is undisputed that Ms. Jenkins signed all of the admission paperwork, including the arbitration agreement, at the same time and with the consent of the resident, Ms. Jones. Finally, the decision overlooked Appellants' ratification, estoppel, and third-party beneficiary arguments.

I. The Court's Decision Overlooks the Undisputed Evidence that Ms. Jones Authorized Ms. Jenkins to Act on Her Behalf.

The undisputed evidence clearly established that Ms. Jones expressly authorized Ms. Jenkins to negotiate her admission to Heritage of the Lowcountry ("Lowcountry"). (R. p. 638, page 8, line 18-p. 639, page 10, line 14; R. p. 629, page 9, lines 2-17; *see also* Final Brief of Appellants ("Appellants' Brief") at 11-13; Final Reply Brief of Appellants ("Appellants' Reply Brief") at 3-4.) Ms. Jones placed no limitations on Ms. Jenkins with respect to her authority in dealing with Lowcountry. (R. p. 629, page 10, lines 2-10.) Plaintiff acknowledged that she knew that Ms. Jenkins was signing the admission paperwork for Ms. Jones. (R. p. 629, page 9, lines 12-17.) This evidence of a specific grant of authority by Ms. Jones to Ms. Jenkins to act on her behalf in negotiating the admission to Lowcountry is undisputed. There is absolutely no evidence in the record that contradicts the undisputed evidence that Ms. Jenkins was acting under the authority expressly granted to her by Ms. Jones. Thus, the record clearly and unambiguously establishes that Ms. Jenkins had actual authority to act on behalf of Ms. Jones.

The sole stated basis for the conclusion that "Jenkins lacked authority to enter into the Arbitration Agreement on Jones' behalf" is that "Jones was competent at the time of her admission, and Sally Dobson, the admissions director for Heritage, agreed it would

have been more appropriate for Jones to sign the contract herself because she was competent, and Dobson did not know if Jenkins had a power of attorney." 2014-UP-317 at 2.

These findings, however, do nothing to contradict the undisputed evidence that Ms. Jones, in fact, granted authority to Ms. Jenkins to negotiate her admission to Lowcountry. None of the cases cited in the decision holds that a competent person cannot authorize an agent to act on her behalf or that such actual authority is somehow destroyed because the party accepting the agent's actual authority cannot establish apparent authority. *See, e.g., R&G Const., Inc. v. Lowcountry Regional Transp. Authority*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000) ("A true agency relationship may be established by evidence of actual ***or*** apparent authority.") (emphasis added); *McCall v. Finley*, 294 S.C. 1, 7, 362 S.E.2d 26, 30 (Ct. App. 1987) (before addressing apparent authority court found there was no evidence of actual authority). Moreover, the admissions director's opinion testimony about what would have been "more appropriate" does nothing to undermine the undisputed evidence that Ms. Jones expressly granted Ms. Jenkins actual authority to act on her behalf in connection with her admission to Lowcountry. Indeed, even to the extent an action may be considered "more appropriate," it still presumes that the alternative action was, as here, "appropriate."

II. The Decision Overlooks The Supreme Court's Recent Arbitration Agreement Merger Doctrine In *Coleman*.

The decision overlooks the holding of the Supreme Court that where "the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction," then "[u]nless there is a contrary intention ... , there [is] a merger." *Coleman*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014). Here,

Respondent acknowledges that the resident's sister, Ms. Jenkins, signed all of the admission paperwork, including the arbitration agreement, on behalf of the resident as part of a single transaction. (*See* Respondent's Final Resp. Br., p. 5.) Respondent admits that Ms. Jenkins met with the "admissions director, Sally Dobson, and 'signed in' her sister for therapy." (*Id.*) Respondent admits that "Ms. Jenkins executed ***all*** of the documents at issue, including the Arbitration Agreement." (*Id.* (emphasis added).) Respondent further admits that "[t]he admissions paperwork contained the separate, stand-alone Arbitration Agreement at issue. (*Id.*)

Thus, under *Coleman*, because the Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, in a single transaction, there was a merger of the Admission Agreement and Arbitration Agreement. Moreover, Plaintiff failed to produce any evidence of a contrary intent among the admission paperwork, thereby failing to rebut the merger. Thus, the Arbitration Agreement is enforceable against Ms. Jones, just the same as her other admission paperwork pursuant to which she received care from the facility.

III. The Court's Decision Overlooks Appellants' Ratification, Estoppel, and Third-Party Beneficiary Arguments.

Appellants demonstrated that Ms. Jones ratified the agreements executed by Ms. Jenkins by accepting the benefits of those agreements (Appellants' Brief at 13; Appellants' Reply Brief at 4-5); that Ms. Jones was bound by the Arbitration Agreement as a third-party beneficiary (Appellants' Brief at 13-14; Appellants' Reply Brief at 5-6); and that Plaintiff was estopped from denying the enforceability of the Arbitration Agreement (Appellants' Brief at 14-15; Appellants' Reply Brief at 5-6). The decision overlooks these arguments.

CONCLUSION

For the reasons set forth herein and in Appellants' Brief and Appellants' Reply Brief, Appellants respectfully request that the Court grant its Petition for Rehearing, reverse the trial court's Order Denying Defendants' Motion To Compel Arbitration and Stay Proceedings and remand this matter for an Order compelling Plaintiff to pursue her claims in arbitration and staying the litigation.

Respectfully submitted,

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August 21, 2014

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Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-25-491 and 492
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Cherry Scott, as Personal Representative of the Estate of
Elizabeth Jones ..... Respondent,

v.

Heritage Healthcare of Estill, LLC d/b/a Heritage of the Lowcountry
and/or Uni-Health Post Acute Network of the Lowcountry, United Clinical
Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation..... Appellants.

PROOF OF SERVICE

I, the undersigned legal assistant, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the Petition for Rehearing and Incorporated Memorandum in Support by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

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August 21, 2014

VIA HAND DELIVERY
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RE: Cherry T. Scott, as PR of the Estate of Elizabeth Jones v.
Heritage Healthcare of Estill, LLC d/b/a Heritage of the Lowcountry
and/or d/b/a Uni-Health Post Acute Care of the Lowcountry,
United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt Corporation
Civil Action No. 10-CP-25-491 and 492
SC Court of Appeals Case No. 2012-207308
Our File No. 5593/1507

Dear Ms. Kitchings:

I enclose for filing the original and seven (7) copies of a Petition for Rehearing and Incorporated Memorandum in Support on behalf of the Appellants in the above-referenced matter, along with our Proof of Service and our firm's check in payment of the appropriate filing fee. Please return a clocked-in copy of same to me.

By copy of this letter to counsel shown below, I am serving a copy of same upon them by mail. Thank you for your assistance.

Yours truly,

Monteith P. Todd

MPT:rco
Enclosures

cc: Lee D. Cope, Esquire
Charles McCutchen, Esquire
Margie Bright Matthews, Esquire