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 No. 2010-CP-25-491 and 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.

Respondent's Return to Petition for Rehearing

Appellant/Petitioner's Petition for Rehearing should be denied. Contrary to the assertions set forth in the Petition, the Opinion does not overlook or misapprehend the law or the facts before the Court of Appeals.

I. Appellants Have Failed to Raise and Preserve Arguments It Now Presents as Grounds for Rehearing.

The first basis for denial of the Petition is issue preservation. Appellants now argue, for the first time, that the admission contract and arbitration agreement merge into one so that if there is evidence that Ms. Jones authorized her sister, Ms. Jenkins, to sign an admission agreement, she authorized her to sign the arbitration agreement as well. Multiple searches of Appellants' briefs to this Court fail to find the word "merger" ever

mentioned. Appellants attempt to raise this issue for the first time after the Opinion has issued. The issue was not raised and ruled upon by the trial court. The issue was not raised to this Court. To now claim rehearing is warranted based upon the issue of merger is not permitted under our appellate rules.

"[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. *Elam v. S.C. DOT*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004). Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler*, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court). *Elam*, 361 S.C. at 23-24, 602 S.E.2d at 779-80.

Nothing would have prevented the issue of merger from being framed before the trial court and then briefed from the outset of this appeal. Thus, this issue has not been preserved and should be disposed of summarily.

II. Even If Appellants Had Raised and Preserved the Issue of Merger, *Coleman v. Mariner Health Care, Inc.* Supports the Findings of this Court's Initial Opinion.

Secondly, the Appellants' reliance on *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), is misplaced. Appellants rely heavily in their petition on the following language from *Coleman*: "Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger." *Coleman*, 407 S.C. at 355. HHE fails to analyze and apply the facts of that case which specifically looks at whether the admission agreement and arbitration agreement are separate from one another. HHE's omission is telling. The Arbitration Agreement at issue in this case specifically states that this agreement is separate and apart from the admission agreement:

> The Resident is not required to sign this Arbitration Agreement in order to be admitted to or to remain in the Facility.

(R. pp. 645-646). This is not shocking or new to Appellants, as they argued in their Final Brief to this Court the following:

> It is undisputed that Plaintiff signed the Arbitration Agreement, a two-page, **standalone agreement** clearly titled "Resident and Facility Arbitration Agreement." (R. pp. 645-646).

(Final Brief of Appellants, p. 10) (emphasis added). Furthermore, Appellants' Reply Brief makes clear that this agreement was "optional." (Reply Brief of Appellants, p. 4).

When the facts of the case at bar are analyzed to determine the intent of the parties, it is clear that the two documents do not merge. As the *Coleman* court noted: "On its face, this clause recognizes the 'separatedness' of the arbitration agreement and the admission agreement, not a merger of the two contracts." *Coleman*, 407 S.C. at 355.

Therefore, even if this issue had been raised and ruled upon to the Circuit Court, or preserved for review by this Court, a proper application of *Coleman* to the facts of this case, requires a finding that there would be no merger and no valid arbitration agreement.

Despite the "Monday-morning-quarterbacking" strategy now being employed, the facts still lead to only one conclusion: the only evidence in the record is that Ms. Jenkins signed a separate, standalone, optional arbitration agreement without authority. The burden is on the Appellants to prove that Ms. Jones gave her sister authority to sign the Arbitration Agreement. This has not been met.

Furthermore, Appellants' position that the decision overlooks its arguments as to ratification, estoppel and third-party beneficiary is without merit. According to *Coleman*, the only authority that can be found is for the Admission Agreement. However, as noted above, because of the "separatedness" of the arbitration and admission agreements, Appellants cannot rely on the limited authority to somehow expand that authority to the Arbitration Agreement.

III. As an Additional Sustaining Ground, Appellant's Appeal Fails Because Appellants Have Waived Any Right to Demand Arbitration.

Finally, although reconsideration is unnecessary, if that exercise were undertaken none of these issues need to be reached because clearly, Appellants have waived their right to demand arbitration. This issues was addressed fully in Respondent's Final Brief (pp. 22-24) and Respondent now incorporates these arguments by reference.

If reconsideration is considered, though, the dispositive issue of waiver should be address. These proceedings were commenced by filing two Notices of Intent that were served on the Defendants on or about April 7, 2010. (R. pp. 39-88). Appellant HHE could have moved at that point to move to compel arbitration. In fact, S.C. Code § 15-79-120

specifically addresses this issue and states that parties can agree to arbitrate prior to filing a medical malpractice action. Instead, Appellant participated in the Notice of Intent proceedings, attended a failed mediation, and the Summonses and Complaints were filed on October 13, 2010. HHE's motion was not filed until August 4, 2011. During that long delay, HHE engaged in discovery. Appellant has served and answered discovery, though they have attempted to limit that discovery only to "arbitration" issues. HHE has taken and defended depositions. Not only did HHE participate in the pre-suit mediation on September 10, 2010, but also a second mediation on August 11, 2011. Throughout this time frame HHE has also participated in procedural and discovery hearings before the trial court, rather than moving to compel arbitration. In fact, Appellant HHE has produced 6,211 pages of discovery documents during the course of this litigation. HHE has repeatedly availed itself of the court system since April of 2010.

Clearly, in South Carolina, the "right to enforce an arbitration clause may be waived." *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (2011). Our Courts have held that less time constitutes waiver. *Rhodes*, 374 S.C. at 125, 128 647 S.E.2d at 250, 252 (Ct. App. 2007). This Court recently addressed the waiver of arbitration in *Carlson v. S.C. State Plastering, LLC*, (Ct. App. Opinion No. 5143, June 12, 2013). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). The question of whether waiver exists is a fact based analysis based on the facts of each particular case. *Carlson*, p. 5.

Unlike the factual situation in *Carlson*, in this case – without question – HHE participated in extensive discovery. The parties have conducted extensive written and

deposition discovery, participated in two mediations, and attended multiple Court hearings. The costs associated with discovery that may not have been expended in arbitration is an example of prejudice that is beyond mere inconvenience. *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003). The Estate has borne the costs of two failed mediations. Most prejudicially, now the Respondent has been involved for years in the appellate process and has been delayed in finalizing discovery and preparing for trial. Had HHE had moved in a timely manner, these issues might have been resolved by this point. Appellant, though, chose to avail itself of the courts and delay pursuing purported rights to arbitration. The trial court properly denied HHE's request on this ground alone, and if reconsideration is considered, this issue should be squarely addressed by this Court, finding that Appellant has waived any right to demand arbitration.

Respectfully submitted,

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August __, 2014
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In The Court of Appeals

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CERTIFICATE OF SERVICE

I, Shanna M. Jarrell, do hereby certify that I have served all counsel in this action with a copy of Respondent's Return to Petition for Rehearing by mailing a copy of the same to counsel via United States Mail, postage prepaid, at the following address(es):

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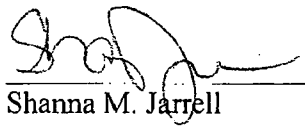

Shanna M. Jarrell

August 29, 2014

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August 29, 2014

The Hon. Jenny Abbott Kitchings, Clerk
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Re: *Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of the 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*
C/A No.: 2010-CP-25-491 & 492
Court of Appeals Case No.: 2012207308

Dear Ms. Kitchings:

Enclosed please find for filing an original and sixteen copies of Respondent's Return to Petition for Rehearing in the above reference case.

Thank you in advance for your kind attention to this matter.

Sincerely,

C/ LDC for

Lee D. Cope

LDC/smj
Enclosure
cc: Tyler Arnold, Esquire
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Monteith P. Todd, Esquire
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