

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HAMPTON COUNTY
Court Of Common Pleas

Carmen T. Mullen, Circuit Court Judge

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OCT 17 2014

S.C. Supreme Court

Opinion No. 2014-UP-317 (S.C. Ct. App. Filed Aug. 6, 2014)

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,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 18, 2014. (App. 768-784).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Ellen Jenkins did not have authority to sign the Arbitration Agreement on behalf of Elizabeth Jones where the undisputed evidence established that Ms. Jones authorized Ms. Jenkins to negotiate her admission to Heritage of the Lowcountry and placed no limitations on Ms. Jenkins with respect to that authority?
2. Did the Court of Appeals err in failing to find a merger of the Admissions Agreement and Arbitration Agreement, as required under this Court's recent decision in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), where it was undisputed that Ms. Jenkins signed all of the admissions agreements, including the arbitration agreement, at the same time and with the consent of the resident, Ms. Jones?
3. Did the Court of Appeals err in failing to find that Ms. Jones ratified the admissions agreements, including the Arbitration Agreement, where Ms. Jones accepted the benefits of the agreements signed on her behalf by Ms. Jenkins?
4. Did the Court of Appeals err in failing to find that Ms. Jones was the third-party beneficiary of the admissions agreements, including the Arbitration Agreement, which were negotiated solely for her benefit?
5. Did the Court of Appeals err in failing to find that Plaintiff was estopped from denying the Arbitration Agreement where Ms. Jones received the benefits of the admissions agreements of which the Arbitration Agreement was a part?
6. Did the Court of Appeals err in declining to address the remainder of Defendants' arguments, finding that they were moot in light of its determination with respect to the issue of Ms. Jenkins's authority to sign the Arbitration Agreement?

STATEMENT OF THE CASE

This appeal involves the denial of a motion to compel arbitration of a nursing home dispute in accordance with the terms of a pre-dispute arbitration agreement.

On October 13, 2010, Plaintiff/Respondent Cherry T. Scott (“Plaintiff”) commenced wrongful death and survival actions alleging nursing home negligence. (R. pp. 89-110.) Plaintiff sued Heritage Healthcare of Estill, LLC (“Heritage”), United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt Corporation (“UHS-Pruitt”) (collectively referred to herein as “Defendants”).

In their Answers, Defendants asserted as a defense that Plaintiff’s claims were barred pursuant to the terms of an arbitration agreement covering Plaintiff’s claims. (R. pp. 112-13, ¶¶ 15-16; R. pp. 118-19, ¶¶ 15-16; R. pp. 124-25, ¶¶ 15-16; R. pp. 130-31, ¶¶ 15-16;.)¹ On December 1, 2010, Plaintiff moved to strike certain of Defendants’ defenses, including defenses relating to arbitration. (R. pp. 159-62.) By Orders dated March 4, 2011, the Court denied Plaintiff’s motions to strike the arbitration defenses. (R. pp. 17-20.)

Following the Orders denying the Motions to Strike, the Defendants engaged in limited discovery solely related to arbitration. Defendants moved for an order compelling arbitration on August 3, 2011. (R. pp. 165-86). Plaintiff filed a response to Defendants’ motion on October 6, 2011. (R. pp. 187-464.) Following a hearing held on October 7, 2011, the trial court entered an order drafted by the Plaintiff denying Defendants’ Motion to Compel Arbitration. (R. pp. 1-14.) Defendants received a copy of the Order on

¹ The Answers of the four Defendants were filed concurrently and are identical in all respects material to this appeal. These have been collectively cited as “Answers,” for the sake of brevity.

November 16, 2011. On November 28, 2011, Defendants timely filed a motion for reconsideration. (R. pp. 465-554.) Plaintiff filed a response to this motion on December 13, 2011. (R. pp. 555-61.) The court denied Defendants' motion for reconsideration by Order entered January 17, 2012. (R. pp. 15-16.) On February 2, 2012, Defendants filed a Notice of Appeal. (R. pp. 562-81.)

On August 6, 2014, the Court of Appeals issued an unpublished opinion affirming the trial court's order solely on the issue of whether Ms. Jenkins had authority to sign the Arbitration Agreement on behalf of Elizabeth Jones. *Scott v. Heritage Healthcare of Estill, LLC*, No. 2014-UP-317 (S.C. Ct. App. Filed Aug. 6, 2014) (App. 765-67). The unpublished opinion did not address Defendants' arguments that the Arbitration Agreement merged with the other admissions documents pursuant to *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014). It also did not address Defendants' ratification, estoppel, and third-party beneficiary arguments. Finding its decision on lack of authority controlling, the Court of Appeals declined to address Defendants' remaining arguments. *Scott*, No. 2014-UP-317 at 3 (App. 767). Defendants filed a Petition for Rehearing which was finally ruled on by the Court of Appeals on September 18, 2014 (App. 783-84). Petitioner seeks a writ of certiorari to review the Court of Appeals' decision.

ARGUMENT

I. Introduction

In this case, Elizabeth Jones was admitted to a skilled nursing facility known as Heritage of the Lowcountry ("Lowcountry") by her sister Ellen Jenkins. In advance of Ms. Jones's admission to Lowcountry, Ms. Jones spoke with Ms. Jenkins and her other siblings, and they all agreed that Ms. Jenkins would handle Ms. Jones's admission to

Lowcountry. (R. p. 638, page 8, line 14—p. 639, page 9, line 24; R. p. 628, page 8, line 9—p. 629, page 10, line 14.) Pursuant to these discussions, Ms. Jenkins negotiated Ms. Jones's admission to Lowcountry in a single meeting, signing agreements on behalf of Ms. Jones, including an Arbitration Agreement. (R. p. 640, page 13, lines 1-14.) After completing the admissions process, Ms. Jenkins discussed the matter with Ms. Jones, and Ms. Jones understood that Ms. Jenkins had admitted her to Lowcountry. (R. p. 641, page 17, lines 19-25.) Ms. Jones accepted the benefit of these agreements negotiated on her behalf by Ms. Jenkins and remained a resident of Lowcountry from April 18, 2007 until May 15, 2009. Now, after full performance by Lowcountry of its contractual obligations, Plaintiff seeks to re-write the agreements to exclude the Arbitration Agreement. Singling out the Arbitration Agreement and treating it as a disfavored agreement violates the Federal Arbitration Act, as well as longstanding principles of state agency and contract law.

Notwithstanding a clear delegation of authority by Ms. Jones to Ms. Jenkins and a subsequent ratification of Ms. Jenkins's actions by Ms. Jones, the Court of Appeals rejected enforcement of an arbitration agreement purportedly for want of authority. In so doing, the Court singled out the Arbitration Agreement, overlooking this Court's recent instruction 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. at 355, 755 S.E.2d at 455. The Federal Arbitration Act requires that the validity of arbitration agreements be determined under general principles of contract law and agency law that would apply to any other contract. *Herron v. Century BMW*, 387 S.C. 525, 531, 693

S.E.2d 394, 397 (2010). The Court of Appeals' decision violates this principal by treating the Arbitration Agreement differently and requiring a greater showing of authority for an arbitration agreement than is required for contracts generally. On the other hand, to the extent that the Court of Appeals intends its decision to apply to contracts generally, the decision represents an unwarranted and dangerous departure from longstanding precedent allowing individuals to act through agents.

The Court of Appeals' decision is inconsistent with the Federal Arbitration Act, as interpreted by the United States Supreme Court and this Court because it singles out arbitration agreements for heightened scrutiny. *See, e.g., Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201, 1203–04 (2012) (per curiam) (unanimously invalidating a state's public policy to not refer wrongful death claims against a nursing home to arbitration); *Dean v. Heritage Healthcare of Ridgeway*, Op. No. 27401 (S.C. Sup. Ct. filed June 18, 2014) (Shearouse Adv. Sh. No. 24 at 34). Moreover, the Court of Appeals' decision is inconsistent with decisions of this Court on issues of agency by concluding that the agent lacked authority solely because the principal was competent and could have opted to act without an agent. The right of individuals to act through trusted agents and to trust that the decisions of those agents will be respected is of the utmost importance. There is no question that Ms. Jones exercised this right by choosing to have her sister, Ms. Jenkins, act on her behalf. *See, e.g., Thompson v. Ford Motor Co.*, 200 S.C. 393, 414, 21 S.E.2d 34, 43 (1942) ("An agent is one appointed by a principal as his representative and to whom the principal confides the management of some business to be transacted in the principal's name, or on his account, and who brings about or effects legal relationships between the principal and third parties.") (citations and quotations

omitted). The Court of Appeals' decision undermines the right of individuals to act through agents by nullifying the actions of Ms. Jenkins, Ms. Jones's designated agent.

Defendants respectfully request that this Court issue a writ of certiorari to consider the propriety of the decision with respect to the Federal Arbitration Act and the serious negative consequences of a decision undermining the rights of individuals to delegate decision-making authority to trusted agents.

II. The Undisputed Evidence Established 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 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 (App. 678-80); Final Reply Brief of Appellants ("Appellants' Reply Brief") at 3-4 (App. 745-46)). 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.

Ms. Jenkins was the agent of Ms. Jones. Agency is the fiduciary relationship resulting from the manifestation of consent by one person to another that the other shall act on behalf of and subject to the control of the first, and of consent by the other so to act. *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 425 S.E.2d 764 (Ct. App. 1992). In order for agency to exist, therefore, one person (the "principal") must intend that another (the "agent") act on her behalf, the agent must

intend to accept the authority of the principal and act on it, and the intention of each must be manifest either in words or conduct between them. *Courtney v. Remler*, 566 F. Supp. 1225, 1230 (D.S.C. 1983). *See also S.B. McMaster, Inc. v. Chevrolet Motor Co.*, 3 F. 2d 469, 474 (4th Cir. 1925) (stating “[t]he agent must have assumed to represent the principal and to have performed the acts in his name and on his behalf”). In this case, Ms. Jones authorized Ms. Jenkins to handle her admission to Lowcountry, and Ms. Jenkins served as Ms. Jones’s agent by executing the admissions paperwork, including the Arbitration Agreement, on Ms. Jones’s behalf.

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 (App. 766). 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. The Court of Appeals' decision represents a departure from long-established case law regarding agency. To the extent this departure is unique to arbitration agreements, it is inconsistent with the Federal Arbitration Act's mandate to enforce arbitration agreements. To the extent that the decision is intended to reflect agency law generally, such a departure from longstanding precedent could have unintended negative consequences for individuals who desire to act through designated agents.

III. The Decision Overlooks This Court's Recent Arbitration Agreement Merger Doctrine In *Coleman*.

The unpublished opinion overlooks the holding of this 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. at 355, 755 S.E.2d at 455. Here, Plaintiff acknowledges that Ms. Jenkins signed all of the admissions paperwork, including the Arbitration Agreement, at Ms. Jones's request and as part of a single transaction. (*See* Respondent's Final Resp. Br., p. 5.) Plaintiff admits that Ms. Jenkins met with the "admissions director, Sally Dobson, and 'signed in' her sister for therapy." (*Id.*) Plaintiff admits that "Ms. Jenkins executed *all* of the documents at issue, including the Arbitration Agreement." (*Id.* (emphasis added).) Plaintiff further admits that "[t]he admissions paperwork contained the separate, stand-alone Arbitration Agreement at issue." (*Id.*) Pursuant to the admissions agreements executed by Ms. Jenkins, Lowcountry provided

care to Ms. Jones.

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

IV. The Decision Ignores Appellants' Ratification, Third-Party Beneficiary, and Estoppel Arguments.

A. Ms. Jones Ratified the Agreements Negotiated by Ms. Jenkins by Accepting the Benefits of Those Agreements.

Ms. Jenkins discussed Ms. Jones's admission to Lowcountry with Ms. Jones after Ms. Jenkins had completed the admissions process, and Ms. Jones understood that Ms. Jenkins had negotiated her admission to Lowcountry. (R. p. 641, page 17, lines 19-25.) Based on the agreements executed by Ms. Jenkins on behalf of Ms. Jones, Heritage admitted Ms. Jones to Lowcountry, and Ms. Jones remained a resident of Lowcountry from April 18, 2007 until May 15, 2009. By accepting the benefits of these agreements, Ms. Jones ratified the agreements. One cannot ratify that part of the contract under which she has accepted the benefits and avoid that part which she later deems to be disadvantageous. *See Southern Bell Telephone & Telegraph Co. v. WRNO, Inc.*, 216 S.C. 533, 535-36, 59 S.E.2d 146, 147 (1950). The Court of Appeals' unpublished opinion ignored the fact that Ms. Jones—who specifically requested Ms. Jenkins to handle her admission to Lowcountry before the agreements were signed and then discussed the admission with Ms. Jenkins afterward—accepted the benefits of the agreements that Ms.

Jenkins had signed and that Lowcountry fully performed its obligations in reliance on these agreements.

B. Ms. Jones Was An Intended Third-Party Beneficiary of the Agreements Signed by Ms. Jenkins.

Additionally, Ms. Jones is bound by the agreements executed by Ms. Jenkins as a third-party beneficiary. Under South Carolina law, “[a] third-party beneficiary is a party that the contracting parties intend to directly benefit.” *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). Ms. Jones’s care was the essential purpose of the admissions agreements, and as a third-party beneficiary, she (and her estate) are bound by the Arbitration Agreement. See *McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 U.S. Dist. Lexis 144288 (D.S.C. Dec. 15, 2011); *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 U.S. Dist. Lexis 103638 (D.S.C. Sept. 13, 2011) (rejecting argument that family member did not have authority to bind resident to arbitration); *Cook v. GGNSC Ripley, LLC*, 786 F. Supp. 2d 1166, 1171-72 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care was enforceable against third-party beneficiary and her estate under third-party beneficiary principles); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004) (same); *Trinity Mission Health & Rehab. v. Scott*, 19 So. 3d 735 (Miss. Ct. App. 2008) (same). The Court of Appeals’ unpublished opinion ignored these arguments.

C. Plaintiff Is Estopped from Denying the Enforceability of the Arbitration Agreement.

A nonsignatory can be bound by an arbitration provision within a contract executed by other parties. *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600-01 (Ct. App. 2012) (“Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision

within a contract executed by other parties.”) (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)). “Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” *Int’l Paper*, 206 F.3d at 417-18 (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)).

“Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001) (citing *Tencara Shipyard*, 170 F.3d at 353 (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)).

The trial court erred in holding that the Plaintiff was not estopped. Ms. Jones received the benefits of the agreements signed by Ms. Jenkins in connection with Ms. Jones’s admission to Lowcountry, and Plaintiff is estopped to deny the enforceability of these agreements, including the Arbitration Agreement, merely because Ms. Jones did not sign them. Plaintiff is not free to pick and choose those portions of Ms. Jones’s agreements with Lowcountry it wants to enforce and those it does not and should be estopped from doing just that. The Court of Appeals’ unpublished opinion ignored this argument.

V. The Remaining Arguments that the Court of Appeals Declined to Address Have Been Decided in Favor of Defendants' Position.

Relying solely on its conclusion regarding Ms. Jenkins's authority to act on behalf of Ms. Jones, the Court of Appeals "decline[d] to address Heritage's remaining arguments." *Scott*, No. 2014-UP-317 at 3 (App. 767). These remaining issues were: (1) whether the Arbitration Agreement was governed by the Federal Arbitration Act; (2) whether the requirement to follow the rules of the American Arbitration Association rendered the Arbitration Agreement unenforceable; (3) whether Defendants waived arbitration; and (4) whether there was a "meeting of the minds" with respect to arbitration. Each of these issues has been decided in Defendants' favor under identical circumstances. See *Dean v. Heritage Healthcare of Ridgeway*, Op. No. 27401 (S.C. Sup. Ct. filed June 18, 2014) (Shearouse Adv. Sh. No. 24 at 34); *Johnson v. Heritage Healthcare of Estill, LLC*, 2014-UP-318 (S.C. Ct. App. Filed Aug. 6, 2014). Accordingly, this matter should be remanded to the Court of Appeals for a decision consistent with *Dean* and *Johnson*.

CONCLUSION

For the reasons stated, Petitioners ask the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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Petitioners.

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 A Writ of Cert by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

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