

STATE OF SOUTH CAROLINA

COUNTY OF BAMBERG

CAMILLE HODGE, JR, as personal representative of the estate of MABLE HODGE,

Plaintiff,

-vs-

UNIHEALTH POST-ACUTE CARE OF BAMBERG, LLC f/k/a Bamberg County Nursing Center; UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC.; UNITED HEALTH SERVICES, INC.; UHS-PRUITT HOLDINGS, INC. a/k/a UHS-Pruitt Corp.; R. DALE PADGETT, M.D., P.A.; and DR. HERBERT A. MOSKOW;

Defendants.

CAMILLE HODGE, SR.,

Plaintiff,

-vs-

UNIHEALTH POST-ACUTE CARE OF BAMBERG, LLC f/k/a Bamberg County Nursing Center; UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC.; UNITED HEALTH SERVICES, INC.; UHS-PRUITT HOLDINGS, INC. a/k/a UHS-Pruitt Corp.; R. DALE PADGETT, M.D., P.A.; and DR. HERBERT A. MOSKOW;

Defendants.

FILED
BAMBERG COUNTY

2015 MAR 27 AM 10:03

JAMES B. HIERS
CLERK OF COURT
BAMBERG, SC

IN THE COURT OF COMMON PLEAS

FOR THE SECOND JUDICIAL CIRCUIT

CIVIL ACTION NO: 2014-CP-05-17

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ORDER DENYING DEFENDANTS' SC Court of Appeals
MOTION TO DISMISS
OR, ALTERNATIVELY,
TO COMPEL ARBITRATION
AND STAY PROCEEDINGS

CIVIL ACTION NO: 2014-CP-05-19

This matter is before the Court on the motion of the UPAC Defendants to dismiss this action for want of jurisdiction, or in the alternative, to compel arbitration and to stay proceedings. The issue presented by the motion is whether a nursing home can bind a mentally

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and legally competent adult to an arbitration agreement that divests the competent patient of her right to a trial by jury when the agreement is signed only by a family member and the person whom the nursing home wishes to bind has not signed the agreement, has not given her family member a power of attorney or other authority to make contractual commitments on her behalf, and has done nothing to hold the family member out to others as having such authority. In the circumstances of the undisputed facts of this case, the Court answers that question in the negative and denies the motion.

Factual and Procedural Background

On August 31, 2010, Mable Hodge, a resident of Bamberg County and a patient of Defendant Dr. Herbert Moskow, entered Unihealth Post-Acute Care of Bamberg, LLC's ("UPAC's") Bamberg facility for rehabilitation. Dr. Moskow's records indicate that Ms. Hodge was functioning well when she was admitted to his and UPAC's care. Dr. Moskow's September 1, 2010, initial history and physical of Mable Hodge states: "Physical examination reveals a well developed and well nourished female in no real distress . . . Extremities: full range of motion." Approximately three weeks after her admission to UPAC, Ms. Hodge was discharged, by ambulance, as a paraplegic. She never walked again and is now deceased.

This lawsuit ensued. Plaintiffs allege that Ms. Hodge developed a Spinal Epidural Abscess that the Defendants failed to diagnose or to treat. Camille Hodge, Jr., acting as Personal Representative of the estate of his mother, Mable Hodge, filed this action against UPAC and related entities United Health Services of South Carolina, Inc., United Health Services, Inc., and UHS-Pruitt Holdings, Inc. (these four Defendants referred to jointly as the "UPAC Defendants"), Dr. Herbert Moskow, and Dr. Dale Padgett, P.A. Camille Hodge, Sr., has filed a separate action against the same Defendants for loss of consortium.

The UPAC Defendants' motion is based on documents signed on August 30, 2010, the day prior to Mable Hodge's admission to UPAC, by her husband, Camille Hodge, Sr. At that time, Ms. Hodge was a patient at Providence Hospital in Columbia. Among the documents presented to Mr. Hodge was a twelve-page Admission Agreement and a separate five-page Arbitration Agreement. Both agreements, drafted by UPAC, have separate signature lines for (1) "Patient/Resident's Signature" and (2) "Patient/Resident Representative's Signature." UPAC never obtained Mable Hodge's signature on either the Admission Agreement or the Arbitration Agreement and, instead, asks this Court to hold that Mr. Hodge waived his wife's right to a jury trial even though (as discussed below) UPAC's own guidelines mandate that its employees must obtain the patient's signature on the Arbitration Agreement if the patient is competent.

At the motion hearing, UPAC acknowledged that Mable Hodge was competent at the time of her admission, that she did not sign the Arbitration Agreement (or any other document incorporating it by reference), and that she had not executed a health care power of attorney. Thus, there is no dispute as to the following facts:¹

- 1) The Arbitration Agreement was signed only by UPAC and Camille Hodge, Sr.
- 2) The Arbitration Agreement was not signed by Mable Hodge, by her personal representative Camille Hodge, Jr., by Dr. Moskow, or by Dr. Padgett.²
- 3) Mable Hodge was competent at the time she was admitted to UPAC on August 31, 2010, and at the time the Arbitration Agreement was signed by Mr. Hodge Sr. on August 30, 2010.

¹ UPAC asked the Court to order a deposition of Mr. Hodge, Sr. solely on the arbitration issue. Because the facts material to the Court's decision are not contested and because the parties submitted, without objection, all documents that they wished the Court to consider, the Court concludes that the deposition of Mr. Hodge would not provide any additional material facts that would be helpful to the Court in reaching its decision.

² All parties agreed at the hearing that this motion affects only UPAC and that Plaintiffs' claims against the doctor Defendants, Moskow and Padgett, would proceed to a jury trial regardless of the court's ruling on UPAC's motion.

- 4) Mable Hodge had not executed a general power of attorney or health care power of attorney (or any other document giving authority to her husband or any other family member to make contractual commitments or waivers on her behalf) at the time she was admitted to UPAC or at the time the Arbitration Agreement was signed by Mr. Hodge Sr.
- 5) Mable Hodge was a patient at Providence Hospital in Columbia on August 30, 2010, when Mr. Hodge Sr. signed the Arbitration Agreement with UPAC in Bamberg.
- 6) UPAC presented Mable Hodge with other documents to sign at the time of her admission, and Mable Hodge signed those documents, but not the Arbitration Agreement.

Analysis

South Carolina's Supreme Court and Court of Appeals have recently faced the precise issue that is before the Court today: may a nursing home enforce an arbitration agreement against a patient when the nursing home has obtained the signature of the patient's relative but has failed to obtain the signature of the patient herself, and when the relative does not have the patient's power of attorney?

On March 12, 2014, the South Carolina Supreme Court issued its opinion in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014). In *Coleman*, the Circuit Court denied the nursing home's motion to compel arbitration because the arbitration agreement was signed by the patient's relative but not by the patient. The nursing home appealed and the South Carolina Supreme Court affirmed the Circuit Court's denial. In that case, the Supreme Court ruled that even though the patient was incompetent at the time of her admission to the nursing home, and even though the patient's sister had statutory authority under the Adult Health Care

Consent Act (S.C. Code § 44-66-10 *et seq.*) to make health care decisions for her sister, she could not bind her sister to an Arbitration Agreement with the nursing home.

Three months after the *Coleman* decision, the Supreme Court addressed other nursing home arbitration issues, most of which are not before the Court today. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014). In *Dean*, however, the Court *sua sponte* raised the question of whether a competent patient could be bound to a nursing home arbitration agreement when the family member signing the Arbitration Agreement does not possess the patient's health care power of attorney. The Court stated, "[w]e are concerned that, according to the Record, the patient did not sign either the residency agreement or the [Arbitration] Agreement on her own behalf, despite being competent at the time, nor did Respondent possess a health care power of attorney to sign either contract on the patient's behalf." *Dean*, 408 S.C. at 389 n. 13. This Court shares that concern in this case.

Even more recently, the South Carolina Court of Appeals faced the same question before the Court today – in a lawsuit involving the same issues, the same defendant, and represented by the same lawyer as are before the Court today.³ In *Scott v. Heritage Healthcare of Estill, LLC*, 2014 WL 3845113, Circuit Judge Carmen Mullen denied UPAC's motion to compel arbitration when UPAC had obtained the signature of the patient's sister but had failed to obtain the patient's own signature on its arbitration agreement. UPAC appealed. The Court of Appeals affirmed Judge Mullen's denial, ruling as follows:

³ While South Carolina Appellate Court Rule 268(d)(2) provides that unpublished opinions generally have no precedential value, there is an exception in the rule for "proceedings in which they are directly involved." The *Scott* case involves the same defendant, represented by the same lawyer, making the same argument that they are making before this Court today, and thus falls close to the rule's exception. Moreover, the Court does not treat *Scott* as controlling precedent, but instead views it as persuasive reasoning on the precise issue presented here.

We affirm as to whether Ellen Jenkins had authority to sign the arbitration agreement on [her sister] 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. We find the evidence reasonably supports the trial court's findings that Jenkins lacked authority to enter into the Arbitration Agreement on Jones' behalf because 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. Therefore, we find the Arbitration Agreement is not enforceable against Respondent.

2014 WL 3845113, at *1 (emphasis added).

In *Scott*, the Court of Appeals focused on three facts leading to the conclusion that UPAC's Arbitration Agreement was not enforceable against the patient: (1) the patient was competent at the time her family member signed the Arbitration Agreement, and UPAC failed to obtain the signature of the competent patient; (2) the family member had no health care power of attorney vesting her with authority to sign on the patient's behalf; and (3) UPAC acknowledged that it should have obtained the patient's signature on the arbitration agreement. All three of those factors are present in the case at hand. This Court finds the reasoning of the Court of Appeals in *Scott* persuasive, and likewise concludes that these three factors prevent UPAC from compelling arbitration pursuant to the Arbitration Agreement under the facts of this case.

First, Mable Hodge was clearly competent at the time of her admission, yet UPAC did not have her sign the Arbitration Agreement. UPAC conceded these facts at the hearing. Moreover, UPAC elected to have Mable Hodge personally sign certain documents – but not the Arbitration Agreement – at the time of her admission. For instance, the Court was presented with an “Inventory of Personal Effect” dated September 1, 2010 – the day after Mable Hodge was admitted to UPAC – that bears Mable Hodge's signature. When UPAC wanted Mable

Hodge's signature, UPAC knew how to obtain it. She was competent and could have signed the Arbitration Agreement, but did not do so.

Second, at the time of her admission to UPAC, Mable Hodge had vested no one with a health care power of attorney (or general power of attorney or any such document for that matter) to make decisions, contractual commitments, or waivers on her behalf. Again, at the hearing, UPAC conceded that Mable Hodge had not executed a health care power of attorney. The Court was presented with a form that was completed just days prior to Mable Hodge's admission to UPAC, while she was a patient at Providence Hospital in Columbia. The form clearly indicates that Mable Hodge had not executed a Health Care Power of Attorney. This form was in Mable Hodge's medical record and easily accessible by UPAC if it had chosen to inquire.

Third, UPAC's internal documents demonstrate that UPAC knows that it is required to obtain a patient's signature on its Arbitration Agreements if the patient is competent. Prior to the hearing, the Court was presented with UPAC's internal "Arbitration Checklist." The very first line of that document states that UPAC must "Determine competency of patient/resident." UPAC employees are then directed to "Secure appropriate signatures" (emphasis in original). The UPAC checklist unequivocally instructs its employees that if the patient/resident is "***Competent, capable of signature*** - Patient/resident must initial each page in lower right hand corner and sign and date the final page in the presence of Admissions Coordinator and one witness" (bold and italics in original, underlining added). These guidelines appear to have been drafted to comply with a federal regulatory mandate, which states: "the facility may seek a health care decision (or any other decision or authorization) from a surrogate or representative

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only when the resident is unable to make the decision.” Interpretive Guidelines to 42 CFR § 483.10(a)(3) and (4) (emphasis added).

UPAC failed to follow its own guidelines. This Court will not ignore both South Carolina law and the movants’ own guidelines by allowing a family member with no health care power of attorney to bind a competent individual to a nursing home arbitration agreement, particularly when the effect of such a result would be to divest the individual of a fundamental right.

In the absence of any evidence that Mable Hodge gave her husband any express authority to act for her, UPAC argues that Mable Hodge “represented” that her husband was authorized to act on her behalf by “allowing” him to procure her admission to the Bamberg facility. UPAC contends that such “acquiescence” established an apparent agency on which it relied in providing its services to Mable Hodge. UPAC submitted, and the Court considered, the affidavit of Deborah Rutland, its administrator, who states that Mr. Hodge Sr. signed the Arbitration Agreement. Tellingly, however, Ms. Rutland does not state that Mable Hodge actually represented, by words or conduct, that her husband had authority to act on her behalf, or that she otherwise held out her husband to UPAC as having authority to execute the arbitration agreement for her.

South Carolina’s appellate courts have repeatedly ruled that:

[t]he concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal. *Beasley v. Kerr-McGee Chem. Corp.*, 273 S.C. 523, 257 S.E.2d 726 (1979); *Visual Graphics Leasing Corp. v. Lucia*, 311 S.C. 484, 429 S.E.2d 839 (Cl.App.1993). See also *Moore v. North American Van Lines*, 310 S.C. 236, 423 S.E.2d 116 (1992) (basis of apparent authority is representations made by principal to third party and reliance by third party on those representations).

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R & G Const., Inc. v. Lowcountry Regional Transp. Authority, 343 S.C. 424, 540 S.E.2d

113, 118 (Ct. App. 2000) (emphasis added).

It is essential to the doctrine of apparent agency that the purported principal has in some fashion represented or "held out" the purported agent as having been given authority by the principal.

UPAC has presented no such evidence to the Court. Mable Hodge is now deceased. Thus, only UPAC is in a position to come forward with evidence of words or actions by Mable Hodge holding out her husband to UPAC as her agent with authority to make a contractual waiver for her, and only UPAC can show that it reasonably relied on its belief in Mr. Hodge's authority. This UPAC has not done, other than pointing out the obvious fact that Mable Hodge was admitted to the facility and stayed there. Under the cases discussed above, this is not enough. Nor can UPAC demonstrate "reasonable reliance" when its own "Arbitration Checklist" directs that its employees must obtain the patient's own signature on the Arbitration Agreement when the patient is competent, and when the Arbitration Agreement itself recites that its execution "is not a precondition to admission." (UPAC Arbitration Agreement at 5)

Similarly, UPAC argues that Mable Hodge should be equitably estopped from denying the enforceability of the Arbitration Agreement because she received the "benefit" of staying in their nursing home. Putting aside the issue of whether the stay was a benefit to Mable Hodge, there is no question that she received no "benefit" from the entirely separate Arbitration Agreement that UPAC seeks to enforce against her. Equitable estoppel applies only to prevent a party from relying on one part of a contract while seeking to deny another part of the same contract. As our Court of Appeals has ruled: "[i]n the arbitration context, the doctrine [of equitable estoppel applies] when [one party] has consistently maintained that other provisions of

the same contract should be enforced to benefit him.” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (2012) (emphasis added) (internal citations omitted). Assuming that Mable Hodge received some benefit from UPAC’s 12-page Admission Agreement, there can be no question that Mable Hodge received no benefit from the separate 5-page UPAC Arbitration Agreement. Because Mable Hodge is not seeking to enforce any part of the Arbitration Agreement against UPAC, equitable estoppel does not apply.⁴

In the *Scott* case cited above, UPAC made precisely the same arguments to Judge Mullen and to the Court of Appeals that it is making to this Court today. The Court of Appeals gave short shrift to those arguments: “We decline to address Heritage’s remaining arguments because we find this issue [the fact that the resident never signed the Arbitration Agreement] is dispositive.” *Scott*, at *2. That is, UPAC’s failure to follow its own procedures and obtain a valid Arbitration Agreement signed by a competent patient prevents it from arguing that the resident, simply by staying at its facility, is somehow bound to an agreement that she never signed.

Moreover, the Supreme Court in *Coleman* addressed these same merger and estoppel arguments in detail and held that the nursing home’s arbitration agreement did not merge with the nursing home’s separate admission agreement. The Court held that the nursing home had chosen to make the admission agreement and the arbitration agreement two separate documents and because it had drafted the documents, any ambiguity would be resolved against it. The Court then noted that the nursing home’s admission agreement contained language that expressly and intentionally made it a separate agreement from the arbitration agreement. That is equally

⁴ UPAC also argues that Mable Hodge was a third-party beneficiary of the Arbitration Agreement, and therefore is bound by it. The Court finds this argument unpersuasive, as the third-party beneficiary doctrine operates to allow a third party to enforce a contract to which he or she is not a party. Since the Plaintiffs are not seeking to enforce the Arbitration Agreement, the third-party beneficiary doctrine does not apply.

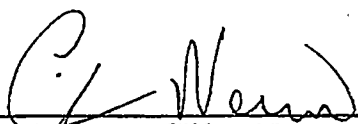
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true of the case at hand. UPAC's Admission Agreement states on its face that it is governed by South Carolina law and "is the exclusive statement of the terms and conditions between the parties with respect to the matters set forth herein, and supersedes all prior agreements. . . ." (UPAC Admission Agreement at 9, paragraph I (emphasis added)) UPAC's Arbitration Agreement, by contrast, provides that it is governed by federal law and that "[t]he signing of this Agreement is not a precondition to admission." (UPAC Arbitration Agreement at 5) That is, both documents prepared by UPAC acknowledge that the Admissions Agreement is the sole agreement governing the terms and conditions of the patient's admission to the nursing home, and thus Mable Hodge's admission did not operate to merge these two separate agreements or to bind her to an Arbitration Agreement she never signed.

The Supreme Court in *Coleman* also noted that "the [Arbitration Agreement] could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate." 407 S.C. at 355. The UPAC arbitration agreement in the case at hand contains the exact same language: "This Agreement may be revoked by written notice to the Healthcare Center from the Patient/Resident within thirty (30) days of signature." (UPAC Arbitration Agreement at 5) Finally, the Supreme Court in *Coleman* held that even if there is "an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter." *Id.* at 355-56. Each of those reasons applies with equal force to the case at hand, and the Supreme Court has clearly held that, in these circumstances, the nursing home cannot prevail on a claim for merger or equitable estoppel.

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For each of these independent reasons, the Court finds that UPAC did not enter into a binding Arbitration Agreement with Mable Hodge and the Motion to Dismiss or to Compel Arbitration is DENIED.



~~The Honorable~~ Clifton Newman
South Carolina Circuit Court Judge

March 16, 2015
~~Kingstree~~, South Carolina
Charleston

FILED
BAMBERG COUNTY
IN THE COURT OF COMMON PLEAS
2015 MAR 27 AM 10:03
FOR THE SECOND JUDICIAL CIRCUIT
JAMES B. HIERS
CLERK OF COURT
BAMBERG, SC
ACTION NO: 2014-CP-05-17

STATE OF SOUTH CAROLINA

COUNTY OF BAMBERG

CAMILLE HODGE, JR, as personal
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HODGE,

Plaintiff,

-vs-

UNIHEALTH POST-ACUTE CARE OF
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PRUITT HOLDINGS, INC. a/k/a UHS-Pruitt
Corp.; R. DALE PADGETT, M.D., P.A.; and
DR. HERBERT A. MOSKOW;

Defendants.

ORDER DENYING DEFENDANTS'
MOTION TO COMPEL DEPOSITION

CAMILLE HODGE, SR.,

Plaintiff,

-vs-

UNIHEALTH POST-ACUTE CARE OF
BAMBERG, LLC f/k/a Bamberg County
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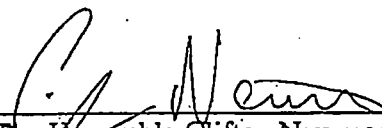
Defendants.

CIVIL ACTION NO: 2014-CP-05-19

Attest
JAMES B. HIERS
CLERK OF COURT
BAMBERG COUNTY, SC
A TRUE COPY

The Defendant, Unihealth Post-Acute Care of Bamberg, LLC ("UPAC") moves to
compel the deposition of Camille Hodge, Sr. related solely to issues concerning its Arbitration
Agreement. For the reasons explained fully in this Court's Order on Defendant's Motion to

Dismiss or to Compel Arbitration, the motion to compel the deposition of Mr. Hodge is
DENIED.



The Honorable Clifton Newman
South Carolina Circuit Court Judge

March 16, 2015
~~Kingsree~~, South Carolina
Christy,

STATE OF SOUTH CAROLINA

COUNTY OF BAMBERG

CAMILLE HODGE, JR, as personal
representative of the estate of MABLE
HODGE,

Plaintiff,

-vs-

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PRUITT HOLDINGS, INC. a/k/a UHS-Pruitt
Corp.; R. DALE PADGETT, M.D., P.A.; and
DR. HERBERT A. MOSKOW;

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE SECOND JUDICIAL CIRCUIT

CIVIL ACTION NOS: 2014-CP-05-17 and

**ORDER DENYING DEFENDANT UPAC'S
MOTION FOR RECONSIDERATION**

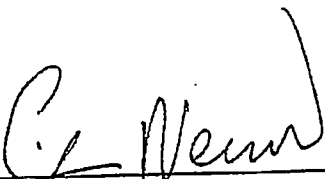
CIVIL ACTION NO: 2014-CP-05-19

FILED
BAMBERG COUNTY
2015 MAY -4 PM 12:01
JAMES B. HIERS
CLERK OF COURT
BAMBERG, SC

This matter is before the Court on Defendant UPAC's Motion for Reconsideration of the
Court's Orders dated March 16, 2015.

After careful review of the submissions of counsel and applicable law, the Motion is hereby denied.

AND IT IS SO ORDERED.



Clifton Newman
Presiding Judge

April 30, 2015
Columbia, South Carolina