THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

Case No. 2013-CP-46-2930
Appellate Case No. 2014-001624

Mae Ruth Davis Thompson, Individually and as the appointed Personal Representative of the Estate of Eula Mae Davis, Deceased . . . . . .Respondent,

v.

Pruitt Corporation d/b/a UHS-Pruitt Corporation; UHS-Pruitt Holdings, Inc.; UHS of South Carolina-East, LLC; United Health Services of South Carolina, Inc.; United Clinical Services, Inc.; United Rehab, Inc.; Rock Hill Healthcare Properties, Inc.; Uni-Health Post Acute Care-Rock Hill, LLC d/b/a UniHealth Post Acute Care-Rock Hill . . . . . Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The parties agree that *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014) applies to the interpretation of the Adult Health Care Consent Act (S.C. Code Ann. § 44-66-10 *et. seq.* (2002)) ("the Act") (Respondent's Brief at 5). Additionally, the parties recognize that common law contract principles may also bind a non-signatory to a contract (Respondent's Brief at 9). However, while the Defendants seek to enforce the Arbitration Agreement contained in the Admission Agreement to UniHealth Post Acute Care – Rock Hill ("UPAC- Rock Hill" or "the Facility") through the plain terms of the agreements and the statutory and common law of South Carolina, the Respondent seeks to avoid her contractual obligation to arbitrate by arguing that the Act is inapplicable to agreements despite the lack of an anti-merger clause or other indicia of separateness which would prevent merger, that there was no agency relationship between the decedent and her son who signed the admissions paperwork despite a course of conduct which suggests otherwise, that the decedent was not a third-party beneficiary to the agreements despite the fact that they were executed *solely* for her care and benefit, and that the Respondent cannot be equitably estopped from repudiating the arbitration agreement despite her presence when the agreement was signed. For these reasons, and as will be more fully set forth herein, the arguments raised by the Respondent should be rejected, and the trial court's order should be reversed.

ARGUMENT

I. The Adult Health Care and Consent Act applies because the admissions documents, including the Arbitration Agreement, merged at the time of execution.

Respondent contends that the Act is not applicable to the Arbitration Agreement in this case because the Arbitration Agreement does not merge with the other admissions documents because the language in the documents "demonstrat[e] the parties' intent that the Admission and

Arbitration Agreement are not to be considered a single contract" and that the documents were not "executed 'at the same time, by the same parties, for the same purpose, and in the course of the same transaction.'" (Respondent's Brief at 8-9). However, this argument ignores the plain language of the agreements and the Supreme Court's opinion in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014).

Respondent seeks to shoehorn the agreements in this case into the contrary intent exception to the merger doctrine which the *Coleman* court held applied to the agreement in that case, by alleging that the "exhibit language" in the Admissions Agreement does not refer to the arbitration agreement and that the arbitration agreement is voluntary and not required for admission, thereby evidencing intent that the doctrine of merger not apply. However, Respondent admits in her brief that the Arbitration Agreement was presented along with the Admission Agreement and the other "stack of documents" at admission. (Respondent's Brief at 2). It is not clear why all the rest of the "stack of documents" would, presumably, be considered "exhibits" to the Admission Agreement while the arbitration agreement would not. There is nothing ambiguous about describing the documents presented with the admission agreement as "exhibits."[1]

Further, in his own testimony, Andrew Davis, who completed the admissions paperwork on behalf of his mother, testified that he recalled signing the arbitration agreement and that he and a representative of the Facility "went through it, *as an admission document.*" (R. p. 292, ll. 5-7). When asked if he remembered anything about signing the arbitration agreement, Mr. Davis testified that he "remember[ed] going through the process of filling out *the admission agreement.* Arbitration is a word that would stick to your mind, you know." (R. p. 293, ll. 3-6). Thus, Andrew

[1] Later in the Admissions Agreement, it states that "All addendums are incorporated herein by reference." (R. p. 77). While the language used in this section is slightly different, it again evinces the intent of the parties to include all documents executed at that time as a single contract.

Davis himself understood that the arbitration agreement was part of the admission agreement to the Facility.[2]

Respondent also misinterprets *Coleman* by arguing that "[t]he *Coleman* admission agreement included similar 'exhibit' language that did not detract from the 'separateness' of the admission and arbitration agreement." (Respondent's Brief at 7). The *Coleman* admission agreement stated that:

> This Agreement, including all Exhibits hereto, *and the Arbitration Agreement* between the Facility and the Resident, if the parties sign one, supersede all other agreements, either oral or in writing between the parties, and contain all of the promises and agreements between the parties. Each party to this Agreement acknowledges that no representations, inducements, or promises have been made by any party or anyone acting on behalf of any party, that are not contained in this Agreement *or in the Arbitration Agreement*. This Agreement may be amended only by a written agreement signed on behalf of [...]

407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). The admissions agreement in *Coleman* refers to the "Agreement, including all Exhibits hereto" before referring *separately* to the arbitration agreement. *Id.* Thus, the plain language of the admission agreement in *Coleman* considers the arbitration agreement separate from the admissions agreement and its exhibits. Here, on the other hand, the admission agreement simply refers to "[t]his Agreement *together with all exhibits*." (R. p. 76) (emphasis added). The arbitration agreement is never set out separately from the other exhibits to the Admission Agreement, unlike in *Coleman*. Instead, a caption on the lower left corner of the arbitration agreement identifies the documents as part of the "Admission Packet-South Carolina Healthcare Centers". Unlike in the admissions documents here, it was the repeated,

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[2] The Defendants assert that there was no ambiguity in the Admission Agreement regarding the meaning of the term "exhibits." However, to the extent such an ambiguity exists, "where a contract is ambiguous, parol evidence may be admitted to supply the deficiency and establish the true intent." *Skinner v. Elrond*, 308 S.C. 239, 244, 417 S.E.2d 599, 602 (Ct. App. 1992) (citing *U.S. Leasing Corp. v. Janicare, Inc.*, 294 S.C. 312, 364 S.E.2d 202 (Ct. App. 1988)).

separate referral to the arbitration agreement by the admission agreement at issue in *Coleman* that the Supreme Court found to "recognize[] the 'separatedness' of the A[rbitration]A[greement] and the admission agreement." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

Respondent focuses on the *Coleman* court's brief mention of the arbitration agreement's thirty-day disclaimer because she recognizes that the "anti-merger" language that the Supreme Court found compelling in *Coleman* is not present in this case. However, prior to the one sentence discussion of the disclaimer, the Supreme Court has already noted that the admission agreement "[o]n its face . . . recognizes the 'seperatedness' of the AA and the admission agreement." *Id.* at 355, 755 S.E.2d at 455. The disclaimer language is merely presented as additional evidence, where the intent of the parties was already evident. Thus, the mere existence of language allowing a party to disclaim an arbitration agreement within thirty (30) days of execution is not, standing on its own, sufficient evidence of contrary intent to defeat merger.

This is especially true in the instant case. As an initial matter, to say that the revocability of the arbitration agreement in the admissions documents makes it fundamentally different than, and therefore separate from, the admissions agreement and its exhibits is logically inaccurate. The admissions agreement itself is just as capable of revocation, as Ms. Davis could have left the Facility at any time. Just as importantly, just as the arbitration agreement was capable of revocation within 30 days, this same right was provided to Ms. Davis with regard to other portions of the Admission Agreement. (R. p. 76) (giving Facility the right to make changes/amendments to agreements but allowing patient to reject these changes/modifications within 30 days by writing). Thus, there is no material difference between the arbitration agreement and the other documents executed as part of Ms. Davis's admission to the Facility.

Finally, Respondent argues that merger does not apply to the documents at issue because they were not executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." (Respondent's Brief at 8). Respondent concedes that the documents were executed at the same time, but disputes that the parties were the same or that the purpose of the documents was the same. *Id.* However, in *Coleman*, the Supreme Court held that an arbitration agreement signed by a representative in conjunction with other admissions documents was executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. Thus, any claim that the documents were not executed for the same purpose is foreclosed by the express language of *Coleman.*

Respondent asserts that the agreements were not executed by the same parties because the executed arbitration agreement "includes Son as a party." (Respondent's Brief at 8). However, Respondent contradicts this in her own brief where she denies that "Son entered a valid contract with Appellants in his individual capacity." (Respondent's Brief at 19). Thus, Respondent admits that the parties to all agreements are the same.

Additionally, the son was the individual who signed all agreements on behalf of his mother The Admission Agreement itself states that it is between the Facility, the Patient/Resident, "and certain other undersigned parties." (R. p. 68). The agreement goes on to define certain responsibilities of a signatory representative under the agreement, such as responsibility for payment of funds under certain conditions. *Id.* Similarly, in Section III, the Admission Agreement sets forth the responsibilities of "[t]he Patient/Resident, *and/or undersigned parties*." (R. p. 69) (emphasis added). Therefore, Andrew Davis, as signatory and representative, was a party to both the Admission Agreement and the arbitration agreement. The documents were executed at the

same time, by the same parties, for the same purpose, and the documents merge and the Respondent is bound by arbitration agreement.

II. Andrew Davis was his mother's agent and was authorized to execute the agreements on his mother's behalf.

The arbitration agreement is also binding on the Respondent because Andrew Davis was his mother's authorized agent. Respondent attempts to distinguish this case from case law cited in Defendants' brief by alleging that no conduct on the part of Ms. Davis indicated to third-parties that Andrew Davis was authorized to act on her behalf. (Respondent's Brief at 11-12). However, Andrew Davis and his sister, the Respondent, both testified that Andrew Davis was responsible for all of their mother's financial affairs, business dealings, and that Mr. Davis was the one who would sign documents for her. (R. pp. 298-299). He had done this for several years without his mother ever manifesting to him that he did not have the authority to make such decisions or sign things on her behalf. (R. pp. 285-287; 290); (R. p. 298, l. 7 – p. 299, l. 10). When asked, he stated that his mother was "all right with [him] signing documents for her." (R. p. 291, ll. 2-4). In fact, Andrew Davis testified that Ms. Davis had authorized him to make healthcare admissions decisions specifically. (R. p. 286, ll. 14-21).

Thus, the uncontroverted testimony is that Ms. Davis represented to others that her son, Andrew Davis, was her agent for the purposes of healthcare administration and other personal and financial affairs. The apparent authority of an agent results from conduct or other manifestations of the principal's consent, whereby third persons are justified in believing the agent is acting within his authority." *R & G Constr. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433-34, 540 S.E.2d, 113, 118 (Ct. App. 2000). "Such authority is implied where the principal passively permits the agent to appear to a third person to have the authority to act on his behalf." *Id.* at 434, 540 S.E.2d at 118. "Agency may be implied or inferred and *may be proved circumstantially by the*

conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal." *Id.* (emphasis added). Here, Andrew Davis not only exhibited a pretense of authority with his mother's knowledge, but admits that she had actively given him permission to act in this capacity. Andrew Davis was, therefore, an agent of his mother and his signature on the admissions documents is binding as to her and the Respondent.

III. Plaintiff is bound because Ms. Davis was a third-party beneficiary of the agreements.

Respondent also contends that Ms. Davis was not a third-party beneficiary to the arbitration agreement. The bases for this are threefold: (1) that there is no valid contract and, therefore, there can be no third-party beneficiary of that contract; (2) that Ms. Davis was not intended to be a third-party beneficiary of the contract; and (3) that Ms. Davis never consented to arbitration and, therefore, cannot be bound to arbitrate.

Respondent relies on the affidavit of an administrator for the Facility, Kate Johnson, for her claim that no binding contract exists between the Facility and Andrew Davis. In the affidavit, Ms. Johnson indicates that Andrew Davis signed the admissions paperwork as a representative of his mother. Defendants do not dispute this and, in fact, specifically argue this is the case. However, this statement is in no way inconsistent with the idea that Andrew Davis also signed certain paperwork, including the arbitration agreement individually. In fact, Respondent admits that the documents themselves indicate otherwise. (Respondent's Brief at 15).

Respondent also asserts that Ms. Davis could not be a third-party beneficiary of the agreements because there was no intent for her to be a beneficiary at the time the agreements were made. The only South Carolina authority the Respondent cites for this proposition is *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009). The cited language, however, has nothing to do with arbitration and merely recites the

maxim of contract law that contracts must be construed based on the intent of the contracting. *Id.* Ms. Davis is clearly the party who is the direct beneficiary of the contract at issue. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) (citation omitted) ("A third party beneficiary is a party that the contracting parties intend to directly benefit"). The agreements were *solely* for her admission and care at the Facility. Under these circumstances, South Carolina Federal Courts have repeatedly found that the resident is a third-party beneficiary of arbitration agreements signed by a family member/representative. *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, 2014 WL 6863550 at *3 (D.S.C. Oct. 31, 2014); *McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 WL 6318575 at *3 (D.S.C. Dec. 15, 2011); *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 WL 4089435 at *6 (D.S.C. Sept. 13, 2011). Here, Ms. Davis is a third-party beneficiary of the admissions agreements and is bound by those agreements.

These decisions all also stand for the proposition that a non-signatory can be bound by an arbitration agreement. *Id.* The Respondent asserts that none of the doctrines discussed in *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), which recognizes that non-signatories to a contract can be required to arbitrate claims, apply in this case. This is an overly narrow reading of *Pearson.* Although the *Pearson* court makes reference to the doctrines discussed by Respondent in her brief, the opinion does not indicate that this is an exclusive list. More importantly, in *Pearson*, the court held that "the determination of whether a nonsignatory is bound by a contract presents no state law question of contract formation or validity." *Id.* at 289, 733 S.E.2d at 601. Because no such state law questions are presented, "the court looks to the federal substantive law of arbitrability to resolve the question." *Id.* at 289-90, 733 S.E.2d at 601. In *Gilbert*, *McCutcheon*, and *Wiggins*, every South Carolina Federal Court examining the issue has held that the resident of a nursing Facility can be bound to an arbitration agreement as part of

the admissions paperwork because the resident is a third-party beneficiary of the agreement. Therefore, Ms. Davis is bound to the arbitration agreement as a third-party beneficiary of the agreement.

Respondent also asserts that the language in the arbitration agreement does not encompass the complaint at issue here because it is limited to "**ANY DISPUTES THAT MAY ARISE IN THE FUTURE BETWEEN THE PARTIES**." (R. p. 80). This is a misrepresentation of the language in the agreement. Initially, this language comes from a disclaimer at the top of the document, which is simply there to make it clear to the reader that the document is an arbitration agreement and that the signing the agreement will waive the right to a jury trial. *Id.* The scope of the agreement is set forth just below the disclaimer and includes "[a]ny and all claims or controversies arising out of or in any way relating to" the admissions paperwork or "the care or services provided by, the Healthcare Center," among other topics. *Id.* The document also states that it is for the benefit and binding on "Patient/Resident and the Healthcare Center; their successors, assigns, and *intended and incidental beneficiaries*." (R. p. 81) (emphasis added). The agreement goes on to define "Patient/Resident" as including "his or her guardian, attorney-in-fact, agent, sponsor, representative, or any person whose claim is derived by through or on behalf of the Patient/Resident, including . . . any parent, spouse, child, executor, administrator, heri, or survivor entitled to a wrongful death claim." *Id. See also Allen v. Pacheco*, 71 P.3d 375 (Col. 2003) (holding that arbitration agreement applied to non-party spouse as heir of decedent).

Further, the sentence where the language quoted by the Respondent is found reads, in its entirety, that "**THE PATIENT/RESIDENT AND THE HEALTHCARE CENTER UNDERSTAND AND ACKNOWLEDGE THAT THIS AGREEMENT IS A VOLUNTARY AGREEMENT TO SUBMIT FOR RESOLUTION BY ARBITRATION ANY DISPUTES**

THAT MAY ARISE IN THE FUTURE BETWEEN THE PARTIES." (R. p. 80). In its proper context, the sentence makes clear to whom the agreement applies. Thus, the Complaint in this case clearly falls within the scope of the arbitration agreement.[3]

IV. The Respondent should be estopped from alleging the invalidity of the arbitration agreement

The Respondent is also equitably estopped from denying the validity of arbitration agreement. Respondent's assertion that the elements of equitable estoppel have not been satisfied are misplaced. Initially, as discussed, *supra*, the determination of whether a non-signatory is bound by an arbitration agreement is a matter of federal substantive law. *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 289-90, 733 S.E.2d 597, 601 (Ct. App. 2012). Therefore, Respondent's reliance on the common law of South Carolina for a determination of equitable estoppel is incorrect.

Under federal law, "[e]quitable 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 Co. v. Schwabedizzen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). Because such conduct is contrary to equity, "[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)). Here, Respondent accepted admission to the Facility in accordance with the admissions documents signed by her son, and now her estate seeks to repudiate these agreements because it does not like

[3] Additionally, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 739 S.E.2d 209, (2013) (citing *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996)).

the provisions of the arbitration agreement. Federal courts examining this issue have routinely held that such conduct estops a party from denying an arbitration agreement's validity. *See THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, 2014 WL 6863550 at *4 (D.S.C. Oct. 31, 2014); *McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 WL 6318575 at *2-3 (D.S.C. Dec. 15, 2011); *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 WL 4089435 at *6 (D.S.C. Sept. 13, 2011).

Even if the issue of equitable estoppel is examined under South Carolina law, however, the Respondent should still be estopped from denying the validity of the arbitration agreement. Ms. Davis, Andrew Davis, and Respondent, all acted in ways that took a contrary position to that now being taken by the Respondent. Andrew Davis and the Respondent, who was present at the time the documents were signed, held Andrew Davis out to the Facility as an individual who was authorized to sign the admissions documents on behalf of his mother, intended that this representation procure their mother's admission to the Facility, and now Respondent asserts that the agreements were never valid.

Similarly, Ms. Davis accepted the benefits of all the agreements signed by her son, Andrew Davis. She was admitted to the Facility and began receiving medical care. She also became capable of enforcing the arbitration agreement against the Facility in the event she had a complaint or issue. Respondent's assertion that she is not seeking to enforce either agreement is misplaced. Ms. Davis enforced the agreements when she was admitted to the Facility, as the sole purpose of the admissions documents was her admission. Ms. Davis was comfortable with her son signing her healthcare documents for her and never indicated anything to the contrary (R. p. 291, ll. 2-4; p. 296, ll. 15-19). Thus, Ms. Davis has enforced the agreement through her stay at the Facility and the Respondent may not now choose to disclaim portions that do not suit her.

As to the Facility, it relied on the representation of Ms. Davis and her children as to Andrew Davis's ability to sign the admissions paperwork, as evidenced by Ms. Davis' admission to the Facility, and have been prejudiced by the this reliance, as Respondent now seeks to repudiate the agreements. Respondent's contention that the Facility did not exercise reasonable diligence in determining whether Andrew Davis had a power of attorney or legal guardianship is unavailing. Initially, as discussed at length, *supra*, there are multiple ways that Ms. Davis can be, and is, bound to the contract with the Facility despite her non-signatory status. Thus, it is not unreasonable not to require proof of a power or attorney or guardianship.

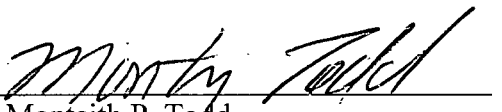
Perhaps more importantly, the requirement that an assisted care Facility establish that, prior to admittance, the patient's relative and signatory to the admissions paperwork obtain and provide documentation of a power of attorney or guardianship, or the verification that such a power of attorney or guardianship exists, would place an enormous burden on the family and/or patient to be admitted. Such a requirement would cause extended delay and hardship that would adversely affect the most vulnerable individuals. This requirement would also run afoul of federal law, as requiring proof of a legal power of attorney or legal guardianship before an arbitration agreement can be effective would place a requirement on arbitration agreements that does not exist for other agreements. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-44 (2006). Therefore, such a requirement should be rejected, and the Respondent should be equitably estopped from asserting the invalidity of the arbitration agreement.

Conclusion

Based on the foregoing, the Court should reverse the decision of the Circuit Court and compel arbitration in this case.

Respectfully Submitted,

SOWELL GRAY STEPP & LAFFITTE, LLC

BY: 

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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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 Final Reply Brief of Appellants by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

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