THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2014-CP-05-17 and 19
Appellate Case No. 2015-001183

Camille Hodge, Jr., as Personal Representative of the Estate
of Mable Hodge, Deceased . . . . . .Respondent,

v.

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, MD, PA; and Dr. Herbert A. Moskow,

of Whom 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.; and UHS-Pruitt Holdings, Inc. a/k/a
UHS-Pruitt Corp. are . . . . . Appellants.

Camille Hodge, Sr., ...Respondent,

v.

UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County
Nursing Center; United Health Services of South Carolina, Inc.;
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UHS-Pruitt Corp. are . . . . . Appellants.

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INTRODUCTION

Appellants in this case seek to enforce the arbitration agreement contained in the Admission Agreement to UniHealth Post-Acute Care of Bamberg, LLC, f/k/a Bamberg County Nursing Center ("UPAC-Bamberg" or "the Facility") through the terms of the agreements and the statutory and common law of South Carolina and the United States. Respondents seek to avoid their contractual obligation to arbitrate by arguing that there was no agency relationship between the decedent and her husband 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 Respondents are not equitably estopped from repudiating the arbitration agreement despite Ms. Hodge accepting all the benefits of the admissions agreements during her admission and care at the Facility. For these reasons, and as will be more fully set forth herein, the arguments raised by the Respondents should be rejected, and the trial court's order should be reversed.

ARGUMENT

I. Respondents are bound by the Admission Agreement and arbitration agreement

The arbitration agreement in this case is enforceable despite the unpublished Court of Appeals decision in *Scott v. Heritage Healthcare of Estill, LLC*, Op. No. 2014-UP-317 (S.C. Ct. App. filed Aug. 6, 2014). Plaintiffs argue that the *Scott* and *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346 755 S.E.2d 450 (2014) stand for the proposition that an admissions agreement including an arbitration agreement cannot be binding on a patient where the agreement is signed by a family member. (*See, e.g.*, Respondent's Brief at 7). This is an inaccurate statement of the law.

As an initial matter, the characterization of the factors in *Scott* relied upon by the trial court in reaching its decision is of no moment to this case. As admitted by Respondents, the trail court examined three factors from *Scott* and used those factors in its decision to deny arbitration in this case. (Respondent's Brief at 8-10). Whether the circuit court's reliance on these factors is characterized as a "test" or not, this reliance was improper, as "[m]emorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d)(2), SCACR. Nevertheless, Respondents brief and the lower court's opinion both cite heavily to and rely upon the unpublished *Scott* decision. This reliance is in error.

The trial court's holding court ignores established agency, third-party beneficiary, and equitable estoppel law. The validity of the arbitration agreement in this case must be determined in accordance with the 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), *vacated sub nom. Sonic Automotive, Inc.*, ___ U.S. ___, 131 S.Ct. 2872, 179 L. Ed. 2d 1184 (2011), *reinstated,* 395 S.C. 461, 719 S.E.2d 640 (2011). Ms. Hodge permitted Mr. Hodge, Sr. to sign contract on her behalf on this occasion and prior occasions, and Mr. Hodge had taken over many of his wife's medical affairs without objection, making him a general agent for his wife. *See R&G Constr., Inc., v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) ("When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances."); (R. pp. 262, 265-280); (R. p. 371, ll. 14-22). In allowing her husband to sign her into the Facility and

handle her other affairs, Ms. Hodge also conferred apparent authority on her husband to act on her behalf. *See Pee Dee Nursing Home v. Florence Gen. Hosp.*, 309 S.C. 80, 419 S.E.2d 834 (Ct. App. 1992).

Similarly, Ms. Hodge was a third-party beneficiary under the Admissions Agreement (including the arbitration agreement) at the Facility, as Ms. Hodge was the party that the contracting parties intended to directly benefit from the agreements. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) (citing *Touchberry v. City of Florence*, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988)). Even assuming the arbitration agreement is considered a separate contract, which Appellants deny, Ms. Hodge is the third-party beneficiary of that agreement as well as the arbitration agreement, which conferred its own benefits on Ms. Hodge.

Finally, Respondents are estopped from denying the validity of the arbitration agreement. Respondents argue that the estoppel claims must fail because "the resident never signed the Arbitration Agreement." (Respondent's Brief at 11). However, this claim ignores "[w]ell-established common law principles [including estoppel and agency which] dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288-89, 733 S.E.2d 597, 600-01 (Ct. App. 2012) (citing *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)). Certainly in the instant case had Ms. Hodge disagreed with Mr. Hodge, Sr.'s decision to execute the arbitration paperwork for her, she could have repudiated the Admission Agreement and attendant exhibits. However, Ms. Hodge never made any attempt to repudiate Admission Agreement and exhibits, including the arbitration agreement, while she was at the Facility. If Ms. Hodge had not wished to allow her husband to

have signed her admissions paperwork she had ample opportunity express her wishes. Instead, Ms. Hodge stayed at the Facility, enjoying the benefit of the Admissions Agreement, including its related agreements,[1] and continuing to represent by her presence that her husband was authorized to sign these agreements. Respondents should now be estopped from taking a contrary position.

The trial court's holding that the lack of a valid power of attorney someone prohibits Ms. Hodge from being bound by the arbitration agreement signed by her representative, Mr. Hodge, Sr., ignores all these common law principles and treats arbitration agreements differently than other contracts, in contravention of federal law. *See, e.g. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). In fact, since *Coleman*, Federal Courts in South Carolina interpreting the FAA in light of the *Coleman* decision have reaffirmed the validity of these common law doctrines in enforcing arbitration. *See THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, 2015 WL 1268185 at *2 (D.S.C. Mar. 19, 2015) ("the benefits of admission operate to stop the defendant from rejecting arbitration now").

The other basis cited by the trial court and Respondents for denying Appellants' motion to compel arbitration, that the Facility had an internal checklist which required staff to get the patient's own signature if she was competent, is equally unavailing. The mere existence of an internal policy regarding preferred practices cannot, however, invalidate the FAA or common law contract doctrines which would bind Ms. Hodge under the arbitration agreement. *See, e.g., Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 711 S.E.2d 908 (2011) (in negligence case

[1] To the extent Respondents argue that the plaintiff received no benefit under the admissions paperwork signed prior to her admission at UPAC-Bamberg, Appellants would assert that her admission and stay at the Facility clearly belie this claim. Additionally, the arbitration agreement itself conferred benefits upon the plaintiff, as her admission allowed the right to immediately enforce the agreement against the Appellants, with the attendant benefits of arbitration (i.e. quick and inexpensive resolution), and the Facility agrees to compensate the arbitration service for up to five (5) days of hearing costs on behalf of both parties, thereby saving the Ms. Hodge a significant amount of money, among other benefits.

although internal policies can be evidence of standard of care they cannot create/change legal duty). Nothing in the admissions documents themselves or in the arbitration agreement require strict adherence to the checklist in order to make the Admission Agreement and incorporated arbitration agreement valid. Therefore, any reliance on the arbitration checklist to invalidate the arbitration agreement is misplaced.[2]

II. Appellants should have been permitted to depose Camille Hodge, Sr.

Appellants should have been permitted to depose Camille Hodge, Sr. prior to the Court's hearing on their Motion to Compel Arbitration. As an initial matter, Respondents fail to even address the issues of the factual nature of third-party beneficiary and equitable estoppel doctrines, focusing instead only on agency. *See Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) (upholding a grant of summary judgment because there was no evidence appellant was an intended third-party beneficiary); *Gaymon v. Richland Mem'l Hosp.*, 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997) (holding that "equitable estoppel may involve a question of fact for the fact-finder").

Even this focus is misplaced, however. The existence of agency is a factual question. *Am. Fed. Bank FSB v. Number One Main Joint Venture*, 321 S.C. 169, 173-74, 467 S.E.2d 439, 442 (1996) (citing *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991)). Appellants seek to question Mr. Hodge, Sr. as a witness regarding the existence of the agency relationship because he has personal knowledge of the relationship between him and his wife and any representations his wife may have made to the facility. Mr. Hodge, Sr. is uniquely positioned

[2] Respondents also argue that federal regulations require a patient's consent for health care decisions or authorizations in order for a facility to receive federal funds through Medicare before a nursing home may receive Medicare funds. (Respondent's Brief at 11). Simply put, these federal regulations have no bearing on whether or not Ms. Hodge was bound to the arbitration agreement in this case, as a facility's receipt of federal funds have no bearing on either the FAA or common law contract doctrines.

to provide this information, as Ms. Hodge is deceased and no longer able to provide answers to these questions. Nevertheless, Respondents claim that the facts in this case "uncontested" while refusing to allow Appellants access to the primary witness in this case. Because of the factual nature of the issues on which a determination of the arbitrability of these claims must be based, it was reversible error for trial court to refuse to allow the deposition of Mr. Hodge, Sr.

III. The issue of the arbitrability of Mr. Hodge, Sr.'s claims is properly preserved

Appellants argue that Mr. Hodge, Sr.'s claims must be arbitrated pursuant to the agreement he signed with UPAC-Bamberg. This argument is preserved. Respondents claim that no distinction was made between the claims in the Circuit Court and that the argument was expressly waived by counsel for the Appellants by a statement made during the hearing on the motion that the memorandum in the lower court "basically covers both cases" and that "[t]he issue is the same in both cases." (Respondent's Brief at 16). However, Respondent's brief misrepresents this statement.

The issue in both cases is the issue of whether or not the arbitration agreement signed by Mr. Hodge, Sr., on behalf of the decedent and individually, is a valid arbitration agreement. This point is repeatedly made by Respondents in their brief. A broad, qualified generalization taken out of context that the cases are "basically" the same does not expressly waive Appellants' arguments regarding the enforceability of the arbitration agreement as to Mr. Hodge, Sr. In fact, the distinction was made by Appellants in filing two separate Motions to Dismiss and Compel Arbitration and comments during the hearing that Appellants had filed two separate motions. (R. p. 141); (R. p. 146); (R. p. 393, ll. 9-10) ("we have to move the Court to enforce the arbitration that *they* signed"); (R. p. 394, ll. 17-18) ("we acknowledge he [Mr. Hodge, Sr.] signed the arbitration agreement"); (R. p. 398, ll. 2-4) ("I filed two separate - there's two cases. I filed

motions to compel arbitration for both cases"). Similarly, the lower court acknowledged that its ruling applied to both cases. (R. p. 398, l. 14) ("whatever ruling applies to all pending matters"). (emphasis added).

Therefore, the issue of whether Mr. Hodge, Sr. may be compelled to arbitration individually was properly raised to the Circuit Court.

Conclusion

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

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October 13, 2015

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CERTIFICATE OF COUNSEL

Counsel for Appellants certifies that the Final Reply Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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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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RE: Camille Hodge, Jr., as Personal Representative of the Estate Of Mable Hodge v. UniHealth Post-Acute Care of Bamberg 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, MD, PA; and Dr. Herbert A. Moskow

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Appellate Case No. 2015-001183 (Consolidated for Appeal)
Our File No. 5593/1530

Dear Ms. Kitchings:

I enclose for filing the originals (unbound) and fifteen copies each of the Final Brief of Appellants and Final Reply Brief of Appellants in the above-referenced matter. Please return a clocked-in copy of same to me for our records.

By copy of this letter to counsel shown below, we are serving a copy of each of our briefs upon them by mail. Thank you for your assistance.

SOWELL S G GRAY

Litigation is our Business.

Yours truly,

Monteith P. Todd

MPT:rco
Enclosures

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