THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

Opinion No. 5384 (S.C. Ct. App. Filed March 2, 2016)
Appellate Case No. 2016-001057

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 . . . . . Petitioners.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

The Respondent's return to the petition for writ of certiorari highlights the need for this Court's review of the Court of Appeals' decision. The case highlights a number of inconsistencies in interpretation of South Carolina law regarding arbitration agreements and the Supreme Court should accept certiorari to address these issues and reverse the Court of Appeals.

I. The arbitration agreement is part of the Admission Packet and merges with the other documents to create the contract for Ms. Davis's admission to the Facility

The Respondent's return makes a number of arguments in an attempt to force the agreement in this case into the mold of *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014). These arguments are not persuasive, as the language exhibited by the two agreements is not the same. Respondent is ultimately left only with the argument that the voluntariness of the arbitration agreement prevents its merger with the remaining portions of the admission agreement. This argument fails and the Supreme Court should grant certiorari and reverse the Court of Appeals on the issue of merger.

The Respondent attempts to reframe the holding of *Coleman* in her return by asserting that the *Coleman* agreement's intention not to merge was evidenced solely by the voluntariness of the arbitration agreement. However, this assertion ignores the primary basis for the holding of non-merger in *Coleman*, which was that the *specific language of the admission agreement referred separately to the admission agreement and arbitration agreement*, evidencing an intent for the agreements not to merge. *Coleman*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014). Only after acknowledging that this clause, "[o]n its face . . . recognizes the 'separatedness' of the AA and the admission agreement" did the *Coleman* court address, as additional support, the voluntariness of the arbitration agreement.

In the instant case, the Petitioners' admission agreement lacks the anti-merger language in *Coleman*, which Respondent does not address. The *Coleman* agreement stated that "[t]his Agreement, including all Exhibits hereto, and the Arbitration Agreement between the Facility and the Resident, if the parties sign one, supersede all other agreements . . . ." *Id.* at 355, 755 S.E.2d at 455. In this case, however, the admission agreement states that "[t]his Agreement together with all exhibits is the exclusive statement of the terms and conditions between the parties . . . ." (R. p. 76). Thus, the agreement in *Coleman* notes that there are exhibits to the admission agreement but then *separately identifies* the arbitration agreement, making clear that it is not intended to be part of the admission agreement and its exhibits. In this case, however, the plain language of the admission agreement states that all contemporaneous agreements are exhibits to the admission agreement. Further in this case, all the agreements, including the arbitration agreement, are labeled "Admission Packet-South Carolina Health Centers." (R. pp. 68-114).

Respondent attempts to circumvent the evidence of the parties' intent that all admissions documents be construed together by asserting that the term "exhibits" is not defined and, therefore, ambiguous. As an initial matter, there is nothing ambiguous about this term and Respondent offers no evidence that the term is unambiguous other than the fact it is not defined by the contract and is allegedly inconsistent with the arbitration agreement's thirty (30) day disclaimer.[1] However, where a contract does not define a term, a court should "look to the common meaning of [the term] in conjunction with the other language in the contract." *S.C. Farm. Bureau Mut. Ins. Co. v. Oates*, 356 S.C. 378, 382-83, 588 S.E.2d 643, 646 (2003) (citing *Strother v. Lexington Cnty. Recr. Comm'n*, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998) (holding that undefined terms must be

[1] Respondent also claims "other language" in the arbitration agreement supports her assertion of non-merger but does not cite to any "other language" in support of this claim.

interpreted in accord with their usual and customary meaning); *USAA Prop. and Cas. Ins. Co. v. Rowland*, 312 S.C. 536, 539, 435 S.E.2d 879, 881-82 (Ct. App. 1993) (where terms are undefined in insurance policy, the term should be defined accord to the usual understanding of the term to the normal person)). *See also Bardsley v. Gov't Emps. Ins. Co.*, 405 S.C. 68, 76, 747 S.E.2d 436, 440 (2013) ("[i]t is a well-settled principle of contract interpretation that absent a contractual definition to the contrary, contract language is given its ordinary and plain meaning") (citing *Dean v. Am. Fire & Cas. Co.*, 249 S.C. 39, 41, 152 S.E.2d 247, 248 (1967)). The plain meaning of the term "exhibit" is "a document attached to and made part of a . . . contract," and this definition clearly indicates that the arbitration agreement was meant to be and exhibit of the admission agreement. *Black's Law Dictionary* 614 (8th ed. 2004). *See also Heilker v. Zoning Bd. of Appeals of City of Beaufort*, 346 S.C. 401, 409, 552 S.E.2d 42, 46 (Ct. App. 2001) (holding that dictionaries can assist the court in defining terms); (R. p. 291-94) (Andrew Davis testimony that that the arbitration agreement was "an admission document" presented to him and signed at the same time as the other agreements).

Even assuming, *arguendo*, that the lack of definition in the contract for the term "exhibit" makes it ambiguous, the court must to look to at the intention of the parties to determine the contract's meaning. *Madden v. Bent Palm Invs., LLC*, 386 S.C. 459, 464-65, 688 S.E.2d 597, 600 (Ct. App. 2010) (citations omitted). *See also Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009) ("When an agreement is ambiguous, the court should seek to determine the parties' intent") (citing *Ebert v. Ebert*, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995)); *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25 (holding that "it is a general rule that parol evidence is admissible to show the true meaning of an ambiguous written contract"). Here, Mr. Davis's testimony establishes that he understood the arbitration agreement

to be part of the admission agreement to the Facility. (R. p. 292, ll. 5-7; R. p. 293, ll. 3-6). Thus, it was erroneous for the Court of Appeals to find that the term was "ambiguous." *Thompson v. Pruitt Corporation*, Op. No. 5384 (S.C. Ct. App. filed Mar. 2, 2016) (App. 430-31).

Respondent attempts to undercut the plain language of the admission agreement by asserting that the thirty (30) day disclaimer language is inconsistent with the language in the admission agreement, which incorporates all exhibits, including the arbitration agreement. However, there is no inconsistency in incorporating all agreements provided to Mr. Davis into the complete admission agreement to the Facility and allowing certain portions to contain elections. In fact, many other portions of the Admission Packet contain voluntary elections. *See* (R. p. 66, ¶ 8; R. pp. 85-114). Similarly, the admission agreement itself contains language of voluntariness, giving the patient thirty (30) days to reject any changes or modifications to the terms of her stay at the Facility. (R. p. 76). Thus, there is nothing in the language of the arbitration agreement that is inconsistent with or contradicts the plain language of the admission agreement that incorporates all exhibits, including the arbitration agreement.[2] Therefore, the agreements merge and the Supreme Court should grant certiorari and reverse the Court of Appeals.

II. The common law contract doctrines of agency, third-party beneficiary, and equitable estoppel bind Respondent to the arbitration agreement at issue

A. Agency

The Court of Appeals held that the Andrew Davis was not his mother's agent when he signed the agreements in the Admission Packet on behalf of his mother and, therefore, she is not

[2] While the Respondent asserts that the voluntariness of the arbitration agreement is conclusive evidence of an intent for the agreements to remain separate under *Coleman*, in the instant case this voluntariness does not distinguish the arbitration agreement from many other provisions in the Admission Packet. Thus, while such a provision may have been sufficient indicia of separatedness in *Coleman*, here it does not evidence any intent that the arbitration agreement be treated differently than the other portions of the Admission Packet.

bound by the arbitration agreement. Indeed, Respondent asserts that the Mr. Davis could not have been his mother's general agent because she made no representations to Petitioners. However, respondent and Mr. Davis both admitted that he had authority from his mother to sign contracts and agreements such as these on her behalf, and she was comfortable with this arrangement. (R. p. 291, ll. 2-4) ("Q: And your mother was all right with you signing documents for her? A: Yes."); (R. p. 300-301) ("Q: Now, who signed the paperwork? A: Probably Phillip [Andrew Davis]. Q: And if there was a contract your mother was entering into . . . would Phillip sign the contract for her? A: Yes."). Thus, the Court of Appeal's finding on agency and apparent authority is inapposite to Respondent's own admissions regarding the authority given to Mr. Davis by their mother. The record shows that Andrew Davis was an agent of his mother and his signature on the admissions documents, including the arbitration agreement, is binding as to her and the Respondent. Therefore, the Court of Appeals' decision is contrary to the law of South Carolina and the Supreme Court should grant certiorari and reverse this decision.

B. Third-party beneficiary

The Court of Appeals also erred in finding Ms. Davis was not a third-party beneficiary of the agreement in question. The Court of Appeals held, and Respondent argues in her return, that there can be no third-party beneficiary because there was no valid contract in this case. However, this assertion is misplaced. Even assuming, *arguendo*, that Mr. Davis was unable to bind his mother to the admission agreement and arbitration agreement as her representative, the admission and arbitration agreements remain valid as to Mr. Davis as an individual signatory of those agreements.

Respondent attempts to avoid this fact by asserting that Petitioners' employee, in an affidavit, stated that Mr. Davis "signed the AA not for himself but 'as the representative' of

Mother." (Return pp. 12-13). This assertion, however, misstates the testimony of Kate Johnson, which was simply that "Mr. Davis, as the representative of Ms. Davis, executed an arbitration agreement . . . ." (R. p. 66). This statement is true. Mr. Davis did execute the agreement as a representative of Ms. Davis. But he also executed it on behalf of himself individually, as clearly stated in the agreement itself: "This Arbitration Agreement is made and entered into this 1st day of January, 2011, by and between UniHealth PAC Rock Hill . . . and EULA M DAVIS and ANDREW DAVIS . . . ." (R. p. 80). The agreement goes on to state: "NOTE: In signing this Agreement, Patient/Resident Representative binds both Patient/Resident *and Patient/Resident Representative individually.*" (R. p. 84) (emphasis added). There is no basis in the record for Respondent's assertion that Mr. Davis is not a party to this agreement or the admission agreement. *See also* (R. p. 68) (noting that the admission agreement binds the Facility and Ms. Davis, as well as "certain undersigned parties," which includes Mr. Davis, and whose responsibilities are set forth in the agreement). Thus, a valid contract exists, of which Ms. Davis was a third-party beneficiary.

Respondent also raises for the first time in her return a claim that the Petitioners' third-party beneficiary claim fails because it is contrary to the provisions of the South Carolina Probate Code. As an initial matter, Petitioners would assert that this claim was never raised and ruled upon by either the trial court or the Court of Appeals and should not be considered. See Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("[a]n issue cannot be raised for the first time on appeal") (citations omitted). To the extent this issue has been properly raised, there is nothing in Probate Code that prohibits the application of well-established contract doctrines this case. *See, e.g. Touchberry v. City of Florence*, 295 S.C. 47, 48, 367 S.E.2d 149, 150 (1988) (noting longstanding case law recognizing third-party beneficiary doctrine). Respondent cites no case law addressing such a conflict or holding that the Probate Code prohibits enforcement of contracts on

the basis of the third-party beneficiary doctrine and Petitioners are not aware of any case law addressing this issue in the state. Thus, to the extent the Respondent's assertions are based on the Probate Code and these claims are preserved, the Supreme Court should grant certiorari to review this novel issue.

Finally, extensive case law in South Carolina has held that non-signatories may be bound to arbitration provision within a contract executed by other parties through common law contract doctrines, which include third-party beneficiary. *See, e.g. Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012); *Wilson v. Willis*, Op. No. 5387 (S.C. Ct. App. filed Mar. 2, 2016) (noting that a non-signatory can be bound to a contract where there is a significant relationship between her claims and agreement containing the arbitration clause, *despite not being aware of the agreement's existence*). In fact, in *McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 WL 6318575 (D.S.C. Dec. 15, 2011), the South Carolina District Court held that the third-party beneficiary doctrine bound a non-signatory to an arbitration agreement in a context almost identical to that in the in the instant case. This was true regardless of whether the documents merged. *Id.* at *3.[3] Thus, because the Court of Appeals' decision is at odds with other federal and state case law, the Court should grant certiorari.

C. Equitable estoppel

[3] Respondent attempts to distinguish this case law by suggesting the *McCutcheon* opinion was based on merger or that its holding has been limited. However, after noting its finding that that the documents merged, the court went on to rule that the plaintiff was bound to the arbitration agreement as a third-party beneficiary and equitable estoppel "[e]ven if the Arbitration Agreement and Admissions Agreement constitute two separate contracts." *Id.* at *3. Further, while Respondent claims that the case holding is "limited" by *Benezra v. Zacks Inv. Research, Inc.*, 2012 WL 1067559 (M.D.N.C. Mar. 30, 2012), this assertion is misplaced both because a North Carolina District Court cannot "limit" the holding of an equal District Court in South Carolina and, more importantly, because the *Benezra* court simply found that *McCutcheon* was not applicable to the facts of that case, which involved the relationship between an investment advisor and a client.

Finally, the Court of Appeals erred in holding the Respondent is not equitably estopped from denying the enforceability of the arbitration agreement. In South Carolina, federal courts interpreting the FAA have repeatedly found that estates may be bound to nursing home arbitration agreements under the doctrine of equitable estoppel. *See THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert* 2015 WL 1268185, adopting report and recommendation, *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, 2014 WL 6863550; *McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 WL 6318575; *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 WL 4089435. This is true regardless of whether the arbitration agreement is contained within the admission agreement or in a separate document. *McCutcheon, 2011 WL 6318575* (holding that "[e]ven if the Arbitration Agreement and Admissions Agreement constitute two separate contracts . . . it would be inequitable . . . to allow the plaintiff to assert that [family member] had authority to sign the Admissions Agreement . . . but lacked such authority to sign the Arbitration Agreement" and holding that the plaintiff was equitably estopped from denying the arbitration agreement's enforceability). Federal law makes no distinction between the individual making the representations as to his ability to sign a contract in a representative capacity and that same individual serving as the personal representative of the decedent's estate. *See id.*

Respondent asserts that Petitioners cannot meet the elements of equitable estoppel under South Carolina law. As an initial matter, Petitioners assert that these elements have been met, as set forth in their Petition for Writ of Certiorari. Petitioners have also asserted, however, that there is conflicting law in South Carolina regarding the issue of equitable estoppel in the context of arbitration under the Federal Arbitration Act (hereinafter "FAA"). On the same day that the Court of Appeals decided this case, it also issued an opinion in *Wilson v. Willis*, Op. No. 5387 (S.C. Ct. App. filed Mar. 2, 2016), which held that Respondents were equitably estopped from denying the

enforceability of an arbitration agreement. In that opinion, the Court of Appeals did not address the elements of equitable estoppel under South Carolina law, relying instead on the federal law analysis set forth in *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012).

Nevertheless, Respondent asserts that this analysis cannot apply to the instant case, in spite of the contemporaneous Court of Appeals decision to the contrary, as well as the prior holding of *Pearson*, because of the United States Supreme Court decision in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009). However, a Federal District Court in South Carolina has recognized the potential conflict between South Carolina law and *Arthur Andersen*. In *Swane Co. v. Berkeley Cnty. S.C.*, 2015 WL 6688072 at *6 (D.S.C. Oct. 30, 2015), the District Court held that because South Carolina courts have continued to utilize the pre-*Arthur Andersen* analysis in applying the doctrine of equitable estoppel in the arbitration context, this is the proper test under South Carolina state law and must be applied in the context of the FAA. Therefore, it is the Court of Appeals' decision in this case that is inconsistent with South Carolina law on this issue, and the Supreme Court should grant certiorari and reverse the Court of Appeals.

Additionally, while the Court of Appeals held in this case that the claims did not arise as a result of the contract because they are tort claims and that the "significant relationship" test between the asserted claims and the contract pursuant to *Long v. Silver*, 248 F.3d 309 (4th Cir. 2001) did not apply because this case does not involve shareholders and the agency relationship inherent in such a relationship, the Court of Appeals in *Wilson* held exactly to the contrary – i.e. that the tort claims bore a significant relationship to the contract, even though they were not contract claims. *See, e.g.*, *Thompson* (R. p. 434). The Court of Appeals erred in holding that the claims in this case do not arise out of the admission agreement, including the arbitration agreement, between the Ms. Davis, Mr. Davis, and the Facility. While Respondent asserts that the claims

arose simply out of the nature of the relationship between the parties, this assertion ignores the fact that the relationship existed only because of the admissions agreement. Put simply, the plaintiff's claims are based entirely on alleged actions/inactions taken by Petitioners as a result of Petitioners agreement to care for Ms. Davis pursuant to the provisions of the Admission Packet to the Facility. Thus, the claims in this case arose out of the agreement, just like the claims in *Wilson*, and the Court of Appeals' opinion is in conflict with existing state.

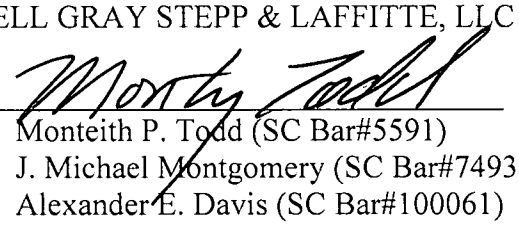
Finally, both Mr. Davis and the Respondent were present when the admissions documents, including the arbitration agreement, were signed on behalf of their mother. Both freely admit not only that neither asserted at any time during the admission of their mother to the Facility that Mr. Davis did not have authority to sign the agreements on behalf of his mother, but also that they believed then and *still believe* that Mr. Davis had the authority to sign the documents on behalf of his mother and that she was comfortable with this arrangement. (R. p. 291, ll. 2-4; p. 300, l. 23 – p. 301, l. 10). Nevertheless, throughout this litigation and in direct contravention of the testimony of Respondent and Mr. Davis, Respondent has repeatedly taken the contrary position that Mr. Davis had no authority to bind his mother to the arbitration agreement in question. Respondent should not be allowed to testify under oath that Mr. Davis had such authority and then assert to the court this authority did not exist. Such conduct is inequitable and the Court of Appeals erred in holding that Respondent was not estopped from taking these irreconcilable positions. For the reasons set forth herein, the Supreme Court should grant the Petitioners' writ and reverse the decision of the Court of Appeals.

CONCLUSION

The petition for certiorari should be granted. The Court of Appeals erred in holding that the admission and arbitration agreements did not merge into a single, enforceable agreement. The Court of Appeals also erred in holding that the doctrines of agency, third-party beneficiary, and equitable estoppel do not bind Respondent. State and federal law mandate the enforcement of the arbitration agreement in this case, and the petitioners respectfully request that the Court grant their petition for writ of certiorari and review the Court of Appeals' decision.

Respectfully Submitted,

SOWELL GRAY STEPP & LAFFITTE, LLC

BY: 

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PROOF OF SERVICE

I, the undersigned Legal Assistant, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Petitioners, do hereby certify that I have served all counsel and Clerk of Court of SC Court of Appeals in this action with a copy of the *Reply to Return to Petition for Writ of Certiorari* by the means shown below at the following address(es):

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