

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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JUL 15 2016

SC Court of Appeals

Robert Stanley Pollock as Personal)
Representative of the Estate of Elizabeth)
Scott Pollock,)

Plaintiff,)

Civil Action No.: 2015-NI-40-00044

vs.)

ORDER

PruittHealth – Columbia, LLC and)
UniHealth Post Acute Care – Columbia,)
LLC, d/b/a Unihealth PAC – Columbia,)
LLC,)

**(Denying Defendants' Motion to Dismiss and
Compel Arbitration and Granting Plaintiff's
Motion to Compel Arbitration)**

Defendants.)

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COURT OF APPEALS
RICHMOND, VA

INTRODUCTION

This case involves a Notice of Intent to File Suit that Plaintiff filed pursuant to S.C. Code Ann. §15-79-125. The Notice of Intent alleges that Defendants were negligent in their care and treatment Elizabeth Scott Pollock while she was a resident of their nursing home and that she died as a result. More specifically, the Notice of Intent alleges that Ms. Pollock developed bedsores/pressure ulcers at Defendants' facility and Defendants failed to adequately treat this condition.

In response to the Notice of Intent, Defendants filed a Motion to Dismiss and Compel Arbitration. This Motion was based upon several documents Ms. Pollock's son signed when she was admitted, most notably an "admission agreement" and a separate "arbitration agreement." In their motion, Defendants argue that the two documents effectively merge and that the Notice of Intent should be dismissed and binding arbitration should be compelled by this Court.

Plaintiff has filed a Motion to Compel mediation pursuant to S.C. Code Ann. §15-79-125(C). Plaintiff contends that the mandatory mediation requirements of S.C. Code Ann. §15-79-125(C) cannot be waived by private contract and even if these requirements could be waived, Plaintiff was not willing to do so in this case. Plaintiff also disputes Defendants' *claims that the admission agreement and arbitration agreement merge* citing Thompson v. Pruitt Corporation (Ct. App. 2016) Opinion number 5384 (March 2, 2016 advance sheets; rehearing denied April 21, 2016) where both the Circuit Court and Court of Appeals declined to compel arbitration based on the same or very similar admission agreements and arbitration agreements.

A hearing was held on April 26, 2016. Present at the hearing were Robert D. Dodson representing the Plaintiff and Josh Whitley representing the Defendants. Prior to the hearing, each party submitted a written memorandum of law that the Court has carefully read and considered. As discussed in more detail below, this Court is of the opinion that Defendants' Motion to Dismiss and Compel binding Arbitration should be denied and that Plaintiff's Motion to Compel mandatory mediation pursuant to S.C. Code Ann. §15-79-125(C) should be granted.

FACTUAL BACKGROUND

Ms. Pollock was admitted to Defendants' nursing home on October 25, 2013. Affidavit of Betty R. Pederson-Chase, RN-BC, WCC, LNHA, CDP, attached to Notice of Intent to File Suit at paragraph 6 (hereinafter "Pederson-Chase Affidavit"). According to the Notice of Intent, Ms. Pollock did not have any pressure ulcers or bedsores when she was first admitted to Defendants' nursing home. Pederson-Chase Affidavit, paragraph 6. Nonetheless, the Notice of Intent alleges that because of her medical condition, she was at risk for developing bedsores and

pressure ulcers but this fact was not timely recognized or appreciated by Defendants or its staff. Pederson-Chase Affidavit, paragraphs 6-7.

At the time of her admission, her son, who is also the personal representative to Ms. Pollock's Estate, signed a series of documents with Defendants. Most relevant and important for purposes of the pending Motions were two documents: an admission agreement and a separate arbitration agreement. Exhibit B and Exhibit C to Defendants' Memorandum of Law. These documents are separate and distinct documents. There is nothing before the Court to indicate that Robert Pollock had a power of attorney for his mother or had been appointed as her legal guardian. Rather, his ability to admit his mother to a skilled nursing facility rested on the statutory authority outlined in the South Carolina Adult Health Care Consent Act, S.C. Ann. §§ 44-66-10 et. seq. In relevant part, the Act allows an "adult child" to consent to medical care and treatment on behalf on an incapacitated patient.

DISCUSSION

Defendants seek to compel mandatory arbitration by arguing that the Admission Agreement merged with the Arbitration Agreement. Defendants' Memorandum of Law, p. 8. Defendants also argue that under common law agency principles and the "common law doctrines of third-party beneficiary and estoppel" that Plaintiff should be compelled to mandatory binding arbitration. Defendants' Memorandum of Law, p. 11.

Plaintiff takes issue with Defendants' argument and points this Court to Thompson v. Pruitt Corporation (Ct. App. 2016) Opinion number 5384 (March 2, 2016 advance sheets; rehearing denied April 21, 2016). Like the case now before this Court, Thompson involved an adult child who placed an ailing parent in a skilled nursing facility owned by Pruitt. Thompson

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also involved two separate agreements, an admission agreement and a separate and distinct arbitration agreement. Based on the Court of Appeals opinion in Thompson and the admission agreement and arbitration agreement presented to the Court in this case, the documents appear to be identical or nearly identical. The legal issues addressed by the Court of Appeals in Thompson are the same legal issues addressed in Defendants' Memorandum of Law – merger of the admission agreement and arbitration agreement; common law agency; third-party beneficiary and equitable estoppel. Plaintiff argues Thompson is binding precedent that this Court is required to follow. Accordingly, Plaintiff argues the Court must deny Defendants' Motion to Dismiss and Compel Binding Arbitration.

At the hearing on this matter, Defense Counsel argued several things. While acknowledging that the documents at issue were similar if not the same to those in Thompson, Defense Counsel contended that the Court of Appeals opinion addressing the issues of merger, common law agency, etc. were mere *dicta* since Court of Appeals first noted that the “issue [of merger] is not preserved for our review.” This Court is not persuaded by this argument.

First, courts may reach conclusions for multiple reasons. In carefully reading and considering the entirety of the Court of Appeals opinion in Thompson, the Court of Appeals appears to have done just that. Its opinion is several pages long and the lengthy discussion of the Court of Appeals in addressing the admission agreement and arbitration agreement before it appear to this Court to be providing alternative reasons as to why Circuit Court's opinion should be affirmed.

Additionally, that portion of the Court of Appeals opinion in Thompson noting that the “issue is not preserved for our review” is limited to the merger arguments advanced. Nowhere

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did the Court of Appeals indicate that the common law agency arguments, third-party beneficiary arguments and equitable estoppel arguments were not preserved for appeal. Thus, even if Defense Counsel were correct and Court of Appeal discussion as to merger was mere *dicta*, the remainder of Thompson concerning common law agency arguments, third-party beneficiary arguments and equitable estoppel arguments is binding precedent on this Court.

At the time the pending motions were argued before this Court, Defense Counsel also pointed out that litigation in the Thompson case was ongoing and that the South Carolina Supreme Court had yet to decide the issues. Defense Counsel suggested that Thompson may eventually be overruled by our Supreme Court in light of the Supreme Court's rulings in two cases: Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014) and Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 759, 759 S.E.2d 727 (2014). This Court is not persuaded by these arguments.

As an initial matter, Thompson is a published opinion of an appellate court in this State and is binding precedent on this Court. It is not for this Court to speculate or base its decision in this case on how it thinks our Supreme Court might ultimately resolve Thompson, if in fact our Supreme Court even hears Thompson. All this Court can and must do is follow binding precedent and in this case that is Thompson. However, in examining and reviewing not only Thompson but also examining and reviewing Coleman and Dean, this Court finds that neither of these cases support Defendants' position that the Notice of Intent should be dismissed and binding arbitration compelled.

In Coleman, the Supreme Court affirmed the decision of the lower courts in refusing to compel arbitration based on an arbitration agreement that was separate and distinct from an

admission agreement. In that case, the sister of an adult patient was authorized to make health care decisions by virtue of the Adult Health Care Consent Act, S.C. Ann. §§ 44-66-10 et. seq. In that case, she admitted her sister for care and treatment at a skilled nursing care facility. At admission she signed two documents: a “RESIDENTIAL ADMISSION AND FINACIAL AGREEMENT’ and an ‘AGREEMENT FOR ARBITRATION.’” (emphasis in original). Since arbitration was related to a form of alternative dispute resolution and did not concern medical care or treatment (nor payment thereof), the Supreme Court concluded that “Sister did not have the capacity to bind Decedent to this voluntary arbitration agreement.” The Supreme Court also rejected estoppel arguments noting there were two separate agreements and there was “not a merger of the two contracts.”

Just as in Coleman, there are two separate documents in this case that on their face purport to be separate and distinct. The Admission Agreement in the case now before this Court specifically states:

This Agreement together with all exhibits 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, negotiations, representations, tender documents, and proposals, written and oral with respect to the subject matter hereof. Variance from, or addition to, the terms and conditions of this Agreement in any written notification from the Patient/Resident shall be of no effect.

(emphasis added). The Admission Agreement provides that:

The Healthcare Center may terminate this Agreement and transfer or discharge the Patient/Resident in accordance with applicable state and federal laws and regulation.

Meanwhile, the arbitration agreement has a different procedure for revoking it:

This Agreement may be revoked by written notice to the Healthcare Center from the Patient Resident within thirty (30) days of signature. If not revoked within thirty (30)

days, this Agreement shall remain in effect for all care and services rendered at the Healthcare Center...

The language from the admission agreement and arbitration agreement now before this Court closely resemble language that the Supreme Court found did not merge into a single contract in Coleman. Contrary to Defendants' arguments, Coleman does not support their position that this Court should compel arbitration. To the contrary, Coleman and Thompson compel this Court to deny the pending Motion to Dismiss and Compel arbitration.

Likewise, Dean does not support Defendants' arguments that this Court should dismiss the Notice of Intent and compel binding arbitration. Like the case now before this Court, Dean also involved a nursing home residency agreement and a separate arbitration agreement that were both signed by an adult child on behalf of an incapacitated parent. The arbitration agreement in Dean provided that arbitrations were to be conducted following the rules of the AAA but at the time the agreement was entered and at the time the controversy arose, the AAA was not hearing cases concerning alleged nursing home malpractice. Thus, the Supreme Court noted that "the outcome of this appeal turns on whether the unavailability of the AAA to serve as arbitrator dooms the Agreement as a whole." Dean, 759 S.2d at 733. The Supreme Court remanded the case to the Circuit Court to resolve issues as to whether the adult child had the authority to sign the arbitration agreement and whether there was an actual meeting of the minds between the parties. Because Dean did not address whether the arbitration agreement merged with the admission agreement, Dean does not support Defendants' arguments in this case.

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In reading Dean, Coleman and Thompson together, this Court finds that Plaintiff's arguments are correct and Defendants' Motion to Dismiss and compel binding arbitration should be denied.

Plaintiff has also filed a Motion to Compel mandatory mediation. Plaintiff's Motion is based on S.C. Code Ann. § 15-79-125(C) which mandates that between 90 and 120 days after a Notice of Intent is filed, the parties must mediate the case. That time window has now passed, thus prompting the Plaintiff to file the current Motion.

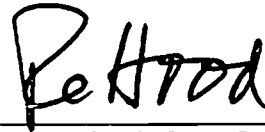
In response to the Motion, Defense Counsel argued he did not want waive his right to compel arbitration by participating in another form of ADR. The Court is not persuaded by these arguments for multiple reasons. First, Plaintiff's Counsel stated in open Court and on the record, that he would not seek to use Defendants' participation in mediation as a grounds to argue that Defendants had waived their right to compel arbitration. Second, the Plaintiffs Dean supra, made the same arguments and those arguments were squarely rejected by the Supreme Court. Third, this Court has denied Defendants' Motion to Compel Arbitration and because of that there is no arbitration to be waived by Defendants.

Finally, and perhaps most importantly, the mandatory mediation requirements found in S.C. Code Ann. § 15-79-125(C), are just that, mandatory. These are requirements imposed by the Legislature and the Plaintiff to this matter is not willing to waive the statutory requirement of mandatory mediation. Whether the current dispute between the parties will be resolved through mediation remains to be seen but for purposes of the pending Motion, this Court must follow the statutory law of this State. Accordingly, the Court finds Plaintiff's Motion to Compel Mediation should be granted.

CONCLUSION

For the reasons discussed above, Defendants' Motion to Dismiss and compel binding arbitration should be and hereby is DENIED. Plaintiff's Motion to Compel Mediation should be and hereby is GRANTED.

IT IS SO ORDERED!



Robert E. Hood, Circuit Court Judge

Columbia, South Carolina
May 19, 2016

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EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015NI4000044

Robert Stanley Pollock

PruittHealth Columbia LLC

Elizabeth Scott Pollock

UniHealth Post Acute Care Columbia LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant.

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Non-suit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other _____

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MAY 15 2016

SC Court of Appeals

JEANETTE W. McBRIDE
2015 MAY 23 PM 2:27
RICHLAND COUNTY
FILED

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code 2164 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 24 day of May, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Robert Daniel Dodson

Claudius O. Tackett II

Joshua Steven Whitley

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

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EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS
ROBERT POLLOCK AS PERSONAL

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015-NI-40-00044
PRUITTHEALTH COLUMBIA, LLC AND UNIHEALTH POST
ACUTE CARE - COLUMBIA, LLC D/B/A UNIHEALTH PAC
COLUMBIA
DEFENDANT(S)

REPRESENTATIVE OF THE ESTATE OF ELIZABETH
POLLOCK
PLAINTIFF(S)

Submitted by: _____ Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other Dismissed without prejudice
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment of the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : Defendant's Motion to Reconsider is Denied

RICHLAND COUNTY
FILED
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JEANETTE W. McBRIDE
C.C.P. & G.S.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge Rehoad Judge Code 2164 Date 6/30/16

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 5 day of July, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

ROBERT DODSON

JOSHUA WHITLEY

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride



STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS)
CA. NO.: 2015-NI-40-00044)

Robert Stanley Pollock as Personal)
Representative of the Estate of Elizabeth)
Scott Pollock,)

Plaintiffs,)

vs.)

PruittHealth Columbia, LLC and UniHelath)
Post Acute Care - Columbia, LLC d/b/a)
UniHealth-PAG-Columbia,)

Defendants.)

ORDER

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Court of Appeals

RICHLAND COUNTY
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JEANETTE W. MCBRIDE
C.C.P. & S.S.

After careful consideration of the submitted briefs, the applicable law and all other arguments, this Court denies Defendant's Motion to Reconsider.

Under SCRCP Rule 59(f), a Rule 59(e) motion "may in the discretion of the court be determined on the briefs filed by the parties without oral argument." Hence, the grant or denial of a Motion to Reconsider is within the discretion of the circuit court. Motions to Reconsider are limited in scope and are not to be used to repeat the same arguments previously presented. *Dockins v. Benchmark Commc'n*, 180 F.R.D. 294, 295 (D.S.C. 1998). A Motion to Reconsider cannot be granted where the moving party simply seeks to have the Court rethink its decision. *Id.*

Accordingly, Defendant's Motion to Reconsider is DENIED.

Robert E. Hood

The Honorable Robert E. Hood
5th Judicial Circuit Judge

Columbia, South Carolina

This 30 day of June, 2016