THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2015-CP-05-00124
Appellate Case No. 2015-002493

Polly McGill and Mary Broxton, as Co- Personal Representatives of the Estate of Virginia Butler, deceased, Plaintiffs

Of Whom Polly McGill, as Personal Representative of the Estate of Virginia Butler is the ..... Respondent,

v.

The Regional Medical Center Foundation d/b/a The Regional Medical Center and Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post Acute Care of Bamberg, LLC, Defendants,

Of Whom Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post Acute Care of Bamberg, LLC is the ..... Appellant.

SUPPLEMENTAL RECORD ON APPEAL

Monteith P. Todd
J. Michael Montgomery
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211
(803) 929-0300
Counsel for Appellant

W. Jones Andrews
McGowan, Hood & Felder
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100
Counsel for Respondent

SUPPLEMENTAL RECORD ON APPEAL
INDEX

PLEADINGS

EXHIBITS/DOCUMENTS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BAMBERG	)	SECOND JUDICIAL CIRCUIT
Polly McGill and Mary Broxton, as Co-Personal Representatives of the Estate of Virginia Butler, deceased	)	
Plaintiffs,	)	
v.	)	**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION**
The Regional Medical Center Foundation d/b/a The Regional Medical Center and Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post-Acute Care of Bamberg, LLC,	)	
Defendants.	)	

Plaintiffs Polly McGill and Mary Broxton, as the appointed Co-Personal Representatives of the Estate of Virginia Butler, through her attorney, respectfully submit this Memorandum of Law in Opposition to Defendant Pruitt Health-Bamberg, LLC d/b/a Unihealth Post-Acute Care of Bamberg, LLC's Motion to Dismiss and Compel Arbitration. Defendant's motion asks the Court to enforce a contract against a person who neither assented to it nor authorized anyone else to assent on her behalf. Defendant also asks the court to apply the contract defense of equitable estoppel but neither cites nor attempts to meet the elements required to apply the doctrine. Finally, Defendant asks the court to find that the contract governing Ms. Butler's admission to the nursing home merged with the separate and independent arbitration agreement presented to Ms. Butler's family when Ms. Butler was admitted. This argument was rejected by the South Carolina Supreme Court in March 2014. The precise contract language on which Defendant relies to seek arbitration was rejected by a circuit court in York County in April 2014.

BACKGROUND

Virginia Butler was a resident at Defendant's Bamberg nursing home in January-February 2014. As all times relevant to this action, Ms. Butler's medical records indicated that she suffered from dementia. Ms. Butler was transferred to Defendant's facility from The Regional Medical Center where she had received treatment for a broken leg suffered in a fall. While at Defendants' facility, Ms. Butler had pressure ulcers that progressed to stage 4. A stage 4 pressure ulcer is a severe medical condition characterized by a wound deep enough to expose a person's muscle, tendon or bone. Ms. Butler's pressure ulcers became infected and she died a few weeks later. Plaintiffs' Complaint alleges that the defendant nursing facility breached their duty in caring for Ms. Butler's pressure ulcers.

When Ms. Butler arrived at the nursing home, Defendant's staff approached Ms. Butler's family members with several documents related to Ms. Butler's admission. Mary Robinson, Ms. Butler's niece, was approached by a representative from Defendant Unihealth Bamberg while Ms. Robinson was at work. M. Robinson Aff. ¶ 4, attached as **EXHIBIT 1**. The documents included an Admission Agreement and a separate and independent Arbitration Agreement. By its express terms, "the signing of th[e] [Arbitration] Agreement [was] not a precondition to admission, expedited admission, or the furnishing of services" to Ms. Butler. Arbitration Agreement at 5. Ms. Robinson was not Ms. Butler's guardian, conservator, or attorney in fact. M. Robinson Aff. ¶ 5. Plaintiff filed the current action in the Bamberg County Court of Common Pleas on June 11, 2015. On July 10, 2015, Defendant Pruitt Health-Bamberg, LLC d/b/a Unihealth Post-Acute Care of Bamberg, LLC filed a Motion to Dismiss and Compel Arbitration.

ARGUMENT

I. Federal Arbitration Act ("FAA") mandatory language only applies where parties have a valid and enforceable arbitration agreement.

Plaintiffs does not dispute Defendant's citation to the mandatory language in the FAA. However, it is important to note that this mandatory language only applies in instances where a valid arbitration agreement has been established. This is evident from the FAA provision quoted in Defendants' memorandum. (Defs' Mem. at 4). "The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement...is not in issue." 9 U.S.C. § 4. While it is true that the U.S. Supreme Court has held that the FAA "leaves no place for the exercise of discretion," the Court also cited the FAA's savings provision that denies enforcement of agreements susceptible to the general contract defenses of fraud, duress, and unconscionability. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); 9 U.S.C. § 2; see also Defs' Mem. P. 6-7(quoting Byrd).

The South Carolina Supreme Court has noted that "the FAA does not require parties to arbitrate when they have not agreed to do so." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 591, 553 S.E.2d 110, 116 (2001) (citing Volt Info. Scis. Inc. v. Board of Trs., 489 U.S. 468, 478 (1989)). Defendant's memorandum recognizes this fact by acknowledging the threshold issue of whether a written agreement to arbitrate exists. Defs' Mem at 4. Plaintiff does not dispute that the FAA contains mandatory language, but the mandatory language does not require arbitration here since there is no valid arbitration agreement between the parties.

II. There is no valid arbitration agreement between Virginia Butler and Defendant.

Plaintiff's Complaint alleges wrongful death and survival claims based on Defendants' negligent treatment of Ms. Butler's pressure ulcers. With the exception of the wrongful death claim discussed below, the Complaint's claims related to duties established and breached during

Ms. Butler's life and damages sustained during Ms. Butler's life. These claims belong to Virginia Butler. Ms. Butler's personal representative presents these claims on Ms. Butler's behalf. See S.C. Code Ann. § 15-5-90 (stating that claims "survive both to and against the personal or real representative...of a deceased person"). Accordingly, Defendants must show a valid and enforceable arbitration agreement between Virginia Butler and Defendants to prevail on their motion. Defendants' motion, memorandum, and attached documents do not meet this burden.

A. The Adult Health Care Consent Act does not apply to the Arbitration Agreement.

Defendant's reliance on the Adult Health Care Consent Act ("the Act") is misplaced because the Act does not apply to the separate and independent Arbitration Agreement on which Defendant relies. Additionally, the Admission Agreement and Arbitration Agreement do not merge because the contracts expressly reject merger and the contracts were not signed by the same parties for the same purpose. Just as the South Carolina Supreme Court recently ruled in Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 353 755 S.E.2d 450, 454 (2014), this Court should reject Defendant's statutory and common law merger arguments. In doing so, the Court would be acting consistently with an order from York County just last year involving the **exact same contracts** and many of the same Defendants. See Thompson v. Pruitt Corp. et al., Case No. 2013-CP-46-2930 (S.C. Com. Pl. Apr. 11, 2014) ("As the Arbitration Agreement does not deal with healthcare decisions, the provisions of the Act do not apply") (attached as **EXHIBIT 2**).[1]

The Act does not apply to a free-standing nursing home arbitration contract and Plaintiffs are not bound to the Arbitration Agreement under the Act's provisions. The Act's primary

[1] The defendants in Thompson (represented by Defendants' counsel) appealed the circuit court's ruling. S.C. Ct. App. Case No. 2014-001624. The appeal has been fully briefed and is awaiting a ruling from the Court of Appeals.

purpose is to identify and authorize individuals to make "decisions concerning . . . health care" on behalf of a person "unable to consent" S.C. Code Ann. § 44-66-30(A). The Act intends "to insure that the patient's wishes **concerning her medical treatment** are honored whenever possible." Coleman, 407 S.C. at 353, 755 S.E.2d at 454 (emphasis added). The Act establishes the order of priority for those individuals authorized to make health care decisions. The first level of decision-making priority, pursuant to the Act, is granted to a legally-appointed guardian and an attorney-in-fact empowered pursuant to a duly executed durable power of attorney. S.C. Code Ann. § 44-66-30(A). An incapacitated individual's adult children and extended family members are further down in priority. Id.

The Act expressly limits the decision-making power of any individual to only "health care" decisions. S.C. Code Ann. § 44-66-30(A). "Health care" is defined in the Act and the South Carolina Supreme Court recently construed the definition to limit an individual's decision-making authority to: (1) "provision or withholding of medical care including placement in a facility which provides such care;" and (2) "certain financial decisions . . . to pay for services rendered." Coleman, 407 S.C. at 352, 755 S.E.2d at 453. An individual's power under the Act applies "primarily to traditional health care decisions" and only "secondarily" to financial matters related to those decisions. Id. at 353, 755 S.E.2d at 454.

The Act grants only limited decision-making power related to nursing home admission. An individual authorized by the Act may enter an agreement to admit a resident to a nursing home and may enter a contract agreeing to pay for nursing home services. Coleman, 407 S.C. at 353-54, 755 S.E.2d at 454. A potential resident or her family are typically presented with multiple contracts and other documents when the family contemplates admitting their loved one to a nursing home. Coleman demonstrates that the Act does not apply to all documents

associated with nursing home admission. Specifically, the Act does not apply if a document "was not required for [the resident's] admission, contained no provision for medical, nursing, or health care services to be provided for [the resident], and did not require any financial commitment to pay for such services." Id. at 353, 755 S.E.2d at 454.

Based on the Coleman standard, the Act does not apply to the Arbitration Agreement. The Arbitration Agreement does not contain any provision for medical, nursing, or health care services. The bolded and underlined language in Section I of the Arbitration Agreement indicates that its provisions are intended only for dispute resolution. Arbitration Agreement at 1. The Arbitration Agreement does not contain any provisions relating to payment for medical, nursing, or health care services. Only the scope of arbitrable disputes and procedures for an arbitration hearing are included in the Arbitration Agreement.

Defendant argues the Arbitration Agreement's terms were required for Ms. Butler's admission to UPAC-Bamberg because the Arbitration Agreement merges with the Admission Agreement, a contract that covers "health care" decisions. The Coleman Court acknowledged South Carolina law indicating that contracts signed at the same time by the same parties and for the same purpose will be construed together "in the absence of anything indicating a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts Resort Realty, Inc. v. Down'round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Coleman refused to apply the merger doctrine because the admission agreement contained language "indicating a contrary intention." The Court found that language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. For example, a term in the arbitration agreement permitted the resident to disclaim arbitration within thirty days while no

such term existed in the admission agreement. 407 S.C. at 355, 755 S.E.2d at 455. This incongruity indicated the parties' intent to keep the two agreements separate. Id.

Defendant argues that the Admission Agreement and Arbitration Agreement merge and rely on the Admission Agreement's incorporation of its "exhibits" to assert that the Arbitration Agreement is an "exhibit" of the Admission Agreement. Defs.' Mem. at 7. However, the Admission Agreement never defines "exhibits" and nothing in the Arbitration Agreement indicates that it is intended to be the Admission Agreement's exhibit.[2] In fact, "exhibit" appears just once in the Admission Agreement and does not appear at all in the Arbitration Agreement. The Coleman admission agreement included similar "exhibit" language that did not detract from the "separateness" of the admission and arbitration agreements. 407 S.C. at 355, 755 S.E.2d at 455.

There are multiple terms in the Arbitration Agreement demonstrating the parties' intent that the Admission and Arbitration Agreements are not to be considered a single contract. Like Coleman, the Arbitration Agreement in this case contains a thirty-day revocability period that is not present in the Admission Agreement. (Arbitration Agreement at 5, subsection (C)). Also, the Arbitration Agreement acknowledges that agreeing to its terms is "voluntary," i.e. not a prerequisite to admission. Arbitration Agreement at 1. This same sentiment is expressly stated later in the Arbitration Agreement. Signing the Arbitration Agreement "is not a precondition to admission, expedited admission, or the furnishing of services to the Patient/Resident by the Healthcare Center." Arbitration Agreement at 5, subsection (B)). The Arbitration Agreement was intended to be a separate contract from the Admission Agreement and, just as in Coleman, the

[2] Any ambiguity as to merger must be construed against Defendant since they were the agreements' exclusive drafters. Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455 (citing Davis v. KB Home of S.C., Inc., 394 S.C. 116, 129, 713 S.E.2d 799, 805 n. 4 (Ct. App. 2011)).

merger rule from Klutts is overcome by the contracts' contrary intent. Klutts Resort Realty, Inc., 268 S.C. at 88, 232 S.E.2d at 24.

Defendant's merger argument suffers from other flaws. Klutts indicates that merger only applies to instruments executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." Even if Defendant's positions were taken as true and two valid contracts existed, the Agreements would not merge under the Klutts test. Even under Defendant's theory of the case, the two contracts are not between the same parties. Defendants attempted to include Ms. Robinson and Ms. Butler as parties to the Arbitration Agreement. Ms. Robinson is not listed as a party to the Admission Agreement and Defendant does not argue otherwise. Additionally, the two Agreements were not executed for the same purpose. The Admission Agreement purports to cover a bed hold policy, pharmacy selection, and other activities incident to nursing home services. In contrast, the Arbitration Agreement's stated purpose is to establish the procedures "to submit for resolution by arbitration any disputes that may arise." Arbitration Agreement at 1.

In sum, the Adult Health Care Consent Act does not apply to the Arbitration Agreement, and the Court should reject Defendant's motion on this basis. Additionally, the contracts do not merge under the Klutts test because they were not executed by the same parties or for the same purpose. Finally, the contracts do not merge because Defendants, as the drafters of these form contracts of adhesion, included unambiguous language indicating that the Arbitration Agreement was separate from the Admission Agreement.

B. Defendants cannot meet their burden of demonstrating Ms. Robinson signed admission paperwork as Ms. Butler's agent.

Defendant cannot demonstrate that Ms. Robinson was acting as Ms. Butler's agent when signing admission paperwork. Basic contract law holds that a contract binds only those parties

who show an "objective manifestation of...assent at the time the contract was made." Laser Supply & Services, Inc. v. Orchard Park Assoc., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009). Virginia Butler clearly did not sign the Arbitration Agreement or personally give any other objective manifestations of assent to the agreement. Defendant may argue Mary Robinson was acting as Ms. Butler's agent. For agency situations, the legal burden is on the party asserting that an agency exists. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). In this case, Defendant must show that all necessary elements of an agency relationship are "clearly established" by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent's authority to act. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).

Agency is a "fiduciary relationship which results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf." Peoples Fed. Savs. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992) (citing Restatement (Second) of Agency § 1 (1958)). An agency relationship may be established with clear evidence of actual or apparent authority conferred by the purported principal on the purported agent. Cowburn v. Leventis, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Actual authority is "expressly conferred upon the agent by the principal." Richardson v. PV, Inc., 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009). Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations." Young v. S.C. Dep't of Disabilities & Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). To prove apparent authority, a party must show (1) purported principal consciously or impliedly represented another to be his agent; (2) reliance on

the representation by a third party; and (3) change in position by third party in reliance on the representation. Cowburn, 366 S.C. at 39-40, 619 S.E.2d at 448.

South Carolina law clearly states that an agency relationship cannot be established solely by the words and actions of the purported agent. Id. Defendants do not argue Ms. Robinson had actual authority to bind Ms. Butler to the Arbitration Agreement. Defendants cannot point to any statutory power Ms. Robinson had to act for Virginia Butler. Ms. Robinson was never designated as Ms. Butler's attorney-in-fact for any reason. M. Robinson Aff. ¶ 5.

Defendant also cannot demonstrate that Ms. Robinson had any apparent authority to act on Ms. Butler's behalf. For apparent authority to exist, "[e]ither the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief." R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000). Defendants have not identified any conduct by Ms. Butler demonstrating that she intended to cause Defendant to believe Ms. Robinson was authorized to act for her. In fact, as Defendants note in their memorandum, Ms. Butler suffered from dementia. Defs.' Mem. at 5. These conditions rendered her incapable of forming the requisite intent.

III. Plaintiffs are not equitably estopped from refusing to arbitrate.

Defendant incorrectly alleges Plaintiffs are equitably estopped from opposing enforcement of the Arbitration Agreement. This argument fails because Defendant neither cite not make any attempt to satisfy all required equitable estoppel elements. By failing to meet its burden on these elements, Defendant's motion should be denied. Defendant's argument also fails because its fundamental premise is faulty. Defendants' entire equitable estoppel argument is based on the assertion that the Admission Agreement and Arbitration Agreement are one contract or that they somehow merged in to one. See Defs.' Mem. at 10 (arguing Plaintiffs are

somehow estopped from opposing enforcement of Arbitration Agreement because Ms. Butler allegedly "received all the benefits of the Admissions [sic] Agreement"). Thus, as articulated in their memorandum, **Defendants' equitable estoppel argument is wholly dependent on merger.**[3] As discussed in Section II(A) above and further below, Defendants' merger argument in contrary to Coleman and the contracts' express language.

Equitable estoppel is a contract defense for which the asserting party "bears the burden of establishing all the elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id.

Defendant cannot meet its burden to establish these elements. (R. p. 11-12). Defendant does not attempt to apply or even cite these elements in their brief. Defendant cannot meet its burden on other elements listed in Strickland. There is no evidence Ms. Butler acted in a way amounting to a false representation to Defendant regarding Ms. Robinson's status or that Ms. Butler intended for Defendant to act in reliance on her conduct. Ms. Butler's diminished mental capacity prevented her from forming the required intent for Defendant to rely on her conduct.

---

[3] In an attempt to avoid the obvious import of the Supreme Court's holding in Coleman, Defendant argues that equitable estoppel and common law merger are distinct legal concepts. Defs.' Mem. at 10. Plaintiffs do not disagree with this general proposition. Yet, the single paragraph in Defendant's memorandum that attempts to apply equitable estoppel to this case is dependent on alleged merger. Id. at 10-11.

Additionally, the evidence shows Defendant cannot meet its burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. This element requires Defendant to show it did not know Ms. Robinson lacked authority to sign the arbitration agreement on her aunt's behalf and Defendant lacked the ability to make this determination. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. See Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, Defendant had the capacity to determine whether Ms. Robinson had authority to sign an arbitration agreement on Ms. Butler's behalf. Defendant is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. Defendant is familiar with the legal concepts of guardianship and powers-of-attorney. Defendant had the ability to ask Ms. Robinson whether she was Ms. Butler's guardian or attorney-in-fact and had the ability to request supporting documentation.

Another major flaw in Defendant's equitable estoppel argument is that it is premised on Defendant's faulty merger argument. In Coleman, the South Carolina Supreme Court rejected a nursing home's equitable estoppel argument because it was based on the home's faulty assertion that an admission agreement merged with a separate and independent arbitration agreement. 407 S.C. at 354-55, 755 S.E.2d at 455[4]. Defendant makes similar arguments in its memorandum.

[4] Defendant's last attempt to distinguish Coleman is a reference to a single district court order that is itself distinguishable. Defs.' Mem. at 10 (citing THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, Civil Action No. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. March 19, 2015)). Gilbert is different because, as the district court acknowledged, cases like Coleman involved separate admission and arbitration agreements where admission was not dependent on agreeing

Defs.' Mem. at 8-9. Defendant argues Plaintiffs is not free to selectively enforce portions of the Admission Agreement. Id. at 10. However, Plaintiffs have not chosen to "enforce" any portion of the Admission Agreement. Their Complaint alleges wrongful death and survival claims premised on common law duties owed by a nursing home to its resident. For the same reason, Defendant errs when they claim Plaintiffs seeks to repudiate any agreement. Plaintiffs' Complaint does not reference and is not based on any contract.

Even if Plaintiffs had based a claim on an alleged breach of the Admission Agreement, such conduct would not equitably estop them from opposing enforcement of the separate and independent Arbitration Agreement. The Admission Agreement does not reference arbitration at all. Presumably, Defendant is arguing that the Admission Agreement and Arbitration Agreement merge, and Plaintiffs are bound by the later by seeking to enforce the former. Yet, Plaintiffs do not seek to enforce either agreement and, as discussed in Section II(A), Defendant cannot meet its burden of proving merger because the agreements indicate that they are not to merge.

The separateness of the two contracts in this case is an important fact further distinguishing the "direct benefit" cases on which Defendants rely. Def's Mem. at 9-10. International Paper notes that equitable estoppel can apply to bar refusal of arbitration when the refusing party "receives a direct benefit from a contract containing an arbitration clause." 206 F.3d at 418 (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999)). The Fourth Circuit opinion does not fully list the equitable estoppel elements for South Carolina law provided in Strickland. Additionally, International Paper considered a single contract in which a party was suing to enforce some terms while seeking to avoid the same

---

to arbitrate. This case is much more like Coleman than Gilbert. The Arbitration Agreement and Admission Agreements are completely separate here and admission is not dependent on a resident agreeing to arbitrate.

contract's arbitration provision. The same is true for Jackson v. Iris.com, 524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007), which Defendant cites in further support of their estoppel argument. In Jackson, a musician was estopped from refusing a contract's mandatory arbitration provision when he sought to enforce the same contract's liquidated damages provision. Id. at 750-51. In sum, Defendant's equitable estoppel argument is only potentially viable if this Court finds the Admission Agreement and Arbitration Agreements merge. However, as in Coleman, the evidence shows the contracts are separate, and Defendants cannot meet their burden to prove merger.

IV. Virginia Butler's heirs did not sign the Arbitration Agreement and are not bound by its terms.

Plaintiffs' Complaint includes a cause of action for wrongful death claim arising out of Defendant' negligent care of Ms. Butler. Under South Carolina law, a wrongful death claim is independent of any claim a decedent may have for her injuries. See Crosby v. Glasscock Trucking Co., Inc., 340 S.C. 626, 628, 532 S.E.2d 856, 856 (2000) (finding South Carolina's wrongful death statute "created a new cause of action" distinct from decedent's claim for pre-death injury). While a wrongful death claim must be pursued by a decedent's personal representative, the claim is for the benefit of a class of beneficiaries including the decedent's spouse, children, parents, or "heirs." S.C. Code Ann. § 15-51-20; Lester v. McFaddon, 415 F.2d 1101, 1103 (4th Cir. 1969). Any recovery from a wrongful death claim is not processed through the decedent's estate but must go "directly to the statutory beneficiaries." Lester, 415 F.2d at 1103. Wrongful death proceeds are disbursed among the beneficiaries according to South Carolina intestacy law. S.C. Code Ann. § 15-51-40.

Plaintiffs did not sign an agreement with Defendant and did not do anything else to objectively manifest assent to the Arbitration Agreement's terms. The group that Plaintiffs

represent, Virginia Butler's heirs at law, did not exist until Ms. Butler's death. See Jones v. Leagan, 384 S.C. 1, 16, 681 S.E.2d 6, 14 (Ct. App. 2009) (noting person's heirs are not determined until person's death). The Arbitration Agreement purports to require arbitration for the wrongful death beneficiaries' claims by defining the "Parties" to the Agreement to include any person "entitled to bring a wrongful death claim." However, this provision is unenforceable because it violates fundamental South Carolina law by purporting to bind persons who have no expressed assent to the Agreement's terms.

It does not appear that South Carolina courts have specifically addressed whether an arbitration agreement can bind the people who later become a nursing home resident's wrongful death beneficiaries. The issue was recently addressed in Missouri. In Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (en banc), a prospective nursing home resident's daughter signed an arbitration agreement on the resident's behalf. In language tracking the Agreement in this case, the agreement in Lawrence purported to bind the resident "and all persons whose claim is derived through or on behalf of" the resident. The court held that the agreement was not binding on the resident's wrongful death beneficiaries because they were proceeding on the independent tort of wrongful death that was not derivative of any claim the resident would have retained had she survived. Id. at 528-29; see also Bybee v. Abdulla, 189 P.3d 40, 43 (Utah 2003) ("a decedent does not have the power to contract away the wrongful death action of his heirs")[5].

While there is a split among jurisdictions as to whether a wrongful death claim is affected by a decedent's assent to arbitrate, the difference of opinion is usually based on whether a state

[5] Courts from other jurisdictions have reached the same conclusion. Woodall v. Avalon Core Ctr.-Fed. Way, LLC, 231 P.3d 1252, 1258 (Wash. App. Div. 1 2010) (refusing to compel arbitration of wrongful claim because wrongful death claim never belonged to decedent); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007) (concluding decedent "could not restrict his beneficiaries to arbitration of their wrongful death claims, because he held no right to those claims").

views wrongful death claims as independent or derivative causes of action. Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 598 (Ky. 2012). In states where wrongful death is a derivative claim, a decedent's assent to arbitrate may affect the statutory beneficiaries' wrongful death claim. Id. However, in states where wrongful death is an independent claim, a decedent cannot waive her statutory beneficiaries' independent right to a jury trial on their independent wrongful death claim. Id. South Carolina clearly recognizes wrongful death as an independent cause of action. Crosby, 340 S.C. at 628, 532 S.E.2d at 856. Therefore, Plaintiffs' wrongful death claim, brought for the benefit of Ms. Butler's statutory beneficiaries, may not be compelled to arbitration.

Accordingly, even if the Court were to find the Arbitration Agreement binding as to Ms. Butler's claims, the Agreement cannot apply to her wrongful death beneficiaries who did not sign the Agreement.

CONCLUSION

Based on the arguments above, Plaintiffs respectfully request that the court deny Defendant's motion in full. Ms. Butler did not sign the Arbitration Agreement and Ms. Robinson lacked any legal authority to sign on her behalf. Defendants have failed to prove or even cite the required elements to support their equitable estoppel argument. Defendants' motion should be denied.

Respectfully submitted,

W. Jones Andrews, Jr.
McGowan, Hood & Felder, LLC
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100
jandrews@mcgowanhood.com

Attorney for Plaintiffs

September 4, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF BAMBERG)

AFFIDAVIT
Mary Robinson

I, Mary Robinson depose and say the following:

1. That I am over eighteen years of age and reside in Bamberg County, South Carolina.
2. That my mailing address is P.O. Box 162, Bamberg, SC 29003.
3. I am the niece of Virginia Butler.
4. On the date of Ms. Butler's transfer from Orangeburg to Unihealth- Bamberg Nursing Home, a female representative came to my work place and asked me to sign documents for my Aunt. I did.
5. I have never been appointed by any court as a Guardian or Representative or Power of Attorney for my Aunt.

Mary Robinson
Mary Robinson

Sworn to and signed before me
this 3 day of Sept, 2015.

Notary Public

My Commission expires:

WILLARD H. DUNCAN NOTARY PUBLIC SOUTH CAROLINA My Comm. Exp. 04/13/2017

PLAINTIFF'S EXHIBIT 1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
Mae Ruth Davis Thompson, Individually and as the appointed Personal Representative of the Estate of Eula Mae Davis, deceased,	)	
Plaintiff,	)	**ORDER**
v.	)	
	)	Case No. 2013CP46-2930
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,	)	
Defendants.	)	

This matter came before me on March 13, 2014, upon Defendants' Motion to Dismiss and Compel Arbitration or, Alternatively, to Compel Arbitration and Stay Proceedings in this case. Representing Plaintiff was John G. Felder, and representing Defendants was Robert E. Horner. Based on the submissions and arguments of the parties, I make the following findings and conclusions.

STATEMENT OF CASE

The following facts are clearly established in the record, and are adopted by me as the facts of this case. The parties have acknowledged that it is for this court to determine the factual issues pertaining to arbitrability for the purpose of ruling on this motion.

On January 11, 2011, Plaintiff and her brother, Andrew Davis ("Davis"), accompanied their mother Eula Mae Davis ("Decedent") to Uni-Health Rock Hill ("Uni-Health"), a nursing care facility, to admit Decedent to the facility for rehabilitation care.[1] As the admission process

[1] For ease of discussion, the term "Uni-Health" is used throughout this order to refer to the interests of all the Defendants, as those interests may appear, or be established, in subsequent proceedings.

proceeded, Davis and Plaintiff met with Uni-Health's staff to complete and execute necessary paperwork, and discuss Decedent's admission and care at the facility. In conjunction with Uni-Health's staff, Davis completed a number of forms associated with the admission process. Included were a detailed Admission Agreement, and a separate five-page Arbitration Agreement. The Arbitration Agreement provides that it applies to "[a]ny and all claims or controversies arising out of or in any way relating to [the] Agreement or the Patient/Resident's Admission Agreement, . . . or the Patient/Resident's stay at, or the care of services provided by [Uni-Health], or any acts or omissions in connection with such care or services." The Arbitration Agreement also seeks to bind potential future wrongful death beneficiaries to arbitration. The Arbitration Agreement precludes a jury trial and limits discovery that would otherwise be permitted under the South Carolina Rules of Civil Procedure.

Davis signed both the Admission Agreement and the Arbitration Agreement for Decedent on lines calling for the signature of "Patient/Resident Representative." His intended capacity was obviously as Decedent's "Representative." Decedent was not present in the meeting with Uni-Health's staff, as she was in the process of being transferred from a local hospital to Uni-Health. Decedent had never executed a power-of-attorney appointing Davis as her attorney-in-fact. Nor had she executed any other document giving Davis express authority to contract on her behalf in making healthcare decisions, or any other matter.

Prior to her admission to Uni-Health, Decedent permitted Davis to assist her with her finances, which amounted to paying her bills, and receiving and cashing her monthly Social Security check. The Decedent signed documents on her own behalf pertaining to renting her home. According to Davis and Plaintiff, Decedent also continued to handle her own affairs, as well as permitting Davis to do so. The Decedent, herself, had no prior contact with Defendants' facility, and never represented that Davis was her agent, either expressly, or impliedly. There is nothing in the record to indicate that Uni-Health relied on Davis' prior acts on behalf of Decedent in accepting him as Decedent's "Representative" for the purpose of executing the Admission Agreement and the Arbitration Agreement.

Plaintiff asserts that there is no valid Arbitration Agreement, because Davis lacked authority, express or implied, to enter the agreement on behalf of Decedent. Defendants assert that there was such authority, either express, or implied, by virtue of an agency relationship held by Davis, as evidenced by his assisting Decedent with her personal and financial affairs.

The parties acknowledge that the validity of the Arbitration Agreement must be

determined in accordance with the general principles of contract and agency law applicable to any other contract.

DISCUSSION

The dispositive issue before the court in this matter is whether Plaintiff is bound by the Arbitration Agreement signed by Davis as "Representative" of Decedent. It is undisputed that Davis held no power of attorney, or similar document, of any kind expressly granting such power or authority.

The Adult Health Care Consent Act (S.C. Code Ann. § 44-66-10 *et seq.* (1976, as amended) ("Act") confers such authority in regard to health care decisions, and thereby bound both Uni-Health and Decedent's estate in regard to the terms and conditions of the Admission Agreement. The manifest purpose of the Act is to enable contracting parties in a healthcare situation to enter into a binding agreement when express authority has not been conferred upon an agent for that purpose. It further eliminates the need to deal with questions of apparent agency or authority in order to make such a contract binding.

However, the Act does not confer such authority with respect to an Arbitration Agreement, such as the one in issue in this case. *See Coleman v. Mariner Health Care, Inc.*, Supreme Court, Opinion No. 27362, filed March 12, 2014. As the Arbitration Agreement does not deal with healthcare decisions, the provisions of the Act do not apply to establish the necessary principal-agent relationship. *Id.*

Therefore, if Plaintiff is to be bound by the Arbitration Agreement, it must be the result of an express or implied-in-law principal-agent relationship between the Decedent and Davis. Davis must have been cloaked with actual or apparent authority to contract with Uni-Health concerning arbitration as an alternate method of resolving any dispute between the parties.

An agency relationship may be established with clear evidence of actual or apparent authority conferred by the principal on the alleged agent. *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Actual authority is ". . . expressly conferred upon the agent by the principal." *Richardson v. PV, Inc.*, 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009). It is clear that there was no such action by Decedent.

Apparent authority is based on ". . . representations made by the principal to the third party and reliance by the third party on those representations." *Young v. S.C. Dep't of Disabilities & Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). To prove apparent authority, a party must show ". . . (1) that the purported principal consciously or impliedly

represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Cowburn*, 366 S.C. at 39, 619 S.E.2d at 448. The burden of establishing agency is upon the party asserting that a principal-agent relationship exists. *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).

Evidence is lacking to satisfy Uni-Health's burden in this case. First, there is no evidence that Decedent made any express representation to Uni-Health's staff. Indeed, she never spoke with Uni-Health's staff concerning her admission. Second, there is no evidence that Uni-Health relied upon the fact that Davis assisted Decedent with her affairs by paying her bills and depositing her Social Security check. The depositions of Davis and Plaintiff do not indicate that Uni-Health's staff was made aware of that fact.

Further, Decedent personally executed the lease documents for her home. Although Davis took Decedent to medical appointments, there is no evidence that he was involved in the appointments as acting on Decedent's behalf. While Decedent was "comfortable" with Davis "sign[ing] her in" to the hospital, she assumed that responsibility herself as well. (Davis deposition at p. 17, lines 1-25.)

In short, I conclude that Decedent did not expressly or impliedly represent to Uni-Health that Davis was her agent for the purpose of signing the Arbitration Agreement. I further conclude that Uni-Health did not rely on any apparent agency relationship in regard to the Arbitration Agreement. Thus, I conclude that Decedent and Plaintiff were not bound to the Arbitration Agreement, and that the Arbitration Agreement cannot be enforced against Plaintiff. It follows that Decedent's heirs are likewise not bound.

Therefore, since the Arbitration Agreement is unenforceable, Defendants' motion to compel arbitration must be denied. As this ruling is dispositive of the issue presented, no ruling on the ancillary issues presented is required.

AND IT IS SO ORDERED.

April 11, 2014

S. Jackson Kimball
Special Circuit Court Judge
York County

#4

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2015-CP-05-00124
Appellate Case No. 2015-002493

Polly McGill and Mary Broxton, as Co- Personal Representatives of the Estate of Virginia Butler, deceased, Plaintiffs

Of Whom Polly McGill, as Personal Representative of the Estate of Virginia Butler is the ..... Respondent,

v.

The Regional Medical Center Foundation d/b/a The Regional Medical Center and Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post Acute Care of Bamberg, LLC, Defendants,

Of Whom Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post Acute Care of Bamberg, LLC is the ..... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Supplemental Record on Appeal contains all material proposed and agreed to be included by the parties and not any other material.

SOWELLGRAY STEPP & LAFFITTE, LLC

BY: Monty Todd

Monteith P. Todd
J. Michael Montgomery
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211
(803) 929-0300
Attorneys for Appellant

7/20, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2015-CP-05-00124
Appellate Case No. 2015-002493

Polly McGill and Mary Broxton, as Co- Personal Representatives of the Estate of Virginia Butler, deceased, Plaintiffs

Of Whom Polly McGill, as Personal Representative of the Estate of Virginia Butler is the ..... Respondent,

v.

The Regional Medical Center Foundation d/b/a The Regional Medical Center and Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post Acute Care of Bamberg, LLC, Defendants,

Of Whom Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post Acute Care of Bamberg, LLC is the ..... Appellant.

PROOF OF SERVICE

I, the undersigned legal assistant, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Appellant, Pruitt Health-Bamberg, LLC d/b/a Uni-Health Post-Acute Care of Bamberg, LLC, do hereby certify that I have served all counsel in this action with a copy of the Supplemental Record on Appeal by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

W. Jones Andrews, Jr., Esquire
McGowan, Hood & Felder
1517 Hampton Street
Columbia, SC 29201

Michael C. Tanner, Esquire
Post Office Box 1061
Bamberg, SC 29003

7/20, 2016

Robin C. Owens

Robin C. Owens, Legal Assistant