26250

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

RECEIVED
MAR 22 2018
SC Court of Appeals

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

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

v.

UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp.; R. Dale Padgett, MD, PA; and Dr. Herbert A. Moskow,

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

Camille Hodge, Sr., ... , Respondent,

v.

UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp.; R. Dale Padgett, MD, PA; and Dr. Herbert A. Moskow,

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

APPELLANTS' PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellants submit this petition for rehearing because the Court overlooked or misapprehended several points of law and fact in its opinion dated March 7, 2018. For the reasons set forth below, the Court should grant Appellants' petition, withdraw the original opinion, and substitute a new opinion reversing the circuit court's order denying Appellants' motions to compel arbitration as well as its order denying Appellants' motion to compel the deposition of Camille Hodge, Sr.

At the outset, Appellants are concerned with the Court's finding that "[t]he only agreement from which Respondents even arguably received a benefit was the Admission Agreement because Mable was admitted to the Facility as a result of it. However, because the Facility allegedly caused Mable's injuries that later led to her death, we find it difficult to find she benefited even from being admitted." Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, Op. No. 5541 (S.C. Ct. App. Mar. 7, 2018) (Shearouse Adv. Sh. No. 10 at 70–71). Appellants take exception to the Court questioning whether a patient "benefited even from being admitted" to their facility. But the Court's sua sponte finding as to medical causation on the merits is even more problematic because it was not argued and is not supported by any facts in the record on appeal. See Rule 210(h), SCACR (stating "the appellate court will not consider any fact which does not appear in the Record on Appeal"); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); see also generally I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 723 (2000) (asserting that "[t]he basis for respondent's additional sustaining grounds must appear in the record on appeal").

Moreover, the Court's statements bleed into the merits of the underlying medical malpractice action. Although Respondents made a passing remark in their brief questioning whether Mable received a benefit from staying in Appellants' facility, the Court took it a step

further and commented on medical causation. See Resp. Br. at 12–13 ("Putting aside the issue of whether the stay was a benefit when she arrived in 'no real distress' and was wheeled out three weeks later as a paraplegic for the remainder of her life, there is no question that she received no 'benefit' from the Arbitration Agreement that Appellant[s] seek to enforce against her."). Appellants would note that Respondents cited no material in the record in support of this assertion—and could not cite any given that no depositions were taken prior to the motions being filed—and, thus, it was nothing more than the argument of counsel. See Shinn v. Kreul, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) ("A court cannot consider facts appearing only in argument of counsel."); 15 S.C. JUR. Appeal and Error § 79 at n.1 (2018) ("The argument of counsel is not evidence and, standing alone, provides no support for a finding of fact."). In any event, the Court appears to have accepted that Mable received no benefit from the Arbitration Agreement and extrapolated on that notion to find Mable did not even benefit from being admitted to Appellants' facility. This was error.

In sum, the merits of this lawsuit are not relevant to the issues on appeal and were not before the Court—the only legal questions before the Court pertain to the enforceability of an arbitration agreement under various principles and what evidence may be used to demonstrate the arbitrability of Respondents' claims. Accordingly, the Court erred by weighing into the underlying facts—without these facts being in the record before the Court—and making sua sponte findings regarding the care provided at Appellants' facility and the issue of medical causation. Because these findings could prejudice Appellants' defense once the appellate process runs its course and the parties either arbitrate or try the underlying medical malpractice action, the Court should strike these comments from the opinion and issue a substituted opinion.

In addition to veering off course into the merits, the Court overlooked or misapprehended the appropriate standard of review in this case. Specifically, the Court failed to acknowledge that "[i]t is the policy of this state and federal law to favor arbitration[,] and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" Landers v. Fed. Deposit Ins. Co., 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 92 (4th Cir. 1996)). Likewise, the Court failed to acknowledge that "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." Hall v. Green Tree Servicing, LLC, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015) (quoting Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014)). Respectfully, the Court did not identify or apply the complete standard of review in its opinion, and this error controlled its analysis which led to finding in favor of Respondents. No doubts were resolved in favor of Appellants, and Respondents put forth no evidence—aside from arguments of counsel—to demonstrate the claims were not suitable for arbitration.

Indeed, this Court ignored the appropriate lens through which a motion to compel arbitration must be considered and shifted the burden to the nursing home facility to prove the Arbitration Agreement is enforceable. In other words, the Court placed the burden on the facility to demonstrate a patient, or the patient's representative, benefited from the agreement and intended to waive their right to a jury trial. Although Respondents contended "there is no question [Mable] received no 'benefit' from the Arbitration Agreement" in their brief, they cited nothing in support of this conclusory assertion. If "no question" existed, then the parties would not be before the Court arguing these issues on appeal. Cf. Batten v. Howell, 300 S.C. 545, 547, 389 S.E.2d 170, 171 (Ct. App. 1990) (observing "[t]he fundamental premise upon which" the state policy favoring

arbitration "is grounded is the laudable goal of providing a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings" (quoting Trident Tech. Coll. v. Lucas & Stubbs, Ltd., 286 S.C. 98, 104, 333 S.E.2d 781, 785 (1985))); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 357–58, 755 S.E.2d 450, 456 (2014) (Toal, C.J., dissenting) (noting that "[u]sing a separate contract for arbitration agreements is conducive to greater freedom of choice" and "should be encouraged").

Further, the Court overlooked or misapprehended that this burden-shifting double standard contravenes the longstanding principle in this state that "when a man places his signature to a written contract it is a serious matter, and the law presumes that he knows what he is doing." New v. Collins, 126 S.C. 294, ___, 119 S.E. 835, 835 (1923); see also Mayor & City Council of Baltimore v. Baltimore City Composting P'ship, 800 F. Supp. 305, 308 (D. Md. 1992) ("The intentions of the parties to a contract are to be 'generously construed as to issues of arbitrability.'" (quoting Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 813 (4th Cir. 1989))). It also ignores the fact that, on numerous occasions, our appellate courts have recognized the benefits of arbitration. See, e.g., Batten, 300 S.C. at 547, 389 S.E.2d at 171 (recognizing the benefits of arbitration and asserting that the state policy favoring arbitration "is grounded is the laudable goal of providing a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings" (quoting Trident Tech. Coll., 286 S.C. at 104, 333 S.E.2d at 785)). These benefits apply in all settings, and nursing home arbitration agreements should not be treated any differently.

Against this backdrop, when viewing this case through the appropriate lens, the Court overlooked or misapprehended several points of law and fact and, therefore, should withdraw its opinion for the reasons set forth below.

I. Motion to Compel Deposition and Agency Analysis

First, the Court erred in affirming the circuit court's denial of Appellants' motion to compel the deposition of Camille Hodge, Sr. as well as the circuit court's finding that Appellants failed to establish that signing the Arbitration Agreement was within the scope of his agency.

Specifically, the Court overlooked or misapprehended that (1) the requested deposition was well within the scope of discovery allowed in Rule 26(a), SCRCP; (2) Respondents had no legitimate objection for not allowing Appellants to depose Camille Hodge, Sr.; (3) Mr. Hodge's testimony was important to shed light on questions regarding the scope of his agency given that Mable is deceased; (4) agency is a fact-intensive inquiry; and (5) Mr. Hodge's testimony was not the sole evidence offered to prove an agency relationship. Additionally, the Court's error in overlooking or misapprehending the necessity of Mr. Hodge's deposition controlled its analysis and ultimate conclusion that Appellants failed to establish the scope of his agency in this case.[1]

The Court correctly noted the appropriate scope of discovery described in Rule 26(a), SCRCP, but then overlooked the fact that Mr. Hodge's deposition fell comfortably within that scope. The Court also overlooked the fact that Respondents had no legitimate objection to Appellants taking Mr. Hodge's deposition. The rule provides that "[p]arties may obtain discovery by . . . depositions upon oral examination." Rule 26, SCRCP. Rule 26 instructs the circuit court to only limit the "frequency or intent of use of discovery" in one of three circumstances, none of which are present in this case. Id. Appellants merely sought to take a deposition, which is arguably the most basic discovery tool—aside from written discovery—used in the course of litigation.

---

[1] Appellants, of course, agree that the appeal of the circuit court's denial of their motion to compel Mr. Hodge's deposition has a sufficient nexus to the appeal of the denial of their motion to compel arbitration because the purported lack of evidence—which, incidentally, the circuit court would not allow Appellants to procure—controlled the circuit court's analysis of the agency issue. See Brown v. Cty. of Berkeley, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005). Because the issues are so intertwined, Appellants will address them together in this petition for rehearing.

Mr. Hodge's deposition was not "unreasonably cumulative or duplicative." Rule 26(a)(i), SCRCP. It was not "obtainable from some other source that is more convenient, less burdensome, or less expensive" given that Mable is deceased. Id. Appellants certainly did not have "ample opportunity by discovery in the action to obtain the information sought" because these motions were argued during the pleadings stage, and Respondents refused to make Mr. Hodge available for a deposition. Rule 26(a)(ii), SCRCP. Finally, it would be disingenuous for Respondents to argue that a deposition would be "unreasonably burdensome or expensive." Rule 26(a)(iii), SCRCP. As this Court noted, Respondents' only objection was that "the law in South Carolina does not allow a relative to waive a party's right to a jury trial." Not only is that an incorrect statement of the law, but it is also not a legitimate discovery objection. See Rule 26(a)(i)–(iii), SCRCP. Thus, the Court misapprehended the scope of Rule 26 and overlooked Respondents' improper objection in affirming the circuit court's denial of Appellants' motion to compel the deposition of Mr. Hodge.

Moreover, and perhaps more importantly, the Court overlooked or misapprehended the importance of Mr. Hodge's testimony to help ascertain the scope of his agency in this case. Respondents argued—and the circuit court, and now this Court, have agreed—Appellants failed to establish the scope of agency, while simultaneously not allowing Appellants to obtain and present relevant evidence to demonstrate agency. This is fundamentally wrong. Cf. Rule 1, SCRCP (asserting that the South Carolina Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action"). In essence, the Court is requiring Appellants to fight with their hands tied behind their backs. Respondents did not bring this case until after Mable's death. Because Mable is deceased, the only source from which Appellants could obtain further information—in addition to the records produced in discovery demonstrating a course of conduct—regarding the scope of Mr. Hodge's agency was Mr. Hodge.

Respondents should not be permitted to withhold relevant and admissible evidence in contravention of Rule 26, SCRCP. Respectfully, the Court overlooked or misapprehended that its decision is allowing them to do just that.

Additionally, the Court overlooked or misapprehended that agency is a fact-intensive inquiry, and its decision affirming the circuit court's denial of Appellants' motion to compel the deposition of Mr. Hodge prevented Appellants from presenting relevant facts. "Generally, agency is a question of fact." R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 434, 540 S.E.2d 113, 118 (Ct. App. 2000). "[A]gency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal." Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982). "Questions of agency ordinarily should not be resolved by summary judgment where there are any facts giving rise to an inference of an agency relationship." Reid v. Kelly, 274 S.C. 171, 174, 262 S.E.2d 24, 26 (1980).

Our supreme court has long recognized that, "[w]ith reference to proof of agency, the general rule is well settled, of course, that the declarations of an agent alone as to his agency are insufficient to prove agency, but if there are other corroborating facts, agency then becomes a question for the jury." City of Greenville v. Washington Am. League Baseball Club, 205 S.C. 495, ___, 32 S.E.2d 777, 780 (1945) (emphasis added). To be sure, the agent's "statements are admissible and competent as circumstances in connection with other competent evidence to prove the legal relationship of principal and agent." Id. (emphasis added). "The relationship of agency need not depend upon express appointment and acceptance, but may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case. Id. at ___, 32 S.E.2d at 781 (emphasis added).

> The existence of agency is a fact[] and like other facts may be proved by any evidence, traceable to the alleged principal, and having a legal tendency[] to establish it. The agency may be shown by conduct by the relations and situation of the parties, by acts and declarations, by matters of omission as well as commission, and, generally, by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent, for the performance of the act in controversy.

Id. (quoting 1 MECHEM ON AGENCY § 261, at 185).

As this Court recognized in its opinion, "[a]n agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992).

Here, the Court overlooked or misapprehended the fact that Appellants were not seeking to use the statements of Mr. Hodge, standing alone, to prove agency in this case. Because Mable is deceased, however, Mr. Hodge's testimony—coupled with the course of conduct in which he engaged on her behalf leading up to Mable's admission to Appellants' facility—was relevant and admissible to demonstrate, via circumstantial evidence, the scope of his agency. Respondents argued, and this Court agreed, that Appellants would not be able to prove agency via this testimony with no indication as to what Mr. Hodge might have said. Regardless, as Appellants were not trying to use Mr. Hodge's testimony alone to prove the scope of his agency, the present case is distinguishable from Dickerson v. Longoria, 995 A.2d 721 (Md. 2010), and Klippel v. Mid-Carolina Oil, Inc., 303 S.C. 127, 399 S.E.2d 163 (Ct. App. 1990), and the Court erred in relying upon these authorities in affirming the circuit court's decision to deny Appellants the right to depose Mr. Hodge. Likewise, this case is readily distinguishable from Thompson v. Pruitt Corp.,

416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), because unlike the patient in that case who suffered from dementia and, therefore, had no capacity to form an intent to create an agency relationship, in this case, Mable had the capacity to authorize Mr. Hodge to act as her agent and hold him out as acting on her behalf. The Court further misapprehended that Appellants did not rely upon the fact of marriage, in and of itself, to prove an agency relationship.

In light of the foregoing, the Court overlooked or misapprehended that Appellants demonstrated the circuit court's ruling on their motion to compel was controlled by an error of law, "resulted in prejudice to the right of [A]ppellant[s]," and amounted to a "clear abuse of discretion." Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989). Respondents cannot assert a defense that purports to shift the burden of proof to Appellants and then deny Appellants access to evidence that is relevant, admissible, and critical to carrying that burden. Therefore, the Court should withdraw its opinion and substitute a new opinion, reversing the circuit court's denial of Appellants' motion to compel Mr. Hodge's deposition and remanding with instructions to allow his deposition to go forward. The Court should also strike its agency analysis from the opinion given that any determination would be premature without the benefit of Mr. Hodge's testimony.[2]

II. Equitable Estoppel

Next, as to the issue of equitable estoppel, the Court overlooked or misapprehended that it is inequitable to allow Respondents to pick and choose which admissions documents they deem acceptable to enforce in this case. That is not the law, nor should it be.

[2] Even on the merits, the Court erred in finding no common law agency between Mable and Mr. Hodge, and Appellants would rely upon the arguments set forth in their Final Brief of Appellant and Final Reply Brief and incorporate them as fully and effectually as if set forth herein verbatim. The Court overlooked that Mable held out Mr. Hodge to be her agent, and Appellants' facility relied upon the couple's representations as to his scope of agency, whether express or implied, when he filled out the admissions paperwork. See Landers, 402 S.C. at 109, 739 S.E.2d at 213 (stating "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" (quoting Am. Recovery Corp., 96 F.3d at 92)).

In its opinion, the Court found that, "even if the Admission and Arbitration Agreement merged, because Respondents are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement." Respectfully, the Court misapprehended Appellants' equitable estoppel argument—which is different from the narrow merger questions addressed in Coleman, 407 S.C. at 346, 755 S.E.2d at 450, and Thompson, 416 S.C. at 43, 784 S.E.2d at 679—and the Court overlooked that nothing demonstrates the purview of the Arbitration Agreement would be limited solely to breach of contract claims.

First, the Court overlooked or misapprehended that the present case is distinguishable from Coleman because it has nothing to do with the Adult Health Care Consent Act[3] and Appellants' arguments are not premised upon the common law doctrine of merger. See THI of S.C. at Magnolia Manner-Inman, LLC v. Gilbert, 2015 WL 1268185, at *2 (D.S.C. Mar. 19, 2015) (rejecting argument that Coleman operated to prohibit an agreement from binding a personal representative of the estate of a nursing home patient under common law principles of third-party beneficiary or equitable estoppel). Instead, as Appellants argued in their briefs, equitable estoppel presents a different inquiry for the Court. See Pearson v. Hilton Head Hosp., 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) ("Equitable estoppel precludes a party from asserting rights 'he otherwise would have had against another' when his own conduct renders assertion of those rights contrary to equity." (quoting Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 417–18 (4th Cir. 2000))). Likewise, the present case is readily distinguishable from Thompson because the patient in that case was demented, whereas Mable had mental capacity.

[3] S.C. Code Ann. §§ 44-66-10 through -80 (2018).

Here, the Court was asked to decide whether Respondents should be permitted to accept the benefits of an agreement and later repudiate that agreement when it no longer suited them. Cf. E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 200 (3d Cir. 2001) ("Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract."); Jackson v. Iris.com, 524 F. Supp. 2d 742, 749–50 (E.D. Va. 2007) ("[A] party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage. . . . [W]here . . . a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a direct benefit from a contract containing an arbitration clause.").

Mable, who was mentally competent, was admitted to Appellants' facility, began receiving medical care, and accepted the benefits of all admissions documents signed by her husband, Camille Hodge, Sr. She, or her personal representative, was able to enforce the Arbitration Agreement against the facility in the event she had an issue. Neither the law nor equity give Respondents the freedom to pick and choose which parts of Mable's admissions documents they wish to enforce. And our appellate courts should not sanction this behavior because it shatters the reasonable expectations of parties to these instruments and puts nursing home arbitration agreements on a different footing than any other contract. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (noting that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts").

Second, the Court overlooked or misapprehended the fact that the Arbitration Agreement was not limited to breach of contract claims. The Court cited no law in support of this statement and, indeed, the Court's finding is contrary to its own precedent. See Pearson, 400 S.C. at 288, 733 S.E.2d at 600 (stating "[t]he rule in the Fourth Circuit is that 'a broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a "significant relationship" exists between the asserted claims and the contract in which the arbitration agreement is contained.' Well established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." (quoting Long v. Silver, 248 F.3d 309, 316 (4th Cir. 2001); Int'l Paper Co., 206 F.3d at 416)). Nothing in the admissions documents limited the scope of arbitration to breach of contract claims. As the Court noted, the Arbitration Agreement provided that the following claims would be submitted to arbitration: "[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement, including the interpretation of either, or the Patient/Resident's stay at, or the care or services provided by, the Healthcare Center, or any acts or omissions in connection with such care or services." This broad language unquestionably encompasses the present actions Respondents filed against Appellants. See, e.g., Landers, 402 S.C. at 109, 739 S.E.2d at 214 (observing "the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained").

Third, although the Court noted the Thompson court found that any ambiguities should be construed against the drafter, the Court failed to reconcile that principle with the directive that all doubts should be resolved in favor of arbitration, and the party resisting arbitration bears the burden of proving the claims are not suitable for arbitration. See Landers, 402 S.C. at 109, 739 S.E.2d at

213 (quoting Am. Recovery Corp., 96 F.3d at 92); Hall, 413 S.C. at 271, 776 S.E.2d at 94 (quoting Dean, 408 S.C. at 379, 759 S.E.2d at 731). In other words, the Court overlooked or misapprehended the fact that the opinion, as written, will leave litigants wondering how the interplay of these standards impacts the burden of proof in the context of motions to compel arbitration. Even so, nothing in the Arbitration Agreement was ambiguous. The only thing ambiguous at this point was the Hodges' conduct in dealing with healthcare providers and, as noted above, Appellants should be given an opportunity to clarify questions surrounding agency by deposing Camille Hodge, Sr. To the extent a question of fact arises as to agency, the law requires the scales to tip in favor of compelling these claims to arbitration as intended in the unrevoked agreement Mr. Hodges signed on Mable's behalf upon admission to Appellants' facility.

Finally, the Court overlooked or misapprehended the circuit court's error in relying upon an unpublished opinion from a different case. See Scott v. Heritage Healthcare of Estill, LLC, Op. No. 2014-UP-317 (S.C. Ct. App. filed Aug. 6, 2014). Our appellate court rules do not provide for the exception relied upon by the circuit court or this Court in support of citing to an unpublished opinion. The rule plainly states that "[m]emorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d), SCRCP. While Appellants, like this Court, are guided by the principle that "whatever doesn't make any difference, doesn't matter,"[4] the Court respectfully overlooked or misapprehended the extent to which Respondents and the circuit court relied upon the unpublished Scott decision in arriving at their conclusion. At each level of review, Respondents have made a point to note that this case involves the same parties with the same lawyers making the same arguments on similar facts. Putting aside the inaccuracy of that statement, Appellants

[4] McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

believe that the circuit court and this Court have erroneously applied nonbinding precedent to Appellants because of prior appeals involving arbitration issues. This is improper because every case turns on its own peculiar facts and circumstances. And, quite frankly, nothing prevents Appellants from litigating these arbitration issues when patients and their representatives continue reneging on valid contracts to which they have affixed their signatures. While the present dispute does concern questions surrounding the arbitrability of claims, that does not change the South Carolina Appellate Court Rules.

The U.S. Supreme Court has recognized on numerous occasions that arbitration agreements under the Federal Arbitration Act[5] (the FAA) are to be treated the same as any other contract. See, e.g., Gilmer, 500 U.S. at 24 (noting that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts"). Unfortunately, this does not appear to be the case in South Carolina in the context of enforcing nursing home arbitration agreements. But see Coleman, 407 S.C. at 358, 755 S.E.2d at 457 (Toal, C.J., dissenting) ("The Supreme Court has repeatedly emphasized that arbitration agreements must be placed on the same footing as all other contracts."); AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, 1745–46 (2011) (explaining that placing arbitration agreements on equal footing with other contracts with other contracts is consistent with the liberal judicial policy favoring arbitration); Saturn Distrib. Corp. v. Williams, 905 F.2d 719, 722 (4th Cir. 1990) (observing that the FAA "requires that states place no greater restrictions upon arbitration provisions than they place upon other contractual terms" and asserting that, "with few limitations, if a state law singles out arbitration agreements and limits their enforceability, it is preempted"); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("Courts may not, however,

[5] 9 U.S.C. §§ 1–16.

invalidate arbitration agreements under state laws applicable only to arbitration provisions."); Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2 [of the FAA]."); Stephen J. Ware, Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1012 (1996) ("Any law that singles out arbitration agreements by making them less enforceable than other contracts is preempted by the FAA.").

Simply put, the Court should not permit Respondents to repudiate the Arbitration Agreement at this stage. By allowing them to do so, the Court misapprehended the doctrine of equitable estoppel and overlooked the fact that its decision treats nursing home arbitration agreements differently than other contracts under the law in direct contravention of U.S. Supreme Court precedent.

CONCLUSION

Based upon the foregoing, the Court should grant the present petition for rehearing; withdraw its March 7, 2018, opinion; issue a substituted opinion reversing the circuit court's orders denying the motions to compel arbitration; and remand with instructions for the circuit court to issue an order compelling the claims to arbitration. In the alternative, the Court should grant this petition for rehearing; withdraw its opinion; issue a substituted opinion reversing the circuit court's orders denying the motions to compel arbitration as well as its order denying Appellants' motion to compel the deposition of Camille Hodge, Sr; and remand with instructions for Mr. Hodge's deposition to go forward. Under either scenario, the Court should strike its comments on the merits of the underlying medical malpractice action from any substituted opinion in this matter.

Respectfully submitted,

SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC

By: _____

Monteith P. Todd
mtodd@sowellgray.com
J. Michael Montgomery
mmontgomery@sowellgray.com
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Counsel for Appellants

March 22, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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

RECEIVED
MAR 22 2018
SC Court of Appeals

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

v.

UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp.; R. Dale Padgett, MD, PA; and Dr. Herbert A. Moskow,

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

Camille Hodge, Sr., ...Respondent,

v.

UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp.; R. Dale Padgett, MD, PA; and Dr. Herbert A. Moskow,

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

PROOF OF SERVICE

I, the undersigned Legal Assistant, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the Petition for Rehearing by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

Counsel Served:

John C. Moylan, III, Esquire
Meliah Bowers Jefferson, Esquire
Wyche, PA
801 Gervais Street, Suite B
Post Office Box 12247
Columbia, SC 29211

Bakari T. Sellers, Esquire
J. Preston Strom, Esquire
Strom Law Firm, LLC
2110 N. Beltline Boulevard
Columbia, SC 29204

Counsel for Respondent

James D. Nance, Esquire
Nance, McCants & Massey
218 Newberry Street, SW
Post Office Box 2881
Aiken, SC 29802

Counsel for R. Dale Padgett, MD, PA and Dr. Herbert A. Moskow

March 22, 2018

Robin C. Owens, Legal Assistant

SOWELL GRAY ROBINSON
Litigation + Business

MONTEITH P. TODD
DIRECT 803 231.7837 DIRECT FAX 803 231.7887
mtodd@sowellgray.com

March 22, 2018

RECEIVED
MAR 22 2018
SC Court of Appeals

VIA HAND DELIVERY
Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Camille Hodge, Jr., as Personal Representative of the Estate Of Mable Hodge v. UniHealth Post-Acute Care of Bamberg f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings Inc. a/k/a UHS-Pruitt Corp.; R. Dale Padgett, MD, PA; and Dr. Herbert A. Moskow

Camille Hodge, Sr. v. UniHealth Post-Acute Care of Bamberg f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings Inc. a/k/a UHS-Pruitt Corp.; R. Dale Padgett, MD, PA; and Dr. Herbert A. Moskow
Appellate Case No. 2015-001183 (Consolidated for Appeal)
Our File No. 5593/1530

Dear Ms. Kitchings:

I enclose for filing the original and seven copies of a Petition for Rehearing in the above-referenced matter, together with the appropriate filing fee and proof of service. Please return a clocked-in copy of same to me for our records.

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

Yours truly,

Monty Todd

Monteith P. Todd

MPT:rco
Enclosures
cc: John C. Moylan, III, Esquire
Meliah Bowers Johnson, Esquire
James Nance, Esquire
Bakari Sellers, Esquire
J. Preston Strom, Esquire