THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2018-001006

Opinion No. 5541 (S.C. Ct. App. filed Mar. 7, 2018)

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 . . . . . Petitioners.

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,

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PETITIONERS' REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 242(g), SCACR, petitioners 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. (collectively "petitioners") submit this reply to respondents' return in opposition to the petition for a writ of certiorari from this Court to review the court of appeals' decision. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018). Petitioners write only to clarify a few points that were either raised or glossed over in respondents' return to the petition for a writ of certiorari. For the reasons set forth below, the Court should grant certiorari, reverse, and remand.

I. The court of appeals failed to articulate or apply to proper standard of review.

First, respondents' reading of petitioners' standard of review argument misses the point. Petitioners are aware that nothing requires an appellate court to identify every single applicable case in a standard of review section. That is not the gist of petitioners' argument. Rather, petitioners contend that the court of appeals failed to acknowledge that any doubts as to the arbitrability of respondents' claims should be resolved in favor of arbitration and, in turn, did not resolve any doubts in favor of arbitration. See 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)). Contrary to respondents' assertions, that constitutes reversible error.

Indeed, just two months ago, this Court reversed the court of appeals for applying the inappropriate standard of review on appeal. See Buckson v. State, Op. No. 27805 (S.C. Sup. Ct. filed May 23, 2018) (Shearouse Adv. Sh. No. 21 at 77–86). As Justice James noted in his concurrence, "the court of appeals *articulated* the correct standard of review" in that case, but "its

analysis [was] proof it did not *apply* the correct standard of review." Id. (Shearouse Adv. Sh. No. 21 at 85) (James, J., concurring). Here, the court of appeals did not articulate or apply the correct standard of review. Doubts were not resolved in favor of arbitration. Additionally, the Court exceeded its scope of review by veering into the merits of the lawsuit and making a sua sponte finding regarding medical causation of the care provided at petitioners' facility. The circuit court never made that "factual finding[]," and the record does not contain "any evidence" that would "reasonably support[]" such a finding. Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007). Notably, respondents did not even address this argument in their return to the petition for a writ of certiorari.

Further, respondents' argument that the court of appeals was "not determining 'the scope' of what issues were subject to arbitration,"[1] but rather was "determining 'whether' arbitration would be compelled," is a nonstarter. As the U.S. Supreme Court has recognized for over thirty years, under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 (1983). It is undisputed that respondents asserted Mr. Hodge did not possess the authority to enter into the Arbitration Agreement on behalf of Ms. Hodge as a defense to arbitrability. Because this was a "defense to arbitrability," the circuit court and court of appeals were required to resolve all doubts in favor of arbitration. See id. Even a cursory review of the circuit court's order and the court of appeals' decision reveals that did not occur in this case. Accordingly, the Court should reverse and remand with instructions to apply the proper standard of review.

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[1] The parties, of course, are not arguing whether the Arbitration Agreement was sufficiently broad to cover the present dispute. Respondents could hardly take that position.

II. The court of appeals erred in holding the circuit court did not abuse its discretion in finding Mr. Hodge's deposition would have no bearing on the agency question.

Second, respondents attempt to shift this Court's focus to the reliance prong of apparent authority to dodge the primary question before the Court—whether they should be entitled to withhold evidence that our appellate courts have repeatedly found is "admissible and competent" for purposes of the agency inquiry. See, e.g., City of Greenville v. Wash. Am. League Baseball Club, 205 S.C. 495, 504, 32 S.E.2d 777, 780 (1945) (asserting that an agent's "statements are admissible and competent as circumstances in connection with other competent evidence to prove the legal relationship of the principal and agent" (emphasis added)). Respondents continue to rely upon the circuit court's assertion that Mr. Hodge's deposition "would not provide any additional material facts that would be helpful" in determining the agency question. But respondents neglect to address how the circuit court, or anyone for that matter, could possibly know this without the benefit of seeing Mr. Hodge's actual deposition testimony. The answer is they cannot.

In any event, the Court need not engage in this telepathic exercise. As noted above, an agent's statements are "admissible and competent," Wash. Am. League Baseball Club, 205 S.C. at 504, 32 S.E.2d at 780, and the circuit court's failure to allow presentation of this evidence constituted a "clear abuse of discretion," Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (holding that "rulings on discovery matters will not be disturbed on appeal absent a clear abuse of discretion," which arises when "the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law"). More importantly, respondents gloss over the fact that petitioners were not trying to use Mr. Hodge's statements, standing alone, to prove agency in this case. Cf. Wash. Am. League Baseball Club, 205 S.C. at 504, 32 S.E.2d at 780 (stating "that the declarations of an agent alone as to his agency are insufficient to prove agency," but an agent's "statements are admissible

and competent as circumstances in connection with other competent evidence to prove the legal relationship of the principal and agent").

Respondents cannot assert agency as a burden-shifting defense and then withhold evidence from petitioners that is admissible, competent, and critical to carrying their burden. The court of appeals' decision is allowing them to do just that. Although respondents contend petitioners "had every opportunity to present the circuit court with any evidence" that Mr. Hodge was Mrs. Hodge's agent, a review of the record reveals that is simply not true. Accordingly, for these reasons, as well as those set forth in the petition for a writ of certiorari, the Court should grant certiorari, reverse, and remand with instructions for Mr. Hodge's deposition to go forward prior to any reconsideration of the agency issue that respondents raised as a defense to petitioners' motion to compel arbitration.

III. The court of appeals erred in treating nursing home arbitration agreements differently than other contracts.

Third, and finally, respondents ignore that the very authority upon which they rely demonstrates that the court of appeals has treated nursing home arbitration agreements differently than other contracts.

At the outset, petitioners agree with respondents that the court of appeals did not expressly find the other admissions documents were enforceable, and they certainly were not trying to make any misrepresentations to the Court. The court of appeals did, however, observe that "[e]ven if Husband had some authority as Appellants contend is evidenced by Husband signing these documents, this court has held 'the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial.'"

Hodge, 422 S.C. at 579, 813 S.E.2d at 311 (quoting Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016)).

In effect, the court of appeals was stating that even if Mr. Hodge had authority to sign the other admissions documents, thereby rendering them enforceable, he would not have had authority to sign the Arbitration Agreement. That statement, on its face, "takes its meaning precisely from the fact that a contract to arbitrate is at issue" and, therefore, violates the Federal Arbitration Act (the FAA).[2] Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987). The U.S. Supreme Court recently rejected the exact same rule and held that a state supreme court's requirement that an agent "must possess specific authority to 'waive his principal's fundamental constitutional rights to access the courts [and] to trial by jury'" violated the FAA because it "singles out arbitration agreements for disfavored treatment." Kindred Nursing Ctrs., Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1425 (2017) (first alteration in original) (quoting Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 327 (Ky. 2015)). Thus, irrespective of whether the court of appeals' statement is consistent with Coleman v. Mariner's Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014), a point petitioners will not concede,[3] it still violates the FAA and is preempted.

In sum, it is well-settled that arbitration agreements are to be treated the same as any other contract. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (noting 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"); 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 other

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[2] 9 U.S.C. §§ 1–16 (2012).

[3] This case is distinguishable from Coleman because it has nothing to do with the Health Care Consent Act. See S.C. Code Ann. §§ 44-66-10 through -80 (2018).

contracts."). Because the circuit court and the court of appeals failed to adhere to this directive, the Court should grant certiorari, reverse, and remand.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for a writ of certiorari, the petitioners respectfully request that the Court grant certiorari to review the decision of the court of appeals, reverse, and remand with instructions for Mr. Hodge's deposition to go forward and an appropriate consideration of the issues in light of the law governing arbitration.

Respectfully submitted,

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July 9, 2018

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PROOF OF SERVICE –REPLY TO RETURN TO CERTIORARI PETITION

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

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July 9, 2018