THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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SC Court of Appeals

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2017-CP-26-01351
Appellate Case No. 2018-000188

Orveletta Alston as Personal Representative of the
Estate of Willie Earl Alston, Sr.,..Respondent,

v.

Conway Manor, LLC, Raymond Tiller, and
John and Jane Does 1-10,.. Appellants.

FINAL REPLY BRIEF OF APPELLANTS CONWAY MANOR, LLC, RAYMOND TILLER, AND JOHN AND JANE DOES 1-10

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REPLY ARGUMENT

I. Appellants have appropriately preserved their argument that all claims raised by Respondent are subject to arbitration because the trial court addressed whether Mr. Alston was bound to arbitrate, and all claims raised by Respondent derive from Mr. Alston.

Within her brief, Respondent incorrectly argues that the issue of whether the wrongful death beneficiaries are bound to arbitration is not before this Court because it was not ruled upon at the trial level. (Respondent's Brief, n. 1.)

Appellants argued at the trial court level that because Mr. Alston was required to arbitrate, his wrongful death beneficiaries also were bound to arbitrate. [R. p. 183 – 189.] This is because a suit under the South Carolina Wrongful Death Act, S.C. Code Ann. § 15-51-10 et seq., is entirely derivative of the decedent's rights. See Estate of Stokes v. Pee Dee Family Physicians, LLP, 389 S.C. 343, 347, 699 S.E.2d 143, 145 (2010) ("[O]ur law has remained steadfast to the principle of limiting the right of recovery under the wrongful death statute to those cases in which the party injured would have been entitled to recover if death had not ensued." (cataloguing cases)); Rish v. Seaboard Air Line Ry., 106 S.C. 143, 90 S.E. 704, 704-05 (1916) ("The [Wrongful Death Act] gives a right of action where none existed before, and limited the right of recovery to those cases in which the party injured would have been entitled to recover if death had not ensued.").

Throughout its Order denying Appellants' Motion, the court never gave any indication that its rulings were applicable only to Respondent's survival claims or only to Respondent's claims on behalf of the wrongful death beneficiaries. Instead—and in line with Appellants' argument, the trial court addressed whether Mr. Alston was bound to arbitrate where it specified to whom its

rulings applied.[1]

By obtaining rulings on whether Mr. Alston was bound to arbitrate, Appellants preserved their argument that Respondent is bound to arbitrate all claims she raises on behalf of the Estate and on behalf of the wrongful death beneficiaries. Appellants reiterated this position in footnote 3 of their Brief, never abandoning their argument. (Appellants' Brief, p. 4, n. 3.) Appellants, therefore, are entitled to appellate review of whether Respondent is required to arbitrate all claims raised within her Complaint.

II. Respondent's argument that Mr. Alston is not a third-party beneficiary is supported by mere dicta that is factually-distinguishable from this matter.

Appellants have set forth in detail their argument that Mr. Alston is third-party beneficiary under the Admission Agreement and that Respondent, therefore, is bound to arbitrate all claims against Appellants. (Appellants' Brief, p. 11 – 12.) This argument is supported by the trial court's finding that Mr. Alston benefited from the Admission Agreement [R. p. 7.], a factual finding which Respondent has not shown or argued to be unreasonable based on the evidence. Those arguments are reiterated and incorporated into this Reply Brief.

In response to this argument, Respondent cites Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018) for the proposition that because Respondent is not attempting to enforce a breach of contract claim based on the Admission Agreement, Appellants' third-party beneficiary argument must fail. (Respondent's Brief, p. 18.) Unlike the present case where the Admission Agreement contains both Conway Manor's

[1] See, for example, the Order at R. p. 4 ("Ms. Alston-Woods, did not indicate at any time on the Admission Agreement that she had any authority to enter the contract *on behalf of her father*.") (emphasis added); Order at R. p. 7 ("Defendants' argument that *Willie Alston, Sr. is bound by the Arbitration Agreement* executed by his daughter as a third-party beneficiary is without merit.") (emphasis added).

agreement to provide Mr. Alston services and an agreement to arbitrate any claims arising out of the provision of those services, the admission agreement and arbitration agreement in Hodge were separate documents which that Court found did not merge. Id. at 563, 813 S.E.2d at 302. Further unlike the present case where Mr. Alston received services and care for over a year and only an aspect of that care is at issue, the Hodge Court noted that the Estate argued the resident in that case had not received any benefit from the admission agreement because allegedly defective medical care was provided from early within admission. Id. at 553, 563, 813 S.E.2d at 297, 302.

Therefore, the Hodge Court's statement that "even if the Admission Agreement and Arbitration Agreement merged, because Respondents are not suing for breach of the Admission Agreement, they are not attempting to enforce that agreement" is mere dicta which is not binding on this Court. Id. at 563, 813 S.E.2d at 302. Likewise, that dicta is based upon a factual scenario where the Court determined that the resident's estate was claiming that no appropriate care was provided during the residency. In the present case, Mr. Alston directly received the benefit of the services contracted for well over a year, meaning that he did in fact benefit from the Admission Agreement. This distinguishes the present case from Hodges and brings the present case in line with the case law cited in Appellants' Brief in support of its third-party beneficiary argument. (Appellants' Brief, p. 11 – 12.)

III. Rule 268(d)(2), SCACR does not prohibit Appellants from citing a South Carolina Federal District Court opinion as non-binding but potentially relevant analysis of an issue before this Court.

Respondent incorrectly argues that Rule 268(d)(2), SCACR prohibits Appellants from citing a relevant South Carolina Federal District Court opinion, THI of S.C. at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. Sept. 13, 2011). (Respondent's Brief, p. 19.)

Initially, Rule 268(d), SCACR addresses citations to South Carolina state trial and

appellate court orders and opinions. The rule does not address in any way federal district court opinions.[2]

Next, Appellants concede that Wiggins has no binding effect on this Court. Instead, Appellants merely assert that this Court may, in its discretion, find the District Court's analysis in Wiggins relevant as this Court considers the issues on appeal. Rule 268(d) does not preclude Appellants from citing Wiggins for that purpose.

IV. Appellants properly preserved their argument that the Federal Arbitration Act mandates arbitration because that issue was fully briefed before and ruled on by the trial court.

Despite Respondent's argument to the contrary (Respondent's Brief, p. 21), Appellants' argument that the Federal Arbitration Act ("FAA") mandates arbitration is preserved for appellate review.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (internal citation omitted). Requiring that an issue be raised to the trial court "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." Id. (internal citation omitted).

Appellants presented the trial court with a thorough argument on the issue of whether the FAA mandates arbitration of Respondent's claims. The argument covered all factors necessary to establish that the FAA mandated arbitration, including the factors that a valid arbitration agreement exists, a dispute exists within the scope of that agreement, and that interstate commerce was

[2] Though not binding on this Court, Appellants note that district court opinions such as Wiggins not published in a reporter may be cited in the Federal Court of Appeals and the South Carolina Federal District Court. See Rule 32.1, FRAP; Local Civil Rule 7.05(C)(2) DSC.

implicated. [R. p. 107 – 110.] In fact, Appellants dedicated a page of argument to the interstate commerce factor and supported the argument through citation to law and affidavit testimony. [R. p. 109 – 110.]

Respondent, in reply, presented her arguments to the trial court as to why the FAA did not mandate enforcement of the Agreement. [R. p. 177 – 178.] Finally, Appellants argued at the hearing before the trial court that the FAA mandated arbitration. [R. p. 209:lines 8 – 13.] Based on the parties' memoranda and oral arguments, the trial court considered and ruled upon the issue of whether the FAA mandates arbitration, finding "the FAA does not apply." [R. p. 10.]

Respondent appears to argue that issue preservation rules require an appellant to secure a ruling on every factor or element contained within an issue presented to the trial court but cites no authority for this proposition. Such an argument runs contrary to the theory behind issue preservation. The trial court had before it everything necessary to consider whether the FAA mandates arbitration in this matter, including arguments on all factors necessary for the FAA to apply and require arbitration. This gave the trial court a full and fair opportunity to rule on the issue.

Based on everything it heard, the trial court did rule on the issue, finding that the FAA did not apply. To mandate that an appellant secure a ruling on each and every factor or element subsumed within an issue would run contrary to the purpose underpinning issue preservation principles, would run contrary to the principles of judicial economy, and would require an appellant to engage in futile actions in order to preserve issues for appellate review. See, e.g., Fettler v. Gentner, 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct. App. 2012) ("'This [c]ourt does not require parties to engage in futile actions in order to preserve issues for appellate review.'") (internal citation omitted).

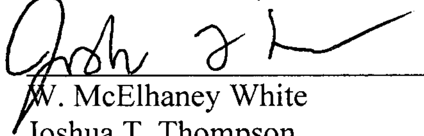
The relevant issue before this Court is whether the trial court improperly denied Appellants' Motion because the FAA mandates arbitration. Having heard and considered the parties' arguments on all factors underpinning that issue, the trial court ruled on the same. This issue, therefore, is preserved for appellate review.

CONCLUSION

All issues raised by Appellants in their initial brief have been properly preserved and presented to this Court for appellate review. This Court, therefore, should reach the merits of Appellants' arguments on appeal and reverse the trial court's order denying Appellants' Motion.

Respectfully submitted this 24th day of August, 2018.

Holcombe Bomar, P.A.



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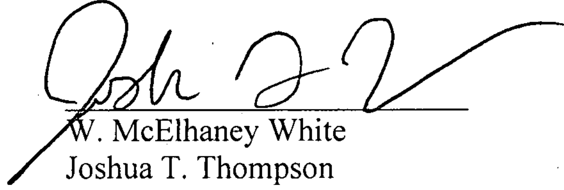
Rule 211(b) Certification

The undersigned attorneys for the Appellants certify that this Final Reply Brief of Appellants complies with Rule 211(b), SCACR.



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