

of action for Wrongful Death and Survivorship. The parties agreed to conduct limited discovery and mediate this matter without waiver of Sumter East's arbitration rights. Following the parties' inability to resolve this matter at mediation, Sumter East filed this Motion to Dismiss and Compel Arbitration. Plaintiffs contend that the Arbitration Agreement is unenforceable under state law.

STANDARD OF REVIEW

A parties' right to a jury trial in South Carolina is governed by state law. Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978). The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement to arbitrate exists in the first place...If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citing S.C. Code Ann. § 15-48-20(a)). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

In determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). Arbitration is available only when the parties contractually agree to arbitrate. Id. South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard

to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989).

The present case is very similar to three cases where the South Carolina Court of Appeals and Supreme Court addressed the issue of arbitration agreements in skilled nursing facilities: Coleman v. Mariner Health Care, Inc, 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, our Courts have found Arbitration Agreements to be unenforceable where a family member signed an Arbitration Agreement near the time of admission to a skilled nursing facility for the Decedent and did not have authority to do the same. In all three cases, the Courts found that neither implied authority nor estoppel applied.

ANALYSIS

THE ARBITRATION AGREEMENT IS NOT ENFORCEABLE BECAUSE WILSON WAS NEVER CLYBURN'S LEGAL GUARDIAN OR ATTORNEY IN FACT AND LACKED ACTUAL OR APPARENT AUTHORITY TO SIGN THE ARBITRATION AGREEMENT FOR CLYBURN.

Wilson executed documents on behalf of Clyburn upon her entry to Sumter East on October 13, 2016, including an Arbitration Agreement titled "Dispute Resolution Program" [hereinafter referred to as "Arbitration Agreement"]. The Arbitration Agreement states:

YOUR PARTICIPATION IN DRP IS VOLUNTARY. BY SIGNING THIS AGREEMENT, YOU AGREE TO PARTICIPATE IN THE DISPUTE RESOLUTION PROGRAM. THIS AGREEMENT MAY BE REVOKED BY SENDING A WRITTEN NOTICE OF REVOCATION WITHIN THIRTY (30) DAYS FROM THE DATE OF ADMISSION OR THE DATE ON WHICH THIS AGREEMENT IS SIGNED, WHICHEVER OCCURS LATER. A DECISION TO REVOKE THIS AGREEMENT WILL IN NO WAY ADVERSELY AFFECT THE RESIDENT'S STATUS AT

THE FACILITY. WE WILL NOT REFUSE TO ADMIT, ATTEMPT TO DISCHARGE THE RESIDENT OR TAKE ANY OTHER ADVERSE ACTION AGAINST THE RESIDENT BASED ON A REVOCATION OF THE OPPORTUNITY TO PARTICIPATE IN A DRP.

The Arbitration Agreement is separately paginated from the Admissions Agreement, and each document contains its own signature lines. At the bottom of the Arbitration Agreement there is a signature line for the resident, another line for the signature of a Representative to sign when a “mentally competent resident is unable to physically execute the Agreement and authorizes a Representative to sign Agreement on the Resident’s behalf.” Both of these lines were left blank. The next signature line states, “If resident is judged incompetent, complete this section. . . I am the spouse, responsible party, legal guardian or power of attorney of the resident and have the authority to sign the agreement on his/her behalf. In signing this Agreement, the Legal Representative or Family Member binds both the Resident and themselves Individually.” Wilson signed the Agreement under this section.

A. Wilson lacked the actual authority to bind Clyburn’s estate to an Arbitration Agreement.

Sumter East argues that Wilson’s signature on the Arbitration Agreement binds Clyburn’ estate. The court disagrees. The mere fact that an arbitration agreement exists does not automatically refer any dispute to arbitration. The agreement must be valid, enforceable, and signed by the parties who had the express and legal authority to do so. The legal consequences of an agent’s actions can only be attributed to the principal when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 359 S.C. 635, 598 S.E.2d 717 (Ct. App. 2004). Moreover, it is the duty of one dealing with an agent to use due care to ascertain the scope of the

agent's authority. Frasier v. Palmetto Homes of Florence, 323 S.C. 240, 473 S.E.2d 865 (Ct. App. 1996). The evidence shows Wilson was not the legal guardian of Clyburn, nor was she the attorney in fact.

Wilson also lacked the capacity to bind Clyburn under the South Carolina Adult Health Care Consent Act ("AHCCA"). The AHCCA governs the placement or removal of an individual from a facility that provides intermediate or skilled nursing care. S.C. Code Ann. § 44-66-20(1). Under the AHCCA, a party may consent to health care on behalf of a patient if the patient is deemed unable to consent to treatment after two licensed physicians have examined the patient and certify an inability to consent. S.C. Code Ann. § 44-66-20(8)(emphasis added). S.C. Code Ann. § 44-66-30 lists the appropriate persons who may make health care decisions for a patient who is unable to consent and provides an order of priority for who may make those decisions. It reads:

- (A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority:
- (1) a guardian appointed by the court pursuant to Article 5, Part 3 of the South Carolina Probate Code, if the decision is within the scope of the guardianship;
 - (2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant Section 62-5-501, if the decision is within the scope of his authority;
 - (3) a person given priority to make health care decision by another statutory provision;
 - (4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:
 - a. entry of a pendent lite order in a divorce or separate maintenance action;
 - b. formal signing of a written property or marital settlement agreement; or
 - c. entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;
 - (5) an adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
 - (6) a parent of the patient;

- (7) an adult sibling of the patient; or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation;
- (8) a grandparent of the patient; or if the patient has more than one grandparent, a majority of the grandparents who are reasonably available for consultation;
- (9) any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient, or if the patient has more than one other adult relative, a majority of those adult relatives who are reasonably available for consultation.

Defendant has put forth insufficient evidence to demonstrate that Clyburn herself was unable to consent or that two licensed physicians certified her inability to consent, as required by the statute, which would trigger the AHCCA and allow a family member to make health care decisions for her.

Additionally, even if Wilson had actual authority under the AHCCA, her authority under the Act would extend only to health care decisions and would not give her the authority to sign an Arbitration Agreement. The AHCCA only deals with health care related decisions, not legal decisions. Nowhere in the entire AHCCA is the word "legal" or "arbitration" used. Clearly the legislature intended this Act to govern only those decisions related to health care. The South Carolina Supreme Court addressed this issue squarely in Coleman v. Mariner Health Care, 407 S.C. 346, 755 S.E.2d 450 (2014). In Coleman, a nursing home resident's sister was authorized to make health care decisions under the AHCCA because her sister was unable to consent within the meaning of the Act and she was an individual with statutory priority to represent her sister. The court held that her authority under the AHCCA did not give her the capacity to bind her sister to a voluntary arbitration agreement. According to the Court, the AHCCA specifically limited the representative's authority to making health care decisions and associated financial

arrangements. The Court held arbitration is not a health care or related financial decision, and thus the decision to engage in arbitration exceeds the authority granted by the AHCCA. *Id.* at 351-52, 755, S.E. 2d at 453.

Sumter East argues that the Admissions Agreement and Arbitration Agreement signed by Wilson should be merged into one document, which Wilson had authority to sign. This court disagrees and finds the Admissions Agreement and Arbitration Agreement were not merged and should be treated as two separate documents.

Our South Carolina Supreme Court has ruled that there is a difference between a residency contract and an arbitration agreement, and that just because the two agreements are executed contemporaneously does not make them one and the same. The Supreme Court has ruled:

Assent to this contract [the admission agreement] was a condition for Decedent's admission to Facility. On the other hand, the AA was not required for Decedent's admission, contained no provision for medical, nursing, or health care services to be provided for Decedent, and did not require any financial commitment to pay for such services. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 354, 755 S.E.2d 450, 454 (2014).

The Court reached similar holdings in Thompson v. Pruitt Corp., 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016) and Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) ("The Act confers authority on a health care surrogate to consent on the patient's behalf 'to the provision or withholding of health care' and to make financial decisions obligating the patient to pay for the medical care provided." (quoting

Coleman, 407 S.C. at 351-52, 755 S.E.2d at 453)).

In this case, as in Coleman, the Admission Agreement and Arbitration Agreement were separate documents, each with its own separate pagination and signature lines. Furthermore, in this case the Admissions Agreement contains language indicating that the Admissions Agreement is the “entire agreement and understanding between the parties.” In addition, the Arbitration Agreement could be revoked within thirty days, whereas the Admissions Agreement contained no revocation provision. The Arbitration Agreement states that a resident’s decision to revoke the document has no bearing on whether or not the resident would be admitted to the facility. The language of Sumter East’s own document suggests that even Sumter East treated these as entirely separate agreements.

Sumter East cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit. Therefore, even if Wilson had the actual authority to sign the Admissions Agreement, that authority did not extend to the Arbitration Agreement.

B. Wilson did not have the apparent authority to bind Clyburn’s Estate.

South Carolina law requires that to prove apparent authority, the Defendant must show “(1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party’s detriment.” Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special

Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but the relationship between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. Id.

Sumter East places much emphasis on the behavior and deposition testimony of Wilson as to her apparent authority to act for Clyburn. The case law, however, suggests that it is Clyburn's actions which dictate whether she held Wilson out as her agent. This Court finds that the present case is nearly identical to Hodge and Thompson. In Hodge, the South Carolina Court of Appeals discussed a Maryland case, Dickerson v. Longoria, 414 Md. 419, 995, A.2d 721, 743 (2010). The Court specifically stated, "'This limited range of acts performed on the [decedent]'s behalf suggest, at most [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that.'" Hodge at 567. Further, in Thompson, the Court determined that "'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.'" Thompson at 686.

The only evidence that suggests Clyburn held Wilson out as having authority to sign an Arbitration Agreement on Clyburn's behalf is the fact that she remained at the facility for some five months and never repudiated the Arbitration Agreement. However, by its very terms her

residence at Sumter East was not effected by the Arbitration Agreement. Clyburn's silence on the issue is not a sufficient basis from which to infer apparent authority.

PLAINTIFFS ARE NOT EQUITABLY ESTOPPED FROM DENYING THE ARBITRATION AGREEMENT

Sumter East argues that Plaintiffs should be equitably estopped from denying enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its 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 conduct 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 the estoppel must (1) lack knowledge and the means of attaining 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 the conduct of the party to be estopped. Id.

Defendant has not met its burden to establish these elements. There is insufficient evidence Wilson acted in a way amounting to a false representation to Sumter East regarding her authority to act for Clyburn. Additionally, Sumter East cannot meet its burden to show they lacked knowledge or the means of attaining the truth of the facts in question. 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 determined the truth of the facts in question. 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, Sumter East had the capacity to determine whether Wilson had authority to sign the Arbitration Agreement on Clyburn's behalf. Sumter East is – or should be – familiar with the legal concepts of guardianship and powers-of-attorney. Sumter East had the ability to simply ask Wilson whether she was Clyburn's guardian or attorney-in-fact and to request supporting documentation.

Sumter East also fails to show any direct benefit Clyburn received by virtue of the Arbitration Agreement. As stated above, the Admissions Agreement and Arbitration Agreement were separate documents, and Clyburn's admission to Sumter East was never conditioned upon her signing the Arbitration Agreements. Sumter East cannot point to any other "direct benefit" Clyburn received from entering into the Arbitration Agreement which would support its claim that she be equitably estopped from denying the Agreement. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home's "equitable estoppel argument is premised on [the home's] contention that, under state law, the admission agreements and the [arbitration agreements] merged"); Thompson, 416 S.C. at 59-60, 784 S.E.2d at 688 (any benefit of admission "is of no moment" for the application of equitable estoppel to a separate arbitration contract).

Further, so long as the admission and arbitration contracts are separate documents, any alleged misrepresentations made by a resident's family member when signing the contracts would not equitably estop the resident's attorney-in-fact from challenging the family member's authority to bind the resident to arbitration. A family member who signs an arbitration contract

without legal authority to bind the resident acts in their individual capacity and their misrepresentations, if any, would have no bearing on claims against the nursing home by the resident even if the misrepresenting family member is also the attorney in-fact for the resident. Thompson, 416 S.C. 43, 62, 784 S.E.2d 679 (Ct. App. 2016) (finding nursing home “may not hold [resident’s] estate responsible for any possible misrepresentations Son or Daughter may have made in their individual capacities”). Since the agreements were not merged, Defendant’s equitable estoppel argument must be denied. See Coleman, 407 S.C. at 355–56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no merger).

THE ARBITRATION AGREEMENT WAS NOT RATIFIED BY WILLIE MAE CLYBURN.

Clyburn's continued residency Sumter East did not act as a ratification of the Arbitration Agreement. To establish a ratification of the Arbitration Agreement Sumter East must show (1) acceptance by the principal of the benefits of the agent's acts, (2) the principal's full knowledge of the facts, and (3) circumstances or an affirmative election demonstrating the principal's intent to accept the unauthorized arrangement. Lincoln v. Aetna Gas. & Sur. Co., 300 S.C 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989).

Clyburn’s presence at the facility alone cannot constitute an affirmative representation. See Hodge (rejecting the notion that a nursing home resident represents his/her family member has authority to enter an arbitration agreement on the resident’s behalf simply by failing to object to the family member’s signature).

Sumter East argues Clyburn accepted the benefits of the Arbitration Agreement and relies

on this as proof of ratification. However, the only alleged benefit Sumter East can cite is admission to the facility, which the terms of the Arbitration Agreement show were not impacted by the signing or refusing of the Agreement. The Court of Appeals' ruling in Thompson speaks directly on this point, stating, "any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial." 416 S.C. at 60, 784 S.E.2d at 688. As there is no clear benefit that Willie Mae Clyburn derived from the Arbitration Agreement, and her presence alone does not constitute an affirmative representation to accept the Arbitration Agreement, this Court finds that the Arbitration Agreement was not ratified.

CONCLUSION

For the foregoing reasons the Defendant's Motion to Dismiss and Compel Arbitration is DENIED.

IT IS SO ORDERED.

Kristi Curtis, Circuit Court Judge

June __, 2020
Sumter, South Carolina



Sumter Common Pleas

Case Caption: Andrietta Atkinson , plaintiff, et al VS Ssc Sumter East Operating Company, Llc , defendant, et al
Case Number: 2017CP4301740
Type: Order/Other

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762