RECEIVED
Jun 01 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2019-001413
Circuit Court Case No. 2018-CP-10-01251

Estate of Richard Ladson, Jr.,
By and through Personal Representative
Richard Miles Ladson, Sr., POA,

Respondent,

v.

THI of South Carolina at Charleston, LLC
d/b/a Riverside Health and Rehab,

Appellant.

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

PIERCE | SLOAN, LLC
Carl E. Pierce, II (SC Bar No. 7946)
Benjamin C. Smoot, II (SC Bar No. 101372)
Carl E. Pierce, III (S.C. Bar No. 104229)
P.O. Box 22437
Charleston, South Carolina 29413
Phone: (843)722-7733; Fax: (843)722-7732

Attorneys for Respondent Estate of Richard Ladson, Jr., by and through P.R. Richard Miles Ladson, Sr., POA

NOW COMES Respondent, by and through its undersigned counsel, pursuant to Rule 221(a), SCAR, and at the request of this Honorable Court, following the filing on April 6, 2022, of its Unpublished Opinion No. 2022-UP-169 affirming the circuit court's denial of Facility's motion to compel Plaintiff's claims to arbitration (the "Subject Opinion") and contends no law or material point was misapprehended or overlooked in the Court's analysis of the facts and law giving rise to the Subject Opinion in the instant case. In fact, as this Honorable Court has observed, Facility's admission agreement and the arbitration agreement were never merged under South Carolina law. Therefore, Facility's appeal was properly denied and its petition for rehearing should similarly be rejected.

BACKGROUND

On September 20, 2010, Julia Wright ("Ms. Wright"), Respondent's sister, accompanied Respondent to Appellant's Facility to admit Respondent for rehabilitation care. (R. pp. 59-77). At the time of his admission, all parties agree Mr. Ladson suffered from dementia. Id.

In conjunction with Mr. Ladson's admission to Facility, Ms. Wright signed a number of documents, including an Admission Agreement[1] and an Arbitration Agreement. (R. p. 71)[2] The Admission Agreement was a twelve-page document, and the Arbitration Agreement was a separate one-page document. The Admission Agreement governed the type of care Mr. Ladson would receive from Appellant and Mr. Ladson's financial obligation to pay for those services. On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement" provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Mr. Ladson's admission to Appellant's Facility.

---

1 (R. pp. 59-70). Plaintiff does not challenge the validity of the Admission Agreement.

2 Both the Admission Agreement and the Arbitration Agreement were countersigned by a Leslie Solomon, the Facility's Director of Admissions. (R. pp. 59-71).

Ms. Wright signed the Admission Agreement on the "Signature of Representative" line. Appellant did not ask Ms. Wright for proof of authority to act on Mr. Ladson's behalf, and Mr. Ladson never gave Ms. Wright power-of-attorney to complete these documents.

On the same day, Ms. Wright signed a document called an Arbitration Agreement. This document was not part of the 12 pages comprising the Admission Agreement but was its own separate document with its own signature blocks. The Arbitration Agreement provides for alternative dispute resolution for any claim a party may bring against another arising out of Mr. Ladson's admission in Appellant's Facility. Ms. Wright signed the Arbitration Agreement on the line labeled "Resident/Representative Signature."

Thereafter, while under Appellant's care, Mr. Ladson developed multiple preventable pressure ulcers due to Appellant's failure to properly treat him, and Mr. Ladson was unable to heal said pressure ulcers for the same reasons. Mr. Ladson's pressure ulcers worsened, became infected and then septic. (R. pp. 3-12). Mr. Ladson's condition grew increasingly severe over the following months until no other medical alternative existed other than an above the knee amputation of his right leg at Roper Hospital on October 13, 2016.

As a result, Respondent filed negligence claims alleging Respondent's injuries were caused by Appellant's improper nursing home care. After a period of discovery, Appellant moved to dismiss the Complaint and compel arbitration. The Circuit Court denied the motion and concluded the Act did not apply to the Arbitration Agreement, a contract unrelated to nursing home care or payment for nursing home services. The Circuit Court found no agency relationship existed between Mr. Ladson and Ms. Wright and Mr. Ladson was not a third-party beneficiary because there was no valid underlying contract. Finally, the Circuit Court held that Appellant failed to meet its burden to establish all equitable estoppel elements. The Circuit Court denied Appellant's Motion to Reconsider on the same grounds. And the Court of Appeals again denied

Facility's appeal to this Court on the same grounds on April 6, 2022, holding the subject admission agreement and the arbitration agreement did not merge. Facility's Petition for Rehearing now follows, asserting the same hollow arguments it has now for the fourth time before a South Carolina court to bind Richard Ladson, Jr. and his Estate to an arbitration agreement it was never a party to.

STANDARD OF REVIEW

"[A] petition for rehearing must show points supposedly overlooked or misapprehended by the court. Its purpose is not to present points lawyers of losing parties overlooked or to have the case tried in [the appellate court] for a second time. Arnold v Carolina Power & Light Co. 168 SC 163, 167 SE 234 (1933). A circuit court's determination of whether a claim is subject to arbitration is reviewed de novo on appeal. Gissel v. Hart, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes de novo review of the determination of whether an arbitration agreement is enforceable against a nonsignatory. Wilson v. Willis, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.* While both federal and South Carolina policy favors arbitration of disputes, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Int'l Paper Co. v. Scwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000). Ultimately, arbitration "is a matter of consent, not coercion." Volt Information Scis., Inc. v. Bd. Of Trs. Of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

ARGUMENT

I. The Court of Appeals correctly determined the Independently Invalid Arbitration Agreement did not Merge with the Ladson Admission Agreement.

While our Supreme Court in Coleman v. Mariner Health Care, Inc. 407 S.C. 346, 755 S.E.2d 450 (2014) acknowledged 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)) it refused to apply the merger doctrine to a nursing home arbitration agreement because the admission agreement contained language ***"indicating a contrary intention." (Emphasis added).*** The Coleman Court found that the language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreement." 407 S.C. at 355, 755 S.E.2d at 455 and that the documents did not serve the same purpose.

The language in the contracts at issue here likewise plainly establishes that the Arbitration Agreement and Admission Agreement existed separately and were not merged by any operation of law. The two documents were offered for two completely different purposes- one for the provision of health care services and the other for dispute resolution. The Arbitration Agreement was intended to be a separate contract from the Admission Agreement and, just as in Coleman, the merger rule from Klutts is overcome by the contracts' plain meaning and contrary intent. Klutts Resort Realty, Inc., 268 S.C. at 88, 232 S.E.2d at 24.

Facility's merger argument suffers from other flaws this Court has identified. 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 Appellant's positions were taken as true and two valid contracts existed, the Agreements would not merge under the Klutts test, because the two Agreements were not executed for the same purpose. The Admission Agreement purports to cover 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.

Coleman, Thompson, and Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544 (Ct. App. 2017) are controlling and the Court of Appeals Subject Opinion got it right. An arbitration contract does not merge with an admission contract in which a nursing home and its resident chose to insert an "entire agreement" or integration provision (aka "merger clause") limiting its parameters and excluding other writings. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. Coleman held one such provision proved "on its face" that merger does not apply. Id. Also, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated. Id.; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the contracts are structured, finding it is unlikely parties intended two contracts to be treated as one if they chose *separate titles*, *required separate signatures*, and *numbered each contract's pages differently*. Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685; Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two agreements while taking the position that agreeing to the former was not required to obtain the benefits of the latter. 422 S.C. at 562-63, 813 S.E.2d at 302. All four of these examples apply to the Admission Agreement and Arbitration Agreement used by Facility in this case and on each of these four grounds the Admission Agreement and Arbitration Agreement were never merged under South Carolina law.

i. The Admission Agreement's "Entire Agreement" Provision

The Admission Agreement concludes with an "Entire Agreement" provision identifying the limited scope of that contract. (R. p. 70, § XVIII). Specifically, this provision states "this

Agreement represents the entire understanding between the parties." "Agreement" is capitalized because it is a defined term, which the Admission Agreement's opening line limits to "THIS ADMISSION AGREEMENT." (R. p. 59) (emphasis in original). Facility argues the Admission Agreement's "Entire Agreement" provision is different than its counterparts in Coleman, Thompson, and Hodge because it does not specifically reference the Arbitration Agreement. However, the Admission Agreement's "Entire Agreement" provision is just as probative against merger as those in earlier cases. It specifically limits the contract's interpretation to the "Agreement" and then defines that term narrowly in a way that does not include the Arbitration Agreement or any other writing. To argue the "Entire Agreement" provision must specifically reference a separate writing to exclude that writing from the common law merger rule is to overlook the fundamental purpose an integration provision serves in a contract. See Palmetto State Sav. Bank of S.C. v. Barr, 293 S.C. 252, 253-54, 359 S.E.2d 531, 532 (Ct. App. 1987) (finding purpose of integration provision is to create "strong implication the whole intentions of the parties has been expressed" in the writing containing the clause); Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984) (citing Armour Fertilizer Works v. Hyman, 120 S.C. 375, 113 S.E.2d 330 (1922) (the terms of a completely integrated contract "cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing")).

Plus, there is contract language here that tracks Coleman and progeny almost word for word. In Coleman, the court focused on the fact that the admission contract's "Entire Agreement" provision referenced "[t]his Agreement... and the Arbitration Agreement." Referencing the two writings distinctly was "the admission agreement's recognition of the arbitration agreement as a separate document." Thompson, 416 S.C. at 52, 784 S.E.2d at 684 (citing Coleman, 407 S.C. at

355, 755 S.E.2d at 455). Hodge applied the same principle using language from an arbitration contract that referenced an admission contract in distinct terms. 422 S.C. at 562, 813 S.E.2d at 302. If an arbitration contract explains its scope extends to disputes arising from "this Agreement or the ... Admission Agreement," then the parties "recognized a separateness" between the two contracts. Id. The Arbitration Agreement in this case does exactly what Coleman, Thompson, and Hodge identify as proof that defeats the Facility's merger argument. In describing its term, the Arbitration Agreement states that its effect will continue even after the termination of "this Agreement or the Admission Agreement." (R. p. 59).

Finally, Facility hints that the "Entire Agreement" provision supports an Admission Agreement-Arbitration Agreement merger because it incorporates "other Admissions Materials." (R. p. 70, § XVIII). To the extent Facility implies the Arbitration Agreement was incorporated by reference into the Admission Agreement, Facility has offered nothing in either contract to support this conclusion. "Admissions Materials" is not a defined term and there is nothing to suggest the Arbitration Agreement was intended to be included within it. Plus, since Facility admits agreeing to arbitration was not required for admission, it would be counterintuitive to conclude the Arbitration Agreement was an "admissions material." Thompson rejected a similar argument when a nursing home argued its admission contract's "entire agreement" provision incorporated a separate arbitration contract by referring broadly to "exhibits." Since "exhibit" was undefined and not referenced elsewhere in either contract, the term was ambiguous and was interpreted against the nursing home who drafted it. 416 S.C. at 53-54, 784 S.E.2d at 685 (citing Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455).

ii. Inconsistent Termination Provisions

Two contracts executed at the same time do not merge if they contain inconsistent terms. The parties likely did not intend for the two be read as one if they chose to, for example, apply different substantive law to the two agreements. Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Coleman, Thompson, and Hodge made special note of inconsistent provisions in admission and arbitration contracts regarding when each contract may be cancelled at the resident's urging. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 551, 813 S.E.2d at 296. In each instance, the arbitration contract allowed the resident to disclaim or revoke its provisions within thirty days, but the admission contract did not include a similar right. Id. Here, the Arbitration Agreement does not have a disclaimer provision, and Facility positions this fact as its primary argument for distinguishing Coleman, Thompson, and Hodge. Appellant's Brief, Page at 9.

However, the contracts' termination provisions are just as inconsistent here as in those cases. The Arbitration Agreement states that its effect on disputes between the parties would survive even if both the Admission Agreement and Arbitration Agreement are cancelled. (R. p. 59). As structured by Facility, there does not seem to be any means by which a resident could unilaterally cancel the Arbitration Agreement. The Admission Agreement is very different in that it allows a resident to unilaterally terminate that contract "at any time." (R. p. 64, § IV, ¶ 1). Thus, while Facility is correct the Arbitration Agreement is technically different than Coleman and progeny because it lacks a disclaimer provision, that distinction makes no difference because the Arbitration Agreement and Admission Agreement still have inconsistent termination provisions that rebut any argument the parties intended these two separate contracts merge into one.

iii. Contract Formatting and Structure

Thompson and Hodge prove it is not just specific contract language that shows a nursing home, and its resident did not intend for admission and arbitration contracts to merge. Intent can be derived from the way a contract is formatted or structured. Rather than adding an arbitration provision to the admission contract or attaching that language as an exhibit, the nursing home in Thompson chose to place it in an entirely separate document with its own, distinct "Arbitration Agreement" label. 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1. That choice is in itself evidence of "the parties' intent for [the arbitration contract] to stand by itself as an independent contract." Id. Facility did the same here, and the Arbitration Agreement announces itself as a distinctive contract from its very title. Hodge also noted the importance of formatting choices a nursing home makes when constructing its admission and arbitration contracts. 422 S.C. at 562, 813 S.E.2d at 302. An arbitration contract looks more and more like its own independent document if entering it requires a separate signature than the admission contract and the documents have separate pagination. Id. Here, the Arbitration Agreement required separate signatures. Plus, the Admission Agreement ran from "Page 1 of 12" to "Page 12 of 12," while the Arbitration Agreement was all on its own.

Based on the foregoing, and as determined by this Court in its April 6, 2022, Subject Opinion, the law of merger as adopted and applied in South Carolina fails to operate to bind Mr. Ladson to the Arbitration Agreement through the Admission Agreement and Facility's Petition for rehearing should be denied.[3]

---

[3] Because this Honorable Court did not address Facility's equitable estoppel argument as it should not have in light of its finding the Admission Agreement and Arbitration Agreement were not merged, Respondent does not address it here and instead relies on this Court's analysis of equitable estoppel in the context of nursing home arbitration disputes in Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E. 2d 268 (Ct.App. 2020).

CONCLUSION

Based on the arguments stated above, Respondent respectfully requests the Court deny Facility's Petition for Rehearing. Because the Admission Agreement and Arbitration Agreement were not merged, Facility cannot force Mr. Ladson to arbitrate its nursing home negligence claims against it. This Honorable Court did not overlook or misapprehend any points attendant to this appeal. The Arbitration Agreement is not valid because Mr. Ladson could not and did not assent to its terms. Ms. Wright possessed no legal authority to bind him to it. Merger fails to operate to bind him to the Arbitration Agreement under South Carolina law, and this case is now ripe for litigation in South Carolina's trial courts.

Respectfully submitted,

PIERCE | SLOAN, LLC
Carl E. Pierce, II (SC Bar No. 7946)
Benjamin C. Smoot, II (SC Bar No. 101372)
Carl E. Pierce, III (S.C. Bar No. 104229)
P.O. Box 22437
Charleston, South Carolina 29413
Phone: (843)722-7733; Fax: (843)722-7732

Attorneys for Respondent Richard Ladson, Jr., by and through Richard Miles Ladson, Sr., POA

June 1, 2022
Charleston, South Carolina

RECEIVED
Jun 01 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2019-001413
Circuit Court Case No. 2018-CP-10-01251

Richard Ladson, Jr.,
by and through Personal Representative
Richard Miles Ladson, Sr., POA,

Respondent,

v.

THI of South Carolina at Charleston, LLC
d/b/a Riverside Health and Rehab,

Appellant.

PROOF OF SERVICE

I, Benjamin Catlett Smoot II, of Pierce Sloan LLC counsel for Respondent Richard Ladson, Jr., by and through Personal Representative Richard Miles Ladson, Sr., POA, hereby certify that the foregoing **Respondent's Return to Appellant's Petition for Rehearing** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on June 1, 2022, properly posted for delivery to the following address:

CLEMENT RIVERS, LLC
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)

Attorneys for Appellant

Respectfully Submitted,

PIERCE | SLOAN, LLC

Carl E. Pierce, II (SC Bar No. 7946)
Benjamin C. Smoot, II (SC Bar No. 101372)
Carl E. Pierce, III (S.C. Bar No. 104229)
P.O. Box 22437
Charleston, South Carolina 29413
Phone: (843)722-7733; Fax: (843)722-7732

Attorneys for Respondent Richard Ladson, Jr., by and through Personal Representative Richard Miles Ladson, Sr., POA

June 1, 2022
Charleston, South Carolina