IN THE MISSISSIPPI COURT OF APPEALS

MANHATTAN NURSING & REHABILITATION CENTER, LLC, ET AL. — **APPELLANTS,**

V. — **NO. 2008-CA-00925**

LOUISE WILLIAMS, ET AL. — **APPELLEES**

REPLY BRIEF OF THE APPELLANTS

Appeal from the Circuit Court For Hinds County
The Hon. Winston L. Kidd Presiding
No. 251-07-108 CIV

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ORAL ARGUMENT IS REQUESTED

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A. The Circuit Court erred when it ruled that Appellants waived their right to enforce the Arbitration Agreement.

Again, the lower court denied Appellants' Motion to Compel Arbitration on the essential premise that Appellants waived their right to enforce the underlying Arbitration Agreement. In her brief, the Appellee, Ms. Louise Williams, argues that the trial court's decision was correct due to Appellants' failure to follow case law, their invocation of the judicial process, and the consequent delay and prejudice to Ms. Williams. As explained below, both she and the Circuit Court are in error, and the lower court's decision must be reversed.

1. The Circuit Court Applied an Incorrect Legal Standard.

Again, the Circuit Court applied *Century 21 Maselle and Associates, Inc. v. Smith*, 965 So.2d 1031 (Miss. 2007) to determine that Appellants' waived their right to arbitrate, basing this determination more specifically on the finding that "[Appellants] failed to promptly schedule and notice a hearing on [their Motion to Compel Arbitration." (T.R., Vol. 2, pp. 176, 181). Because the Circuit Court applied the wrong legal standard, its decision was error.

In the opinion cited by the lower court, *21 Maselle and Associates, Inc. v. Smith*, 965 So.2d 1031 (Miss. 2007), the Mississippi Supreme Court mandated a procedure under which litigants may safely move to enforce an arbitration agreement without waiving their rights to such agreement. Specifically, "[l]itigants shall prospectively follow the procedure mandated by this Court and separately file a 'Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration,' and then promptly schedule and notice a hearing on their motions." *Century 21*, 965 So.2d at 1039 (¶12). Just as the Supreme Court wrote, though, the mandatory procedure applied *prospectively* only, meaning that only from the date of the Court's opinion, August 16, 2007, and

onward would a litigant would risk a waiver for failure to comply with that procedure. Here, though, clearly *all* pertinent events occurred well before August 16, 2007. By its own terms, then, the *Century 21* procedure did not apply to the instant case. It was thus error for the Circuit Court to find a waiver here for any failure to comply with procedure.

2. Under the Correct Legal Standard, There is No Waiver.

Perhaps out of recognition of that error, Ms. Williams goes beyond the Circuit Court's stated basis for its decision and further argues that additional factors, namely invocation of the judicial process, undue delay and prejudice, compel a finding of waiver here. Under the applicable legal standard, though, Appellants clearly did not waive their right to arbitrate.

Initially, it bears emphasis that in Mississippi the finding of a waiver of the right to arbitrate is disfavored, and the courts presume against that conclusion. *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 179 (¶39) (Miss. 2006) ("*Horton*"); *Virginia College, LLC v. Moore*, 974 So.2d 269, 271 (¶7) (Miss. Ct. App. 2008) (observing the judicial "intention to uphold arbitration agreements if at all possible under the circumstances."). The federal courts recognize a "strong" presumption against such waivers, and the party claiming one bears a "heavy burden." *Republic Ins. Co. v. PAICO Receivables, LLC,* 383 F.3d 341, 344 (5th Cir. 2004) ("*Republic Ins.*").

First, Ms. Williams argues at length that Appellants waived their right to arbitrate by invoking the judicial process in two principal ways: a) they filed a Motion to Dismiss concurrent with their Motion to Compel Arbitration; and b) they sought to depose the affiants, Ms. Still and Ms. Williams. On the first, Ms. Williams neglects a material point: both the motion itself and its supporting memorandum clearly show that Appellants filed the Motion to Dismiss *in the alternative* to the Motion to Compel Arbitration and merely to preserve their defenses under rule 12 lest they waive them. (T.R., Vol. 1, p. 14 at ¶8; p. 25). As to the second point, Appellants

have already briefed their reasons for seeking the depositions of the affiants who gave testimony opposing the Arbitration Agreement, and they need not be repeated here. Suffice it to say, for purposes of the waiver doctrine, one substantially engages the litigation process only when one takes steps to resolve *in court* the merits of a claim for liability that would otherwise be arbitrable, *Republic Ins.*, 383 F.3d at 344, and certainly Appellants did not do so here. Never once did they serve discovery relating to the *merits* of Ms. Williams claims for damages, nor did they move for summary judgment on those claims, nor did they even set their Motion to Dismiss for hearing.[1] Further, the depositions of the affiants were critically necessary: if Appellants had come before the circuit court without proof rebutting the affidavits, then Ms. Williams would have easily defeated their Motion to Compel Arbitration. While that scenario might be preferable to Ms. Williams, it is grossly unfair to Appellants.

Second, Ms. Williams argues at length that Appellants unduly delayed in pursuing their right to arbitrate. The record of this case fails to support her point. Appellants filed their Motion to Compel Arbitration on March 30, 2007, (T.R., Vol. 1, p. 13), and thereafter, on or about May 3, 2007, counsel for the parties discussed whether Ms. Williams would even oppose the Motion at all. (T.R., Vol. 2, p. 200). Without consulting Appellants and obtaining their agreement, on May 25, 2007, Plaintiff unilaterally filed a Notice setting the hearing of the Motion on August 16, 2007, (T.R., Vol. 2, p. 172), and, on June 1, 2007, understanding that Notice to signify Ms. Williams' intent to oppose the Motion, Appellants requested dates for the affiants' depositions, which would be limited to the grounds of Ms. Williams and her sister for opposing the Arbitration Agreement. (T.R., Vol. 2, p. 189). On June 4, 2007, Ms. Williams offered herself and

[1] Ms. Williams finds significant the fact that at one point, as a courtesy to her and Ms. Still, Appellants offered to depose them on both their grounds for opposing the Arbitration Agreement and the merits of their claims. Appellants did so merely to spare the deponents the inconvenience of two depositions and explained so clearly. (T.R., Vol. 2, p. 194). A mere offer of such a courtesy hardly supplies the basis for a finding of waiver.

her sister for "full discovery depositions," contrary to Appellants' request, (T.R., Vol. 2, p. 191), and, trying to prevent a waiver scenario, on June 12, 2007, Appellants offered terms to resolve the competing interests of the parties. (T.R., Vol. 2, p. 194-95). On June 28, 2007, though, Ms. Williams rejected those terms and accused Appellants of waiving their right to arbitrate. (T.R., Vol. 2, p. 197). On July 27, 2007, Appellants requested new dates for the depositions of Ms. Williams and Ms. Still, again limited to their grounds for opposing the Arbitration Agreement, (T.R., Vol. 2, p. 203), and Appellants sought to cancel the upcoming August 16th hearing, (T.R., Vol. 2, p. 174). Thereafter, on July 30, 2007, Ms. Williams wrote to the court about keeping the hearing date or hearing the motion telephonically, (T.R., Vol. 2, p. 213), and on July 31, 2007, Appellants responded, explaining to the court why their Motion to Compel Arbitration would not be ripe for hearing until they took the necessary proof. (T.R., Vol. 2, p. 215). On the same date Appellants wrote again to Ms. Williams proposing specific dates for the limited depositions, but Ms. Williams never responded, opting instead to appear in the absence of Appellants' counsel at the August 16th hearing as reflected in her letter of August 23, 2007. (T.R., Vol. 2, p. 228).

To be sure, the foregoing account demonstrates an unfortunate breakdown in communication and inability to agree on acceptable terms of limited but necessary discovery. And, while the parties did not move at the break-neck pace that Ms. Williams now demands, the record hardly shows Appellants unreasonably failing to pursue their right to arbitrate. During the operative period from May 25 to August 16, 2007, a period of *less than* 3 months, Appellants pursued their right by trying to take the proof necessary to support the enforceability of the Arbitration Agreement. Importantly also, if Ms. Williams had at any time felt herself put to undue delay, she could have readily cured the problem with a simple motion for a status conference or a motion for a scheduling order governing the discovery sought by Appellants.

The record discloses no such efforts by her and supports no finding of undue delay.

Third, Ms. Williams argues that she has suffered "prejudice" in this case. In the waiver rubric, "prejudice" refers specifically to the delay, expense and other damage to a party's legal position resulting when its opponent first tries to litigate and then arbitrate some aspect of the merits of the underlying claims. *Republic Ins.*, 383 F.3d at 346. Here again, though, Appellants never once took any meaningful step to litigate the merits of Ms. Williams' claims for damages. Further, she offers on point little else than generalized and conclusory assertions of prejudice, not a fact-specific account of any particular detriment suffered by her.

The approach to the waiver doctrine urged by Ms. Williams goes too far. To avert a waiver, Ms. Williams would require the proponent of arbitration to: a) invoke the right to arbitrate in its response to the complaint; b) schedule its motion to compel arbitration on the very next hearing date offered by the trial court; and c) to refrain from any discovery at all, regardless of whether its opponent has filed in the record proof negating or at calling into substantial question the enforceability of the subject arbitration agreement, and regardless of what discovery might benefit the court's determination of the contract's enforceability. In Mississippi, though, "a party who invokes the right to compel arbitration and pursues that right will not ordinarily waive the right simply because of involvement in the litigation process, and a party who seeks to compel arbitration after a long delay will not ordinarily be found to have waived the right where there has been no participation in, or advancement of, the litigation process." *Horton,* 926 So.2d at 180 (¶41). Clearly, Ms. Williams' approach is inconsistent with the case law and is too favorable to opponents of arbitration to be valid. Appellants come within the protection of the case law, and hence the lower court's decision was in error and must be reversed.

B. This Case Should be Remanded for Further Proceedings.

Ms. Williams further argues that this case should not be remanded for discovery as Appellants have sought. But Appellants note that in a recent case the Mississippi Court of Appeals reversed the circuit court's decision to deny arbitration on the finding of a waiver and remanded for a determination of the issues regarding the enforceability of the subject arbitration agreement. See *Virginia College, LLC v. Moore*, 974 So.2d 269, 274 (¶15) (Miss. Ct. App. 2008). Likewise, a remand for the same determination is warranted here, with the addition that Appellants should be permitted discovery limited to Ms. Williams' grounds for opposing the instant Arbitration Agreement.

This position is entirely consistent with Rule 26. The familiar rule provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the claims or defenses of any party." MISS. R. CIV. PROC. 26(b)(1). Here, Appellants have asserted the "claim," so to speak, that their Arbitration Agreement is enforceable, and Ms. Williams responded with various "defenses" supported by affidavits and other evidence against that contract. As the determination of whether an arbitration contract is enforceable is clearly a judicial inquiry, 9 U.S.C. § 4 (authorizing court to determine "summarily" such issues); *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204, 1208 (2006), it follows that parties should be permitted to utilize the judicial procedures, including discovery under Rule 26, to help the court in making that determination.

Ms. Williams' opposition to this argument is based on case law warning against discovery while a motion to compel arbitration is pending. But she fails to account for the material point: those cases appeared to involve discovery relating to the merits of the underlying claims for liability. Here, though, Appellants have not advanced discovery relating to Ms.

Williams' claims for damages; they have sought only discovery relating to her defenses against the Arbitration Agreement. Without a fair opportunity to take rebuttal evidence, on remand Appellants will be put to an obvious and undue disadvantage.

C. Alternatively, Ms. Williams should be deemed estopped.

Lastly, Ms. Williams argues that she should not be estopped from challenging the Arbitration Agreement. She principally argues that, because she now "confesses" Appellants' grounds for dismissing her breach-of-contract claim, Appellants have no basis for the conclusion that Ms. Williams' contractual claim estops her from challenging the Arbitration Agreement. Her position is contrary to the case law and must be rejected.

Initially, Appellants note that Ms. Williams in error argues that the authorities cited by Appellants, such as *Terminix Intern., Inc. v. Rice*, 904 So.2d 1051 (Miss. 2004) are distinguishable from the case *sub judice* because the gravamen of the claims there were contractual, not tortious, in nature. As she acknowledges in her Brief, though, the plaintiffs in the *Rice* case sued in tort on such claims as negligence for the failure of Terminix to keep their house free of termites. (See Brief of Appellee, p. 17). The *Rice* case is fully applicable here, and it demonstrates the error of the trial court in entertaining in the first place Ms. Williams' resistance to the Arbitration Agreement when she was estopped from challenging that contract at all.

Further, Ms. Williams' "confession" of her contractual claim does nothing to relieve her of the estoppel that now binds her. Again, Ms. Williams twice alleges that Ms. Henderson had a contract for healthcare services with Appellants. (T.R., Vol. 1, p. 5, at ¶15; p. 9, at ¶36). She further alleges that, by virtue of their medical negligence in rendering health care to Ms. Henderson, Appellants breached the healthcare-services contract, (T.R., Vol. 1, p. 10, at ¶37), whereby Ms. Henderson suffered injury, (T.R., Vol. 1, p. 10, at ¶38), entitling Ms. Williams to

recover monetary damages. (T.R., Vol. 1, p. 11, at ¶43). In Mississippi, factual allegations made in a pleading are "evidentiary admissions." *Radmann v. Truck Ins. Exchange*, 660 So.2d 975, 977 (Miss. 1995). Other jurisdictions concur. See *White v. ARCO/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983) ("Normally, factual assertions in pleadings and pretrial orders are considered to be judicial admissions conclusively binding on the party who made them."); *First Tennessee Bank, N.A. v. Mungan*, 779 S.W.2d 798, 801 (Tenn. Ct. App. 1989) ("[t]he general rule is that factual statements in pleadings are judicial admissions being conclusive against the pleader in the proceedings in which they are filed unless they have been amended or withdrawn but under the latter circumstance continue to be evidentiary admissions.").

Here, then, Plaintiff's "confession" of her contractual claim makes no difference. Again, Plaintiff chose to begin this case with the allegations that she made a valid and enforceable contract for healthcare services, the Admission Agreement, for her Ms. Henderson's benefit and that the breach of the same by Appellants entitled her to money. Whether she "confesses" or withdraws her allegations, the law deems them "conclusive" admissions of fact from which she may not now retreat.

The foregoing rule of pleading law clearly promotes accountability. By making factual allegations "conclusive" admissions as to the pleader, the law compels litigants to choose their words carefully. And, taken in that light, Ms. Williams' position appears simply too opportunistic to prevail. Evidently, Ms. Williams was perfectly content at the beginning of this case to posit the validity and enforceability of the Admission Agreement, as she thought at the time that such an allegation would pay her a pecuniary benefit. But, now that she has seen how her contractual claim results in more burden than benefit, she wants otherwise. Ms. Williams took a decisive position at the beginning of this case because she intended to pursue it to her

financial benefit. She may not now so easily disavow her position in favor of another that better suits her interests at the moment. In Mississippi, "[i]t is axiomatic that estoppel forbids one from both gaining a benefit under a contract and then avoiding the obligations of that same contract." *Bailey v. Estate of Kemp*, 955 So.2d 777, 782 (¶21) (Miss. 2007).

Again, however Plaintiff might now consider her allegations, she is bound to them as "conclusive" admissions. Under *Terminix Intern., Inc. v. Rice*, 904 So.2d 1051, 1058 (¶28) (Miss. 2004), Plaintiff therefore remains estopped from challenging the Arbitration Agreement contained within the healthcare-services contract that she admitted to be valid and enforceable, the Admission Agreement. See also *Fradella v. Seaberry*, 952 So.2d 165, 175 (¶26) (Miss. 2007) (holding non-signatory realtor was entitled to enforce arbitration clause of land-purchase contract where plaintiff, a party to the contract, sued to enforce realtor's obligations under same). Taken from any angle, Ms. Williams is simply estopped in this case from challenging the Arbitration Agreement. Accordingly, the Circuit Court's decision to deny Appellants' Motion to Compel Arbitration was error and must be reversed on this basis as well.

CONCLUSION

Appellants again respectfully submit for all foregoing reasons that the lower court erred in denying their Motion to Compel Arbitration upon a finding that Appellants waived their right to arbitrate. Appellants therefore pray that this Court reverse the lower court's order denying the Motion to Compel Arbitration and remand this case with instructions to: a) allow Appellants an opportunity to take discovery relating to the Arbitration Agreement; and b) determine the enforceability of that contract. Alternatively, this Court may conclude the case here upon a finding that Ms. Williams was estopped from ever challenging the Arbitration Agreement at all. Appellants again pray for such other and general relief as this Court might deem proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, as required by M.R.A.P. 25(a), that I served the Appellants' original Brief, as well as 3 copies of the same, upon the following clerk of court via FedEx delivery:

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And, I further certify that I served a true copy of the Brief via U.S. Mail, first class, postage prepaid, upon the following counsel of record and circuit judge:

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On this 9th day of February, 2009.

Chase Pittman