

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**S.C. SUPREME COURT**

APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No.: 2018-CP-37-00271

Opinion No. 5866 (S.C. Ct. App. Filed October 6, 2021)

Appellate Case No. 2022-000100

Stephanie Underwood, as Personal  
Representative of the Estate of Betty  
Herrington,

Petitioner,

v.

SSC Seneca Operating Company,  
LLC, d/b/a Seneca Health &  
Rehabilitation Center;  
SavaSeniorCare, LLC; SSC Equity  
Holdings, LLC; SavaSeniorCare  
Administrative Services, LLC;  
SavaSeniorCare Consulting Services,  
LLC

Defendants,

Of Whom SSC Seneca Operating  
Company, LLC, d/b/a Seneca Health  
& Rehabilitation Center;  
SavaSeniorCare, LLC;  
SavaSeniorCare Administrative  
Services, LLC; SavaSeniorCare  
Consulting Services, LLC

Respondents.

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**BRIEF OF PETITIONERS**

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**STATEMENT OF ISSUES ON APPEAL**

- 1. DID THE COURT OF APPEALS ERR IN FAILING TO ENFORCE THE PLAIN LANGUAGE OF THE DISPUTE RESOLUTION PROGRAM CONTRACT AND INSTEAD LOOKING TO THE PURPORTED INTENT OF THE PARTIES TO FIND THAT THE DISPUTE RESOLUTION PROGRAM APPLIES TO DISPUTES FOR OVER \$50,000.00**

## STATEMENT OF CASE

Petitioner Betty Herrington was admitted to Seneca Health and Rehabilitation Center (“SHRC”) on or about February 27, 2016, after having been treated at Oconee Medical Center for a wound on her left foot, among other medical conditions. Petitioner was a resident of SHRC from her admission until she was transferred to Oconee Medical Center on March 28, 2016. While at SHRC, Respondents failed to regularly monitor and treat Petitioner’s left foot wound as prescribed by her doctors. Because of this lack of proper monitoring and treatment, the wound on Petitioner’s left foot deteriorated and the infection spread, ultimately leading to a left foot transmetatarsal amputation with left tendon Achilles lengthening. After the amputation, Petitioner was readmitted to SHRC on April 5, 2016.

Petitioner filed a Notice of Intent alleging malpractice by Respondents on August 3, 2017, and, after pre-suit mediation was unsuccessful, filed this suit on April 25, 2018. Petitioner filed suit against SSC Seneca Operating Company, LLC, d/b/a Seneca Health & Rehabilitation Center, SavaSeniorCare, LLC, SSC Equity Holdings, LLC, SavaSeniorCare Administrative Services, LLC, and SavaSeniorCare Consulting Services, LLC. The Respondents are a web of related companies owned by SavaSeniorCare, LLC (“Sava”). (See A. pp. 23-27). According to its website, Sava is “one of the largest providers of skilled nursing, memory care and rehabilitative services in the nation.” (See <https://www.savaseniorcare.com/company.html>). SSC Seneca Operating Company, LLC, d/b/a Seneca Health & Rehabilitation Center, is a Delaware limited liability company operating within the State of South Carolina, and was the licensee of SHRC during Petitioner’s stay. (A. p. 24). SSC Equity Holdings, LLC, SavaSeniorCare Administrative Services, LLC, and SavaSeniorCare Consulting Services, LLC, are all Delaware limited liability companies operating within the state of South Carolina, but are not registered to

do business in South Carolina. (See A. pp. 23-25). On September 6, 2018, a Consent Order to Stay was entered as to SavaSeniorCare, LLC and SSC Equity Holdings, LLC, staying the proceedings as to these two defendants. (A. pp. 5-10).

On June 25, 2018, SSC Seneca Operating Company, LLC, SavaSeniorCare Administrative Services, LLC, and SavaSeniorCare Consulting Services, LLC, moved to compel arbitration (collectively “Motions to Compel Arbitration”). (A. pp. 84-112). All three Respondents moved to compel arbitration based on a document entitled “Dispute Resolution Program” (“DRP”). (A. pp. 88-96). On February 27, 2016, Petitioner signed the DRP among various other admissions documents when she was being admitted to SHRC. The DRP and other admissions documents were drafted by Respondents. (A. pp. 11-15) The DRP defines a “Dispute” as:

“**Dispute**” means (a) any claim or dispute totaling \$50,000.00 individually or in the aggregate that would constitute a cause of action that either party could bring in a court of law (b) this agreement does not prevent either party from initiating a grievance proceeding, complaint, to survey agencies, appeal proceedings with the appropriate state or federal entity regarding an involuntary transfer or discharge, or any such claim or dispute involving solely a monetary claim in an amount less than \$50,000.00 Any such claim shall not be deemed a dispute under this agreement.”

At the hearing, Respondents argued that the DRP was meant to apply to claims equal to *or greater than* \$50,000.00, even though the document does not state this. The Circuit Court found that, by its unambiguous terms, the DRP only applied to claims or disputes of exactly \$50,000.00. (A. pp. 11-15). The Circuit Court refused to adopt Respondents’ desired reading of the DRP, as to do so would require the Court to add additional language that is not present in the DRP. Respondents filed Motions to Reconsider on October 22, 2018. (A. pp. 246-254). Their Motions were denied via order dated October 26, 2018, and they filed a Notice of Appeal on November 21, 2018. (A pp. 16-23; A. pp. 283-287).

On October 6, 2021, the Court of Appeals issued an Order finding that the Circuit Court erred in interpreting the DRP as only applying to claims for exactly \$50,000.00. (A. pp. 334-339). Petitioners timely filed a Petition for Rehearing and Petition for Rehearing *En Banc* which were denied via an Order dated January 11, 2022. (A. pp. 340-349; A. pp. 350-352). During the pendency of the Appeal, Betty Herrington passed away. On March 16, 2022, Herrington's daughter and the Personal Representative of her estate, Stephanie Underwood, was substituted as a party in this case.

## ARGUMENTS

### STANDARD OF REVIEW

Whether a claim is subject to arbitration is an issue for judicial determination. Partain v. Upstate Auto. Grp., 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). “While this determination by a trial court is reviewed de novo, an appellate court will not reverse this finding if it is reasonably supported by the evidence.” York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (S.C. App. 2013). Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

**I. THE COURT OF APPEALS ERRED IN FAILING TO ENFORCE THE PLAIN LANGUAGE OF THE DISPUTE RESOLUTION PROGRAM CONTRACT AND INSTEAD LOOKED TO THE PURPORTED INTENT OF THE PARTIES TO FIND THAT THE DISPUTE RESOLUTION PROGRAM APPLIES TO DISPUTES FOR OVER \$50,000.00**

The plain language of the DRP provides that it does not apply to disputes for over \$50,000.00. Specifically, the DRP applies to “disputes” and defines a “dispute” as “any claim or dispute totaling \$50,000.00 individually or in the aggregate that would constitute a cause of action that either party could bring in a court of law[.]” (A. pp. 90-91) (*emphasis added*). In its Order, the Court of Appeals does not disagree with the Circuit Court’s reading of what the DRP actually says, or find that the DRP is ambiguous. Instead, the Court of Appeals concluded that when read as a whole, the DRP should be interpreted to apply to disputes for \$50,000.00 or more. The Court of Appeals erred in coming to this conclusion as it fails to follow binding precedent, and violates numerous rules of contractual interpretation. Further, the Court of Appeals erred in taking the extraordinary step of construing a contract against the non-drafting unsophisticated party, and in favor of the drafting sophisticated party. The Court of Appeals’

Opinion has opened up a giant loophole that will be exploited by drafting parties, including sophisticated ones, to change the terms of contracts they drafted to benefit themselves.

**a) The Court Of Appeals Erred In Finding That The DRP Had A Meaning Other Than What It Says**

The DRP applies to “disputes” and defines a “dispute” as “any claim or dispute *totaling \$50,000.00 individually or in the aggregate* that would constitute a cause of action that either party could bring in a court of law[.]” (A. pp. 90-91) (*emphasis added*). In its Opinion, the Court of Appeals did not find that the plain language of DRP applied to disputes over \$50,000.00. Instead, the Court found that the parties intended for the DRP to apply to disputes over \$50,000.00 when reading the DRP as a whole. (A. p. 338). To do so, the Court had to insert the words, “or more” after \$50,000.00 in the definition of dispute. The Court of Appeals erred in not enforcing the plain language of the DRP and instead attempting to discern the parties’ intention. “When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. The court’s duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (S.C. 1994) (internal citations omitted). “The court is without authority to consider parties’ secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed.” Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (S.C. App. 2009). “[T]he court cannot supply material stipulations or read into the contract words which it does not contain so as to change the meaning of words contained in the contract.” McPherson v. J. E. Sitrine & Co., 206 S.C. 183, 206, 33 S.E.2d 501, 510 (S.C. 1945)(citing 17 C.J.S., Contracts, § 296, pp. 702–707). Because the definition of dispute was

plain and capable of legal interpretation the Court of Appeals should have enforced the language of the DRP and affirmed the Circuit Court's Order.

**b) The Court Of Appeals Erred In Failing To Follow Binding Precedent**

Ellis v. Taylor, and its predecessors, which state that a court's duty is to enforce an unambiguous contract, have been the well settled law of this state for many years. 316 S.C.at 248, 449 S.E.2d at 488. In its Opinion, the Court of Appeals states:

“We acknowledge *Ellis*, which states:

When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.

316 S.C. at 248, 449 S.E.2d at 488 (citation omitted). Still, we have recognized that one cannot interpret text without also considering context. *See State v. Miles*, 421 S.C. 154, 161, 805 S.E.2d 204, 208 (Ct. App. 2017) (quoting *Avis Rent A Car Sys., Inc. v. Hertz Corp.*, 782 F.2d 381, 385 (2d Cir. 1986)). And sometimes “[t]here is no surer way to misread any document than to read it literally.” *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring).” (A. p. 338).

Respectfully, the legal analysis in this case should start and end with Ellis, which is binding precedent. Instead, the Court of Appeals cites to a Court of Appeals case and a 2<sup>nd</sup> Circuit Court of Appeals decision. In Ellis, this court made clear that “[t]he court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.” Id. The Court of Appeals' decision ignores this precedent because the Court believes that the plain language of the contract would “result in an idiosyncratic agreement that does not remotely accomplish its stated purpose.”<sup>1</sup> (A. p. 338).

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<sup>1</sup> It is important to note that the consideration exchanged by the parties in the DRP was a mutual agreement to submit specific claims to arbitration. (A. p. 90). Enforcing the plain language of the DRP does not create a huge disparity in the consideration provided by each party- instead the parties are equally bound by the narrow scope of the DR

Under Ellis and its predecessors, whether or not an agreement accomplishes its stated purpose or is idiosyncratic is irrelevant so long as the language is plain and capable of legal construction. The principal set out in Ellis is important as the operation of the terms of a contract are often not truly known to the parties until they seek to enforce them. If the Court of Appeals' reasoning stands, any party, including sophisticated drafting parties, will be able to simply petition a court to have the terms of a contract amended to terms more favorable to it. Courts will be thrust into the role of "fixer" for any party who does not like the contract it drafted. Therefore, the Court of Appeals erred in not following this binding precedent.

**c) The Court Of Appeals Erred In Seeking To Interpret The DRP Without First Finding That The DRP Was Ambiguous**

The Court of Appeals' Opinion did not find that the language of the DRP was ambiguous. The Court cited to Yarborough v. Phoenix Mut. Life Ins. Co., for the proposition that when interpreting a contract, "all of its provisions should be considered, and one may not, by pointing out a single sentence or clause, *create an ambiguity*." 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976) (*emphasis added*) (A. pp. 337-338). The Court of Appeals' Opinion conflated narrowness with ambiguity, and reasoned that because the plain language of the DRP is incredibly narrow, it can interpret the meaning of the contract as if it were ambiguous instead of enforcing its plain language. However, a court cannot resort to rules of contract construction to interpret a contract, unless it first finds that it is ambiguous. See Ellis, 316 S.C. at 248, 449 S.E.2d at 488. Because the Court of Appeals did not find that the DRP was ambiguous, it violated precedent by interpreting the DRP and looking to the parties purported intent instead of enforcing its plain language.

Further, the Court of Appeal erroneously reasoned that the DRP needed an interpretation other than its plain language in order to give effect to all of the DRP's provisions. Specifically, the Court stated "[w]e do this because '[p]resumably, all portions of a contract are inserted for a purpose and the contract must be read as a whole, giving appropriate weight to all provisions.' *Id.* We assume the parties intended a meaningful agreement, not a nonsensical or absurd one, so we read agreements in a way that 'will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so.' *Id.* at 593, 225 S.E.2d at 349." (A. pp. 337-338). This line of reasoning is flawed, as, whether the DRP applies to disagreements for only \$50,000.00 as the Circuit Court found, or to disagreements for \$50,000.00 or more as the Court of Appeals found, all of the operative provisions of the DRP are given the same effect and weight. The plain language of the DRP does not leave out or render moot any provision of the DRP that is saved by the Court of Appeals' interpretation. The operative provisions of the DRP function the exact same regardless of the amounts included in the definition of dispute. Therefore, it is unnecessary to add language to the DRP in order to give weight to all of its provisions, and the Court of Appeals erred in attempting to do so.

**d) The Court Of Appeals Erred In Taking The Extraordinary Step Of  
Construing A Contract Against The Non-Drafting Unsophisticated Party,  
And In Favor Of The Drafting Sophisticated Party**

In finding that the DRP applies to disputes of \$50,000.00 or more, the Court of Appeals took the extraordinary step of construing a contract against the non-drafting unsophisticated party, and in favor of the drafting sophisticated party. The DRP was drafted by Respondents.<sup>2</sup> Respondents are sophisticated entities. (A. p. 13). According to Respondents' website, they are

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<sup>2</sup> The DRP does not contain a provision stating that the contract will not be construed against the drafter.

“one of the largest providers of skilled nursing, memory care and rehabilitative services in the nation.” See <https://www.savaseniorcare.com/company.html>. Further, Respondents are sophisticated enough to set up a web of at least five related entities to handle various parts of running a nursing home. (A. pp. 23-28). Conversely, Petitioner was an unsophisticated individual. If a court finds that a contract is ambiguous, then any doubts and ambiguities in a contract must be construed against the drafter. See Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 309, 698 S.E.2d 773, 778 (S.C. 2010). Further, “[w]here a contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention.” Hellams v. Harnist, 284 S.C. 256, 259, 325 S.E.2d 569, 571 (S.C. App. 1985). The language of the DRP is clear that it only applies to disputes for \$50,000.00, and the Court of Appeals did not find the DRP to be ambiguous. However, even if it were found that the DRP was ambiguous, the Court is required to construe that ambiguity against the drafter of the contract, which in this case is Respondents. This is especially true in the present case where Respondents are sophisticated companies, and Petitioner was an unsophisticated individual. See Impac Mortg. Holdings, Inc. v. Timm, 226 A.3d 323, 342 (Md. Spec. App. 2020), cert. granted, 232 A.3d 257 (Md. 2020), and aff’d, 255 A.3d 89 (Md. 2021)(“There are sophisticated parties on both sides of this preferred stock relationship, and they are bound by the unambiguous terms of the documents memorializing that relationship.”); see also Progressive Intern. Corp. v. E.I. Du Pont de Nemours & Co., C.A. 19209, 2002 WL 1558382, at 1 (Del. Ch. July 9, 2002)(“Sophisticated parties are bound by the unambiguous language of the contracts they sign.”). It is unprecedented to construe a contract against the non-drafting unsophisticated party, and in favor of the drafting sophisticated party. By its ruling, the Court of Appeals turns years of precedent on its head, and opens the door to the drafting party attempting to change the

meaning of a contract when it is unhappy with the results of the contract it drafted. If left standing, one can envision the Court of Appeals' Opinion in this case being cited in every forthcoming case where a bank is unhappy with the foreclosure terms in its note and mortgage, an insurance company is unhappy with the terms of coverage in its insurance policy, or a tech company is unhappy with its "terms and conditions" that one is required to click on any time they do something online. These sophisticated parties, like Respondent, will argue that the plain language of the contract is not what they meant to say, and that their purported intention should prevail. Therefore, the Court of Appeals' Opinion should be reversed.

**e) The Court Of Appeals Erred In Looking To General Language In The DRP  
Instead Of The Specific Defined Terms**

Even if the DRP were found to be ambiguous, the Court of Appeals erred in interpreting the DRP based on general language included in the DRP, instead of using the specific defined terms. In its Opinion, the Court of Appeals states that:

“[t]he agreement begins by stating the parties’ desire to ‘have all disagreements resolved through the dispute resolution program.’ In similar fashion, the agreement closes with a reference to the parties ‘agreeing to have all disagreements resolved through the dispute resolution program.’ The obvious intention is that most disputes will go through arbitration—claims of lesser value are defined to not even be ‘disputes’—and one cannot come away from the agreement without the idea that the parties intended for the agreement to comprehensively describe how they would handle all of their disputes and disagreements.” (A. p. 338).

The Court of Appeals puts great weight on the repeated pronouncements in the DRP that it was intended to apply to all disagreements. The DRP’s broad pronouncements about applying to all disagreements are delusory as the operative language of the DRP does not apply to all

disagreements under any interpretation.<sup>3</sup> Even under the Court of Appeals' interpretation of the DRP, it does not apply to claims for less than \$50,000.00. In looking to delusive general language to infer the parties' intent, instead of looking to the specific language actually used, the Court of Appeals' Opinion violates two rules of contract construction. First, "[p]arties to a contract may, by agreement, attribute to a word used in the contract any meaning they may desire, and if such meaning is clear the courts will give effect to it." Stand. Oil Co. of New Jersey v. Powell Paving & Contracting Co., 139 S.C. 411, 138 S.E. 184, 193 (S.C. 1927). "[W]here the parties define the words or terms which they propose using, as was done in the contract before us, the contract will be interpreted according to such definitions if free from ambiguity." C.A.N. Enterprises, Inc. v. S.C. Health and Human Services Fin. Commn., 292 S.C. 556, 559, 357 S.E.2d 714, 715 (S.C. App. 1987), aff'd, 373 S.E.2d 584 (S.C. 1988). The specific language which the Court of Appeals chose to rewrite was not found in some boilerplate section at the end of the DRP, but was instead included in the "Definition" section of the DRP. A definition is defined as "[t]he meaning of a term as explicitly stated in a drafted document such as a contract, a corporate bylaw, an ordinance, or a statute; a definiens." Black's Law Dictionary, Eighth Edition. When Respondents drafted the DRP, they clearly intended for its definition of "dispute" to control and the Court of Appeals erred in looking instead to general language in the DRP to determine the parties' purported intent. Second, it is well settled that "[a] proper construction of a contract requires the court to give effect to specific terms over any general language." Crenshaw v. Erskine College, 850 S.E.2d 1, 15 (S.C. 2020), reh'g denied (Nov. 30, 2020). The Court of Appeals flips this rule on its head, and

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<sup>3</sup> In footnotes in Respondents' memos in support of their motions to compel arbitration, Respondents argue for an alternative interpretation of the DRP in which all disputes, regardless of the amount at issue, are subject to arbitration. (A. p. 182; A. p. 216). Respondents have not made this argument anywhere else, and presumably have abandoned it.

gives effect to general language over the specific terms defined by Respondent when it drafted the DRP. The Court of Appeals erred in choosing to interpret the DRP instead of enforcing its plain language, and by failing to apply these well settled principals of contract interpretation.

**f) The DRP Should Not Be Changed After It Was Signed As Herrington Is Presumed To Have Read The DRP, Understood Its Contents, And Assented To Its Terms**

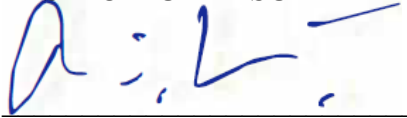
As a signatory to the DRP, Herrington is presumed to have read, understood, and assented to the terms of the DRP. See Gibson v. Epting, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (S.C. App. 2019). The DRP even provides that Herrington had the “right to consult with an attorney of [her] choice.” (A. p. 90). If this legal presumption is to be followed, then it also follows that the contract Herrington understood and agreed to should not be changed after the fact because Respondent is unhappy with the terms it drafted. Instead, the plain language of the contract should be followed, as a party who signed a contract is not presumed to have divined the other party’s unexpressed intentions. The Court of Appeals erred in attempting to interpret the DRP instead of simply enforcing its plain language, and its Opinion should be reversed.

**CONCLUSION**

The Court of Appeals failed to enforce the plain language of the DRP, and instead looked to the parties’ purported intent. In doing so, it ignored years of binding precedent, and interpreted an unambiguous agreement against an unsophisticated non-drafting party, and in favor of a sophisticated drafting party. The Court of Appeals’ Opinion has opened up a giant loophole that will be exploited by drafting parties, including sophisticated ones, to change contracts they drafted to benefit themselves when they are unhappy with the terms. Therefore,

the Court of Appeals' Opinion should be reversed, the Trial Court's Order reinstated, and the matter remanded to the Trial Court.

RESPECTFULLY SUBMITTED,



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