

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Robin B. Stillwell, Circuit Court Judge

Appellate Case No. 2022-001406

Estate of Patricia Royston, by and Respondent,
through the appointed personal representative,
Marianne McCoig, individually and on
behalf on the statutory beneficiaries,

v.

Hunt Valley Holdings, LLC, a/k/a
Fundamental Long-Term Care Holdings, LLC;
Fundamental Clinical and Operational
Services, LLC; Fundamental Administrative
Services, LLC; THI of South Carolina at
Magnolia Place at Greenville, LLC d/b/a
Magnolia Place-Greenville, Petitioners.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly determined the Facility failed to prove a valid arbitration contract based on a purported Arbitration Agreement the Facility did not sign, did not retain, and seemingly did not know existed until months after Respondent filed her claims.
2. Whether the Court of Appeals correctly declined to address the Petitioners' other arguments and Respondent's additional sustaining grounds in light of its accurate ruling on the dispositive issue of mutual assent.

STATEMENT OF THE CASE

Respondent Marianne McCoig alleges medication mismanagement during her mother Patricia Royston's residency at THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville ("the Facility") in December 2016 proximately caused Ms. Royston's death. (R. p. 26). In addition to the Facility's medication administration errors, Respondent alleged corporate negligence and other claims against the Corporate Petitioners Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Care Holdings, LLC ("HVH"), Fundamental Clinical and Operational Services, LLC ("FCOS"), and Fundamental Administrative Services, LLC ("FAS") based on their alleged control over the Facility's budget, staffing, and training which directly affected the quality of care Ms. Royston received. (R. p. 17).

The litigation initially proceeded normally with Petitioners making an appearance and participating in an unsuccessful pre-suit mediation on January 8, 2019. Respondent filed her complaint on January 30, 2019, and each Petitioner answered separately on March 9, 2019. (R. pp. 14-155). The Facility's answer vaguely referenced arbitration in one paragraph but did not cite an arbitration contract or raise arbitration as an affirmative defense. (R. p. 75). Respondent then began discovery by serving HVH with requests for production and requests to admit on February 1, 2019. (R. pp. 197-214). HVH partially participated in discovery by answering the requests to admit on March 21, 2019, but failing to respond to the requests for production. (R. pp. 215-19). Respondent

also sought document production from the Facility on May 1, 2019, but the Facility failed to respond. Respondent filed motions to compel against HVH and the Facility on May 20 and June 19, 2019, respectively. (R. pp. 192-224).

On July 26, 2019, nearly ten months after Respondent’s Notice of Intent and nearly six months after her Complaint, the Facility filed a motion to dismiss, compel arbitration, and for a stay. (R. p. 225)¹ Attached to the Facility’s motion was a copy of a document entitled “Arbitration Agreement” purportedly signed by Ms. Royston. (R. p. 228). This signature was undated and, though the Arbitration Agreement included a signature line for the Facility’s “Authorized Agent,” no one associated with the Facility ever signed it. Id. Moreover, this Arbitration Agreement was not culled from the Facility’s file on Ms. Royston’s admission but was instead acquired from Respondent’s attorney during the litigation. Respondent opposed the Facility’s motion arguing (1) the Facility failed to demonstrate the mutual assent required to form a valid contract; (2) the entity listed in the Arbitration Agreement was different than the Facility; and (3) even if the Facility could prove mutual, the Arbitration Agreement was invalid because it was unconscionable, lacked mutuality of obligation, and failed to include crucial terms. (R. pp. 399-431).

At the August 29, 2019, motion hearing, the Facility admitted it has never located the original Arbitration Agreement and could offer no substantive evidence to either authenticate Ms. Royston’s signature or to show she delivered the Arbitration Agreement to the Facility. (R. p. 184, lines 13-15). In place of evidence to prove contract formation, Petitioners’ counsel offered the circuit court his “hypothesis” and the “only inference I can come up with” on when, how, and

¹ On August 7, 2019, HVH, FCOS, and FAS individually filed motions to stay pending final resolution of the circuit court’s ruling on the Facility’s motion to dismiss. The circuit court’s order did not specifically address these motions, but the parties agreed the circuit court’s ruling on the Facility’s motion would effectively resolve them all. (R. p. 189, lines 12-25).

whether the proposed parties assented to the Arbitration Agreement’s proposed terms. (R. p. 186, lines 13-20; R. p. 187, line 6). When asked by the circuit court whether the Facility’s failure to retain the Arbitration Agreement could mean Ms. Royston intentionally chose not to deliver it, counsel deemed the possibility a “worthy point” for which he could offer only inferences, not evidence, to rebut. (R. p. 186, lines 7-20).

The circuit court entered its order on October 9, 2019. First, the circuit court made two key factual findings: (1) “There is no evidence the Arbitration Agreement was signed by Patricia Royston during the admission process and provided to [the Facility]”; and (2) Petitioners “acknowledge the copy [of the Arbitration Agreement] at issue was not signed by any Facility representative.” (R. p. 2). In light of these findings, the circuit court concluded the Facility failed to meet its burden to prove the mutual assent required to form a valid contract. (R. p. 5). The circuit court also noted a discrepancy between the Facility and the Arbitration Agreement’s text, which referenced only Ms. Royston and an entity identified only as “Magnolia Place of Greenville.” (R. pp. 6-7). On appeal, the Court of Appeals deemed oral argument unnecessary and unanimously affirmed the circuit court’s ruling in a unanimous memorandum opinion. Royston v. Hunt Valley Holdings, LLC, Unpublished Op. No. 2022-UP-203 (S.C. Ct. App. May 18, 2022).

ARGUMENT

The Facility’s contract enforcement motion failed for the most basic reason. The Facility did not produce evidence to prove the formation of a valid contract. The Facility attempted to force arbitration on the estate of its former resident citing an “Arbitration Agreement” the Facility did not sign, hold, or know existed until after Respondent’s lawsuit was initiated and the Facility filed its answer. The circuit court and Court of Appeals found South Carolina law demanded the Facility prove the contract by presenting evidence that both putative parties assented and objectively manifested that assent to the other. Royston, Unpublished Op. No. 2022-UP-203, at 3 (S.C. Ct. App. May 18, 2022) (citing Hughes v. Edwards, 265 S.C. 529, 536, 220 S.E.2d 231, 234 (1975)).² The Petition does not question the Facility’s evidentiary burden or the objective manifestation of assent requirement, and Petitioners do not cite any South Carolina Supreme Court or other binding precedent they claim has been overlooked in this case. In fact, the uncontested contract rules reject Petitioners’ position. The Facility cannot enforce an unsigned proposed contract because the Facility (1) wrote the Arbitration Agreement to require its signature and then chose not to sign; and (2) did not “accept, hold, and act upon” the contract as required to prove a non-signature assent. Dean v. Dean, 229 S.C. 430, 436, 93 S.E.2d 206, 209 (1956); Peddler, Inc. v. Rikard, 266 S.C. 28, 32, 221 S.E.2d 115, 117 (1975).

Instead, the Petition speaks in often dismissive terms to simply disagree with the lower courts’ evaluation of the evidence.³ Petitioners’ disagreement with the outcome below and alternative view of the evidence does not meet this Court’s criteria for discretionary review. See

² See also (R. p. 5) (quoting Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009)).

³ E.g. (Pet. at 14) (arguing that to cite the Facility’s lack of signature when considering evidence of mutual assent was “absurd”).

Rule 242(b), SCACR. Plus, the review the Petition seeks would place the Court in the unusual position of having to (1) conduct an amateur handwriting analysis without expert guidance (Pet. at 9-10 and n. 18); (2) assume a sequence of events surrounding Ms. Royston's admission to the Facility without testimony from any Facility representative (Pet. at 11); and (3) conclude Ms. Royston delivered the Arbitration Agreement to the Facility even though Petitioners, a billion-dollar national organization (R. p. 17 ¶ 6), has zero evidence the document was ever within the Facility's possession. (Pet. at 11-12). Even Petitioners' counsel admits this last point is no more than a "hypothesis." (R. p. 32, line 6). While the Petition insists it is "patently improbable" and "wholly speculative" to think Ms. Royston chose not to deliver the Arbitration Agreement to the Facility (Pet. at 11), counsel told the circuit court that prospect was "a worthy point for sure." (R. p. 186, lines 13-14).

In sum, while Petitioners dispute the lower courts' finding of no contract, they do not challenge the selection or application of any legal principle used to reach that finding. Nor have Petitioners offered any evidence to prove a valid contract was formed here. Thus, the lower courts' rulings were sound, and the Facility's request for a third chance to rehash its insufficient evidentiary showing should be denied.

1. The Court of Appeals correctly applied South Carolina law in considering the Arbitration Agreement's absence from the Facility's files.

The fact that the Facility does not have the Arbitration Agreement in its files is probative for both parts of the mutual assent requirement for contract formation. The Court of Appeals correctly determined this fact supported the conclusion that Ms. Royston never objectively manifested assent of the Arbitration Agreement to the Facility. Moreover, the Court of Appeals could have just as easily held the document's absence proved the Facility could not prove its own objective manifestation of assent.

a. The absent Arbitration Agreement is uncontroverted evidence showing Ms. Royston did not objectively manifest assent to its terms.

Since the Facility sought arbitration, it was the Facility's burden to prove all the required components of contract formation. Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assur. Co., 867 F.3d 449, 456 (4th Cir. 2017) (citing Adkins v. Labor Ready, Inc., 303 F.3d 496, 500-01 (4th Cir. 2002) ("a defendant who seeks to compel arbitration under the Federal Arbitration Act bears the burden of establishing the existence of a binding contract to arbitrate the dispute").⁴ Contract formation demands mutual assent of the proposed parties. Edens v. Laurel Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978) (citing Kitchens v. Lee, 221 S.C. 59, 69 S.E.2d 67 (1952)). A contract party assents only through her objective manifestations. Rodarte v. Univ. of S.C., 419 S.C. 592, 603, 799 S.E.2d 912, 917-18 (2017) (quoting Laser Supply & Servs., Inc., 382 S.C. at 334, 676 S.E.2d at 143-44). As the Court of Appeals recognized, this objective manifestation requirement means a party in Ms. Royston's position only assented if her purported acceptance of the Arbitration Agreement's terms was "actually or constructively communicated" to the Facility. Royston, Unpublished Op. No. 2022-UP-203, at 3 (citing Connor v. Renneker, 25 S.C. 514, 517-18 (1886)). In other words, assent is "based on purpose and intention *which has been made known*" to the counterparty. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989) (emphasis added).

The circuit court evaluated the evidence to determine whether the Facility proved Ms. Royston communicated assent to the Arbitration Agreement to the Facility. Since proof of assent is a question of fact, the circuit court's evaluation of the evidence was entitled to deference on

⁴ See also Maro v. Lewis, 389 S.C. 216, 697 S.E.2d 684, 688 (Ct. App. 2010) (quoting Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962) ("This being an action for breach of contract, the burden was upon the [plaintiff] to prove the contract . . .").

appeal. Jaffe v. Gibbons, 290 S.C. 468, 471, 351 S.E.2d 343, 345 (Ct. App. 1986) (finding that whether parties reached the required “meeting of the minds” for a proposed contract is a question of fact); see also Wilson v. Willis, 426 S.C. 326, 335, 827 S.E.2d 167 (2019) (citing Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007)). An appellate court must not reverse the trial court’s factual findings if “any evidence reasonably supports those findings.” Wilson, 426 S.C. at 335, 827 S.E.2d at 172 (citing Aiken, 373 S.C. at 148, 644 S.E.2d at 707).

The uncontested fact that the Facility does not have the Arbitration Agreement is material evidence showing Ms. Royston did not actually or constructively communicate to the Facility assent to the Arbitration Agreement’s terms. The Facility did not offer any contrary evidence to prove a signed version of the Arbitration Agreement was ever in its possession. Thus, the Court of Appeals fully followed South Carolina contract law in determining the Facility’s admission that it cannot find the Arbitration Agreement “reasonably supports” the circuit court’s ruling on this factual question. Royston, Unpublished Op. No. 2022-UP-203, at 3. The Petition argues it is speculative to find the Facility’s inability to produce the contract supports the conclusion that Ms. Royston never delivered it to the Facility. But, there is nothing speculative about concluding absence of delivery of a document the alleged recipient cannot produce and has no record of. Petitioners’ counsel has conceded the notion that Ms. Royston chose not to, and never did, transmit the Arbitration Agreement to the Facility rises well above speculation. Compare (R. p. 186, lines 13-14) (“it’s a worthy point, for sure”) with Webster’s Third New Int’l Dictionary 2189 (2002) (defining speculation to mean “mere guesswork,” “surmise,” or “conjecture”).

Plus, it’s the Facility’s theory that requires guesswork. The Facility wanted the circuit court to believe Ms. Royston delivered a signed version of the Arbitration Agreement to the Facility even though the Facility cannot now produce it. The Facility has no record of ever receiving this

proposed document. Nor can the Facility produce the testimony of any of its employees who allegedly collected it. Thus, the Facility which, along with the other Petitioners operate a nationwide set of skilled nursing facilities, asks the Court to surmise that it receives important legal documents without retaining them, creating a digital copy, or making any other notation that the document has been obtained. All of this shoddy recordkeeping is to be assumed without the testimony of any Facility representative on how it handles contracts either in general or specifically Ms. Royston's supposed delivery of the Arbitration Agreement. In short, the Court of Appeals correctly performed its limited scope of review by finding the evidence did not support a finding of mutual assent, and the Court should decline the Facility's invitation to grant discretionary review to further air its speculative theory.

b. The Facility's admitted failure to "hold" any purported copy of the Arbitration Agreement is further evidence against mutual assent.

Under long-standing South Carolina law, the Facility's admitted failure to retain the Arbitration Agreement it allegedly received from Ms. Royston means the Facility cannot prove mutual assent. Since it did not sign the Arbitration Agreement, the Facility may show it assented to the contract only with proof that the Facility "accepted, held, and acted upon" the Arbitration Agreement. Peddler, 266 S.C. at 32, 221 S.E.2d at 117 (quoting Gladden v. Keistler, 141 S.C. 524, 140 S.E. 161, 164 (1927)).⁵ The Facility admits it did not "hold" the Arbitration Agreement. Both at the circuit court hearing and in Court of Appeals' briefing, the Facility acknowledged it cannot produce the original Arbitration Agreement and that the Facility has never located even a copy in

⁵ Courts applying South Carolina law continue to apply the Peddler rule even in more recent cases. See Dan Ryan Builders W. Va., LLC v. Main St. Am. Assur. Co., 452 F. Supp. 3d 338, 349 (D.S.C. 2020) (citing Peddler and holding that "[a]cceptance of a contract by assenting to its terms, holding it and acting upon it, may be equivalent to a formal execution by one who did not sign it"); Coves Darden, LLC v. Ibanez, Op. No. 2016-UP-402, 2016 WL 4379419, at * 2 (S.C. Ct. App. 2016).

its own records. (R. p. 184, lines 13-15) (“it’s absolutely true . . . that we don’t have a copy of” the Arbitration Agreement); Appellants’ Br. at 7 (“the Facility has been unable to locate the Arbitration Agreement . . .”). The “holding” requirement from Peddler demands at the very least that the party seeking enforcement maintained a copy of the purported contract. Bishop Realty & Rentals, Inc. v. Perk, Inc., 292 S.C. 182, 185, 355 S.E.2d 298, 300 (Ct. App. 1987) (applying Peddler rule only because evidence showed the party seeking enforcement “retained a copy of the signed instrument for its files”).

In sum, the Court of Appeals correctly counted the Arbitration Agreement’s absence from the Facility’s files as evidence against a finding of assent by Ms. Royston. This evidence is similarly important to show the Facility lacks the required evidence to prove its own objective manifestation of assent. Without proof of mutual assent, the Court of Appeals correctly determined the Facility failed to meet its burden to prove the formation of a valid arbitration contract.

2. The Facility’s failure to sign the purported Arbitration Agreement further evidences a lack of mutual assent.

The Facility alone drafted the form Arbitration Agreement and unambiguously designated signatures from all involved parties as the sole means for manifesting assent to its terms. Since the Facility then chose not to sign the Arbitration Agreement, South Carolina law states that it has not proved mutual assent to the Arbitration Agreement’s terms.

Under long-standing South Carolina law, when a contract demands all parties’ signatures, it is ineffective until all parties have signed. Dean, 229 S.C. at 436, 93 S.E.2d at 208. In Dean, the South Carolina Supreme Court affirmed a circuit court’s refusal to enforce a proposed contract that demanded five parties’ signature but included only four. Id. As Dean explained

The reason for holding the instrument void is it was intended that all the parties should execute it and that each executes it on the implied condition that it is to be

executed by the others, and, therefore, that until executed by all, it is inchoate and incomplete and never takes effect as a valid contract.

Id. (quoting 17 C.J.S., Contracts § 62 at 412). The same principle applies here. Since the Facility chose dual signatures as the designated means by which the Arbitration Agreement was to be executed, the Facility's failure to sign renders the Arbitration Agreement "inchoate and incomplete" such that the circuit court was correct to find it "never takes effect as a valid contract."

The lower courts' rulings are also consistent with a number of cases from other jurisdictions finding that a nursing home may not enforce a purported arbitration contract the home chose not to sign. The Arkansas Supreme Court has ruled a nursing home's failure to sign a series of arbitration contract on the line designated for its signature "is fatal to the validity of these agreements." Robinson Nursing & Rehab. Ctr., LLC v. Phillips, 586 S.W.3d 624, 635 (Ark. 2019). Without the signature the contracts called for, the home could not meet its burden to demonstrate an objective manifestation of intent. Id. at 635-36; see also Pine Hills Health & Rehab., LLC v. Matthews, 431 S.W.3d 910, 915 (Ark. 2014) (holding that, while there are ways to prove assent other than a signature, a nursing home failed to prove its assent to an unsigned arbitration contract). In 2015, a Pennsylvania court held a nursing home that drafted an arbitration contract calling for its signature but failed to sign did not assent merely by presenting the proposed contract to a prospective nursing home resident. Bair v. Manor Care of Elizabethtown, PA, LLC, 108 A.3d 94, 98 (Pa. Super. 2015) ("By failing to affix its signature, [the nursing home] did not consent to arbitrate"). Similarly, a Tennessee federal district court rejected a nursing home's attempt to compel arbitration when it failed to sign a proposed arbitration agreement even though the nursing home offered an affidavit from its general manager claiming the absent signature did not indicate a lack of assent. Caldwell v. SSC Lebanon Operating Co., LLC, Civil Action No. 3:16-cv-0036, 2016 WL 3905670 (M.D. Tenn. July 19, 2016) (quoting Flanary v. Carl Gregory Dodge of Johnson

City, LLC, No. E2004-00620-COA-R3-CV, 2005 WL 1277850, at * 9 (Tenn. App. May 31, 2005) (rejecting affidavit as “nothing more than a post-commencement of litigation statement” insufficient to make objective manifestation of assent).

Thus, the Court of Appeals followed South Carolina law in finding the Facility’s missing signature as probative evidence on the crucial assent question. Pursuant to Dean, the Facility’s choice not to sign is fatal to its attempt to prove mutual assent. Moreover, the Court of Appeals’ ruling is right in line with rulings from around the country refusing to permit a nursing home to force arbitration under similar circumstances. Since both binding and persuasive authority support the Court of Appeals’ opinion, there is no need for further appellate review.

3. The Court of Appeals correctly declined to address the remaining issues raised by the parties.

The Court of Appeals’ proper evaluation of the contract formation evidence mooted the remaining issues raised by the parties. Since the Facility failed to prove a valid arbitration contract, the Court of Appeals correctly chose not to address the Facility’s objection to the circuit court’s alternative basis for refusing to compel arbitration. Royston, Unpublished Op. No. 2022-UP-203, at 3 (citing Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)). The lack of mutual assent likewise mooted the additional sustaining grounds Respondent cited in her briefs including arguments that the purported Arbitration Agreement was unconscionable and inapplicable to Respondent’s wrongful death claim. See Resp’t Br. at 13-35.

CONCLUSION

Based on the arguments stated above, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari. The Court of Appeals’ unanimous, unreported memorandum opinion correctly considered the Facility’s inability to produce a copy of the purported Arbitration Agreement and its failure to sign when affirming the circuit court’s ruling that the Facility did not

meet its burden to prove a valid arbitration contract. The Court of Appeals' decision is further supported by the unambiguous rules from Peddler and Dean, along with a number of similar cases from other jurisdictions. In the face of this substantial binding and persuasive authority, the Facility offers nothing but speculation to prove assent. In the end, the Court of Appeals' ruling was correct, and Petitioners offer no legitimate basis for further appellate review.

Respectfully submitted,

/s/ Jordan C. Calloway _____

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