RECEIVED
Jan 29 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2020-CP-10-01205
Appellate Case No. 2020-001117

Teresa Dalton, as Personal Representative of the
Estate of Ethel Ruckart, ...Respondent,

v.

Mount Pleasant Manor, LLC, and
Bruce White, ... Appellants.

FINAL REPLY BRIEF OF APPELLANTS MOUNT PLEASANT MANOR, LLC AND BRUCE WHITE

W. McElhaney White
Holcombe Bomar, P.A.
P.O. Drawer 1897
Spartanburg, SC 29304
(864) 594-5300
mwhite@holcombebomar.com

Attorneys for Appellants

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES AND RULES

REPLY ARGUMENT

I. The Health Care Power of Attorney granted Teresa Dalton the power to execute a binding Arbitration Agreement.

Respondent argues the Health Care Power of Attorney ("HCPOA") was not broad enough to grant Ms. Dalton the power to sign the Arbitration Agreement on Ms. Ruckart's behalf. (Respondent's Brief, pp. 4 – 9.) As Respondent notes, powers of attorney are subject to rules of contract interpretation. The rules seek to ascertain and give effect to the intention of the parties, and in determining that intention, the court looks to the language of the contract. When the language is plain, it alone determines the contract's force and effect, and this is despite the contract's wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. Stott v. White Oak Manor et al., 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct.App.2019) (citing Watson v. Underwood et al., 407 S.C. 443, 454-455, 756 S.E.2d 155, 161-162 (Ct.App.2014)).

The HCPOA is not as limited as Respondent would propose. [R. pp. 192 - 198] Initially, it should be noted the HCPOA was not a document drafted by Mount Pleasant Manor, LLC ("Mount Pleasant Manor"). Mount Pleasant Manor was provided this document by Ms. Dalton. To the extent there are any ambiguities in the HCPOA, it is well settled law that they should be construed against Respondent, the drafter of the HCPOA. Southern Atlantic Financial Services, Inc. v. Middleton, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct.App.2002).

Respondent agrees she had power under the HCPOA to execute the Admission Agreement. (Respondent's Brief, pp. 5 – 6.) She simply argues the HCPOA was not broad enough to grant Respondent the power to execute the Arbitration Agreement. This is incorrect. The plain language of the HCPOA clearly grants Respondent that authority.

In Section 4(H) of the HCPOA, Ms. Ruckart granted Ms. Dalton the right to execute "any agreement, release, authorization or other document that may be necessary, desirable, convenient or proper in order to exercise and carry out any of these powers…". Ms. Dalton was not limited to executing any documents that were "necessary" for Ms. Ruckart's admission to Mount Pleasant Manor; rather, she was authorized to execute documents which were desirable, convenient or proper. [R. p. 193.]

Section 7(B) of the HCPOA cannot be ignored. It states, "…my health care agent's signature or action taken under the authority granted in this document may be accepted by persons as fully authorized by me and with the same force and effect as if I were personally present, competent and acting on my own behalf." [R. p. 196.]

There is no need to look beyond the plain language of the HCPOA. It authorized Ms. Dalton to execute and deliver the Arbitration Agreement, and Appellants were entitled to rely upon it when she did so.

Respondent argues South Carolina precedent supports her position that a Health Care Power of Attorney does not grant authority to execute an arbitration agreement. This is incorrect for a few reasons. First, to Appellants' knowledge, no South Carolina court has ruled on whether a health care power of attorney, much less the HCPOA at issue in this case, is broad enough to grant such authority. Second, as noted above, powers of attorney are subject to normal rules of contract interpretation. In other words, one must read and give effect to the plain language of the health care power of attorney to determine the intent of the parties.

The cases cited by Respondent do not elucidate this matter. Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014) does not address health care powers of attorney.

Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct.App.2018) does not hold that a health care power of attorney is insufficient to grant authority to sign an arbitration agreement.

As discussed in Appellants' Initial Brief, the court in Hodge actually suggested a health care power of attorney could have been sufficient to grant such authority. (Appellant's Initial Brief, pp. 8 – 9.) The language from Hodge quoted in Respondent's Brief comes from a section of the opinion addressing an agency argument, and it cites an Illinois case which did not involve a health care power of attorney. (Respondent's Brief, p. 7.)

Appellants agree with Respondent that Stott v. White Oak Manor, Inc. et al., 426 S.C. 568, 828 S.E.2d 82 (Ct.app.2019) did not hold that a health care power of attorney covers an optional arbitration contract, but Appellants disagree with Respondent's position that Stott does not "imply" such. That is precisely what the court in Stott did. The court held "[b]ecause we find [the resident] was mentally competent to sign the Arbitration Agreement, we affirm the circuit court's decision that Stott did not have authority under her durable health care power of attorney to sign the Arbitration Agreement". Id. at 578, 828 S.E.2d at 88. There is no other way to read this holding. The court clearly implied the result would have been different had the resident been mentally incompetent at the time of admission.

Respondent cites cases from other jurisdictions as persuasive authority for her position. Not surprisingly, there are a number of jurisdictions which support Appellants' position and hold that a health care power of attorney is sufficient to grant the agent authority to execute an enforceable arbitration agreement in a nursing home admission. See e.g. Garrison v. Superior Court of Los Angeles County, 132 Cal.App.4th 253, 266, 33 Cal.Rptr.3d 350, 360 (2005) (the revocable arbitration agreements were executed as part of the health care decision making

process); Owens v. National Health Corporation, 263 S.W.3d 876, 884 (Tenn.2007) (an attorney-in-fact acting pursuant to a durable power of attorney for health care may sign a nursing home contract that contains an arbitration provision); Moffett v. Life Care Centers of America; 187 P.3d 1140, 1147 (Colo.App.2008), aff'd, 219 P.3d 1068 (Colo.2009) (a person who holds a medical durable power of attorney, in selecting a long-term care facility, has the power to execute applicable admissions forms, including arbitration agreements); Hogan v. Country Villa Health Services, 148 Cal.App.4th 259, 264, 55 Cal.Rptr.3d 450, 453 (2007) (health care power of attorney sufficient to execute arbitration agreements).

Finally, Respondent argues the HCPOA is invalid because it was not recorded. This issue was not raised to or ruled upon by the trial judge. Nevertheless, there was no requirement that the HCPOA be recorded.

S.C. Code Ann. § 62-5-502(b) provides "[i]f a durable power of attorney for health care executed under…the laws of another state does not conform to the requirements of this section, the provisions of this section do not apply to it". S.C. Code Ann. § 62-5-504 requires that any health care powers of attorney be substantially in the form set forth in that statute. The HCPOA at issue in the case at bar is not in the form required by S.C. Code Ann. § 62-5-504. As a result, S.C. Code Ann. § 62-5-502(a) does not apply to the HCPOA at issue in this case, and there is no requirement that it be recorded.

Appellants contend the legislature never intended to require health care powers of attorney to be recorded. S.C. Code Ann. § 62-5-504 sets for the statutory form for health care powers of attorney in South Carolina. It contains specific instructions for persons to follow in executing the document. Nowhere in those instructions is any mention of a purported requirement that the

document be recorded. If that had been the legislature's intent, it could have easily inserted such an instruction in the statutory form.

S.C. Code Ann. § 62-5-502(a) provides that statutory provisions which refer to a durable power of attorney apply to a health care power of attorney to the extent that they are not inconsistent with this part. (emphasis added) S.C. Code Ann. § 62-8-109(c) and (d) do not use the term "durable" in its use of the terms "power of attorney". This is further evidence the legislature did not intend to require the recording of health care powers of attorney.

Finally, Respondent acknowledges in her brief that the HCPOA was effective for the purpose of admitting Ms. Ruckart to Mount Pleasant Manor. "As Appellants note, Daughter was empowered to admit and withdraw Mother from locations like the Facility offering medical and nursing services." "Appellant's reliance on HCPOA section 4(H) is also misplaced as that section granted Daughter only the authority to take actions "necessary to carry out" her enumerated powers including the power to admit Mother to the Facility." (Respondent's Brief, pp. 5 – 6.) Respondent cannot on the one hand argue that an unrecorded HCPOA was effective for the purpose of signing the Admission Agreement and admitting Ms. Ruckart to the facility, but on the other hand argue the HCPOA had to be recorded for the purpose of executing the Arbitration Agreement.

For all of these reasons, there was no requirement that the HCPOA be recorded before Ms. Dalton exercised her authority under it by executing all of the admission documents.

II. The Admission Agreement and Arbitration Agreement merged, and Respondent is estopped from opposing arbitration.

Respondent's argument against equitable estoppel hinges on her position the Admission Agreement and Arbitration Agreement did not merge. First, she argues the agreements were not executed at the same time for the same purpose. Respondent correctly points out that the

Arbitration Agreement was executed on January 31, 2018, and the Admission Agreement was executed the following day on February 1, 2018. (Respondent's Brief, pp. 13 – 14.)

This is of no consequence. Our Supreme Court noted the common law rule of merger applied even when a transaction consumed more than one day, and the instruments have not been executed simultaneously. Klutts Resort Realty, Inc. et al. v. Down'Round Development Corporation et al. 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).

Next, Respondent argues the Admission Agreement and Arbitration Agreement were not entered for the same purpose. (Respondent's Brief, pp. 13 – 14.) This is incorrect. The Admission Agreement, Arbitration Agreement, and other documents executed by Ms. Dalton were all for the same purpose – the act of Ms. Ruckart becoming a resident of Mount Pleasant Manor. [R. pp. 107 - 122.] The fact that the Admission Agreement and Arbitration Agreement covered different topics is of no consequence. Business transactions of all types often contain more than one writing executed by the parties, which by their very nature cover different aspects of the transaction. To treat an arbitration agreement differently is violative of the long-standing principle that arbitration agreements must be treated as all other contracts (the FAA's purpose was to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and place them on the same footing as other contracts"; Volt Informational Serv., Inc. v. Bd. Of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 474 (1989) (citation and internal quotation marks omitted).

Respondent then argues the parties intended for the Admission Agreement and Arbitration Agreement to be construed as separate contracts. She refers to the holdings of Hodge, Coleman, and Thompson v. Pruitt Corporation et al., 416 S.C. 43, 784 S.E.2d 679 (Ct.App.2016) in support, and discusses the issues of inconsistent termination provisions, contract formatting and structure,

and whether the arbitration agreement was required for admission. (Respondent's Brief, pp. 14 – 18.)

This Court need not go through that analysis. As Respondent correctly points out, the question of merger is one of intent. Did the parties intend for the Admission Agreement and Arbitration Agreement to merge? The answer to that question is "yes", and one needs go no further than the language of the Admission Agreement to find that intent.

Section 22(e) of the Admission Agreement incorporated and merged the Arbitration Agreement with and into the Admission Agreement. It provides in part:

> Entire Agreement. This Agreement and the attachments included in the Packet as listed in the Table of Contents constitute the Agreement and set forth the entire understanding of the parties relating to the subject matter hereof, and supersedes all prior agreements, understanding, and discussions relative to such subject matter. [R. p. 118.]

The "Packet" identified in that section refers to the Admission Packet Checklist. The Admission Packet Checklist indicates the Arbitration Agreement is part of the Admission Agreement. [R. p. 125, ¶ 11; R. p. 161, ¶ 5; R. p. 191.]

Thus, the intent of the parties was that the Admission Agreement and Arbitration Agreement merge. As a result, Respondent should be equitably estopped from asserting claims against Appellants while repudiating the integrated arbitration terms.[1]

---

[1] Respondent argues the Admission Agreement and Arbitration Agreement did not merge in part because the execution of an arbitration agreement was not required for admission to Mount Pleasant Manor. (Respondent's Brief, pp. 17 – 18.) It is worth noting new regulations governing arbitration agreements went into effect in September 2019. Although this was after Mr. Ruckart's admission to Mount Pleasant Manor, they are instructive. Under the new regulations, a long-term care facility such as Mount Pleasant Manor must not require any resident or his representative to sign an arbitration agreement as a condition to admission and must explicitly inform the resident or his representative of his right not to sign the agreement. The arbitration agreement must explicitly grant the resident or his representative the right to rescind the agreement within 30 calendar days of signing it. The arbitration agreement must explicitly state that neither the resident nor his representative is required to sign the arbitration agreement as a condition of admission to the facility. 42 C.F.R. § 483.70(n).

Respondent also suggests the fact that the Admission Agreement is governed by South Carolina law, and the Arbitration Agreement is governed by Federal law, is evidence of their separateness. (Respondent's Brief, pp. 15 – 16.0 This does not tell the whole story. The Admission Agreement is governed by South Carolina state law. The

Respondent then argues Appellants have failed to show Ms. Ruckart received a direct benefit from the contract containing an arbitration provision that would render it inequitable for her to oppose arbitration. (Respondent's Brief, pp. 18 – 20.) Respondent relies on Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 268 (Ct.App.2020). Respondent's reliance on Weaver is misplaced.

Weaver involved a very unfortunate situation in which a nursing home resident eloped from a facility, and her absence was not noted until the following morning. The resident's family was notified, and they began a search. The resident's granddaughter found her grandmother in a retention pond maimed and dismembered by an alligator. She brought suit in her personal capacity against the nursing home for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. The nursing home moved to compel arbitration based on the arbitration provision in the residency agreement. The lower court held, and the Court of Appeals agreed, that the granddaughter was not bound by the arbitration provision. Id. at 227 – 228, 847 S.E.2d at 271.

The court initially noted that the granddaughter was not a party to the admission agreement, nor was there any evidence she was even aware of it. Id. at 228, 847 S.E.2d at 271. It then noted granddaughter's claims relied on general tort duties owed by the nursing home to everyone, not ones arising under the residency agreement. For instance, the court wrote, one of her emotional distress claims alleged she suffered injury because the nursing home mishandled and failed to

---

Arbitration Agreement states in part "such binding arbitration shall be governed by the provisions of the state Arbitration Code. As appropriate and in the event that the Arbitration Code is deemed to not apply, binding arbitration shall be governed by the Federal Arbitration Act." S.C. Code Ann. §15-48-10(b)(4) Code provides that the South Carolina Arbitration Code shall not apply to any claim arising out of personal injury based on contract or tort. Thus, the South Carolina Arbitration Code by its terms do not apply to this case, and instead the Federal Arbitration Act controls.

safeguard her grandmother's remains. There was no provision in the residency agreement regarding the handling of deceased resident's remains. Id. at 232, 847 S.E.2d at 273.

Instead, the duties owed to the granddaughter arose when the facility notified and asked for the family's help in locating the grandmother and failed to warn her of the danger of the alligator pond that the facility knew or should have known about when the granddaughter began her search. These duties, according to the court, did not flow directly from the residency agreement. The court then found the granddaughter had not attempted to procure any direct benefit from the residency agreement while attempting to avoid its arbitration provision. Id. at 232-233, 847 S.E.2d at 273-274.

The facts of Weaver are distinguishable from the facts here. First, the granddaughter in Weaver was not involved in the admission process, and she did not sign the residency agreement containing the arbitration provision. Ms. Dalton, on the other hand, was involved in the admission process and signed the Admission Agreement and integrated Arbitration Agreement. [R. pp. 120, 122.]

Second, the granddaughter in Weaver brought her claims in her individual capacity for damages she allegedly suffered. Ms. Dalton has brought claims in a representative capacity for damages allegedly suffered by Ms. Ruckart and her beneficiaries. [R. pp. 11 - 31.]

Third, the granddaughter in Weaver was relying on general tort duties owed by that facility to everyone, and not under any provision of the residency agreement. In the case at bar, Ms. Dalton is relying on duties arising from care provided directly as a result of the terms of the Admission Agreement (and the integrated Arbitration Agreement). [R. pp. 11 – 31, 107 - 122.]

Fourth, the granddaughter in Weaver had not attempted to procure any direct benefit from the residency agreement. Ms. Ruckart had not only attempted to procure direct benefits from the

Admission Agreement (and its integrated Arbitration Agreement), but had in fact procured such benefits from the care and services she received.

The distinctions between Weaver and the case at bar are clear. Weaver does not, as Respondent contends, control here.

III. Ethel Ruckart was a third-party beneficiary of the Admission Agreement and merged Arbitration Agreement.

Respondent argues Ms. Ruckart was not a third-party beneficiary of the agreements at issue in this case. She first argues there was no valid Arbitration Agreement. (Respondent's Brief, p. 21.) Appellants have addressed the validity of the Arbitration Agreement throughout their Initial Brief and this Reply Brief and would simply incorporate those same arguments here.

Respondent also argues there was no valid contract between Ms. Dalton and Appellants. (Respondent's Brief, p. 21.) In response, Appellants crave reference to the language of the Arbitration Agreement which states in part "...Resident or Resident Representative hereby knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any claim, including any counterclaim, which Resident or Resident Representative may assert...". [R. p. 121.] Thus, whether Respondent wishes to couch the claims as being asserted by Ms. Ruckart or Ms. Dalton, the result is the same – arbitration applies.

Respondent argues next that the third-party beneficiary doctrine does not apply to the Arbitration Agreement because it was not the parties' intent to benefit Ms. Ruckart as a third-party, and because Ms. Ruckart never consented to arbitrate claims against Appellants. (Respondent's Brief, pp. 21 – 23.) These argument were not presented to or ruled upon by the lower court.

If this Court considers these argument, they nevertheless fail on their merits. As to the first point, Respondent argues, in essence, that the parties originally intended Ms. Ruckart to be a

party to the Arbitration Agreement, and thus it is now improper for Appellants to argue she is a third-party beneficiary to the agreement. (Respondent's Brief, p. 22.)

This is an issue of Respondent's making. Appellants' initial argument is Ms. Dalton had the authority to bind Ms. Ruckart to the Admission Agreement and its integrated Arbitration Agreement through the HCPOA. If this Court agrees with Appellants on this point, the analysis stops there. However, if this Court were to find that Ms. Ruckart was not a party to the Arbitration Agreement, that would place her in a third-party status. If that is the case, then Appellants third-party beneficiary argument is triggered and is supported by the reasons argued in Appellants' Initial Brief. (Appellant's Initial Brief, pp. 15 – 16.)

Respondent then argues Ms. Ruckart never consented to arbitrate her claims against Appellants. (Respondent's Brief, pp. 22 – 23.) She relies on this court's decision in Thompson. Thompson, however, is distinguishable from the case at bar.

The court in Thompson ruled there was no merger of the admission agreement and arbitration agreement. Id. at 52, 784 S.E.2d at 684. For the reasons argued above, the Admission Agreement and Arbitration Agreement signed by Ms. Dalton did merge. The Thompson court then cited to Drury v. Assisted Living Concepts, Inc., 245 Or.App. 217, 262 P.3d 1162 (2011), for the proposition that a third-party beneficiary must in some way assent to a contract containing an arbitration clause; otherwise, the contracting parties have waived the beneficiary's right to a jury trial without her consent. Thompson at 57, 784 S.E.2d at 687.

The court in Drury noted a third-party beneficiary's assent to be bound by a contract may be presumed if she seeks to enforce rights under the contract. Id. at 221, 262 P.3d at 1165. It went on to state that assent can be manifested by asserting a claim for relief under the agreement. Id. at 224, 262 P.3d at 1166.

That is what we have in the case at bar. Ms. Dalton has asserted claims on behalf of Ms. Ruckart under the Admission Agreement and the integrated Arbitration Agreement. By doing so, Ms. Ruckart has assented to the agreements and is bound to arbitrate her claims.

IV. Bruce White may enforce the Arbitration Agreement as a non-signatory.

Respondent argues Appellant White is not entitled to enforce the Arbitration Agreement because he is not a party to it. (Respondent's Brief, pp. 23 – 26.) Initially, Appellants once again note Respondent made so such argument to the lower court. If this court decides to entertain the issue, the contention is without merit.

The controlling precedent is S.C. Pub. Serv. Authority v. Great Western Coal, et al., 312 S.C. 559, 437 S.E.2d 22 (Ct.App.1993). The court ruled that a non-signatory to an arbitration agreement is entitled to enforce arbitration if he is willing to submit to arbitration. Otherwise, a party could avoid arbitration simply by naming non-signatory parties in his complaint. Id. at 563, 437 S.E.2d at 24-25.

Respondent refers to Westmoreland v. Sadoux, 299 F.3d 462 (5th Cir. 2002) in support of her position. The court in Westmoreland cited a few instances in which a non-signatory could enforce an agreement to arbitration. One circumstance was when the signatory to the contract raised allegations of "substantially interdependent and concerned misconduct by both the non-signatory and one or more of the signatories to the contract." Id. at 467.

That is precisely what Respondent has done in this case. The two parties named as Defendants in the case are Mount Pleasant Manor, LLC and Bruce White. In Respondent's Complaint, Bruce White is identified by name only in Paragraph 3. After that, he is lumped into the term "Defendants" with Mount Pleasant Manor, LLC. Thus, Respondent has clearly alleged interdependent and concerned misconduct in her Complaint. [R. pp. 11 - 31.]

CONCLUSION

Respondent is bound to arbitrate her claims against Appellants. Ms. Dalton had authority to execute the Admission Agreement and Arbitration Agreement; Respondent is estopped from opposing arbitration; Ms. Ruckart was the third-party beneficiary of the Admission Agreement and merged Arbitration Agreement; and Appellant Bruce White is entitled to enforce the Arbitration Agreement as a non-signatory. For those reasons, and the reasons argued in Appellants' Initial Brief, this Court should reverse the trial court's order denying Appellants' Motion, and the matter should be stayed pending the arbitration of the dispute.

Respectfully submitted this 29th day of January, 2021

Holcombe Bomar, P.A.

W. McElhaney White
Holcombe Bomar, P.A.
P.O. Drawer 1897
Spartanburg, SC 29304
(864) 594-5300
mwhite@holcombebomar.com

Attorneys for Appellants

Rule 211(b) Certification

The undersigned attorneys for the Appellants certify that this Final Reply Brief of Appellants complies with Rule 211(b), SCACR.

Holcombe Bomar, P.A.

W. McElhaney White
Holcombe Bomar, P.A.
P.O. Drawer 1897
Spartanburg, SC 29304
(864) 594-5300
mwhite@holcombebomar.com

Attorneys for Appellants