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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2022-000599
Lower Court Case No. 2022CP200017

Edith Peoples, as personal representative of the estate of Floyd Young,

Respondent,

v.

PruittHealth-Ridgeway, LLC,

Appellant.

FINAL REPLY BRIEF OF APPELLANT

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Respondent's arguments in support of the circuit court's Order suffer from multiple fundamental and fatal flaws. First, Respondent erroneously imputes limitations on Judge Sprott's grant of legal custody to DSS that are unsupported by the plain language of the Order, the factual record, and South Carolina law. Second, Respondent misconstrues the scope and, in turn, the applicability of the Federal Arbitration Act ("FAA"). Finally, Respondent baselessly concludes that the Arbitration Agreement is involuntary and incorrectly determines that it is unconscionable and/or violates public policy. Consequently, and as detailed further below, Respondent has not met its burden of establishing any defense to the enforceability of Mr. Young's valid Arbitration Agreement and, therefore, the circuit court's Order denying Appellant's Motion to Compel Arbitration warrants reversal.

I. NEITHER JUDGE SPROTT'S ORDER NOR SOUTH CAROLINA LAW LIMITED DSS'S AUTHORITY AS MR. YOUNG'S LEGAL CUSTODIAN SUCH THAT IT COULD NOT EXECUTE THE ARBITRATION AGREEMENT ON HIS BEHALF.

Respondent erroneously argues that Judge Sprott's Order was limited in time and scope. It does so though by ignoring the plain language of the Order and the factual record, misconstruing the Order's time frame, reading a portion of the Order in isolation, and misapplying South Carolina law on both DSS's authority and the enforcement of arbitration agreements where, **unlike here**, the Adult Healthcare Consent Act is implicated. However, an accurate reading of the legal and factual record confirms that DSS had and was in no way limited in its authority to execute the Arbitration Agreement on behalf of Mr. Young as his legal custodian.

A. Judge Sprott's Order Granted DSS All of the Authority Granted to Legal Custodians Under South Carolina Law While It Remained Mr. Young's Legal Custodian.

Judge Sprott's Order plainly placed Mr. Young in the "legal and physical custody" of DSS. (R. pp. 82-84). Accordingly, pursuant to Judge Sprott's Order, DSS was permitted to exercise all of the authority granted to legal custodians under South Carolina law, which included the authority to execute contracts, such as arbitration agreements, on behalf of Mr. Young. *See* S.C. Code § 63-15-210 (2012) (defining legal custody in the family law context broadly); *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354 n.4, 755 S.E.2d 450, 454 (2014) (submitting, without deciding, that legal custodians have the broad authority to make legal and other decisions on behalf of individuals in their care); *see also THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert,* Civil Action No. 7:13-cv-2929-BHH, 2014 U.S. Dist. LEXIS 171275, at *16-17 (D.S.C. Oct. 31, 2014) (recommendation and report adopted) (nonprecedential) (enforcing an arbitration agreement signed by DSS on behalf a vulnerable adult). Respondent attempts to limit DSS's authority by arguing that Judge Sprott's Order was limited in time to six months and in scope to merely enabling DSS "to secure a safe and protective placement" for Mr. Young. (Resp. Brief, pp. 4-6). However, Respondent misconstrues the language of Judge Sprott's Order, as well ignores the factual record.

Specifically, the Order states that Mr. Young's "case" will be "reviewed" in six months – not that the case, DSS's authority, or even the Order will *expire* or terminate at the conclusion of six months. (R. pp. 82-84). Moreover, the undisputed factual record demonstrates that DSS's authority did not expire at the end of six months because Mr. Young remained in DSS's custody through at least 2015 or for three years. (R. p. 102). Like the circuit court, Respondent gravely neglects the three-year gap between DSS's appointment as Mr. Young's legal custodian and Respondent's appointment as his Guardian. However, it should not be overlooked by this Court because it shows that, for three years, only DSS had the ability to make decisions for Mr. Young.

At various times in her brief, Respondent tries to distract from this point by asserting that Mr. Young had capacity because Judge Sprott "did not make any findings regarding Mr. Young's overall mental capacity" and Mr. Young was "alert and oriented" according to medical records from Sister of Charity Providence Hospital **ten months after** the execution of Mr. Young's Arbitration Agreement. (Resp. Brief, pp. 4, 9-10). Yet, neither contention negates DSS's authority on their face, and they likewise do not comport with the language of Judge Sprott's Order or the factual record.

As an initial matter, Mr. Young's mental status did not affect DSS's authority because Judge Sprott granted it legal custody, which enabled DSS to act on Mr. Young's behalf. Regardless, as previously briefed, a lack of capacity is implicit, if not explicit, in Judge Sprott's Order due to his findings on Mr. Young's inability to provide for his own care and protection, his involvement of both the South Carolina Department of Mental Health and Mr. Young's Guardian Ad Litem, and his decision to award DSS legal custody in addition to physical custody. (R. pp. 82-84). Furthermore, Mr. Young's post-admission medical records are not relevant to this appeal because they are well beyond the operative time – the time of execution of Mr. Young's Arbitration Agreement. *Verdery v. Daniels (In re Thames)*, 344 S.C. 564, 570, 544 S.E.2d 854, 856 (Ct. App. 2001) (holding "South Carolina has defined contractual capacity as a person's ability to understand, at the time the contract is executed, the nature of the contract and its effect."). Indeed, the only relevant record evidence of Mr. Young's capacity supports that, at all times, he lacked capacity. *See e.g.*, (R. p. 173); (R. p. 15, ¶¶ 4-6) (setting forth that Mr. Young was "under constant skilled nursing care due to his conditions, ***decline in mental cognition*** and his total dependence for his needs for dally (sic) living and activity . . . [he] ***had difficulty speaking and could not make his needs known to the staff***[]" and that, "[d]ue to his pica, [Mr. Young was] known to chew on

his bedgown, bedsheets, his diaper brief, his own feces and other non-food items.") (emphasis added). Therefore, there is no basis for imputing a six-month time limitation to Judge Sprott's grant of legal custody to DSS.

Similarly, there is no basis for imputing a limitation on the scope of DSS's legal custody of Mr. Young because Judge Sprott's Order does not contain one. Respondent improperly reads the phrase, "to secure a safe and protective placement[,]" in isolation. When properly viewed, the phrase is best interpreted as an explanation for the start of DSS's relationship with Mr. Young and not a limitation on its authority. After all, Judge Sprott awarded DSS both legal and physical custody of Mr. Young. If DSS's role was limited to placement, Judge Sprott did not need to grant DSS both forms of custody. Consequently, while Mr. Young remained in DSS's legal custody, DSS had the authority to exercise all of the rights granted to it under South Carolina law, including executing Mr. Young's Arbitration Agreement.

B. The Adult Protection Act Supports DSS's Authority to Execute the Arbitration Agreement on behalf of Mr. Young.

South Carolina law likewise does not contain a limitation on the scope of DSS's legal custody of a vulnerable adult such that it cannot execute arbitration agreements on behalf of vulnerable adults. Despite this, Respondent argues that DSS-related statutes and regulations "do not give authority for DSS to provide services beyond dealing with healthcare issues" and do not give "DSS authority to sign any contracts on behalf of vulnerable adults[.]" (Resp. Brief, pp. 6-9). However, this is simply not true under the very statutes and regulations cited by Respondent, but particularly under the South Carolina Omnibus Adult Protection Act, codified at S.C. Code § 43-35-10 (2010) *et al.* ("Adult Protection Act").

Like the DSS regulation cited by Respondent (S.C. Code Ann. Regs. 114-3310), the Adult Protection Act sets forth a ***non-exhaustive*** list of the services that DSS can provide to individuals

in its custody. *Compare* S.C. Code Ann. Regs. 114-3310(A) (1976) ("Services provided may include, but are not limited to . . .") *with* S.C. Code § 43-35-10 (9) ("These services include, but are not limited to . . ."). Those services include, but are not limited, "elevating the need for protective services, securing and coordinating existing services, arranging for living quarters, obtaining financial benefits to which a vulnerable adult is entitled, and securing medical services, supplies, and legal services." S.C. Code § 43-35-10 (9). The Adult Protection Act necessarily enables DSS to sign contracts on behalf of vulnerable adults. Otherwise, DSS could not properly function; could not secure services from third parties such as banks, schools, healthcare providers, and transportation providers. Notably, it could not sign the admission agreement that Respondent concedes is enforceable. (Resp. Brief, p. 6).

Furthermore, the Adult Protection Act expressly enables DSS to assist vulnerable adults with **legal services**. (*Id.*). Telling, this is not addressed in Respondent's brief. If DSS has the authority to secure "legal services" on behalf of a vulnerable adult, it certainly may choose the forum to do so, including arbitration. At least one federal court recognized this and enforced an arbitration agreement under near identical circumstances. *Gilbert,* 2014 U.S. Dist. LEXIS 171275 at *2-12 (cited supra). Respectfully, this Court should do the same.

Respondent nevertheless asks this Court to carve out an exception to DSS's authority for arbitration agreements only. It argues that the regulatory limitation on DSS's ability to consent to surgery on behalf of a vulnerable adult supports limiting DSS's authority to execute arbitration agreements. As discussed below, this runs afoul of the FAA and South Carolina law. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333 (2011) ("[The] saving clause [of the FAA] permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their

meaning from the fact that an agreement to arbitrate is at issue."); *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 10, 791 S.E.2d 128, 132 (2016) (internal citation omitted) (directing South Carolina courts to apply *Concepcion* and overruling South Carolina's outrageous torts exception to arbitration agreements because it did not apply equally to all contracts). Moreover though, it runs afoul of the rules of statutory interpretation. The inclusion of one exception to DSS's authority indicates that the legislature did not intend to limit DSS's legal authority in other ways. *See Home Health Servs. v. S.C. Dep't of Revenue & Taxation*, 333 S.C. 691, 695 (Ct. App. 1999) (internal citation omitted) ("The inclusion of one exception amounts to an affirmation of the applicability of the statute's provision to all other cases which are not excepted."). Thus, in addition to Judge Sprott's Order, there is ample statutory authority for the enforcement of Mr. Young's Arbitration Agreement.

C. The Adult Healthcare Consent Act is Inapplicable to the Present Case.

In an additional effort to undermine Judge Sprott's Order and the statutory authority in support of DSS's power to execute the Arbitration Agreement on behalf of Mr. Young, Respondent misapplies South Carolina law pertaining to the Adult Healthcare Consent Act, S.C. Code § 44-66-10 (1990) *et seq.*, such as *Thompson v. Pruitt Corporation*, 416 S.C. 43, 784 S.E. 2d 679 (Ct. App. 2016) and *Coleman* (cited supra). Specifically, in citing *Thompson*, Respondent argues "Even if Judge Sprott had given DSS broad authority such as the ability to make health care decisions or generally handle finances, this still would not have given DSS authority to waive a jury trial." (Resp. Brief, p. 5). However, the Adult Healthcare Consent Act is inapplicable to the present case. The Adult Healthcare Consent Act arises when a healthcare provider is left with an incapacitated person and no documentation of a guardian over the same. At that point, the provider goes through a list of statutory decisionmakers. However, when there is a guardian or custodian, the Adult

Healthcare Consent Act is not implicated. As a result, the holdings in *Thompson* and *Coleman* pertaining to it are inapplicable.

Restated a different way, the Adult Health Consent Act concerns consent to healthcare services on behalf of an incapacitated person where there has not been a prior grant of legal authority by the incapacitated person or a court. Here, there had already been a grant of legal authority prior to DSS's execution of the Arbitration Agreement: by Judge Sprott. Unlike the healthcare surrogates in *Thompson* and *Coleman*, by Judge Sprott's Order, DSS had been granted broad authority to act as any legal custodian in caring for Mr. Young prior to signing the Arbitration Agreement. Therefore, any limitations applied to healthcare surrogates under the Adult Healthcare Consent Act do not apply to DSS in this instance.

D. The Separateness of the Arbitration Agreement Supports Enforcement.

Although Respondent acknowledges (as does the circuit court) that DSS had authority to execute Mr. Young's admission agreement, in a final effort to limit DSS's authority for the Arbitration Agreement, Respondent emphasizes the Arbitration Agreement's separateness from the admission agreement. However, this favors enforcement. First, it evinces the voluntariness of the agreement. Second, it is in line with South Carolina's policy of enforcing arbitration agreements executed by individuals with legal authority to make healthcare decisions, which, under *Coleman*, includes authority to sign admission agreements.

Stated another way, under *Coleman* (as well as *Gilbert*), had the Arbitration Agreement been a part of Mr. Young's admission agreement, there would be no question that it was enforceable. *See Coleman*, 407 S.C. at 354, 755 S.E.2d at 454 (holding that a healthcare power of attorney could bind an incapacity person to an arbitration provision contained in admission agreement). Mr. Young's separate Arbitration Agreement should be similarly enforced because DSS had authority to sign it. Refusing to enforce the arbitration agreement actually limits

consumer choice by forcing healthcare entities to defer to adhesion contracts with patients to ensure that they will be fully enforced. *Id.* at 358, (Toal, J. dissenting) ("While there is nothing inherently 'wrong' with including an arbitration agreement in a nursing home residency contract, I believe it is more desirable to make arbitration agreements that are healthcare-related, discretionary, and signed by a surrogate just as enforceable as adhesive arbitration agreements. In my opinion, presenting consumers with a separate arbitration agreement should be encouraged because discretionary agreements enable consumers to make a more voluntary, knowing, and informed choice to arbitrate.").

II. THE FAA GOVERNS THIS DISPUTE BECAUSE A VALID AGREEMENT TO ARBITRATION EXISTS.

Contrary to Respondent's assertion, regardless of the fact that the parties do not dispute that interstate commerce is involved, the FAA is implicated because the Arbitration Agreement is a valid contract. 9 U.S.C. § 2 (2006) (establishing that a party seeking arbitration must only show a valid agreement exists and the agreement concerns interstate commerce); *see also Simmons v. Benson Hyundai, LLC*, No. 5900, 2022 S.C. App. LEXIS 37, at *4-5 (Ct. App. Mar. 16, 2022) (holding that, once a court determines that an agreement is valid, the FAA allows a court to stay a court action pursuant to § 3 and compel arbitration pursuant to § 4). The Arbitration Agreement contains all of the necessary and familiar elements of a valid contract: offer, acceptance, and consideration. *See Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) (stating "another way, there must be an offer and an acceptance accompanied by valuable consideration"). Additionally, it was executed by parties with authority. Therefore, there is no question that the Arbitration Agreement falls within the jurisdiction of the FAA and the court then must enforce the agreement consistent with the strong federal and state policies favoring arbitration. *Shearson/Amer. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (internal citation

omitted) (requiring that courts "rigorously enforce agreements to arbitrate."); *Cape Romain Contractors, Inc. v. Wando E., LLC,* 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) (internal citations omitted) ("There is a strong presumption in favor of the validity of arbitration agreements [in South Carolina] because of the strong policy favoring arbitration."); *Carolina Care Plan, Inc. v. United HealthCare Servs.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004) ("South Carolina law generally favors arbitration."). In other words, because the Arbitration Agreement is a valid contract, the Court cannot overlook the FAA or its directives.

Next, the Court cannot consider the FAA to be a non-issue because the parties bargained for it to apply. In Section III of the Arbitration Agreement, it provides that the FAA governs the Agreement. (R. p. 80). This is permitted under South Carolina law. *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 438, 814 S.E.2d 643, 647 (Ct. App. 2018) ("Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law.").

Finally, the FAA must necessarily be considered by this Court because Respondent and, in turn, the circuit court took positions counter to the FAA. Specifically, they treated Mr. Young's Arbitration Agreement differently from other contracts. The circuit court applied a heightened standard for interpreting grants of legal custody in the arbitration context and Respondent argues that the Arbitration Agreement is unconscionable solely because it exists. (R. pp. 3-7) (Resp. Brief, pp. 10-18). This is improper because, under the FAA, once it has been established that a valid, written agreement to arbitrate exists, a court may only refuse to enforce the agreement if the party opposing arbitration establishes a "generally applicable contract defense," such as fraud, duress, and unconscionability. *Concepcion*, 563 U.S. at 339. As explained further below, Respondent has failed to provide a valid contract defense at any stage of this litigation.

III. THE ARBITRATION AGREEMENT SHOULD BE ENFORCED BECAUSE IT IS VOLUNTARY AND IS OTHERWISE VALID.

A. The Arbitration Agreement is Voluntary.

Respondent argues that Mr. Young's Arbitration Agreement was involuntary (i.e., "Floyd Young Had No Choice") because it was not "presented" to Mr. Young and "he did not have it read to him or explained to him as required by the Agreement itself." (Resp. Brief, p. 12). However, these are baseless claims. Respondent cites to her Affidavit in support, but Respondent's testimony lacks foundation. (R. pp. 142). Particularly, Respondent does not lay a foundation for how she would know whether Mr. Young "was served with any documents" or "notified that he was waiving his right to a jury trial." (*Id.* ¶ 6). She does not indicate whether or not she was present for Mr. Young's admission – let alone the execution of his Arbitration Agreement. Therefore, her testimony is purely speculative. Additionally, it is completely unsupported by the only contemporaneous evidence of DSS's conduct. In signing the Arbitration Agreement, the representative for DSS affirmed that she showed the Arbitration Agreement to Mr. Young and explained it to him to the extent that he could understand it. (R. pp. 80-81).

Regardless, even assuming that there was support for Respondent's claims, they do not render the Arbitration Agreement involuntary or otherwise unenforceable. South Carolina law does not impose a duty upon DSS to show arbitration agreements to vulnerable adults in its legal custody. *See Gilbert*, 2014 U.S. Dist. LEXIS 171275, at *16-17 (nonprecedential) (holding that there is no duty on DSS to explain an arbitration provision signed on behalf of a vulnerable adult in its legal custody to the vulnerable adult).

Respondent does not make any additional arguments in support of her claims of involuntariness because the reality is that all the facts establish that, just as DSS entered the

admission agreement on behalf of Mr. Young, DSS voluntarily entered into the Arbitration Agreement on behalf of Mr. Young.

B. The Arbitration Agreement Does Not Violate Public Policy and Is Not Unconscionable Because Its Conspicuous Provisions Merely Streamline Litigation.

Respondent argues that the Arbitration Agreement violates public policy and/or is unconscionable because it limits recovery of certain damages and participation in "full discovery," requires the FAA to be applied, and purportedly "load[s] every conceivable dispute that the parties may ever have" in arbitration. (Resp. Brief, pp. 12-16, 18). First, Respondent's arguments are misleading. The Arbitration Agreement's provision on punitive damages mirrors state law. It does not require the plaintiff to prove punitive damages "tantamount to beyond a reasonable doubt." (Resp. Brief, p. 13). Instead, it explicitly provides that the arbitrator is to decide punitive damages consistent with what a "[state] court would be required to address." (R. p. 79). Furthermore, it does not disclaim double or treble damages. It also does not necessarily limit the discovery tools available to the plaintiff. Instead, it merely requires the parties to establish discovery procedures with the arbitrator. Additionally, the scope of the agreement is properly limited to controversies arising out Mr. Young's admission to Appellant's facility. Accordingly, it cannot be said to be one-sided or oppressive. *Compare with Smith v. D.R. Horton, Inc.*, 417 S.C. 42 (2016) (cited by Respondent) (holding an arbitration agreement is unconscionable where a home builder disclaimed liability for all implied warranty claims and recovery of monetary damages were entirely at the "whim" of the home builder).

Second, none of these reasons render the Arbitration Agreement unenforceable as a matter of law. To the contrary, they permissibly streamline litigation, which is the benefit of arbitration. In fact, the United States Supreme Court endorses the inclusion of "simpler procedural and evidentiary rules" in arbitration agreements. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265,

280 (1995) (internal citation omitted). Similarly, the South Carolina Supreme Court has held that parties "are always free to contract away their rights[,]" including to damages. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 28, 644 S.E.2d 663, 670 (2007); *see Carolina Care Plan, Inc. v. United HealthCare Servs.*, 361 S.C. 544, 556-57, 606 S.E.2d 752, 758-59 (2004) (refusing to invalidate an arbitration agreement because it limited punitive damages on the face on the agreement). Furthermore, contrary to Respondent's suggestion, none of these provisions are "hidden" in the Arbitration Agreement. In actuality, many form the basis of conspicuous headings in the agreement (e.g., "Witnesses, Subpoenas, and Depositions."). Therefore, they are easily comprehensible prior to signing the voluntary Arbitration Agreement, which further supports enforcement.

C. The Arbitration Agreement Was Properly Executed and Witnessed By The Only Parties with Authority.

In addition to the above, the Respondent also argues that the Arbitration Agreement violates public policy and/or is unconscionable because "Mr. Young was not afforded the right to consult legal counsel" and his "guardian never consented." (Resp. Brief, p. 17-18). These arguments are likewise misleading and inconsequential.

The Arbitration Agreement does not require the signatory *to have* legal counsel prior to execution as Respondent implies. Instead, it informs the signatory that he or she has the "right" to seek legal counsel. (R. p. 81). Furthermore, as explained above, due to Mr. Young's lack of capacity, which was inherent in Judge Sprott's Order, DSS was the only party capable of executing the Arbitration Agreement on Mr. Young's behalf; Mr. Young could neither execute the Arbitration Agreement nor self-appoint his own agent. Therefore, allowing Mr. Young to consult legal counsel was not a condition precedent to the Arbitration Agreement – only informing DSS of its right, which was accomplished by the agreement.

Respondent's criticism that the Arbitration Agreement was not shown to Respondent or Mr. Young's family is also of no moment because, again, there was a three-year gap between DSS's appointment of Mr. Young's legal custodian and Respondent's appointment of his Guardian, so Respondent could neither sign nor revoke the Arbitration Agreement at the time of its execution. Respondent has not cited, and Appellant has not found any authority under South Carolina law requiring anyone, let alone a skilled nursing facility, to present an arbitration agreement or any other agreement to a third party prior to enforcement. Thus, its nonoccurrence has no bearing on enforceability.

CONCLUSION

As demonstrated above, both Judge Sprott's Order granting DSS legal custody and South Carolina law enabled DSS to execute the Arbitration Agreement on behalf of Mr. Young. In addition to being executed by a party with authority, the Arbitration Agreement is further valid because it was voluntary, and its terms permissibly streamline litigation. Respondent did not and cannot establish any other defenses to the enforceability of Mr. Young's Arbitration Agreement. Accordingly, neither the factual nor legal record supports the circuit court's order and Appellant respectfully requests that this Court reverse the decision of the circuit court and grant Appellant's Motion to Compel Arbitration.

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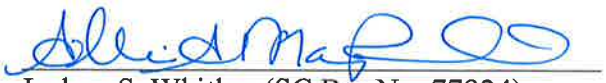
Respectfully submitted,



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CERTIFICATE OF COUNSEL

I certify that I have served the Final Briefs on Respondent by depositing on January 5, 2023, and it complies with Rule 211(b).

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