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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2023-001126

Stanley Dale Floyd and Stephanie Floyd, …………….. Respondents,

v.

SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehab Center, SSC Equity Holdings, LLC, SavaSeniorCare, LLC, Sava SeniorCare Administrative and Consulting, LLC SavaSeniorCare Consulting, LLC, SMV Sumter East, LLC and Natasha Nadkarni, ……………….. Appellants.

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COUNTERSTATEMENT OF ISSUE ON APPEAL

1. Whether an injured nursing home resident's wife must arbitrate her loss of consortium claim based on a purported arbitration contract that contains no valid signature to indicate assent, uses ambiguous terms on her contractual role, and is unsupported by consideration.

STATEMENT OF THE CASE

Following an on-the-job injury, Respondent Stanley Dale Floyd underwent surgery to repair his ruptured left bicep tendon. (Compl. ¶ 56). Mr. Floyd could not be discharged directly home following the procedure because his surgical wound required professional monitoring and careful dressing changes. On May 6, 2019, he was transferred from McLeod Regional Medical Center for short-term inpatient rehabilitation at Appellant SSC Sumter East Operating Co., LLC d/b/a Sumter East Health and Rehab Center ("Facility"). (Compl. ¶ 56). Over the next week, the Facility did little to care for Mr. Floyd or to address his surgical wound. Mr. Floyd's surgical team recommended his wound be packed with saline soaked gauze, that the dressing be changed on a daily basis, and that his arm and elbow remain elevated to promote healing. (Compl. ¶ 57).

The Facility's care plan noted these recommendations (Compl. ¶¶ 58-59), but its staff did little to actually implement them. Mr. Floyd underwent a skin inspection one day after his admission that did not even mention his surgical wound. (Compl. ¶ 63). From the time of his admission on May 6th until May 13th, the medical records do not show a single instance where the Facility changed Mr. Floyd's wound dressing. (Compl. ¶ 64). A full week of neglect took its toll. When the Facility finally changed the dressing on May 13th, the wound was draining a thick green liquid, and Mr. Floyd was in extreme pain. (Compl. ¶ 65). A physician's assistant who examined Mr. Floyd later that day reported Mr. Floyd's clothes were soaked in pus from the wound. (Compl. ¶ 66). The wound itself was open all the way to the muscle and continued draining "copious amounts of yellow green fluid." (Compl. ¶ 66).

Mr. Floyd's condition presented grave danger to his health, and he was transferred to McLeod Regional Medical Center where he was diagnosed with an infection at the surgical site that required several rounds of IV antibiotics and multiple surgeries. (Compl. ¶¶ 67-68). In total,

Mr. Floyd was hospitalized for over a month before he was finally discharged home on June 15, 2019. (Compl. ¶ 67). The mismanagement of his surgical wound cost Mr. Floyd not only a substantial amount in medical expenses but also much of the use of his left arm. (Compl. ¶¶ 68-69). Looking forward, Mr. Floyd has a substantially reduced earning capacity and faces sizeable costs for future medical expenses as well as losses for noneconomic damages. (Compl. ¶ 69).

Mr. Floyd filed this suit on March 4, 2022, alleging medical malpractice, ordinary negligence, and negligent misrepresentation claims based on the Facility's misconduct during his brief stint as the Facility's resident in May 2019. (Compl. ¶¶ 70-81). Additionally, since the Facility's finances and operations are controlled by a number of related entities, Mr. Floyd named as defendants for a corporate negligence claim Appellants SSC Equity Holdings, LLC, SavaSeniorCare, LLC, SavaSeniorCare Administrative & Consulting, LLC, SavaSeniorCare Consulting, LLC, SMV Sumter East, LLC (collective "Corporate Defendants") and Natasha Nadkarni (Facility administrator). (Compl. ¶¶ 82-86). Ms. Floyd also alleged a loss of consortium claim. (Compl. ¶¶ 87-89).

Each Appellant answered the Complaint in April-May 2022[1] after which the Facility and Nadkarni moved to compel arbitration on August 4, 2022. (Defs.' Answers; Facility/Nadkarni Mot. to Compel Arb.). The remaining Appellants each filed a motion on the same date asking the circuit court to stay claims against them pending completion of possible arbitration proceedings between the Floyds and the Facility/Nadkarni. (Corp. Defs.' Mot. to Stay). The argument in favor of arbitration was based on a "Dispute Resolution Program" document ("DRP") Mr. Floyd did not sign, see, or even know existed. (Stanley Floyd Aff. ¶¶ 2-3). Appellants crafted the DRP to be

[1] SavaSeniorCare Consulting, LLC filed a motion to dismiss on April 25, 2022, that is not at issue in this appeal.

executed in different ways based on the resident's mental status. One of the DRP's three signature pages was for instances where the "resident is competent" (DRP at 7), and the other two were to be used in instances where the "resident is adjudged incompetent." (DRP at 8-9).

As the Facility/Nadkarni were fully aware, Mr. Floyd was competent when he was admitted to the Facility. (Order at 3, 13). Yet, the signature page for competent residents is blank—unsigned by either Mr. Floyd or any Facility representative. (DRP at 7). Ms. Floyd and a Facility representative signed the page reserved for residents who have been adjudicated incompetent, with Ms. Floyd's signature on a line for an incompetent resident's "Legal Representative or Family Member." (DRP at 9). Mr. Floyd had not executed a power of attorney and had no "legal representative" at the time of his admission. (Stanley Floyd Aff. ¶ 1). Following a September 7, 2022 hearing before the Honorable Benjamin H. Culbertson, the circuit court entered an order on October 4, 2022, denying the Facility/Nadkarni's motion to compel arbitration and the Corporate Defendants' motions to stay. (Hearing Tr.; Order, dated Oct. 4, 2022). The circuit court concluded the Facility/Nadkarni failed to show a valid arbitration contract with Mr. Floyd or Ms. Floyd and, as a result, the Corporate Defendants' motions to stay were moot. (Order at 5-15).

Following an unsuccessful motion to reconsider, Appellants noticed their appeal on July 11, 2023, seeking review of all circuit court orders concerning the arbitration motion and motions to stay. (Defs.' Mot. to Alter, Amend, or Reconsider; Notice of Appeal). However, Appellants' brief presents no issues on appeal or argument concerning the arbitrability of Mr. Floyd's claims or the Corporate Defendants' motion to stay. Accordingly, the appeal is limited to the

Facility/Nadkarni's[2] flawed assertion that they are entitled to force arbitration on Ms. Floyd's loss of consortium claim.

STANDARD OF REVIEW

As the party seeking to enforce a proposed arbitration contract governed by the Federal Arbitration Act ("FAA"), the Facility bore the burden to prove all contract formation requirements. 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"). Under South Carolina law, whether parties mutually assented or reached the required "meeting of the minds" for a proposed contract is a question of fact. Jaffe v. Gibbons, 290 S.C. 468, 471, 351 S.E.2d 343, 345 (Ct. App. 1986). While de novo review applies to a ruling on a motion to compel arbitration, "a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." 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)).

When a proposed agreement is found not to form a binding contract, "the trial court's factual findings will not be disturbed on appeal unless those findings are wholly unsupported by the evidence or controlled by error of law." Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 301, 305, 609 S.E.2d 838, 841 (Ct. App. 2005). Finally, while both state and federal law recognize a pro-arbitration policy, that policy does not apply to the only question at issue here—i.e. whether the parties formed a valid arbitration contract. Wilson, 426 S.C. at 337, 827 S.E.2d at 173 (finding

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[2] Since their arguments are identical, this brief will refer to the Facility and Nadkarni as "Facility" for ease of reference.

presumption in favor of arbitration "does not apply to the existence of such an agreement or the identity of the parties who may be bound to such an agreement").

ARGUMENT

The Facility's attempt to force arbitration on its resident and his wife fails because the Facility has not shown a valid arbitration contract. The DRP is such a flawed attempt to contract for arbitration that the Facility has abandoned any argument Mr. Floyd is bound by it. Those same flaws should foreclose any attempt to require Ms. Floyd arbitrate her loss of consortium claim. The Facility knew Mr. Floyd was competent to make legal decisions when he was admitted yet presented the DRP to Ms. Floyd, who had no legal authority to act in these circumstances. The Facility also drafted the DRP with a distinct signature page for competent patients, yet asked Ms. Floyd to sign as "Family Member" on a plainly inapplicable signature page reserved for residents previously adjudicated as incompetent. In its zeal to bypass litigation for arbitration, the Facility did not even present testimony from a Facility representative to show the questionable admission paperwork attached to its motion were the documents actually presented to Ms. Floyd. In light of these deficiencies, the DRP fails to meet the requirements for a valid legal instrument under generally applicable South Carolina contract law, and the circuit court's order refusing to compel arbitration should be affirmed.

1. The DRP lacks the core requirements to form a binding contract.

The Facility drafted the DRP to provide a single, specific section for a competent resident to manifest assent to its terms through his signature or one of an authorized representative. That section of the DRP the Facility presented to the circuit court is completely blank—it does not contain the signature of Mr. Floyd, Ms. Floyd, or a Facility representative. Accordingly, the DRP

lacks the objective manifestation of mutual assent required to form a contract and cannot be used to compel Ms. Floyd to arbitrate her claim.

A contract is formed only when one party makes an offer, the other manifests acceptance, and the contract's promises are supported by valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Acceptance requires an "objective manifestation of . . . assent at the time the contract was made." Laser Supply & Services, Inc. v. Orchard Park Assoc., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009). While there are multiple ways that a person can manifest assent to a proposed agreement, contract parties are permitted to designate and limit the acceptable assent methods in the contract itself. For example, under long-standing South Carolina law, when a contract demands all parties' signatures as the designated method of assent, the proposed contract is ineffective until all parties have signed. Dean v. Dean, 229 S.C. 430, 436, 93 S.E.2d 206, 208 (1956). Like all other contract interpretation matters, identifying the designated means for assenting to a contract should be based primarily on a fair reading of the contract's plain language. Bardsley v. Gov't Employees Ins. Co., 405 S.C. 68, 76, 747 S.E.2d 436, 440 (2013) (stating rule requiring contract language be given "its ordinary and plain meaning").

Here, the DRP, drafted exclusively by the Facility, bifurcated the permissible methods of assent based on the potential resident's mental standing. The DRP contains three different signature pages. The second and third pages were only to be considered if a governing body or medical authority had already determined the resident was incompetent. (DRP at 8, 9) ("If resident is adjudged incompetent, complete this section"). If the resident was competent, the only permissible way for any party to assent was to sign on to the first signature page. (DRP at 7) ("If resident is competent, complete this section").

The applicable DRP signature page related to Mr. Floyd's admission is undisputed. The circuit court made a factual finding that Mr. Floyd was competent when he was admitted to the Facility. (Order at 3) ("there is no evidence that [Mr.] Floyd was not competent . . ."); Id. at 13 ("[Mr.] Floyd was competent"). The Facility may only challenge a circuit court's factual finding by showing it is "wholly unsupported by the evidence." Conway, 363 S.C. at 305, 609 S.E.2d at 841. The Facility makes no effort to do so here. It is equally undisputed that the Facility was aware Mr. Floyd was competent at the time the DRP was presented. (Order at 13) (finding the Facility had "knowledge that [Mr. Floyd] was competent"). The Facility's brief does not challenge this portion of the circuit court's order either.

So, based on the contract language it had created and its knowledge of Mr. Floyd's circumstances at the time of his admission, the Facility's sole designated path for acquiring a valid arbitration contract was to present the DRP's signature page for competent residents to Mr. Floyd directly. That page required the resident's signature, not any family member or legal representative, in every instance except where the resident was physically incapable of signing his name. (DRP at 7) (permitting "Signature of Representative" only where "mentally competent resident is unable to physically execute the Agreement" and the resident "authorizes a Representative to sign" for him). The physical incapacity contingency is also plainly inapplicable here as the circuit court made another factual finding on this point that the Facility does not challenge on appeal. (Order at 3) ("there is no evidence that [Mr.] Floyd was . . . not able to sign any documents on his own behalf").

In sum, there was no basis for the DRP to ever be presented for Ms. Floyd's signature. By its plain language, Ms. Floyd could only be made a DRP party if Mr. Floyd was incompetent or physically incapable of signing his name. Since neither scenario arose here, no signature by Ms.

Floyd anywhere on the DRP would comply with the method the Facility designated for parties to consent to the DRP's terms. Thus, the circuit court's ruling correctly applied South Carolina contract law in ruling there is no valid arbitration contract between the Facility and Ms. Floyd. (Order at 13-15). That ruling is not inequitable to the Facility for two reasons: (1) the Facility alone chose the DRP's bifurcated assent structure; and (2) the Facility was fully aware of that language, Mr. Floyd's competency, and Mr. Floyd's physical capacity when it chose to present the DRP to Ms. Floyd.

2. The DRP is ambiguous on the effect of Ms. Floyd's signature.

Glossing over the bifurcated assent structure it created, the Facility relies on Ms. Floyd's signature on an inapplicable section of the DRP. (App. Br. at 6-8). As discussed above, since Mr. Floyd was competent and physically capable of signing, the "adjudged incompetent" page Ms. Floyd signed does not apply and the DRP should have never been presented for Ms. Floyd's signature. Yet, even if the Court were to consider Ms. Floyd's signature as a possible means of personal assent, the DRP's language is ambiguous as to her signature's meaning.

Unlike the signature page for competent residents that should have been utilized here, the page for "adjudged incompetent" residents does not contain a signature line for the resident himself. After all, if the resident lacks mental capacity, his signature would be ineffectual and someone else would have to act in his stead. It is reasonable for any individual who signs for a resident on this page to assume her signature is in a representative, not personal, capacity. Some of the DRP's language supports that conclusion. Ms. Floyd signed on a line labeled "Signature of Legal Representative or Family Member." (DRP at 9). A reasonable interpretation of "representative" is that the person signing on that line is not assuming personal responsibility for the proposed contract terms. That is borne out in the page's other signature. Katelyn Hodges signed

as "Facility Representative" (DRP at 9), and the Facility cannot credibly argue this signature created personal liability for Ms. Hodges to comply with the DRP's terms. She, like Ms. Floyd, signed on behalf of someone else, and the Facility may not use Ms. Floyd's purported status as Mr. Floyd's "representative" to force her to arbitrate her legal claim.

The Facility points to a clause in the paragraph preceding Ms. Floyd's signature, arguing she knew or should have known she was assuming personal liability for the contract by signing as Mr. Floyd's "representative." (App. Br. at 7-8) (quoting DRP at 9) (stating that representative "binds . . . themselves individually"). But, when read as a whole that paragraph is far from clear. The first sentence states that Ms. Floyd "ha[d] the authority to sign the agreement on [Mr. Floyd's] behalf." (DRP at 9). This sentence, along with the "representative" language beneath the signature line, create an ambiguity in the DRP's text. The Facility was the exclusive drafter of the DRP, a form contract of adhesion the Facility used its superior bargaining power to urge on to vulnerable adults through their overburdened family members.

It was incumbent on the Facility to draft the DRP clearly, and the ambiguities arising from careless drafting were properly construed against the Facility. (Order at 14); see also Springs & Davenport, Inc. v. AAG, Inc., 385 S.C. 320, 683 S.E.2d 814 (Ct. App. 2009) ("If there is doubt about the construction of a writing, the doubt must be resolved against the drafter and in favor of the party to whom it was delivered"). This principle has been routinely used to reject nursing home-friendly interpretations of ambiguous terms in arbitration contracts. See e.g. Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (using rule to reject home's proposed reading of "entire agreement" provision); Thompson v. Pruitt Corp., 416 S.C. 43, 53-54, 784 S.E.2d 679, 685 (Ct. App. 2016) (applying rule to nursing home's claim that admission agreement incorporated proposed arbitration contract).

In short, even if Ms. Floyd's signature in the DRP's "adjudged incompetent" section could be valid, that section is ambiguous as to the capacity in which Ms. Floyd was signing. Given the DRP's structure and much of this section's language, a reasonable individual would believe she was signing the DRP as a representative rather than in her personal capacity. The DRP's ambiguous text was correctly construed against the Facility, and the circuit court properly denied the motion to compel arbitration.

3. Ms. Floyd's purported arbitration contract with the Facility is not supported by consideration.

Along with its failure to prove mutual assent to make the DRP a binding contract, the Facility also fails to show the DRP is supported by consideration. Consideration may include a right, interest, or benefit accruing to one party or a forbearance, detriment, or loss undertaken by the other party. Hennes v. Shaw, 397 S.C. 391, 399, 725 S.E.2d 501, 505 (Ct. App. 2012). Consideration must be both valuable and "adequate" to support the contract's promises. Campbell v. Carr, 361 S.C. 258, 264, 603 S.E.2d 625 (Ct. App. 2004) (referring to "grossly inadequate" consideration).

Ms. Floyd accrued no benefit in signing a purported arbitration contract related to her husband's admission to the Facility. The entire transaction between the Facility and Mr. Floyd was based on the Facility's provision of skilled nursing care to Mr. Floyd as his surgical wound healed. (Resident Admission Agreement at 1). The Facility was to coordinate care from Mr. Floyd's physician, provide the prescription medications Mr. Floyd's condition required, and provide basic room and board for Mr. Floyd for the length of his residency. Id. at 1-3. The Facility made no forbearance to Ms. Floyd and she gained no benefit from this transaction. The Facility argues the consideration requirement is met because the DRP's arbitration requirement is mutual. But, as the circuit court correctly noted, the Facility forgoing the right to sue Ms. Floyd was not a genuine

forbearance because it had no legal claims against her and no reasonable expectation to expect it would ever have such claims. (Order at 14).

4. The Facility failed to authenticate the documents offered in support of its arbitration argument.

Finally, the circuit court properly identified a fundamental evidentiary flaw in the Facility's attempt to use the purported Resident Admission Agreement and DRP to compel Ms. Floyd to arbitrate her consortium claim. (Order at 12-13). Any document offered into evidence on a disputed issue must be authenticated as a condition precedent to admissibility. Rule 901(a), SCACR. This requirement applies to all documents offered in support of a motion to compel arbitration. Berry v. Spang, 433 S.C. 1, 10-11, 855 S.E.2d 309, 314-15 (Ct. App. 2021).

The Facility presented the DRP and Resident Admission Agreement to the circuit court without anything to suggest these were the actual documents presented for Ms. Floyd's signature. As the courts acknowledge, the burden of showing a document to be authentic is not high and is often in met in this context through an affidavit from a nursing home representative. Deep Keel, LLC v. Atl. Private Equity Group, LLC, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015). The Facility could have offered an affidavit from Katelyn Hodges, the "Facility Representative" who signed the purported DRP. What the Facility could not do, however, was rely on the DRP and Resident Admission Agreement without making *any* showing that the documents are what the Facility purport them to be. This is not an insignificant evidentiary error. As the Facility admitted in its circuit court memorandum, it has no idea where to find the Resident Admission Agreement it supposedly presented to Ms. Floyd. (Defs.' Mem. at 2 n. 3). The document the Facility attached to its memo was a mishmash of a blank Resident Admission Agreement form where even the facility and resident names are not included and what the Facility purports to be a signature page signed by the Facility and Ms. Floyd. (Defs.' Mem. Exh. 1).

The Facility's attorney simply asked the circuit court to take his word for the notion that these documents were authentic, notwithstanding his admission that the original Resident Admission Agreement had been lost. Rule 901's authentication requirement is designed to prevent just such a scenario. The Facility was required to provide some evidence to support the DRP and Resident Admission Agreement's authenticity. The circuit court correctly determined the Facility failed to make this showing. Without this showing, the Facility cannot rely on these documents, and a lack of authentication is another ground for finding no valid arbitration contract.

CONCLUSION

Based on the arguments stated above, the Floyds respectfully request the Court affirm the circuit court's order. Appellants offer no argument to challenge the circuit court's rulings on Mr. Floyd's claims or on the Corporate Defendants' motions to stay. Moreover, the circuit court correctly determined the Facility failed to show a valid arbitration contract with Ms. Floyd.

Respectfully submitted,

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