

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Eric M. Poulin / Stefan B. Feidler

32 Ann Street

Charleston, SC 29403

ATTORNEY(S) FOR THE PLAINTIFF(S)

W. McElhaney White

101 West St. John Street, Suite 200

Spartanburg, SC 29306

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOR THE 14TH JUDICIAL CIRCUIT

CASE NO: 2017-CP-07-02636

JOSEPH HOLMES, as Personal
Representative of the ESTATE OF DAVID
HOLMES,

Plaintiff(s),

v.

BAYVIEW MANOR, LLC, d/b/a
BAYVIEW MANOR; EPIC GROUP, LP;
and EPIC GENERAL, LLC,

Defendant(s).

ORDER DENYING DEFENDANTS'
MOTION FOR NON JURY TRIAL

RECEIVED
JUN 13 2018
SC Court of Appeals

THIS MATTER is before the Court on Defendants' Motion for Non-Jury Trial.

Arguments were held on April 25, 2018 in the Beaufort County Courthouse. Present at the call of the case was attorney Eric M. Poulin, representing the Plaintiff, and attorney W. McElhaney White, representing the Defendants. For the following reasons, Defendants' Motion is respectfully **DENIED**.

BACKGROUND

The Decedent, David Holmes, was a resident of Defendants' long term care facility. Decedent was first admitted on December 2, 2014, and re-admitted on February 17, 2015. Decedent was incompetent during both admissions. At each admission, Decedent's family signed an Admission Agreement.¹ The Admission Agreements contained the following provision:

¹ Plaintiff argues that the family members lacked authority to sign these Admission Agreements to the extent they contain jury waiver clauses. However, because the Court finds this waiver was invalid and unenforceable in the first instance, it is not necessary to discuss the issues of authority or agency.

Waiver of Jury Trial: (Please read carefully)

Resident hereby knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any litigation, including any counterclaim which Resident may assert, arising from or relating to this Agreement or any other document connected with this Agreement, or arising out of or relating to any of the said documents or any relationship between the Facility and Resident, including the Resident's admission itself, or any other course of conduct, course of dealing statements (whether verbal or written) or actions of the facility or Resident.

Resident represents and warrants that the waiver contained in this Paragraph has been freely and voluntarily made after reviewing the same, or having had an opportunity to review the same, with counsel of Resident's choice.

The Admission Agreements also contained an Arbitration Clause which states that arbitration is "Optional" and allows the person signing to decline by marking an "X." At each admission, the family declined arbitration by marking an "X." Upon Decedent's death, his Estate brought this medical negligence action against the Defendants and requested a jury trial. Defendants now seek to invoke the jury waiver clause of the Admission Agreements, and seek an order setting this case for non-jury disposition.

LAW

An illegal contract is unenforceable. Berkebile v. Outen, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993). "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Id. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full. See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15. Moreover, such facilities, in the case of an individual who is entitled to medical assistance, must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under

the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility." 42 U.S.C. § 1396r(c)(5)(A)(iii).

Finally, it is well settled that to be valid and enforceable, a contract must be supported by valuable consideration. Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct.App.1984)("[a] contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act."). Consideration may consist of "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998).

ANALYSIS

In the instant case, it is undisputed that Decedent was a Medicare and Medicaid beneficiary while residing at Defendants' facility and that the facility was billing and accepting payment from Medicare and Medicaid for Decedent's care.² Therefore, the question of enforceability turns, in part, on whether the jury waiver provision was a mandatory part of the Admission Agreement and a required pre-condition to admission. During arguments, counsel for Defendants was unable or unwilling to take a position on this issue. However, in light of the following analysis, the Court finds that this provision is unenforceable in either case.

If the jury waiver provision was a required pre-condition to admission, then this requirement was a clear violation of Federal Law. 42 U.S.C. § 1396r(c)(5)(A)(iii) prohibits a

² During the hearing, counsel for Defendants stated his belief that Decedent was Medicare eligible but only "Medicaid pending" during his stay. However, Mr. White has since confirmed that Decedent was, in fact, Medicaid eligible during his stay.

facility such as Defendants' from soliciting or accepting "any other consideration" as a condition to admission outside of the Medicaid payments when admitting a patient in Decedent's position. By requiring Decedent's family to waive his right to a jury trial as a condition of admission, Defendants' were requiring and accepting consideration in addition to Medicaid payments. Therefore, the jury waiver clause would be unenforceable due to its illegality.

Alternatively, if the jury waiver was not a precondition to admission, then it fails for lack of consideration. As noted, the waiver, as written, works only in one direction. When asked during arguments what the consideration for the waiver might be, counsel for Defendants argued only that the admission was the consideration for the waiver. When pushed on whether any additional consideration was present (separate and apart from the admission and care) counsel agreed there was none. Here, Defendants cannot have it both ways. They cannot, on the one hand, argue that the waiver was not consideration for the admission but, on the other, argue that the admission was valuable consideration for the waiver. For the waiver to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not.

CONCLUSION

Therefore, we are left with a clause that, if a pre-condition to admission, is unenforceable under the doctrines of illegality; if not a precondition to admission, void for lack of consideration. For these reasons, Defendants' Motion for Non-Jury trial is respectfully **DENIED.**

IT IS SO ORDERED!

Dated this ____ day of May, 2018
Walterboro, S.C.

The Honorable Perry M. Buckner, III
Presiding Judge, 14th Judicial Circuit



Beaufort Common Pleas

Case Caption: David Holmes Estate Of , plaintiff, et al VS Bayview Manor Llc ,
defendant, et al
Case Number: 2017CP0702636
Type: Order/Jury Trial

It is so Ordered

s/ Perry M Buckner III 2122

Electronically signed on 2018-05-15 11:49:25 page 7 of 7