THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2016-001732

Hilda Stott, individually and as Personal Representative of the Estate of Jolly P. Davis, deceased, and as Personal Representative of the Statutory Beneficiaries, ... Respondents,

v.

White Oak Manor, Inc.; White Oak Management, Inc.; and White Oak Manor-Spartanburg, Inc. d/b/a White Oak of Spartanburg, ... Appellants.

FINAL BRIEF OF APPELLANTS

THE WARD LAW FIRM, P.A.

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STATEMENT OF ISSUE ON APPEAL

I. **The trial court erred in denying Appellants' Motion to Compel Arbitration by finding that Hilda Stott was not an authorized agent to execute the White Oak Manor-Spartanburg admission documentation on behalf of Jolly Davis, including the Admission Agreement and Arbitration Agreement.**

STATEMENT OF THE CASE

On December 16, 2015, Respondent Hilda Stott, individually and as Personal Representative of the Estate of Jolly P. Davis, deceased, and as Personal Representative of the Statutory Beneficiaries ("Ms. Stott") filed a Summons and Complaint raising claims for negligence, recklessness, and gross negligence, negligence per se, unjust enrichment, breach of fiduciary duty, joint venture, alter ego, and wrongful death. (R. pp. 7-23). Appellants White Oak Manor, Inc., White Oak Management, Inc., and White Oak Manor-Spartanburg, Inc. d/b/a White Oak of Spartanburg (collectively "White Oak" for purposes of reference in this appeal) timely answered on January 19, 2016. (R. pp. 24-32). White Oak raised the issue of binding arbitration as an affirmative defense, and also filed a Motion to Dismiss and/or Motion to Compel Arbitration. (R. pp. 33-36).

The trial court heard arguments on White Oak's Motion to Dismiss and/or Compel Arbitration on March 22, 2016. (R. pp. 37-59). The trial court issued a Form 4 denying White Oak's Motion to Compel Arbitration, and a formal Order followed. (R. pp. 1-6). White Oak timely filed its Notice of Appeal.

FACTS

On December 22, 2012, Jolly Davis ("Mr. Davis") was admitted to Spartanburg Regional Medical Center ("SRMC") when he became gravely ill with numerous respiratory symptoms. Mr. Davis was admitted to White Oak Manor-Spartanburg on January 2, 2013. On January 6, 2013, Mr. Davis was discharged from White Oak and transferred back to SRMC. On January 11, 2013, Mr. Davis was discharged from SRMC to Restorative Care. Mr. Davis passed away on January 16, 2013.

Upon his entry to White Oak on January 2, 2013, Mr. Davis's niece, Hilda Stott, executed an Authorized Representative Agreement, Admission Agreement, and Arbitration Agreement on his behalf. (R. pp. 74-102). Ms. Stott held a durable power of attorney and a health care power of attorney on behalf of Jolly Davis, both executed on May 11, 2012. (R. pp. 103-125). The Durable Power of Attorney for Finance was recorded on January 8, 2013.

Following are key terms from documents applicable to the issue on appeal:

Admission Agreement: The Admission Agreement in Section 19.4 identified the Entire Agreement as including "[t]his Agreement, Authorized Representative Agreement, the Arbitration Agreement, and the admission documentation." (R. p. 94). The terms of the Arbitration Agreement are incorporated by reference into the Admission Agreement. (R. p. 97).

Arbitration Agreement: The Arbitration Agreement contained a provision that the person signing it acknowledges that "[h]e/she has the legal right to execute the document on behalf of the resident and to hereby bind the resident." (R. p. 45). The Arbitration Agreement further provided that "beginning 7 days from the date hereof, and for another 10 days thereafter, he/she has the right to opt out of this Agreement and no longer be bound by it." If written notice is not given, then the Arbitration Agreement remains and continues in full force. The Arbitration Agreement was signed

by Mr. Davis's attorney-in-fact Hilda Stott on January 2, 2013. Pursuant to its terms, Mr. Davis could opt out of the Arbitration Agreement on or before January 19, 2013.

January 2, 2013 Progress Note: A January 2, 2013 Progress Note Affecting Decisional Capacity presented below contains one notation that indicates that Mr. Davis was, on that date, able to make healthcare decisions for himself. The form also clearly provides, however, that "[t]his form requires the signature of TWO PHYSICIANS! A Progress or Consult Note should be written regarding both the patient's medical condition and mental capacity." The second physician's signature block is blank, and the requirement of this form was not met. (R. p. 73).

Complaint: The complaint in this action specifically alleges "[t]hat, Plaintiff Davis was a resident of WOS [White Oak Manor-Spartanburg] at all times relevant hereto in the County of Spartanburg, State of South Carolina, and was a vulnerable adult as defined by the S.C. Omnibus Adult Protection Act." (R. p. 9). The referenced Act defines a vulnerable adult as "a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction." S.C. Code Ann. § 43-35-10 (11). By Respondent's own pleading and admission, Mr. Davis was substantially impaired in his ability to provide for his own care and protection when he was admitted to White Oak on January 2, 2013.

Durable Power of Attorney for Finance: The language of the Durable Power of Attorney for Finance provided that disability, incapacity, or partial incapacity shall include "my inability to manage my property and affairs or car[e] for myself effectively" and "may be evidenced by a written statement of my regularly attending physician or two other qualified physicians or by court

order." (R. pp. 111). This language is permissive ("may"), not mandatory ("shall"). The Durable Power of Attorney for Finance also explicitly provided in paragraph G that the attorney in fact is empowered to "submit to arbitration claims or litigation." (R. pp. 44, 116-117).

STANDARD OF REVIEW

Arbitrability determinations are subject to *de novo* review. A trial court's findings of fact will be reversed if no evidence reasonably supports those findings. The party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014); Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012); Liberty Builders, Inc. v. Horton, 336 S.C. 658, 662, 521 S.E.2d 749, 751 (Ct. App. 1999).

ARGUMENTS

I. The trial court erred in finding that Hilda Stott was not an authorized agent to execute the White Oak Manor-Spartanburg admission documentation on behalf of Jolly Davis, including the Admission Agreement and Arbitration Agreement.

Arbitration agreements enjoy a strong presumption of validity in federal and state courts. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014). South Carolina has a strong policy favoring resolution of disputes through alternative dispute resolution, including arbitration. C-Sculptures, LLC v. Brown, 403 S.C. 53, 56, 742 S.E.2d 359, 361 (2013).

Arbitration is a matter of contract, and evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009); Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). A written agreement to submit a controversy to arbitration is valid, enforceable, and irrevocable, except upon such grounds as exist for the revocation of any contract. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001).

It is the policy of the state of South Carolina to favor the arbitration of disputes. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009); Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003). Accordingly, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. Id. at 597, 553 S.E.2d at 118–119.

A. Jolly Davis's condition met the requirements for effectiveness of the Durable Power of Attorney for Finance in favor of Hilda Stott at the time of his admission to White Oak.

The language of the Durable Power of Attorney for Finance provided it was effective upon disability, and that disability, incapacity, or partial incapacity shall include "my inability to manage my property and affairs or car[e] for myself effectively" and "may be evidenced by a written statement of my regularly attending physician or two other qualified physicians or by court order." (R. p. 111). This language is permissive ("may"), not mandatory ("shall").

While the Progress Note indicates that one physician noted that Jolly Davis could make healthcare decisions, this note was not properly executed according to its own requirements. Most important, Respondent alleges in the complaint that Mr. Davis was a vulnerable adult as defined by statute, and therefore suffered a physical or mental condition that substantially impaired him from adequately providing for his own care or protection, which conditions included the infirmities of aging. This allegation of Mr. Davis's condition dovetails with the requirements of the Durable Power of Attorney for Finance, which provided for its effectiveness upon Mr. Jolly's inability to manage his property and affairs or care for himself effectively. Nothing in the statute relied on by

Respondent or the Durable Power of Attorney for Finance required incompetence on the part of Mr. Davis as the measure of Ms. Stott's right to exercise her authority as attorney-in-fact. The Durable Power of Attorney for Finance gave Ms. Stott explicit authority to "submit to arbitration claims or litigation" on behalf of Mr. Davis. (R. pp. 44, 116-117).

B. The Durable Power of Attorney for Finance was effective to bind Jolly Davis to the terms of the Arbitration Agreement even though it was not recorded until January 8, 2013.

A power of attorney is an instrument in writing by which one person appoints another as his agent and confers upon that person the authority to perform certain specified acts or kinds of acts on behalf of the principal. A "durable" power of attorney allows the agent to act even if the principal becomes incompetent. Watson v. Underwood, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014).

S.C. Code Ann. § 62-5-501 (c) provides that a power of attorney executed under the provisions of this section must be executed and attested with the same formality and with the same requirements as to witnesses as a will. There is no dispute concerning the execution and attestation of either the Durable Power of Attorney for Finance or the Health Care Power of Attorney. In addition, the statute provides that the instrument is to be recorded in the same manner as a deed in the county where the principal resides at the time the instrument is recorded. It may be recorded before or after the onset of the principal's physical disability or mental incompetence, it is effective notwithstanding the same. Finally, this section provides that if the authority of the attorney in fact relates solely to the person of the principal, the instrument is effective without being recorded.

The Arbitration Agreement contained an opt out provision. Specifically, the resident had seven days from the date of signing, and another 10 days thereafter, to opt out of the Arbitration

Agreement. If written notice is not given within that period, **only then** did the Arbitration Agreement obtain binding authority.

The Arbitration Agreement was signed by Mr. Davis's attorney-in-fact Hilda Stott on January 2, 2013. Pursuant to its terms, Mr. Davis could opt out of the Arbitration Agreement on or before January 19, 2013. Ms. Stott's signature could not bind Mr. Davis until January 19, 2016. So, even though the Durable Power of Attorney for Finance was not recorded on January 2, 2016, it was recorded – and therefore effective – well prior to the expiration of the opt out window. Because no action was taken to opt out before that time, the Arbitration Agreement is valid and binding.

C. The Coleman decision does not bar Hilda Stott's authority under the Health Care Power of Attorney to sign the Arbitration Agreement on Mr. Davis's behalf.

The Court in Coleman v. Mariner, 407 S.C. 346, 755 S.E.2d 450 (2014) held that the Adult Health Care Consent Act does not grant a surrogate appointed pursuant to the Act the authority to execute a voluntary arbitration agreement. Specifically, the Court held that "The sole question before the Court is the scope of the surrogate's authority" under the Adult Health Care Consent Act. Id. at 359, f.n. 4.

Coleman is easily distinguishable from the present situation because Hilda Stott was not identified as a surrogate for Jolly Davis pursuant to the Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10, et seq. Rather, she was formally appointed by Mr. Davis pursuant to a valid Health Care Power of Attorney executed some eight months prior to his admission to White Oak.

In fact, the Supreme Court in Coleman expressly acknowledged that there exist financial decisions that are necessitated by traditional health care decisions. A holding that the Adult Health Care Consent Act does not extend those decisions to a surrogate under the Act does nothing prevent a private, properly executed document from so doing.

The Adult Health Care Consent act does not apply to this case because there exist private contractual agreements concerning Hilda Stott's authority to act on behalf of Jolly Davis.

CONCLUSION

For the reasons set forth herein, Appellants submit that the trial court erred in denying their Motion to Dismiss and/or Compel Arbitration.

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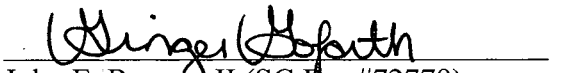

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April 11, 2017

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v.

Hilda Stott, individually and as Personal Representative of the Estate of Jolly P. Davis, deceased, and as Personal Representative of the Statutory Beneficiaries, ...Respondents.

CERTIFICATE OF COMPLIANCE

Counsel certifies that its Final Brief and Final Reply Brief comply with Rule 211(b), SCACR.

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