

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2017-CP-10-05984
Appeal No. 2018-001142

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OCT 22 2018

SC Court of Appeals

Victor Rawl as Personal Representative of the Estate of Vera Brown,

Respondent,

v.

West Ashley Rehabilitation and Nursing Center-Charleston, SC, LLC
d/b/a Heartland of West Ashley Rehab and Nursing Center,

Appellant.

INITIAL BRIEF OF RESPONDENT

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Estate of Vera Brown**

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court err by finding that the Arbitration Agreement executed by the Patient upon admission to the Rehabilitation and Nursing Center is unenforceable on the grounds of lack of consideration?
- II. Did the Trial Court err in finding that the Arbitration Agreement executed by the Patient upon admission to the Rehabilitation and Nursing Center is unenforceable on the grounds of unconscionability?

STATEMENT OF THE CASE

Vera Brown was admitted to the Rehabilitation and Nursing Center on August 24, 2014. Upon admission, Vera Brown executed the admission agreement paperwork and Arbitration the Agreement. [ROA ____; Attachment to Motion to Compel Arbitration.] On August 29, 2014, Vera Brown passed away.

On November 20, 2017, the Summons and Complaint was filed in the Clerk of Court for Charleston County. [ROA ____; Complaint.] On January 8, 2018, Rehabilitation and Nursing Center filed an answer and motion to dismiss and compel arbitration. [ROA ____; Answer; Motion.] The Motion was based on the allegations of the Complaint and the terms of the Arbitration Agreement, particularly the Rehabilitation and Nursing Center argued:

The FAA preempts state law and governs the arbitrability of the Plaintiff's claims. In this case, all elements required under the FAA are met (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision that covers the dispute; (3) the relationship of the transaction to interstate commerce; and (4) Arbitration has not occurred.

The FAA applies to this Agreement because the Agreement involves interstate commerce, preempting South Carolina law. There is a dispute, a written agreement providing for arbitration of the dispute, and the matter has not been arbitrated. The scope of the arbitration clause encompasses the claims asserted by Plaintiff.

Under the FAA, enforcement of the valid Arbitration Agreement is mandatory. Therefore, under the FAA this Court must dismiss or stay the proceedings and compel arbitration.

[ROA ____; Motion.]

Respondent filed two (2) memorandums in opposition of Appellant's motion to dismiss and compel arbitration. The first was filed on February 7, 2018; the second was filed February 22, 2018. [ROA ____; Memorandum; Supplemental Memorandum.] The motion to compel arbitration was heard by the Honorable Dianne Goodstein on March 21, 2018. [ROA ____; Transcript.] The Trial Court issued an order denying the motion to compel on the grounds that:

A. The Arbitration Agreement lacks valuable consideration and is unenforceable where there was no additional consideration in Plaintiff's agreement to the Arbitration Agreement and future promises are not valuable consideration;

and;

B. Plaintiff's agreement to the Arbitration Agreement was unconscionable in the absence of meaningful choice on part of Plaintiff due [to] the one-sided contract provisions, the relative disparity in the parties' bargaining power, and the Defendants' relative sophistication over Plaintiff's decedent.

[ROA __, __; Order, filed May 25, 2018, pages 2, 4.]

STANDARD OF REVIEW

Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, the Court of Appeals will not overrule those findings. Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct.App.2012).

ARGUMENT

While there is a presumption in favor of arbitration agreements, this presumption only applies where there is a valid arbitration agreement. EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 D.E.2d 581 (2003). However, not all arbitration clauses are enforceable. Unless

the parties have contracted otherwise, the Federal Arbitration Act (“FAA”) applies in federal and state courts to any arbitration agreement. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (“the court should apply ‘ordinary state-law principles that govern the formation of contracts.’”). Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010); Simpson, 373 S.C at 14, 644 S.E.2d at 663 (“general contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”).

I. The Arbitration Agreement is not enforceable where the Arbitration Agreement lacks valuable consideration.

The Trial Court was correct when it held that: “The Arbitration Agreement lacks valuable consideration and is unenforceable where there was no additional consideration to Plaintiff’s agreement to the Arbitration Agreement and future promises are not valuable consideration.” [ROA ____.] The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d 161, 166 (S.C. 2003). “Valuable consideration to support a contract 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.” Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)). Where a contract, or arbitration agreement guided by the FAA, lacks valuable consideration the contract will be deemed unenforceable. Rent-A-Center, 561 U.S. 63, 130 S. Ct at 2776; Simpson, 373 S.C at 14, 644 S.E.2d at 663.

In the case at hand, bearing down on the four-corners of the Arbitration Agreement there was no consideration for Plaintiff's agreement to the Arbitration Agreement. State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sistine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). In fact, the Arbitration Agreement states: "The patient will receive services in this center whether or not this agreement is signed." [ROA ____.] Neither the Nursing Center nor Vera Brown gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party, when agreeing to the Arbitration Agreement. Id. The Trial Court correctly assessed the Arbitration Agreement by viewing only the four-corners of the Arbitration Agreement, and could not go beyond the confines of the Arbitration Agreement itself. Accordingly, the Trial Court's order should be affirmed.

II. The Trial Court correctly held that the Arbitration Agreement is unenforceable on the grounds of unconscionability.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. Simpson, 373 S.C. at 25, 644 S.E.2d at 669. In determining whether there is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power, the parties' relative sophistication, the nature of the injuries suffered by the plaintiff, whether the plaintiff is a substantial business concern, whether there is an element of surprise in the inclusion of the challenged clause, and the conspicuousness of the clause. Id.

In the case at hand, Vera Brown was admitted into Defendants' facility on August 25, 2014. On this same day, Vera Brown signed admission paperwork which contained the Arbitration Agreement buried in the admission paperwork. [ROA ____; Motion.] Vera Brown did not contribute to the drafting of Arbitration Agreement nor possess the bargaining power to negotiate the terms of the Arbitration Agreement. See Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App.

1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms).

Additionally, there was an inherent disparity in bargaining power between the parties as this was a transaction between an elderly patient who passed away four (4) days after execution of the Arbitration Agreement. [ROA ____; Complaint.] Furthermore, the Arbitration Agreement was inconspicuously buried in the admission paperwork. [ROA ____; Motion.] We must consider the otherwise inconspicuous nature of the Arbitration Agreement in light of its consequences. While certain phrases are in bold, the arbitration clauses in its entirety is written in the standard small print, and embedded in paragraphs one (1) through fourteen (14) of the Arbitration Agreement. [ROA ____; Motion.] The inconspicuous nature of this provision is hard to ignore. The Arbitration Agreement was also drafted by a superior party, and functioned to contract away certain significant rights and remedies otherwise available to Ms. Brown by law.

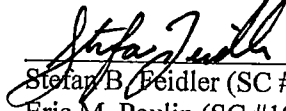
CONCLUSION

Wherefore, based on the aforementioned the Trial Court's decision should be affirmed because: (1) the Arbitration Agreement lacked valuable consideration; and (2) the Arbitration Agreement is unenforceable on the grounds of unconscionability. Therefore, the Respondent respectfully requests that this Court affirm the Trial Court's ruling.

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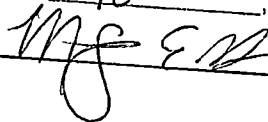
Respectfully submitted,

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This 18 day of 9, 2018

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES
THAT HE SERVED A COPY OF THE
FOLLOWING OR FOREGOING PAPERS ON
ALL COUNSEL OF RECORD THIS 18
DAY OF 10, 2018


STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2017-CP-10-05984
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Victor Rawl as Personal Representative of the Estate of Vera Brown,

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v.

West Ashley Rehabilitation and Nursing Center-Charleston, SC, LLC
d/b/a Heartland of West Ashley Rehab and Nursing Center,

Appellant.

PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief and Designation of Matters on Appellant by depositing a copy of it in the United States Mail, postage prepaid, on October 18, 2018, addressed to Appellant's attorneys of record Molly H. Craig, Ellore A. Ganes, Jean Marie Jennings, and Deborah H. Sheffield at P.O. Box 1508, Charleston, South Carolina 29402.

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October 18, 2018

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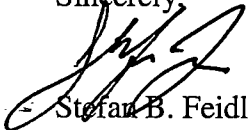
RE: *Estate of Vera Brown v. Heartland of West Ashley Rehab and Nursing Center*
Appeal No.: 2018-001142

Dear Sir/Madame:

Enclosed please find Respondent's Initial Brief with proof of service and Respondent's Designation of Matters. By copy of this letter, I am serving the same on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,



Stefan B. Feidler

Cc: Molly H. Craig (*via U.S. Mail*)
Ellore Ganes (*via U.S. Mail*)
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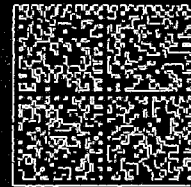
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