STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Court of Common Please

Perry M. Buckner, III, Circuit Court Judge

Case No. 2017-CP-07-02636
Appeal No. 2018-001092

Joseph Holmes, as Personal Representative of the Estate of Mr. Holmes Holmes,

Respondent,

v.

Bayview Manor, LLC, d/b/a Bayview Manor, Epic Group, LP, and Epic General, LLC,

Appellants.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATE STATUTES

FEDERAL STATUTES

STATEMENT OF ISSUES ON APPEAL

I. The "Waiver of Jury Trial" appears to have been a required precondition to admission to Appellant's Facility.

b. The waiver is unenforceable as it violates Federal law.

b. The waiver is unenforceable due to the doctrine of unconscionability.

II. If the "Waiver of Jury Trial" was optional and not required, it is nonetheless invalid.

a. The Waiver lacks consideration.

b. The Wavier is inconspicuous and ambiguous.

i. Ambiguous.

ii. Inconspicuous.

c. Decedent's sisters lacked authority execute the Waiver on Decedent's behalf.

III. The alleged waiver does not apply to Defendants Epic Group or Epic General.

STATEMENT OF THE CASE

This is a professional negligence case involving Appellants, Bayview Manor, LLC, d/b/a/ Bayview Manor, Epic Group, LP, and Epic General, LLC (collectively "Appellants") as owners/operators and/or licensee(s) of a skilled nursing facility, commonly referred to as Bayview Manor. [ROA _____; Complaint.] The Decedent, Mr. Holmes Holmes (hereinafter either "Mr. Holmes" or "Decedent."), was admitted to Bayview Manor after suffering an anoxic brain injury and was noted to be unresponsive during his residency at Bayview Manor. [ROA _____; Complaint.] Prior to his admission, Mr. Holmes' sister, Dorothy Olenja (hereinafter "Dorothy"), was appointed as temporary guardian for Mr. Holmes with the right to care and custody of Mr.

Holmes and with the authority to make medical decisions on his behalf, although she was not appointed conservator. [ROA _____; Temporary Guardianship.]

On December 2, 2014, Mr. Holmes was initially admitted to Bayview Manor through his guardian, Dorothy. [ROA _____; Dorothy Olenja's Deposition Transcript.] Dorothy, as guardian, signed the Admission Agreement. [ROA _____; Admission Agreement.] Mr. Holmes was discharged from Bayview Manor on December 23, 2015. [ROA _____; Dorothy Olenja's Deposition Transcript.] On February 17, 2015, Mr. Holmes was re-admitted into Bayview Manor. [ROA _____; Dorothy Olenja's Deposition Transcript.] At the time of this second admission, Mr. Holmes's other sister, Margaret Holmes (hereinafter "Margaret"), signed the Admission Agreement, although Dorothy remained Mr. Holmes's Guardian. [ROA _____; Margaret Holmes' Deposition Transcript.]

The Waiver of Jury Trial (hereinafter the "Wavier") provision is set forth in the Admission Agreement as follows:

> **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.

[ROA _____; Admission Agreement.]

The Admission Agreement also contained an "Optional Arbitration Clause" which, notably, both sisters rejected when signing the Agreement. [ROA _____; Admission Agreement.]

On April 25, 2018, The Honorable Perry M. Buckner, III (hereinafter the "trial court") heard Appellants' Motion for Nonjury Trial (hereinafter "Motion"). [ROA ____; Appellants' Memorandum in Support of Motion for Nonjury Trial.] By order dated and filed May 15, 2018, the trial court denied Appellants' Motion (hereinafter "Order") [ROA _____; Order Denying Appellants' Motion for Nonjury Trial.] Appellants then filed a Notice of and Motion to Alter or Amend on May 23, 2018 (hereinafter "Motion to Alter or Amend"). [ROA _____; Appellants' Motion to Alter or Amend.] By order dated June 7, 2018, the trial court denied Appellants' Motion to Alter or Amend. [ROA _____; Motion to Alter or Amend.]

STANDARD OF REVIEW

"Whether a party is entitled to a jury trial is a question of law." Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). "The right of trial by jury is highly favored, and waivers of the right are always strictly construed and not lightly inferred or extended by implication." S.C. Cmty. Bank v. Salon Proz, LLC, 420 S.C. 89, 94, 800 S.E.2d 488, 490 (Ct. App. 2017) (quoting Keels v. Pierce, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993)). "In the absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed." Id. "Appellate courts may decide questions of law with no particular deference to the circuit court's findings." Id.; see Snow v. Smith, 416 S.C. 72, 85, 784 S.E.2d 242, 248 (Ct. App. 2016) ("[A] reviewing court is free to decide questions of law with no particular deference to the [master].").

ARGUMENT

As an initial matter, neither Appellant Epic Group, LLC nor Appellant Epic General, LLC are parties to the Admission Agreement that contains the waiver of jury trial at issue. Therefore, neither Appellant Epic Group, LLC nor Appellant Epic General have standing to appeal these matters.

Second, it is important to note that the Appellants are not attempting to compel arbitration. As such, the Federal Arbitration Act is not applicable to the arguments at hand, and the FAA's "presumption" of enforceability does not apply. Rather, this issue depends entirely upon the application of State law.

While South Carolina courts allow and enforce pre-litigation jury trial waivers, these waivers must be strictly construed. The South Carolina Supreme Court accepted the validity of a pre-litigation jury trial waivers in North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 534, 416 S.E.2d 637, 637 (1992), citing the similar conclusion from the Fourth Circuit Court of Appeals in Leasing Serv. Corp. v. Crane, where the Fourth Circuit states:

> The seventh amendment right is of course a fundamental one, but it is one that can be knowingly and intentionally waived by contract. Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was *both voluntary and informed.*

Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832–33 (4th Cir. 1986) (citations omitted) (emphasis added).

I. The "Waiver of Jury Trial" appears to have been a required precondition to admission to Appellant's Facility.

The Waiver at issue was contained within the Admission Agreement, not included in a separate document. Additionally, in contrast to the "Optional Arbitration Clause," the Waiver in no way indicated that it was optional, or that the resident had the ability to strike that provision. Instead, it was presented as part of the Admission Agreement, in such a way as to suggest that it was a pre-condition to admission, and that failure to agree to the Waiver would result in a rejection of the resident's admission. If true, this renders the Waiver unenforceable both because

the demand for this precondition violates federal law and is *per se* unenforceable, and because the Waiver violates state law principles of unconscionability.

a. The waiver is unenforceable as it violates Federal 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. § 1396(c)(5)(A)(iii). This is exactly the reason that we often see arbitration agreements and similar requests in documents separate and apart from the admission agreement, and why facilities take pains to state that the agreements are voluntary and not a pre-condition to admission. Indeed, even as to the Appellants, they apparently recognize this, as they explicitly give residents the option to opt out of the arbitration clause (which Respondent's did in this case).

It is undisputed that Mr. Holmes was not a self-pay admission to Appellants' facility, but rather that the facility did bill Medicare/Medicaid for his stay. As such, Appellants were prohibited from soliciting, accepting, or receiving Mr. Holmes' agreement to waive the right to a jury trial as a precondition of his admission. Therefore, to the extent Appellants argue that the

Waiver in question was a precondition to Mr. Holmes' admission, the Waiver should be severed from the Agreement as violative of federal law and, therefore, unenforceable.

b. The waiver is unenforceable due to the doctrine of unconscionability.

Even if federal law did not prohibit Appellants requiring a jury waiver as a precondition for admission, such a requirement would be unenforceable under South Carolina law as unconscionable.

Generally, an adhesion contract is a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable. Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 498 S.E.2d 898 (Ct.App.1998). If Appellants did argue that the Waiver was a required precondition to Mr. Holmes' admission, the Admission Agreement would constitute a contract of adhesion. While an adhesion contract is not *per se* unconscionable, it represents an absence of meaningful choice. See Fanning v. Fritz's Pontiac–Cadillac–Buick, Inc., 322 S.C. 399, 472 S.E.2d 242 (1996) (unconscionability is the absence of meaningful choice on the part of one party due to one-sided contract provisions together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them).

Here, it is apparent that the jury Waiver provision is one sided. Indeed, while it requires the resident to waive his/her right to trial by jury, it requires no such waiver by the facility. Likewise, if the Waiver were indeed a precondition to admission, it would present residents such as Mr. Holmes with no meaningful choice. Instead, it requires a resident to choose between the forced waiver of a constitutional right, and the ability to receive necessary and often times emergent medical care. Because this Hobson's Choice is so oppressive that no fair and honest person would require it, the provision is unconscionable and should not be enforced.

II. If the "Waiver of Jury Trial" was optional and not required, it is nonetheless invalid.

In order to cure the deficiencies noted above, Appellants may argue that the jury Waiver was negotiable and not a pre-condition to admission. Indeed, this is the way most skilled nursing facilities attempt to force such restrictive provisions upon their residents. However, due to the language of the Waiver, and the fact that it was not signed by Mr. Holmes, this argument would not alter the outcome.

a. The Waiver lacks consideration.

It is axiomatic that every contract in South Carolina must be supported by mutual consideration in order to be valid and enforceable. Here, if Appellants concede (as they must) that the Waiver was not made in consideration of admission, there must exist some other consideration to make the clause enforceable. However, there is none.

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). A typical argument for finding consideration in an arbitration agreement is that arbitration is quicker and less costly than litigation. While this may or may not be true (often it is not), the same rationale does not apply to the waiver of the right to trial by jury. A non-jury trial requires the same discovery and the same amount of preparation as a jury trial. Therefore, there is no rational argument that can be made that a person waiving his/her right to trial by jury enjoys some benefit. Likewise, in the instant matter, the Waiver applies only to residents of the facility and not the Appellants themselves, meaning Appellants suffered no forbearance or detriment in the transaction.

Because Respondent reaps no benefit from the Waiver, and because Appellants suffer no loss, the Waiver is not supported by valuable (or any) consideration. As such, the provision should be stricken as unenforceable.

b. The Waiver is inconspicuous and ambiguous.

In determining whether a party has knowingly and voluntarily waived its right to a jury trial by contract, the South Carolina Supreme Court has looked at whether the waiver is 1) conspicuous in its location within the contract, and 2) unambiguous in its wording. Wachovia Bank v. Blackburn, 407 S.C. 321, 333 n.8, 755 S.E.2d 437, 443 n8 (2014) (finding jury trial waivers were conspicuous and unambiguous when waivers were printed in all capital letters and had a bold heading titled "**WAIVER OF JURY TRIAL**").

i. Ambiguous

First, the waiver at issue is, at best, ambiguous. There is nothing within the Waiver itself to reflect that. Instead, the Waiver appears to be a part of the Admission Agreement and a non-negotiable pre-condition to admission. This is further illustrated when compared with the arbitration section of the Agreement, which states that arbitration is "Optional" and allows the person signing to decline by marking an "X." The jury Waiver provision was much less clear. Here, both sisters testified that they would NOT have agreed to waive a jury trial had they thought there was a choice in the matter. [ROA ___; Margaret Holmes' Deposition Transcript; ROA ____; Dorothy Olenja's Deposition Transcript.] While it might be expected that anybody would testify this way after the fact, it is important to note that both sisters did opt out of arbitration. Therefore, their testimony now is consistent with their actions back then and there is no reason to believe that they would not also have opted out of the jury Waiver had the clause been clear that they had the option to do so.

This provision was also ambiguous as to what was actually being waived. The South Carolina Supreme Court has held that "[a] contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or practice. Williams v. GEICO, App. Case No. 2011-196449, 2014 WL 4087598, at *3(S.C. Aug. 20, 2014) (quoting Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)).

The Waiver at issue purports to apply 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." This could reasonably be understood as waiving only causes of action arising out of the contract, and not tort actions. If read that way, this action, a tort action, would not be covered by the Waiver. Moreover, where ambiguity does exist, even if the ambiguity is not such as to render the entire provision invalid, the terms should be construed against the drafter. If such construction were applied against Appellants here, their Motion, and appeal, would necessarily have to be denied.

ii. Inconspicuous

With respect to whether the trial waiver is conspicuous within the document, our courts have looked at such factors as: 1) whether the heading of the waiver is in bold typeface or underlined; 2) whether the language of the waiver is in all-capital letters; 3) whether the waiver

is near the signature page or buried within the contract; and 3) whether the jury trial waiver stands out in some way from the other paragraphs in the contract.

Here, the Waiver is not conspicuous. The language in the Waiver is not in all-capital letters. This includes the heading. Second, the Waiver is not near the signature page, but instead buried within the contract on page 9 of 11. This is further evident by the fact that the Arbitration provision, which both Dorothy and Margaret voided, is on the signature page, above the signature line, and contains language that is in CAPITALS and in **bold**. Finally, the jury trial waiver does not stand out. Instead, the Waiver mirrors every other provision in the Admission Agreement except the Arbitration provision which was voided by both Dorothy and Margaret.

Therefore, based on the above, the Waiver is not conspicuous.

c. Decedent's sisters lacked authority execute the Waiver on Decedent's behalf.

As noted in the Introduction, Decedent's sister Dorothy Olenja was Mr. Holmes' court appointed guardian at the time both Admission Agreements were signed. As such, it is clear that sister Margaret Holmes did not have authority to sign the second Admission Agreement. Appellants argue that Margaret would have had authority under the South Carolina Adult Healthcare Consent Act ("AHCCA") S.C. Code Ann. § 44-66-10 *et seq.* However, the AHCCA specifically provides for an "Order of Priority" which lists a Court appointed guardian as having priority over any other sibling. S.C. Code Ann. § 44-66-30(A). A healthcare facility cannot avoid this order of priority unless "a health care provider responsible for the care of a patient who is unable to consent determines that the person [with priority] is not reasonably available, is not willing to make health care decisions for the patient, or is unable to consent..." . S.C. Code Ann. § 44-66-30(D). Finally, "[d]ocumentation of efforts to locate a decision maker who is a person identified in subsection (A) must be recorded in the patient's medical record." S.C. Code

Ann. § 44-66-30(B). Appellants knew that Dorothy was Decedent's court appointed guardian (as she was the person who signed the first Admission Agreement). There is no evidence in the medical chart to suggest that Dorothy was unavailable or unwilling to sign the second Admission Agreement. As such, Margaret's signature on the second Admission Agreement is invalid.

The only remaining question, then, is whether, on the first admission, Dorothy's court appointed guardianship conferred upon her the power to waive decedent's right to a jury trial. The case law is clear on this issue that she did not. Although dealing with an arbitration agreement, as opposed to a jury trial waiver, the case of Coleman v. Mariner Healthcare, Inc., 407 S.C. 346 (2014) is almost directly on point. In Coleman, the Decedent's sister was presented with an Admission Agreement and a separate Arbitration Agreement, and signed both. The sister was authorized to do so under the AHCCA as discussed above. In invalidating the Arbitration Agreement, the Court held:

> Here, Sister was presented with two documents at each of Decedent's admissions: a "RESIDENTIAL ADMISSION AND FINANCIAL AGREEMENT" and an "AGREEMENT FOR ARBITRATION." The admission and financial agreement provides that it "sets forth the terms under which the Facility will provide long term care health services to [Decedent] and how the [Decedent] will pay for such services." Assent to this contract was a condition for Decedent's admission to Facility. On the other hand, the AA was not required for Decedent's admission, contained no provision for medical, nursing, or health care services to be provided for Decedent, and did not require any financial commitment to pay for such services. **The scope of Sister's authority to consent to "decisions concerning Decedent's health care" extended to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future.**

> **Under the Act, Sister did not have the capacity to bind Decedent to this voluntary arbitration agreement.** We therefore affirm the circuit court's holding that the Act did not confer authority on Sister to execute a document which involved neither health care nor financial terms for payment of such care.
> -Coleman, 407 S.C. at 353-354 **(emphasis added)**

In the instant case, again, we are assuming that the Waiver was not a pre-condition to admission (if it was, we would not reach this analysis because such a precondition would be illegal and unenforceable under federal law). Therefore, it was separate and distinct from the Admission Agreement. Although Dorothy's authority arose out of her guardianship, and not the AHCCA, the outcome is the same. The Coleman court summarized the powers granted under the AHCCA as follows: "In effect, the Act gives Sister two types of authority. First, she could consent, on behalf of Decedent, to the provision or withholding of medical care including placement in a facility which provides such care. Second, the Act authorized Sister to make certain financial decisions on behalf of Decedent, decisions that obligated Decedent to pay for services rendered." Coleman, 407 S.C. at 352. Dorothy's powers under her court appointed guardianship were similarly limited. See, S.C. Code Ann. § 62-5-312(a)(3)("General powers and duties of guardian - A guardian may give consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service.").

Dorothy was not Mr. Holmes' conservator, only his guardian. This would be similar to the distinction between a healthcare power of attorney and a general durable power of attorney. Although Dorothy was empowered to make healthcare decisions for decedent, and **related** financial decisions, she was not empowered to make other general or financial decisions for Mr. Holmes, including waiving his constitutional right to a jury trial.

Because the Waiver at issue in this case was separate and distinct and not consideration for Decedent's admission, the scope of Dorothy's authority to consent to "decisions concerning Decedent's health care" extended only to the admission agreement, which was the basis upon which Appellants agreed to provide health care for Mr. Holmes. The separate Waiver concerned neither health care nor payment, but instead provided an optional waiver of a constitutional right. The agreement to such a Waiver exceeded Dorothy's scope of authority, and therefore should not be enforced.

III. The alleged waiver does not apply to Appellants Epic Group or Epic General.

As a final matter, "Appellants" Epic Group and Epic General were not parties to the Admission Agreement or Waiver. Accordingly, even if the Waiver were to be enforced against Appellant Bayview Manor, LLC, it would not preclude Respondent's right to a jury trial against the remaining Appellants.

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 6 day of 11, 2018

STATE OF SOUT CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
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Perry M. Buckner, III, Circuit Court Judge

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Bayview Manor, LLC, d/b/a Bayview Manor, Epic Group, LP, and Epic General, LLC,

Appellants.

PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief and Designation of Matters on Appellants by depositing a copy of it in the United States Mail, postage prepaid, on November 6, 2018, addressed to Appellants' attorney(s) of record, W. McElhaney White and Joshua T. Thompson, 101 W. St. John Street, Suite 200, Spartanburg, SC, 29304.

Dated this 6 of 11, 2018

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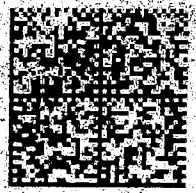

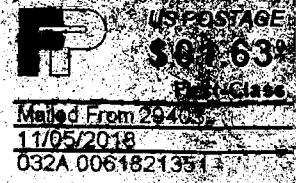

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November 6, 2018

Via U.S. Mail
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RE: *Estate of Joseph Holmes v. Bayview Manor, LLC et al.*
Appeal No.: 2018-001092

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: W. McElhaney White (*via U.S. Mail*)
Joshua Thompson (*via U.S. Mail*)