THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

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SC Court of Appeals

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

Joseph Holmes, as Personal Representative of the
Estate of David Holmes, ... Respondent,

v.

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

FINAL REPLY BRIEF OF APPELLANTS BAYVIEW MANOR, LLC, D/B/A BAYVIEW MANOR, EPIC GROUP, LP, AND EPIC GENERAL, LLC

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ARGUMENT

I. Appellants Epic Group, LLC and Epic General, LLC are entitled to seek enforcement of the waiver of jury trial provisions because Respondent alleges that those Appellants' liability arises out of care provided by the facility and because those Appellants are willing to participate in a non-jury trial.

Respondent argues in conclusory fashion with no legal authority that Epic Group, LLC and Epic General, LLC (the "Epic Appellants") may not seek to enforce the waiver of jury trial provisions because they are not signatories to the Admission Agreements. (Respondent's Brief, p. 3, 13.) Given the conclusory nature of this argument, it should be deemed abandoned on appeal and not considered. See, e.g., Judy v. Judy, 384 S.C. 634, 682 S.E.2d 836 (Ct. App. 2009) (an issue presented through conclusory argument without citation to legal authority is deemed abandoned on appeal). Nonetheless, Respondent's argument is wrong on the merits because Respondent seeks to hold the Epic Appellants liable for the care provided by the facility which did enter into the Admission Agreements and because the Epic Appellants willingly consent to a non-jury trial. [R. p. 184; R. p. 196.]

Though the Epic Appellants are not signatories to the Admission Agreements, Respondent alleges all three Appellants were involved in and responsible for Mr. Holmes' care and alleges causes of action for Alter Ego/Piercing the Corporate Veil, and Amalgamation of Interests. [R. p. 17 – 49.] Likewise, as evident through their joining in the Motion for Nonjury Trial, the Epic Appellants agree to participate in a non-jury trial as envisioned by the Admission Agreements. [R. p. 70 – 93.] In such circumstances, South Carolina law recognizes that the Epic Appellants have the right to seek enforcement of the waiver of jury trial provisions notwithstanding the fact that they are not signatories to the Admission Agreements.

In S.C. Pub. Serv. Authority v. Great Western Coal, et al., the plaintiff contracted with Great Western Coal for the provision of coal. 312 S.C. 559, 437 S.E.2d 22 (Ct. App. 1993). The

contract contained an arbitration clause. The plaintiff later brought suit against Great Western Coal, its president, and another employee, alleging that they had increased coal prices while lowering quality. Id. at 561, 437 S.E.2d at 23 – 24. Defendant president, a non-signatory to the contract, filed a motion to dismiss and compel arbitration. Id. at 561, 437 S.E.2d at 24. The trial judge denied defendant president's motion because he did not sign the contract in his individual capacity, and defendant president appealed. Id. at 563, 437 S.E.2d at 24 – 25.

The Court of Appeals reasoned that "a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint, or signatory parties in their individual capacity because this would nullify the rule requiring arbitration." Id. at 563, 437 S.E.2d at 24 - 25, citing Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990). The Court of Appeals further reasoned that "when the nonsignatory parties are willing to submit to arbitration, the case should be arbitrated." Id. The Court of Appeals therefore, concluded, that the defendant president was seeking arbitration and held that the trial judge erred in denying the same simply because the defendant president did not sign the contract. Id.

Great Western Coal is directly on point. Just like Great Western Coal's president, the Epic Appellants are not signatories to the contracts in question, but the claims against them arise out of and relate to the relationship between Mr. Holmes and Bayview Manor. Also, like Great Western Coal's president, the Epic Appellants joined in the Motion for Nonjury Trial and thus agree to submit to a nonjury trial as envisioned in the Admission Agreements.

Respondent cannot avoid the waiver of jury trial provisions by naming non-signatories. Likewise, as set forth in Argument I(b) of Appellants' Brief and incorporated herein, Respondent cannot rely on the relationship created between Respondent and Bayview Manor when the Admission Agreements were executed and repudiate the Admission Agreements when they work

to his alleged disadvantage. The Epic Appellants are thus entitled to seek enforcement of the waiver of jury trial provision.

II. **The jury trial waivers at issue are not unconscionable because such waivers are routinely entered into and enforced under South Carolina law.**

For Respondent to prevail on his argument that the waiver of jury trial provisions are unenforceable on the grounds on unconscionability, he must establish two factors. First, he must establish unreasonableness, i.e. that the absence of meaningful choice combined with the contract terms "are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Gladden v. Boykin, 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013). Even where unreasonableness exists, the court must not refuse to enforce a contract on the grounds of unconscionability "unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract." Id. at 145, 739 S.E.2d at 884 – 885.

Respondent's unconscionability argument fails to satisfy the first required factor of unreasonableness because waiver of jury trial clauses are routinely entered into and upheld by courts of this State. See, e.g., Gladden, 402 at 144 – 145, 739 S.E.2d at 884 (finding limitation of liability terms and exculpation clauses were not unreasonable because such terms were "routinely entered into" and because courts uphold such clauses). A review of South Carolina case law demonstrates that waiver of jury trial claims are routinely entered into and upheld. See, e.g., Wachovia Bank, NA v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014) ("A party may waive the right to a jury trial by contract."); The Beach Company v. Twillman, LTD., 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002) (same); North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992) (same). Further, as argued in

Argument I(a) of Appellant's Initial Brief and incorporated herein, The Beach Company demonstrates that South Carolina decisional courts have enforced less clear and more inconspicuous jury trial waiver clauses than those at issue in this case.

Even if Respondent could establish unreasonableness, she has put forth no evidence that supports a conclusion that Respondent cannot be said to have consented to the waiver of jury trial provisions. Respondent generally argues that a waiver of jury trial provision contained within an admission agreement presents a "Hobson's Choice" to people such as Mr. Holmes (Respondent's Brief, p. 6), but Respondent presents no evidence as to how that vague generalization applies to Mr. Holmes specifically. The absence of evidence demonstrating a lack of meaningful choice is weighed against the evidence cited by Appellants that (1) the jury trial waiver provision was one of three provisions in the Admission Agreements that specifically admonished signatories to "**(Please read carefully);**" and (2) both Dorothy and Margaret testified that they had the ability to read the Admission Agreements prior to execution and did, in fact, execute those Agreements. [R. p. 72 – 82; R. p. 83 – 93; R. p. 172, l. 14 – 15, p. 174, l. 23, p. 175, l. 2 – 11; R. p. 90, l. 4 -8, p. 91, l. 6 – p. 92, l. 4.]

Respondent has failed to establish that the waiver of jury trial provisions are unreasonable or that Respondent lacked a meaningful choice in executing the Admission Agreements. Respondent's argument that the waiver of jury trial provisions are unconscionable, therefore, fails.

III. The Admission Agreements are unambiguous in establishing that the waiver of jury trial provisions apply to all litigation arising out of any aspect of the relationship between Mr. Holmes and Appellants.

Respondent argues that the Admission Agreements containing the waiver of jury trial provisions should be deemed unenforceable because they are ambiguous. However, Respondent concedes that "[t]here is nothing within the waiver itself to reflect that." [Respondent's Brief, p.

8.] Because Respondent admits that the contract itself is not ambiguous and instead points to whether Dorothy and Margaret would have agreed to the waiver of jury provision if they "thought there was a choice in the matter" [Respondent's Brief, p. 8], Respondent's ambiguity argument must fail. See, e.g., Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585, 592 – 593, 658 S.E.2d 539. 542 – 543 (Ct. App. 2008) (party cannot create ambiguity in a contract when the alleged ambiguity does not exist within the four corners of the contract).

Respondent does vaguely argue that the waiver of jury trial provisions are ambiguous because they could be read to apply only to contract claims, and not tort claims. [Respondent's Brief, p. 9.] However, Respondent provides no support for how the waiver of jury trial provisions could be read that way. More importantly, Respondent has provided no evidence that Dorothy or Margaret reasonably believed the waiver of jury trial provisions to be ambiguous. During their lengthy depositions, Dorothy and Margaret both acknowledged that they signed the Admission Agreements. Neither Dorothy nor Margaret raised any concerns about an inability to understand the waiver of jury trial provisions. Instead they both testified that the skimmed the Agreements and had the opportunity to read them. [R. p. 172, l. 14 – 15, p. 174, l. 23, p. 175, l. 2 – 11; R. p. 90, l. 4 -8, p. 91, l. 6 – p. 92, l. 4.] Further, such an ambiguity argument is undermined by their representations in the Agreements that "Resident or Responsible Party has read or has been read and understands and agrees to all terms and conditions of this agreement unless specifically noted on the agreement." [R. p. 82; R. p. 93.]

Against this background, Appellants note that the jury trial waiver could not be more unambiguous:

> 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.

[R. p. 80; R. p. 91.]

The waiver provisions clearly waive the right to a jury trial "with respect to any litigation" "arising out of or relating to...any relationship between the Facility and the Resident." [R. p. 80, R. p. 91.] This easily encompasses litigation over the quality of care provided by Bayview Manor to Mr. Holmes. While disputes concerning the Agreement are included as one subset of the type of litigation for which a jury trial is waived, there is no legitimate argument that one subset is the only type of litigation for which a jury trial is waived. In such a circumstance where there is no internal conflict and no dispute over the breadth of the clear language of the provision, Respondent's ambiguity argument must fail. See, e.g., Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) ("A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation.")

IV. The waiver of jury trial provisions are conspicuous because they specifically admonish the signatory to "Please read carefully."

Respondent incorrectly argues that the waiver of jury trial provisions within the Admission Agreements are inconspicuous because he focuses solely on the placement and font type of those provisions. (Respondent's Brief, p. 9 – 10.) South Carolina case law on conspicuousness is not so narrowly focused. Instead, "the proper test is whether an important clause was particularly inconspicuous, as if the drafter intended to obscure the term." Gladden, 402 S.C. at 146, 739 S.E.2d at 885. Stated another way, "[t]he test for conspicuousness is whether there is something about the

provision that reasonably calls attention to it." Hannah v. United Refrigerated Services, Inc., 312 S.C. 42, 46, 430 S.E.2d 539, 542 (Ct. App. 1993).

As opposed to trying to obscure the waiver of jury clause provision, Bayview Manor calls particular attention to the waiver provision by making it one of three out of fifty-two titled provisions contained within the Admission Agreements that specifically admonish the signatory in bold and underlined font: "**(Please read carefully)**" in the provision heading. Further, all three provisions which admonish the signatory to please read carefully are grouped on the same page of the Admission Agreement so that the signatory does not have to search out those three provisions to which Bayview Manor calls special attention. Finally, the waiver of jury trial provision is not smaller or less visible than another other clause contained within the Agreements. [R. p. 80, R. p. 91.]

With these factors in mind, Respondent cannot argue that Bayview Manor attempted to obscure the waiver of jury trial provisions or otherwise distract the signatory's attention from those provisions. His argument concerning inconspicuousness, therefore, fails.

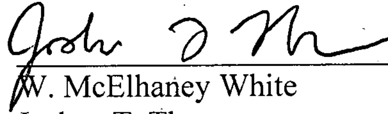
CONCLUSION

Respondent is bound to a nonjury trial in the case at bar, and the arguments presented in his Brief do not change that outcome. Appellants, therefore, reiterate that this Court should reverse the trial court's order denying Appellants' Motion and Appellants' Motion to Alter or Amend, and the matter should be remanded to the lower court for a nonjury trial.

[Signature block on next page.]

Respectfully submitted this 27th day of December, 2018.

Holcombe Bomar, P.A.



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Rule 211(b) Certification

The undersigned attorneys for the Appellants certify that this Final Reply Brief of Appellants complies with Rule 211(b), SCACR.

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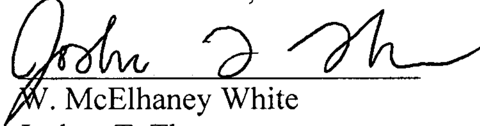
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