THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No.: 2018-CP-37-00271
Appellate Case No.: 2018-002088

Betty Herrington,

Respondent,

v.

SSC Seneca Operating Company, LLC, d/b/a Seneca Health & Rehabilitation Center; SavaSeniorCare, LLC; SSC Equity Holdings, LLC; SavaSeniorCare Administrative Services, LLC; SavaSeniorCare Consulting Services, LLC

Defendants,

Of which SSC Seneca Operating Company, LLC, d/b/a Seneca Health & Rehabilitation Center; SavaSeniorCare Administrative Services, LLC; SavaSeniorCare Consulting Services, LLC

Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. **DID THE TRIAL COURT PROPERLY DENY APPELLANTS' MOTION TO COMPEL ARBITRATION BECAUSE THE DISPUTE RESOLUTION PROGRAM DOES NOT APPLY TO THE PRESENT CASE BY ITS PLAIN AND UNAMBIGUOUS LANGUAGE?**

STATEMENT OF CASE

Respondent Betty Herrington was admitted to Seneca Health and Rehabilitation Center ("SHRC") on or about February 27, 2016, after having been treated at Oconee Medical Center for a wound on her left foot, among other medical conditions. Respondent was a resident of SHRC from her admission until she was transferred to Oconee Medical Center on March 28, 2016. While at SHRC, Appellants failed to regularly monitor and treat Respondent's left foot wound as prescribed by her doctors. Because of this lack of proper monitoring and treatment, the wound on Plaintiff's left foot deteriorated and the infection spread, ultimately leading to a left foot transmetatarsal amputation with left tendon Achilles lengthening. After the amputation, Respondent was readmitted to SHRC on April 5, 2016.

Respondent filed a Notice of Intent alleging malpractice by Appellants on August 3, 2017, and, after pre-suit mediation was unsuccessful, filed this suit on April 25, 2018. Respondent filed suit against SSC Seneca Operating Company, LLC, d/b/a Seneca Health & Rehabilitation Center, SavaSeniorCare, LLC, SSC Equity Holdings, LLC, SavaSeniorCare Administrative Services, LLC, and SavaSeniorCare Consulting Services, LLC. The Defendants are a web of related companies owned by SavaSeniorCare, LLC ("Sava"). (*See* R. pp. 19-23). According to its website, Sava is "one of the largest providers of skilled nursing, memory care and rehabilitative services in the nation." (*See* https://www.savaseniorcare.com/company.html). SSC Seneca Operating Company, LLC, d/b/a Seneca Health & Rehabilitation Center, is a Delaware limited liability company operating within the State of South Carolina, and was the Licensee of SHRC during Respondent's stay. (R. p. 20). SSC Equity Holdings, LLC, SavaSeniorCare

Administrative Services, LLC, and SavaSeniorCare Consulting Services, LLC, are all Delaware limited liability companies operating within the state of South Carolina, but are not registered to do business in South Carolina. (*See* R. pp. 19-21).

On June 25, 2018, SavaSeniorCare, LLC and SSC Equity Holdings, LLC, filed Motions to Dismiss for Lack of Personal Jurisdiction. (R. pp. 76-79). On September 6, 2018, a Consent Order to Stay was entered as to SavaSeniorCare, LLC and SSC Equity Holdings, LLC, staying the proceedings as to these two defendants. (R. pp. 1-6). Also on June 25, 2018, SSC Seneca Operating Company, LLC, SavaSeniorCare Administrative Services, LLC, and SavaSeniorCare Consulting Services, LLC, moved to compel arbitration (collectively "Motions to Compel Arbitration"). (R. pp. 80-108). Appellants' Motions were not accompanied by any memoranda. On September 6, 2018, Respondent filed a Memorandum in Opposition to Appellants' Motions to Compel Arbitration. (R pp. 109-157). On September 7, 2018, Appellants filed memoranda in support of their Motions to Compel Arbitration. (R. pp. 158-238). On September 10, 2018, a hearing was held as to the Motions to Compel Arbitration. (R pp. 42-75). On September 14, Respondent submitted a Supplemental Memorandum to address a new issue that had been raised by Appellants after Respondent had submitted her Memorandum in Opposition to the Motion to Compel Arbitration. (R pp. 239-41).

All three Appellants moved to compel arbitration based on a document entitled "Dispute Resolution Program" ("DRP"). (R. pp. 84-92). On February 27, 2016, Respondent signed the DRP among various other admissions documents when she was being admitted to SHRC. The DRP and other admissions documents were drafted by

Appellants. (R. pp. 7-11) The DRP defines a "Dispute" as:

> "'**Dispute**'" means (a) any claim or dispute totaling $50,000.00 individually or in the aggregate that would constitute a cause of action that either party could bring in a court of law (b) this agreement does not prevent either party from initiating a grievance proceeding, complaint, to survey agencies, appeal proceedings with the appropriate state or federal entity regarding an involuntary transfer or discharge, or any such claim or dispute involving solely a monetary claim in an amount less than $50,000.00 Any such claim shall not be deemed a dispute under this agreement."

At the hearing, Appellants argued that the DRP was meant to apply to claims equal to *or greater than* $50,000.00. The Circuit Court found that, by its own unambiguous terms, the DRP only applied to claims or disputes of exactly $50,000.00. (R. pp. 7-11). The Court refused to adopt Appellants' desired reading of the DRP, as to do so would require the Court to add additional language that is not present in the DRP. Appellants filed Motions to Reconsider on October 22, 2018. (R. pp. 242-50). Their Motion was denied via order dated October 26, 2018, and they filed a Notice of Appeal on November 21, 2018. (R pp. 12-19; R. pp. 279-83).

ARGUMENTS

STANDARD OF REVIEW

Whether a claim is subject to arbitration is an issue for judicial determination. Partain v. Upstate Auto. Grp., 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). "While this determination by a trial court is reviewed de novo, an appellate court will not reverse this finding if it is reasonably supported by the evidence." York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (S.C. App. 2013). Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

I. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION TO COMPEL ARBITRATION BECAUSE THE DRP DOES NOT APPLY TO THE PRESENT CASE BY ITS PLAIN AND UNAMBIGUOUS LANGUAGE

Appellants raise one issue on appeal- did the Circuit Court err in denying their motion to compel arbitration on the grounds that the DRP does not apply to the present case. In doing so, Appellants argue against the plain language of the DRP. In the DRP, Appellants defined "Dispute" to mean "any claim or dispute totaling $50,000.00 individually or in the aggregate." They now ask the Court to interpret "Dispute" to mean "any claim or dispute totaling $50,000.00 or more individually or in the aggregate."

In denying Appellants' motion to compel arbitration, the Court found that:

> "[t]he DRP applies to disputes and defines a dispute as 'any claim or dispute *totaling $50,000.00 individually or in the aggregate* that would constitute a cause of action that either party could bring in a court of law[.]' (DRP, pgs. 2-3) (*emphasis added*). Claims for less than $50,000.00 are excluded from the definition of a dispute. (DRP, pgs. 2-3). The DRP is silent as to claims for greater than $50,000.00, so that they are not included within the definition of a 'Dispute.' Therefore, by its own

> unambiguous terms, the DRP only applies to claims or disputes of exactly $50,000.00." (R. p. 8).

The Court went on to state "[t]he DRP does not apply to the present case as Plaintiff is not claiming exactly $50,000.00 in damages." (R. p. 9). Appellants entire argument is essentially that the Court's interpretation of the definition of dispute is unreasonable and is based on a single phrase taken out of context. In their brief, Appellants state that "Appellants do not take issue with the circuit court's determination that the Arbitraion Agreement is unambiguous....The problem with the circuit court's decision is that it is based on an interpretation of the Arbitration agreement that is patently *unreasonable*—and indeed absurd." (*emphasis* original) (*See* Initial Brief of Appellants, pp. 7-8).[2] Appellants argue that the definition of "dispute" is clearly meant to apply to claims for more than $50,000.00, and that the Court should interpret the DRP based on this purported intent as opposed to its plain language. However, the Circuit Court's interpretation of the DRP is based on the plain language of the DRP. As the Circuit Court found, language would have to be added to the definition of "Dispute" in order to arrive at the meaning now encouraged by Appellant. (R. pp. 8-9). Appellants now seek to have the plain language of the contract that they drafted changed in order to benefit them at the expense of Respondent.

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[2] It is interesting that Appellants now argue that the DRP *unambiguously* applies to disputes of $50,000.00 or more. At the hearing before the Circuit Court, Appellants' counsel stated that "[t]he last argument, Your Honor, regards the idea that only disputes that total individually or in the aggregate $50,000 are subject to arbitration. I will concede that there is, I guess, a reading if you only read that phrase in the arbitration agreement that you could reach that conclusion." (R. p. 59, lines 10-15). Further, in footnotes in their memos in support of their motions to compel arbitration, Appellants argue for an alternative interpretation of the DRP in which all disputes, regardless of the amount at issue, are subject to arbitration. (R. p. 178; R. p. 212).

a. The Circuit Court properly found that, by its own unambiguous terms, the DRP only applies to claims or disputes of exactly $50,000.00.

The DRP defines a dispute as "any claim or dispute *totaling $50,000.00 individually or in the aggregate* that would constitute a cause of action that either party could bring in a court of law[.]" (R. pp. 86-87) (*emphasis added*). Therefore, by its own terms, the DRP only applies to claims or disputes of exactly $50,000.00. "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (S.C. 1994) (internal citations omitted). "The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (S.C. App. 2009). The Circuit Court properly found that, "by its own unambiguous terms, the DRP only applies to claims or disputes of exactly $50,000.00." (R. p. 8).

Appellants contend that the definition of "dispute" was taken out of context and that, when the entire DRP is read, the amount of $50,000.00 is meant to be a threshold amount so that the DRP applies to any claim or dispute equal to or greater than $50,000.00. Specifically, Appellants argue that "[t]he only reasonable interpretation of the Arbitration Agreement, when the plain language of the entire contract is properly and objectively considered, is that the claims or disputes for $50,000.00 *or more* are subject

to arbitration." (*emphasis* original) (*See* Initial Brief of Appellants, p. 10). It is notable that in their brief, Appellants felt it necessary to include the words "or more" in italics in order to express what they purport to be the DRP's intended meaning. This of course is necessary because if, like the DRP, their brief did not include the words "or more" after "$50,000.00," then they would be admitting that the Circuit Court correctly interpreted the DRP. If Appellants intended for the DRP to apply to disputes for $50,000.00 *or more*, then they could have simply added the words "or more" when drafting the DRP as they did in their Appellant Brief. "Where a contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention." Hellams v. Harnist, 284 S.C. 256, 259, 325 S.E.2d 569, 571 (S.C. App. 1985). Presumably, Appellants acted deliberately and carefully when they drafted the DRP. However, Appellants did not include "or more" or other similar language when drafting the DRP, and Respondent did not agree to such language. Instead of including this language in the DRP, Appellants now ask the Court to infer this intent because they apparently believe it benefits them in the present case. They ask the Court to do this in spite of the language they drafted themselves.

Further, when read as a whole, it is clear that the Circuit Court correctly interpreted the definition of dispute. Appellants argue that "[t]he circuit court took a single phrase in the Arbitration Agreement's definition of "disputes" out of context—not only out of its immediate surrounding context in the Arbitration Agreement but out of the context of the Arbitration Agreement altogether—and, viewing that phrase in isolation, declared the Arbitration Agreement's scope to be plainly and unambiguously stated in a way that effectively nullifies its very purpose." (*See* Initial Brief of Appellants, p. 9).

The phrase that Appellants claim was taken out of context was not included in some boilerplate section at the end of the DRP, but was instead included in the "Definition" section of the DRP. A definition is defined as "[t]he meaning of a term as explicitly stated in a drafted document such as a contract, a corporate bylaw, an ordinance, or a statute; a definiens." Black's Law Dictionary, Eighth Edition. As our Supreme Court has stated, "[p]arties to a contract may, by agreement, attribute to a word used in the contract any meaning they may desire, and if such meaning is clear the courts will give effect to it." Stand. Oil Co. of New Jersey v. Powell Paving & Contracting Co., 139 S.C. 411, 138 S.E. 184, 193 (S.C. 1927). This Court has previously held, "where the parties define the words or terms which they propose using, as was done in the contract before us, the contract will be interpreted according to such definitions if free from ambiguity." C.A.N. Enterprises, Inc. v. S.C. Health and Human Services Fin. Commn., 292 S.C. 556, 559, 357 S.E.2d 714, 715 (S.C. App. 1987), aff'd, 373 S.E.2d 584 (S.C. 1988). Despite their contentions that the definition of dispute was taken out of context, the DRP does not provide any additional words defining a dispute outside of the "Definition" section.

The DRP is composed of multiple sections. It starts off with a preamble describing the purported value of the DRP. This is followed by the "DRP Program Description" which has a "Rights and Responsibilities" sub-section, and a "Definitions" sub-subsection. Finally, there is an "Additional Information" section with multiple sub-sections. The Definition section includes two definitions- "Parties" and "Dispute."

> "'**Dispute**'" means (a) any claim or dispute totaling $50,000.00 individually or in the aggregate that would constitute a cause of action that either party could bring in a court of law (b) this agreement does not prevent either party from initiating a grievance proceeding, complaint, to

> survey agencies, appeal proceedings with the appropriate state or federal entity regarding an involuntary transfer or discharge, or any such claim or dispute involving solely a monetary claim in an amount less than $50,000.00 Any such claim shall not be deemed a dispute under this agreement." (R. pp. 86-87).

By its plain language, the DRP defines a dispute as any claim or dispute totaling $50,000.00 individually or in the aggregate. Claims for less than $50,000.00 are excluded from the definition of Dispute, and the DRP is silent as to claims greater than $50,000.00. Other than the definition of Dispute, there is no other section of the DRP which seeks to define Dispute. While Appellants claim that the dollar amounts they imposed in their contract were taken out of context, there is not any other language in the "Definitions" section or the DRP as a whole that seeks to define a Dispute in the way claimed by Appellants. Similarly, there is no other section in the DRP which seeks to add additional definition to the term Dispute so that it would conform to Appellants' claimed meaning.

When drafting the DRP, Appellants were free to define the terms in the DRP as they saw fit. The Circuit Court properly found that, by its own plain language, the DRP only applies to claims for exactly $50,000.00, and that, because Respondent is not making a claim for $50,000.00, the DRP does not apply to the present case. Therefore, the Circuit Court's order should be affirmed.

b. It would be improper for the plain language of the DRP to be changed to benefit Appellants.

In its Order, the Circuit Court stated that "to interpret the DRP to apply to claims exceeding $50,000.00, the Court would have to add language to the DRP that is not present." (R. pp. 8-9). Further, the Circuit Court stated that "Defendants are

sophisticated entities who drafted the DRP and presented it to Plaintiff, and they are bound by the unambiguous language of the contract that they drafted. The Court cannot read words into the DRP to impart a meaning that was not expressed in the contract when executed." (R. p. 9). In its brief, Appellants state that the proper interpretation of the DRP is that "claims or disputes for $50,000.00 *or more* are subject to arbitration." (*emphasis* original) (*See* Initial Brief of Appellants, p. 10). As set forth above, to accept the interpretation encouraged by Appellants, additional language such as "or more" that was not present in the DRP would have to be read into in the DRP.

Appellants are sophisticated entities. (R. p. 9). According to Appellants' website, they are "one of the largest providers of skilled nursing, memory care and rehabilitative services in the nation." *See* https://www.savaseniorcare.com/company.html. Further, Appellants are sophisticated enough to set up a web of at least five related entities to handle various parts of running a nursing home. (R. pp. 19-24). "Sophisticated parties are bound by the unambiguous language of the contracts they sign." Progressive Intern. Corp. v. E.I. Du Pont de Nemours & Co., C.A. 19209, 2002 WL 1558382, at *1 (Del. Ch. July 9, 2002).

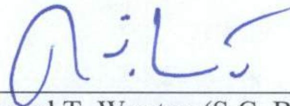
Appellants drafted the DRP, yet now they are asking the Court to add in language to the DRP to arrive at what they purport to be the true intent of the contract. What Appellants seek is inappropriate as "[w]here a contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention." Hellams v. Harnist, 284 S.C. 256, 259, 325 S.E.2d 569, 571 (S.C. App. 1985). Further, while the DRP is clear that it only applies to disputes for exactly $50,000.00, even if it were found that the DRP were ambiguous, "a court will construe any doubts and

ambiguities in an agreement against the drafter of the agreement." Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 309, 698 S.E.2d 773, 778 (S.C. 2010). Therefore the DRP should be interpreted based on its plain language and, and the Circuit Court's Order should be affirmed.

CONCLUSION

A sophisticated web of companies set up by one of the largest nursing home companies in the country is asking the Court to interpret an unambiguous contract that it drafted in a way that is contrary to the contract's plain language, and is detrimental to the unsophisticated non-drafting party. The Circuit Court properly found that the DRP only applies to claims or disputes for exactly $50,000.00. For the reasons set forth above, the Circuit Court's order should be affirmed and this case remanded.

RESPECTFULLY SUBMITTED,



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Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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