THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2019-001124
Opinion No. 5644 (Ct. App. May 1, 2019)

Hilda Stott, individually and as Personal Representative of the Estate of Jolly P. Davis, deceased and as Personal Representative of the Statutory Beneficiaries	.....	Respondent
	v.	
White Oak Manor, Inc., White Oak Management, Inc., and White Oak Manor-Spartanburg, Inc. d/b/a White Oak of Spartanburg	.....	Petitioners.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 242(f), SCACR, Hilda Stott, Individually and as Personal Representative of the Estate of Jolly P. Davis, respectfully submits her return to White Oak Manor, Inc., White Oak Management, Inc. and White Oak Manor-Spartanburg, Inc. d/b/a White Oak of Spartanburg's (collectively "White Oak") Petition for Writ of Certiorari to the Court of Appeals.

STATEMENT OF THE CASE

Hilda Stott filed this action on December 16, 2015, alleging various tort claims arising out of the death of her uncle Jolly P. Davis while he was a nursing home resident at White Oak of Spartanburg. (App. 10-19). The Complaint named as defendants the nursing home itself (White

Oak Manor-Spartanburg, Inc. d/b/a White Oak of Spartanburg) as well as related entities with managerial or operational control over the home (White Oak Manor, Inc., White Oak Management, Inc.). (App. 10 ¶ 5). Ms. Stott alleged Mr. Davis was overmedicated and under-hydrated during a short stint at White Oak's facility in January 2013. (App. 12 ¶ 20). At the time of Mr. Davis's admission on January 2, 2013, White Oak presented Ms. Stott with an Arbitration Agreement which she signed as Mr. Davis's representative. App. 104. Ms. Stott was not Mr. Davis's active agent at the time of his White Oak admission.

This appeal arises out of White Oak's unsuccessful attempt to compel arbitration, citing the Arbitration Agreement. White Oak argues Ms. Stott had authority to enter the Arbitration Agreement on Mr. Davis's behalf. White Oak cites two power of attorney documents naming Ms. Stott as Mr. Davis' agent to support their claim—(1) a "durable power of attorney for finance" which had been signed but not recorded when Mr. Davis entered White Oak's facility; and (2) a "durable health care power of attorney" which would become effective only during any period of Mr. Davis' incompetence. The Court held neither power of attorney form was effective when the Arbitration Agreement was signed and, therefore, Ms. Stott lacked authority to enter the Arbitration Agreement on Mr. Davis' behalf. Stott v. White Oak Manor, Inc., 426 S.C. 568, 828 S.E.2d 82 (Ct. App. 2019).

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals correctly apply the plain language of former S.C. Code Ann. § 62-5-501(C)'s to find a durable power of attorney must be recorded before it is effective?

2. Did the Court of Appeals properly apply contract interpretation rules to find the Arbitration Agreement's plain language did not delay its effective date to some point after the date of its execution?

3. Did the Court of Appeals correctly determine Mr. Davis's durable health care power of attorney form was limited to periods of mental incompetence and that White Oak's counsel previously conceded Mr. Davis was competent when admitted to White Oak's facility?

ARGUMENT

The circuit court denied White Oak's motion to compel arbitration because there was no valid contract requiring its resident (Mr. Davis) or his estate to arbitrate rather than litigate disputes arising out of his time at a White Oak facility. The Court of Appeals affirmed that order in a unanimous decision because the unambiguous language of the pertinent statutes, contracts, and other legal instruments showed Mr. Davis's niece Hilda Stott did not have the legal authority to act on his behalf when she signed the Arbitration Agreement on which White Oak's motion relies. The Court should deny White Oak's request to review the Court of Appeals' ruling because it is substantively correct and grounded largely in both the plain language of a contract White Oak drafted and a concession its counsel made to the circuit court. This case presents no novel issue, no dissenting opinion at the Court of Appeals, and no hint of a constitutional concern or conflict with this Court's previous rulings. See Rule 242(b), SCACR. As the Court of Appeals' opinion demonstrates, resolving this case involved little more than applying the plain language of key documents and legal provisions to background facts on which the parties largely agreed. White Oak's petition should be denied.

The Court of Appeals reached three holdings on the two power of attorney forms White Oak cited as Ms. Stott's purported authority to sign the Arbitration Agreement on Mr. Jolly's behalf. The first two holdings related to the "durable power of attorney for finance" form. First, this document did not confer authority on Ms. Stott to agree to arbitration because it was not recorded with the register of deeds at the time the Arbitration Agreement was signed. Stott, 426 S.C. at 574, 828 S.E.2d at 86. By statute, a durable power of attorney has no effect until it is

recorded. Id. (citing S.C. Code Ann. § 62-5-501(C)[1] ("After the instrument has been recorded . . . it is effective notwithstanding the mental incompetence or physical disability" of the principal)). White Oak cannot contest the Arbitration Agreement was signed (January 2, 2013) before the durable power of attorney for finance was recorded with the Spartanburg County Register of Deeds (January 8, 2013). Stott, 426 S.C. at 574, 828 S.E.2d at 85-86; see also App. 104, 111. Nor can White Oak argue Section 62-5-501(C) was either ambiguous or untested. The Court of Appeals had previously noted the statute's mandatory language on recording, and the connection between recording and a power of attorney's effectiveness. Stott, 426 S.C. at 574, 828 S.E.2d at 85-86 (citing Timmons v. Starkey, 380 S.C. 590, 593 n. 2, 671 S.E.2d 101, 103 n. 2 (Ct. App. 2008)). It is only after recording that a third party can rely on a durable power of attorney's terms when dealing with its named agent. Timmons, 380 S.C. at 599 n. 6, 671 S.E.2d at 106 n. 6. This Court affirmed. Timmons v. Starkey, 389 S.C. 375, 698 S.E.2d 809 (2010).

Unable to contest these decisive points, White Oak focuses on language in the durable power of attorney for finance form to suggest it became effective as soon as Mr. Jolly was "disab[led]." Pet. at 4 (citing App. 113, Art. II). While Ms. Stott disputes White Oak's definition of disability and its analysis of Mr. Davis' functionality, this dispute is ultimately irrelevant. Regardless of what the durable power of attorney for finance form says, it cannot be enforced unless it complies with South Carolina statutory law including Section 62-5-501(C)'s recording requirement. That section applied "[w]henever a principal designates another" to be his agent in times of mental incapacity. S.C. Code Ann. § 62-5-501(A). The durable power of attorney for

[1] While this section has since been replaced, 62-5-501 was the governing law at all pertinent times for this case and its successor also requires a durable power of attorney to be recorded before it becomes effective. Stott, 426 S.C. at 574 n. 4, 828 S.E.2d at 85 n. 4 (citing S.C. Code Ann. § 62-8-109(c) ("an agent may exercise the authority granted unto the agent under the power of attorney only if the power of attorney has been recorded").

finance form's language could not negate or trump South Carolina statutes and it does not even attempt to. By its terms, this power of attorney document chooses South Carolina law to govern its interpretation. App. 125, Art. VII, ¶ H.

The Court of Appeals' second holding addressed White Oak's argument suggesting the Arbitration Agreement's purported effective date was not the date it was executed. Stott, 426 S.C. at 574-75, 828 S.E.2d at 86. White Oak pointed to a provision granting Mr. Jolly an exclusive period to opt-out of the Arbitration Agreement by sending a written notice to White Oak during a ten-day window beginning one week after the contract was signed. App. 103 ¶ 16. The Arbitration Agreement was signed on January 2, 2013, and thus the opt-out period ended on January 19, 2013.[2] In the interim, the durable power of attorney for finance was recorded (January 8, 2013), and White Oak argued the opt-out period pushed the Arbitration Agreement's effectiveness date beyond the recording date. However, the Court of Appeals found the Arbitration Agreement's plain language rejected that interpretation. That language, which White Oak drafted, stated that the Arbitration Agreement "will remain" in effect unless and until the opt-out procedure is complete at which point the parties "will no longer" be bound by its terms. App. 103 ¶ 16.

The Court of Appeals used the first rule of contract interpretation, applying the plain, ordinary meaning of the Arbitration Agreement's terms. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 497, 579 S.E.2d 132, 135 (2003). Using this rule and the ordinary meaning of the terms "remain"[3] and "no longer," the Court of Appeals correctly determined the purpose of the opt-out process was not to delay the Arbitration Agreement's effectiveness date but to provide a

[2] The Petition incorrectly states the date when the Arbitration Agreement was signed as January 2, 2016 and the date when the opt-out period elapsed as January 19, 2016. Pet. at 6; see also App. 104 (showing January 2, 2013 as date when Arbitration Agreement was signed).

[3] "Remain" means "to continue unchanged." Merriam-Webster's Collegiate Dictionary (11th ed. 2005).

means by which the contract, already effective, could be unilaterally cancelled by the resident. Stott, 426 S.C. at 575, 828 S.E.2d at 86 (finding opt-out provision's language "indicates the Arbitration Agreement was binding at the time [Ms.] Stott signed it"). White Oak has not argued the Court of Appeals misapplied the contract interpretation rules or offered a plausible alternative interpretation of the opt-out provision's plain language.

The Court of Appeals' third holding addressed the effectiveness of the durable health care power of attorney form. The key question was whether Ms. Stott's authority under this form was active at the time she signed the Arbitration Agreement. The Court of Appeals held it was not because Mr. Davis's durable health care power of attorney was the "springing" variety, meaning Ms. Stott's powers arose only when Mr. Davis was incapable of making decisions for himself. Id. at 576-78, 828 S.E.2d at 86-88. Health care powers of attorney, like other durable powers, are governed directly by statute. There is even a statutory health care power of attorney form and all such powers must be substantially similar to the form. Id. at 576, 828 S.E.2d at 86 (citing S.C. Code Ann. § 62-5-504). As the Court of Appeals noted, Mr. Davis's health care power of attorney met this requirement. Id. at 577, 828 S.E.2d at 87. Therefore, finding Ms. Stott's authority was limited to times when Mr. Davis could not act for himself was simply a matter of applying the statutes. By statute, health care powers of attorney are "springing" durable powers. Id.

Moreover, by its plain language, Mr. Davis's durable health care power of attorney was effective "***upon, and only during, any period of mental incompetence.***" App. 107 ¶ 2 (emphasis added). The statute and the form's unambiguous language[4] support the Court of Appeals' finding that the durable health care power of attorney form was a "springing" power that had no effect

[4] South Carolina applies the "plain language" interpretation rule from contract law to powers of attorney. Stott, 426 S.C. at 577, 828 S.E.2d at 87 (citing In re Thames, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)).

during periods when Mr. Davis was mentally competent. The only remaining question was whether Mr. Davis was mentally competent when Ms. Stott signed the Arbitration Agreement. The Court of Appeals answered in the affirmative relying this time not on any contract or statute but on White Oak counsel's in-court concession during the original hearing on its motion. Id. at 578, 828 S.E.2d at 87. Specifically, White Oak's counsel told the circuit court

> [W]e don't take issue with the fact that Mr. Jolly appeared to be mentally competent. So ***we're not here today saying that this man was incompetent and just couldn't manage his own affairs. Mentally speaking, we're not saying that at all.***

App. 45, lines 4-8 (emphasis added). The concession was supported by the medical records. Stott, 426 S.C. 578, 828 S.E.2d at 87-88 (citing White Oak admission forms showing Mr. Davis's awareness and competence levels); App. 128 (indicating Mr. Davis's mental status was "independent" and not even "occasionally confused").[5] The Petition offers no reason to question the validity of White Oak's counsel statement and no authority to resolve the issue preservation concerns that arise if White Oak were permitted to withdraw its concession.

CONCLUSION

For all these reasons, Ms. Stott respectfully requests the Court deny White Oak's petition for a writ of certiorari. All of the Court of Appeals' holdings were grounded in either basic contract interpretation rules, plain readings of the applicable statutes, or White Oak's own in-court concessions. None of the Rule 242(b) considerations support White Oak's petition. Plus, efforts to bind a non-signatory nursing home resident to a pre-admission arbitration contract based on the signature of a family member is not an underdeveloped area of the law. South Carolina appellate

[5] In an action seeking to compel arbitration, factual findings will not be reverse so long as "any evidence reasonably supports those findings." Wilson v. Willis, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) (citing Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).

courts have addressed this general issue at least three times in the last six years.[6] In sum, the Court of Appeals' unanimous opinion was correct on the law, and there is no need for further review.

Respectfully submitted,

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[6] Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450, 453 (2014); Thompson v. Pruitt Corp., 416 S.C. 43, 51, 784 S.E.2d 679, 684 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 574, 813 S.E.2d 292, 308 (Ct. App. 2018).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of August, 2019, she served counsel for the Defendants with a copy of the Respondent's Return to Petition for Writ of Certiorari in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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