THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Case No. 2019-CP-07-00433
Appellate Case No. 2019-001536

Viola M. Hackworth, as Personal Representative of the Estate of Eugene Boles a/k/a Eugene N. Boles, deceased, ... Respondent,

v.

Bayview Manor, LLC d/b/a Bayview Manor, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations, ... Appellants.

APPELLANTS' FINAL REPLY BRIEF

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REPLY ARGUMENT

I. Appellants' supporting affidavits are credible, and Respondent's allegations of perjury, back-dating, falsification, and a fraud on the court are without merit.

Respondent makes the following incorrect and unsubstantiated allegations in her Initial Brief ("Brief"), which Appellants address below each allegation:

1. "Appellants concede sworn affidavits . . . were not credible." (Respondent's Brief, p. 11).

   (a) Appellants have made no such concession.

2. " . . . Appellants relied upon and presented to the Circuit Court sworn testimony of their former Admissions Director, Ms. Caruso, which was categorically false." Id., at p. 12.

   (a) Appellants do not agree that Ms. Caruso's affidavit is false. As repeatedly stated at the Trial Court hearing, Appellants' position is that even if Respondent is correct that Respondent did not sign the Admission Agreement and Arbitration Agreement on November 2 and 3, but rather on November 6 and 7, a valid contract was still formed between Mr. Boles (through Respondent and Mr. Byars) and Appellants, which mandates arbitration or, alternatively, a non-jury trial. Respondent has presented no legal argument as to why any alleged inaccuracy in the dates appearing on the Admission Agreement and Arbitration Agreement would change the binding nature of the agreements, especially given the fact that neither Respondent nor Mr. Byars has ever denied signing the agreements.

3. Appellants submitted "false affidavits," Id., at p. 13.

   (a) See 2(a) above.

4. "At the hearing for Appellants' Motion, counsel for Appellants acknowledged inaccuracies in the sworn testimony of Ms. Caruso." Id.

   (a) Appellants made no such concession.

5. "After oral argument of Respondent's counsel, Appellants' counsel reiterated their concession to Respondent's affidavit." Id.

   (a) Appellants made no such concession.

6. "Appellants submitted purported contractual documents that were either back-dated or falsified." Id., at p. 14.

   (a) Even if Respondent is correct that she did not sign the Admission Agreement and Arbitration Agreement on November 2 and 3, but rather on November 6 and 7, that

does not mean there was any back-dating or falsification of records. It could be that Respondent or Ms. Caruso inadvertently wrote the wrong dates. It could be that Respondent is incorrect about her travel itinerary. Regardless, a binding contract was still formed between Mr. Boles (by Respondent and Mr. Byars) and Appellants, which requires arbitration or, alternatively, a non-jury trial. Respondent has presented no legal argument as to why any alleged inaccuracy in the dates appearing on the Admission Agreement and Arbitration Agreement would change the binding nature of the agreements, especially given the fact that neither Respondent nor Mr. Byars has denied signing the agreements.

7. "In willfully producing perjured testimony and concealing relevant information, Appellants committed a fraud on the court." Id.

   (a) See 6(a) above as to the perjury allegation. Appellants do not understand Respondent's allegation of concealment and are thus unable to respond to the same.

8. "By swearing false affidavits to procure a jury waiver, Appellants have willfully produced perjured testimony in an attempt to subvert justice." Id.

   (a) See 6(a) above.

9. "Appellants also concealed relevant documentation in an unconscionable plan to improperly influence the Circuit Court's decision regarding arbitration." Id., at p. 15.

   (a) Appellants do not understand Respondent's allegation of concealment and are thus unable to respond to the same. Appellants produced to Respondent and the Circuit Court all applicable agreements.

10. ". . . Appellants concede they manufactured affidavits . . ." Id.

    (a) Appellants made no such concession.

11. The dates on the two agreements "were presumably back-dated." Id.

    (a) See 6(a) above.

12. Appellants "concealed relevant information from the Circuit Court as Respondent presented Appellants' notation that instructed the parties to 'disregard the [Admission] contract'... ; thus further attempting to mislead the Circuit Court." Id., at p. 15-16.

    (a) Appellants do not understand Respondent's allegation of concealment and are thus unable to respond to the same. Appellants produced to Respondent and the Circuit Court all applicable agreements.

13. "...Appellants' misconduct – in introducing perjured testimony, back-dating or falsifying contracts, and withholding relevant information – constituted a 'fraud on the court . . .

interfere with the 'administration of justice' and attack the very 'institutions set up to protect and safeguard' individuals such as Mr. Boles and Respondent, . . ." Id., at p. 16.

(a) See 6(a) above.

A. <u>Respondent has never disputed that she or her brother Clifford Byars signed the Admission Agreement and Arbitration Agreement or met with Lucy Caruso to discuss and complete the two agreements</u>.

Respondent states in her Brief that:

- the Admission Agreement and Arbitration Agreement were "purportedly signed" by Respondent and Clifford Byars ("Mr. Byars") (Respondent's Brief, p. 1); and

- there were "supposed interactions"[1] between (a) Respondent and Lucy Caruso ("Ms. Caruso") and (b) Mr. Byars and Ms. Caruso to discuss and complete the Admission Agreement and Arbitration Agreement (Respondent's Brief, p. 3).

However, despite producing an Affidavit to the Trial Court which failed to dispute that she and her brother Mr. Byars (1) actually signed the Admission Agreement and/or Arbitration Agreement; or (2) actually met with Ms. Caruso to discuss and complete the two agreements, Respondent once again does not dispute in her Brief that she and Mr. Byars signed the two agreements or met with Ms. Caruso to discuss and complete the two agreements.

Despite taking great efforts throughout her Brief and trial-level Affidavit to incorrectly assert that Appellants' representatives, Christy Drinkard ("Ms. Drinkard") and Ms. Caruso, committed perjury, back-dating, falsification, and a fraud on the court, nowhere in her Brief does Respondent deny that she and Mr. Byars actually signed the agreements or actually met with Ms. Caruso to discuss and complete the agreements, merely that (a) Respondent (but not Mr. Byars) did not allegedly sign these two agreements on the dates which appear on the face of the agreements and (b) Respondent and Mr. Byars were not together at the same time to sign, discuss, and complete the two agreements.

[1] Respondent also puts the words "met" and "personally presented" in quotation marks in her Brief. (Respondent's Brief, p. 3.)

Given the conclusory nature of Respondent's insinuation that she and Mr. Caruso may not have signed the agreements or that they may not have met with Ms. Caruso to discuss and complete the agreements, 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 insinuations are wrong on the merits because arbitration is a matter of contract, and any evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). No requirement exists under contract law – nor has Respondent even attempted to argue – that Respondent and Mr. Byars had to sign the agreements on the same date or in presence of one another.

B. Ms. Caruso's signatures on the Admission Agreement and Arbitration Agreement are presumptively valid, and Respondent has offered no evidence to rebut the presumption.

Respondent states in her Brief that Ms. Caruso "apparently signed" the Admission Agreement and Arbitration Agreement and in Footnote No. 1 goes on to state that "[a] closer review and comparison of Ms. Caruso's signature on multiple documents within the admissions packet indicates it was either pre-printed or otherwise stamped on the documents" and "[i]t also appears a different pen was used for purposes of entry of the date." (Respondent's Brief, p. 4). Respondent later states in her Brief: "it is unclear whether [Ms. Caruso's] signature was pre-printed or stamped upon the document . . . A different pen was clearly used to enter the dates." (Respondent's Brief, p. 7). However, nowhere in her Brief or in her arguments to the Trial Court

does Respondent offer any evidence or legal support for the suggestion that Ms. Caruso's signatures are somehow inauthentic or not genuine.

Given the conclusory nature of Respondent's commentary about Ms. Caruso's signatures, 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 insinuations are wrong on the merits because a stamped signature is a valid form of signing a document and Respondent has offered no basis for doubting the genuineness or authenticity of Ms. Caruso's signature. See, e.g., Smith v. Greenville Cty., 188 S.C. 349, 199 S.E. 416, 418–20 (1938) ("the general rule as to the mode that one may adopt in affixing his signature is . . . as follows: . . . 'The signature may be written by hand, or printed, or stamped, or typewritten, or engraved, or photographed, or cut from one instrument and attached to another.' "); Pee Dee Prod. Credit Ass'n v. Joye, 284 S.C. 371, 375, 326 S.E.2d 650, 653 (1984) ("It is undisputed that a presumption does exist regarding the authenticity of an uncontroverted signature. . . No requirement exists that a signature be witnessed in order to authenticate a document. . . The genuineness of a signature may be established by testimony of one who witnessed the signature where the signature is to be used as a basis of comparison.").

II. Appellants have appropriately preserved their argument that all claims raised by Respondent are subject to arbitration, or, in the alternative, to a non-jury trial.

Respondent incorrectly states in her Brief that Appellants abandoned their alternative remedy of a non-jury trial. (Respondent's Brief, p. 10, n. 3.) Each of the following documents refute Respondent's argument:

(a) the arguments contained in Appellants' Motion and Memorandum in Support of same;

(b) the arguments contained in Appellants' Motion to Alter or Amend;

(c) the Affidavits produced by Appellants;

(d) the plain language of the Admission Agreement made an exhibit to every filing at the trial court level as well as this appeal; and

(e) the hearing transcript before the Trial Court.

Appellants' Motion filed on April 8, 2019 is entitled "NOTICE OF MOTION AND MOTION TO STAY ACTION AND COMPEL ARBITRATION; **IN THE ALTERNATIVE MOTION FOR NONJURY TRIAL**; AND MOTION FOR PROTECTIVE ORDER." (R. p. 127) (emphasis added). Appellants specifically state in their Motion that "**[Appellants] are entitled to a non-jury trial** as a result of the Waiver of Jury Trial provision in the Admission Agreement." (R. p. 128) (emphasis added).

Appellants' Memorandum filed on June 7, 2019 is entitled "MEMORANDUM IN SUPPORT OF 'MOTION TO STAY ACTION AND COMPEL ARBITRATION; **IN THE ALTERNATIVE MOTION FOR NONJURY TRIAL**; AND MOTION FOR PROTECTIVE ORDER' " (R. p. 261) (emphasis added). Appellants specifically state in their Memorandum that "The ADMISSION AGREEMENT contained a **Waiver of Jury Trial** . . ." (R. p. 262) (emphasis added).

Appellants produced an Affidavit from Ms. Caruso which states that:

- "In connection with [Mr. Boles'] admission, I personally presented [Respondent] and Mr. Byars with the admissions documents. . . I described to [Respondent] and Mr. Byars the terms of the agreement and both [Respondent] and Mr. Byars initialed each page confirming all the terms were reviewed and agreed upon. **I explained the waiver of jury trial** . . . provisions to them, and among other things told them that if [Respondent] agreed to these terms, **[Respondent] would be waiving Mr. Boles' right to have a jury hear any dispute**." (R. p. 61, ¶ 8) (emphasis added).

- "I discussed with [Respondent] a separate Arbitration Agreement . . . Here again, **I explained that by signing this agreement, [Respondent] would be waiving Mr. Boles' right to have a jury hear any dispute**. (R. p. 61, ¶ 9) (emphasis added).

The Admission Agreement states:

> **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** . . . 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. 72) (emphasis added).

Appellants' Motion to Alter or Amend filed on August 5, 2019 specifically states: "[t]he Admission Agreement executed on behalf of Mr. Boles by [Respondent] and [Respondent's] brother (Clifford Byars) is valid on its face and contained a **Waiver of Jury Trial**. . ." (R. p. 305) (emphasis added).

Finally, the June 11, 2019 Transcript of the Hearing on Appellants' Motion further refutes Respondent's argument that Appellants waived their alternative remedy of a non-jury trial:

> The Court: Okay. So, it looks like Mr. Barnes, you filed the Motion to Compel arbitration?
> Mr. Barnes: Yes, Your Honor. Walker Barnes on behalf of all Defendants. This is a Motion to Compel Arbitration **in the alternative for a non jury trial** and a Motion for Protective Order.

(R. p. 318, lines 12 – 17) (emphasis added).

> Mr. Barnes: Your Honor, we've submitted, if you look at Exhibit D, the last exhibit that I handed up it is a **affidavit from Lucy Caruso**, who was the admissions director in 2015, at the time of Mr. Boles admission, and **she has sworn to this Court that she would have** explained the concept of arbitration to Ms. Hackworth, the Plaintiff, and would have **literally, specifically explained her waiving a right to a jury trial on behalf of your brother**.

(R. p. 322, lines 17 – 25) (emphasis added).

> The Court: So, which brings me to, so **you asked me for a alternative and one of the alternatives was that it be put on the non-jury docket**, is that ...
> Mr. Barnes: If the decision is to deny the Motion to Compel arbitration **that would absolutely be our second alternative request** but we would prefer to arbitrate the case and we think we have a contractual right to.

(R. p. 325, lines 17 – 24) (emphasis added).

> The Court: Mr. McAllister, **what about the option of putting this on a non-jury docket?**
> Mr. McAllister: Your Honor, we would prefer, obviously, to have a jury of our peers in Beaufort County . . . .

(R. p. 336, lines 2 – 7) (emphasis added).

The Trial Court issued Form 4 denials of Appellants' Motion and Motion to Reconsider. As shown above, both Appellants' Motion and Motion to Reconsider included the alternative remedy of a non-jury trial. The Trial Court gave no indication that its rulings were applicable only to Appellants' request to arbitrate and not to the alternative remedy of a non-jury trial. By obtaining rulings on whether Respondent was bound to arbitrate or, in the alternative, to proceed to a non-jury trial, Appellants preserved their argument that Respondent is bound to arbitrate all claims she raises, or, in the alternative, to proceed to a non-jury trial. Appellants, therefore, are entitled to appellate review of whether Respondent is required to arbitrate all claims raised within her Complaint, or, in the alternative, to a non-jury trial.

III. Respondent has abandoned the issues of unconscionability, lack of meeting of the minds, lack of consideration and mutuality, lack of merger, and inability to bind wrongful death beneficiaries.

In Footnotes 2 and 8 of her Brief, Respondent makes the conclusory statements that she has preserved the right to argue additional defenses against the enforceability of the Admission Agreement and Arbitration Agreement "due to applicable contract law defenses or defects such as unconscionability, no meeting of the minds, lack of consideration and mutuality, … lack of merger . . . [and] other statutory limitations, including an inability to bind wrongful death beneficiaries..." [Respondent's Brief, p. 9, 16]. Respondent also claims that she preserved these arguments at oral argument before the Trial Court and in her two briefs filed with the Trial Court. Id. However, nowhere in her Brief, at oral argument, or in her two briefs before the Trial Court did Respondent offer any evidence, caselaw, or other legal support for the issues of unconscionability, lack of

meeting of the minds, lack of consideration and mutuality, lack of merger, or other statutory limitations, including inability to bind wrongful death beneficiaries.

Given the conclusory nature of Respondent's argument, Respondent's argument as to unconscionability, lack of meeting of the minds, lack of consideration and mutuality, lack of merger, or other statutory limitations, including inability to bind wrongful death beneficiaries 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).

IV. Mr. Byars independently had authority to bind Respondent to the arbitration provision pursuant to the AHCCA because the arbitration provision was contained within the Admission Agreement.

Respondent argues in her Brief that Mr. Byars lacked authority to bind Respondent to the arbitration provision contained within the Admission Agreement and that only Respondent, as attorney-in-fact, could have such authority. (Respondent's Brief, p. 3). Respondent is incorrect in this argument because Mr. Byars (in addition to Respondent) independently had authority to bind Respondent to the arbitration provisions contained in the Admission Agreement pursuant to the South Carolina's Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10, et seq. ("AHCCA").

For the reasons already articulated in Appellants' Brief[2], the South Carolina Supreme Court's reasoning in Coleman v. Mariner Health Care, et al., 407 S.C. 346, 755 S.E.2d 450 (2014) supports Appellants' position on this matter, and Appellants will not repeat those arguments here, other than to point out that, pursuant to the Coleman holding, the AHCCA empowered Mr. Byars (in addition to Respondent) to sign the Admission Agreement on behalf of Mr. Boles and to bind

[2] See Appellants' Brief, p. 5-8.

Respondent to all provisions of that contract, including the arbitration provision.

CONCLUSION

Respondent is bound to arbitrate her claims, or, in the alternative, to proceed to a non-jury trial, and the arguments presented in her 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 proceed to arbitration, or, in the alternative, be remanded to the Trial Court for a non-jury trial.

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

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