THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

RECEIVED
Aug 04 2020
SC Court of Appeals

Case No. 2020-000473

White Oak Manor of Spartanburg . . . . . Plaintiff,

v.

Paulette Smith-Young, ... Defendant,

AND

Paulette Smith-Young, Individually and as The Personal Representative of the Estate of Genobia Smith, Deceased, ... Third-Party Plaintiff,

v.

White Oak Manor-Spartanburg, Inc., d/b/a White Oak of Spartanburg, and White Oak Management, Inc., ... Third-Party Defendants,

OF WHOM

White Oak Management, Inc. is . . . . . Appellant, and

Paulette Smith-Young, Individually and as The Personal Representative of the Estate of Genobia Smith, Deceased is . . . . . Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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STANDARD OF REVIEW

There is no dispute that the standard of review in this appeal is de novo review. Gissel v. Hart, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). Respondent twists this standard by declaring in its Standard of Review section that White Oak Management must prove the existence of contract formation requirements, as if this somehow shifts the applicable standard of review. It does not. The United States Supreme Court has held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability. . . Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (citations omitted). Rather than the "any evidence" standard cited by Respondent, White Oak Management submits that both the formation and the enforceability of the Arbitration Agreement between the parties must be construed in favor of enforcement, and that the review of this construction is de novo on appeal. Kindred Nursing Centers Ltd. Partnership v. Clark, 137 S. Ct. 1421, 1428-1429 (2017) (holding that the FAA's strict construction rule applies to both the formation and enforcement of an arbitration agreement).

I. White Oak Management can enforce the Arbitration Agreement based on the plain application of South Carolina contract law and the construction mandated by the FAA.

The evidence of record in this case establishes an enforceable arbitration contract under the FAA.

A valid contract in South Carolina requires for its enforcement proof of an offer, acceptance of the offer, and consideration. Where an agreement is clear on its face and unambiguous, a court's

only function is to interpret its lawful meaning and the intent of the parties as found within the agreement. See, e.g., Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia, 409 S.C. 568, 762 S.E.2d 696 (2014). There is no evidence in the record that Smith-Young was not authorized to act on behalf of Genobia Smith, or that she did not actually read and sign the Arbitration Agreement on behalf of Genobia Smith.

The Arbitration Agreement provides that it will cover all claims arising out of Genobia Smith's residency at the Facility. Paragraph 14 of the Arbitration Agreement expressly provides that the Arbitration Agreement applies to claims against White Oak Management. Contrary to Respondent's claims, White Oak Management has neither mischaracterized nor misrepresented the holdings in Pearson or International Paper. The analysis in those decisions applies to uphold White Oak Management's right to enforce the Arbitration Agreement.

The Arbitration Agreement intentionally created a direct – and not incidental or consequential – benefit to White Oak Management. The court in Pearson v. Hilton Head Hosp., 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012), relying on International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-17 (4th Cir. 2000), held that "well-established common law principles dictate that in an appropriate case a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." These include principles such as incorporation by reference, assumption, agency, veil piercing/alter ego, and equitable estoppel. International Paper, Id. Further, "[i]t does not follow . . . that under the [FAA] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision." Id. at 416.

Pearson cited and relied upon the South Carolina District Court's opinion in Goer v. Jasco Indus., Inc., 395 F. Supp. 2d 308, 314 n.9 (D.S.C. 2005), which held that "equitable estoppel allows

a non-signatory to compel arbitration . . . when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory." The court also held that "application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise, arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration is effectively thwarted." Id. at 295; see also, J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-321 (4th Cir. 1988).

Looking to (1) the language of the Admission Agreement and Arbitration Agreement (which expressly incorporates claims against White Oak Management), (2) the claims Respondent has raised against White Oak Management, and (3) applying this law, it is abundantly clear that any claims against White Oak Management are substantially intertwined with Respondent's pending claims against White Oak Manor-Spartanburg, Inc., the other signatory to the Arbitration Agreement.[1]

In fact, in Respondent's Counterclaim and Third-Party Complaint, she has alleged that Genobia Smith was a resident at White Oak Manor-Spartanburg, Inc., and that White Oak Management, Inc. provided "critical oversight and management of the facility, and is responsible

[1] Respondent filed the lawsuit styled The Estate of Genobia Smith, through the duly appointed Personal Representative, Paulette Smith Young, Individually and on behalf of statutory beneficiaries v. White Oak Manor, Inc.; **White Oak Management, Inc.**; White Oak Manor-Spartanburg, Inc. d/b/a White Oak of Spartanburg; Inpatient Consultants of North Carolina, P.C.; and Edward Warren, M.D., 2019-CP-42-04347 on December 11, 2019. Defendants White Oak Manor-Spartanburg, Inc., **White Oak Management, Inc.**, and White Oak Manor, Inc. filed a Motion to Compel Arbitration on March 27, 2020. The Consent Order of September 6, 2019 called for the sole remaining claim in this matter against White Oak Management to either be consolidated with the claims from the July 10, 2019 Notice of Intent, or dismissed. Neither of these conditions occurred, resulting in the present posture of this case with White Oak Management named as a defendant in two civil actions based on the same claims.

for management of the facility." Most significant, Respondent thereafter identifies and designates White Oak Manor-Spartanburg, Inc. and White Oak Management, Inc. **collectively as "White Oak" and refers to these two parties collectively in all remaining allegations**. (Third-Party Complaint, ¶ 25). Respondent repeatedly refers to "White Oak's" joint obligations in stating various claims for breach of common law and statutory duties, including "Negligence Per Se," "Agency/Vicarious Liability/Respondeat Superior," "Corporate Negligence," and "Negligence" that allegedly "resulted in injury and wrongful death of Genobia Smith. (Third-Party Complaint, including but not limited to ¶¶ 18, 28, 47, 51, 52, 54, 55, 58-61, 66, 68, 70, 71, 73-75, 77, 78, 81, 84, 85, 88, 89, 91, 92, 95-97). Respondent's Prayer for Relief requested relief only from "White Oak" generally for all of the specifications of harm and damages alleged in the Counterclaim and Third-Party Complaint.[2]

Of serious note, Respondent's reliance on Wilson v. Willis, a case construing whether contracts containing an arbitration clause between insurance companies and insurance agents could bind policyholders, is wholly misplaced. 426 S.C. 326, 827 S.E.2d 167 (2019). The court in Wilson addressed whether an arbitration agreement can be enforced against a nonsignatory, not whether a nonsignatory could enforce arbitration against a signatory.

Further, Respondent misquotes Wilson, surely inadvertently, when she cites the case as follows: "Wilson went a step further, holding that when the issue is whether a non-signatory may enforce an arbitration contract, the presumption is *against* arbitration. 426 S.C. at 337-38, 827 S.E.2d at 173." (Respondent's Brief, p. 10).

[2] Smith-Young's claims in the July 10, 2019 Notice of Intent mirror these claims, as do her claims in the pending 2019-CP-42-04347 case in which White Oak Manor-Spartanburg, Inc. and White Oak Management, Inc. are named defendants.

The case actually holds the opposite, at that citation, as follows: "Moreover, because arbitration, while favored, exists solely by agreement of the parties, a presumption *against* arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate." Wilson, 426 S.C. at 337-38, 827 S.E.2d at 173. Respondent, the party resisting arbitration, is not a nonsignatory, and Wilson has no application to the facts or posture of this case.

Respondent's own allegations of the substantially interdependent and concerted alleged misconduct of White Oak Manor-Spartanburg, Inc. and White Oak Management, through which Respondent alleges joint liability for those alleged wrongs, compels the construction of the Arbitration Agreement to be equally enforceable by White Oak Management. Paragraph 14 of the Arbitration Agreement supports the holding that the parties intended for these claims to be encompassed within the scope of the Arbitration Agreement. To hold otherwise would gut the established federal policy in favor of arbitration, not to mention resulting in inconsistent and unfair results of multiple proceedings in different forums, and a waste of judicial and party resources.

II. White Oak Management did not waive enforcement of the Arbitration Agreement under any construction of the facts and procedure.

White Oak Management relies on its thorough and detailed discussion of the procedural progression of this case and the myriad facts of record establishing that it did not waive its right to enforce the Arbitration Agreement. Nothing in Respondent's Initial Brief supports a claim of waiver under the established law and facts of record in this case.

To briefly address, the FAA requires courts to resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 387-388, 759 S.E.2d 727, 736 (2014) (citations omitted). Dean expressly held that "there is a presumption against finding a party

has waived its right to compel arbitration, . . . and a party seeking to avoid arbitration must show prejudice through an undue burden caused by delay in demanding arbitration.'" Id. The Court in Dean further held that "limited discovery in order to engage in meaningful settlement talks" did not waive arbitration. Id.

White Oak Management never wavered from its position that it was bound by the Arbitration Agreement. White Oak Management was not required to seek arbitration of any claim that was not properly brought. Therefore, it initially sought to dismiss Respondent's procedurally flawed attempts to pursue litigation. This is in no way constituted a waiver. Only after Respondent properly followed the statutory Notice of Intent procedure, and the parties participated in that procedure, did White Oak Management demand arbitration. The Notice of Intent was filed on July 10, 2019. White Oak Management filed its Motion to Compel Arbitration on September 13, 2019, following the failed presuit mediation. It did not at any time prior to that either serve or answer any discovery. No depositions were taken. No evidence was adduced. Respondent thereafter in fact decided to file an entirely new case in December of 2019, naming additional parties. No discovery has been conducted in the case to date. There is zero evidence in the record to support any prejudice, delay, or other detriment to Respondent that would constitute a waiver.

III. Respondent had the right and power to bind a Wrongful Death claim to arbitration.

White Oak Management again relies on its prior arguments. Nothing in Respondent's Initial Brief supports a claim that Respondent could not submit a Wrongful Death claim to arbitration.

To briefly address, South Carolina's Wrongful Death Statute is a derivative action that is able to be disposed of and/or restricted by the decedent or his attorney-in-fact during his lifetime.

Although the case law in South Carolina has not directly addressed the issue at hand, the court has not been hesitant to prohibit wrongful death actions in which the decedent had in some way barred himself from pursuing the underlying cause of action. In Price v. Richmond & D.R. Co., 33 S.C. 556, 12 S.E. 413 (1889), the court determined that a release executed by the decedent prior to his death prevented a wrongful death action brought by the decedent's wife. The court's decision was premised upon the limiting language of the wrongful death statute. The Price court held that if the defendant in some way deprived himself of the right to pursue a cause of action, "his administrator is, likewise, [also] barred of his right of action." Id. at 560, 12 S.E. at 413. Furthermore, the court in Reed v. Northeastern R. Co., 37 S.C. 42, 16 S.E. 289 (1892) affirmed the Price holding and found that "[a]nything that would have defeated [the decedent's] recovery would defeat that in behalf of his family in case he failed to survive." Reed at 53, 16 S.E. at 291.

In Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988), the South Carolina District Court interpreted the Wrongful Death statute, and held that a survivor cannot bring an action under the wrongful death statute to recover for the same wrong sued upon earlier by the decedent, if the personal injury statute of limitations has expired, but the specific wrongful death limitations period has not expired. This clearly establishes that Wrongful Death cause of action is wholly derivative. The District Court, sitting in diversity, examined the issue as the highest court of South Carolina would if confronted with the same situation. It then traced the history of wrongful death claims starting with Lord Campbell's Act. It further held that the same defenses that would have been available to use against the decedent, has he lived, were also available against those asserting the wrongful death claim.

The South Carolina courts would no doubt find that the wrongful death statute contains language establishing a condition precedent to the right to bring a wrongful death claim. Therefore,

a new statutory right is created by S.C. Code Ann. § 15–51–10 in the personal representative of the decedent which can only be maintained if the decedent, had he lived, could have maintained such an action. If the decedent never had a cause of action, none accrues under the wrongful death statute. Scott v. Greenville Pharmacy, Inc., 212 S.C. 485, 48 S.E.2d 324, 326 (1948). Furthermore, anything that would have defeated the decedent's recovery had he survived the accident, "such as contributory negligence, a valid release, or similar acts on his part," would defeat the right of recovery in behalf of his family in case of his death. Reed, 37 S.C. at 53, 16 S.E. at 291. It follows logically that the Respondent's execution of Arbitration Agreement would defeat her right as the personal representative to now disavow her actions. Therefore, because the Arbitration Agreement bound Genobia Smith, it bound her representative.

Because she signed the Arbitration Agreement in her legal capacity on behalf of her mother - and not in her own capacity - she had every right to exercise her mother's option to bind her own heirs. Cases holding that wrongful death claims are not subject to arbitration agreements are generally decided that way because the person signing on behalf of the resident did not have authority to sign on the resident's behalf. Here, there is no challenge to Smith-Young's authority to sign the Arbitration Agreement on behalf of her mother. Her mother had full authority to defer wrongful death claims to arbitration, and did so. See Diversicare Leasing Corp. v. Hubbard, 189 So.2d 24 (Ala. 2015) (holding that "an arbitration agreement that binds the nursing-home resident also binds the resident's representative") (further holding that personal representatives of estates of deceased nursing home residents who properly signed arbitration agreements on behalf of residents "were bound to arbitrate the wrongful-death claims" of the resident's estates.) Id. at 28 and 30; Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004) (holding that personal representatives of nursing home residents were bound by arbitration provisions contained

in admission contracts, arbitration provision was not unconscionable, and not a contract of adhesion); Owens v. Coosa Valley Heath Care, Inc., 890 So.2d 983 (Ala. 2004) (holding that arbitration agreement bound both resident and representative); Estate of Eckstein ex rel. Luckey v. Life Care Centers of America, Inc., 623 F. Supp. 2d 1235 (E.D. Wash. 2009)(holding that claims for neglect, corporate negligence, and wrongful death were subject to arbitration based on arbitration agreement signed by resident's attorney-in-fact that was binding on the estate); Laizure v. Avante at Leesburg, Inc., 109 So.3d 752 (Fla. 2013) (arbitration agreement covered wrongful death claims, and estate and statutory heirs were bound by the arbitration agreement).

Respondent's arguments ignore the clear language of the Arbitration Agreement and the practicalities of arbitration agreements in the long term care context. "[T]o hold otherwise would eviscerate a long term care provider's contractual rights when presented with a wrongful death claim of a resident, the very claim anticipated by the Agreement." Estate of Eckstein, 623 F. Supp. at 1239. See also Sanford v. Castleton Health Care Center, LLC, 813 N.E.2d 411, 420 (Ind. Ct. App.2004) (holding the estate's wrongful death claim was subject to arbitration because "regardless of whether [the personal representative], was privy to the contract containing the arbitration clause, the Estate's survival and wrongful death claims arose out of [Defendant's] alleged negligent treatment of [the resident]")

The Wrongful Death statute clearly derivative. A claim under it only arises if there is a wrongful act that would have been actionable by the decedent, if he had not died. Likewise, if a wrongdoer dies, a wrongful death action survives against the personal representative. Taking Respondent's argument to its logical end, this would mean that the personal representative is personally liable for the decedent's wrongdoing, and he - along with the other heirs - must personally pay any resulting award. Such an absurd outcome would not stand.

Execution of a nursing home arbitration agreement by a party with the capacity to contract binds the decedent's estate and statutory heirs in a subsequent wrongful death action arising from an alleged tort within the scope of an otherwise valid arbitration agreement.

IV. Respondent's argument regarding "additional sustaining grounds" do not impact the enforceability of the Arbitration Agreement.

The additional sustaining grounds raised by Respondent are as follows: (1) Paragraph 14 is a pre-injury exculpatory provision; (2) Paragraph 14 is not supported by consideration, and (3) Paragraph 14 is unconscionable.

The Supreme Court in Kindred expressly addressed the distinction between "contract formation" and "contract enforcement," rejecting the argument that the FAA applied to the latter and not the former. The Court held that "[b]oth the FAA's text and our case law interpreting it say otherwise. The Act's key provision, once again, states that an arbitration agreement must ordinarily be treated as 'valid, irrevocable, and enforceable.' By its terms, then, the Act cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]' – that is, about what it takes to enter into them. Or said otherwise: A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreement once properly made. Precedent confirms that point. In [AT&T Mobility LLC v.] Concepcion, we noted the impermissibility of applying a contract defense like duress 'in a fashion that disfavors arbitration.' 563 U.S. at 341 . . . But the doctrine of duress, as we have elsewhere explained, involves 'unfair dealing at the contract formation stage.' [citations omitted] Our discussion of duress would have made no sense if the FAA, as the respondents contend, had nothing to say about contract formation." Id. at 1428.

Moreover, the evidence of record before the trial court, or rather the lack thereof, does not support a finding that any of the additional sustaining grounds would prohibit enforcement of the Arbitration Agreement.

First, there simply is no pre-injury exculpatory provision. Paragraph 14, as argued exhaustively, makes the Arbitration Agreement enforceable by and against White Oak Management to the same extent as White Oak Manor-Spartanburg, Inc. Public policy in no way prohibits the presentation, review, and signing of a document by a resident's lawfully designated attorney-in-fact. CMS rules expressly allow for pre-injury arbitration agreements as long as they are not a condition of admission to a nursing facility. See 42 U.S.C. § 483. Nothing in the Arbitration Agreement required Respondent to sign as a condition of admission. Further, the Supreme Court in Kindred held in no uncertain terms that attorneys-in-fact under a general durable power of attorney have the authority to bind the principal to pre-dispute arbitration agreements.

Which begs the second points, the allegations of lack of consideration. The Arbitration Agreement itself patently states that the parties acknowledge the mutual consideration involved. The consideration includes, but is not limited to, a quicker resolution of the claims, the ability to choose any individual to represent the resident at the arbitration (or to represent oneself), thereby avoiding attorneys' fees, the relaxed standards for presentation of evidence, and the ability to choose an arbitrator. See, e.g., AT&T Mobility v. Concepcion, 563 U.S. 333, 344-45 (2011).

Likewise, there is no evidence supporting a claim of unconscionability. The Arbitration Agreement was not an adhesion contract, signing it was not required to gain admission for Genobia Smith to White Oak Manor-Spartanburg, it contained an opt-out clause that Respondent initialed in addition to signing the Arbitration Agreement, and it foreclosed no particular type of recovery; it only specified a forum. In Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360

(2001), the Court held that even an adhesion contract is not per se unconscionable, and that a person who can read is bound to read an agreement before signing it. It further held that the debtors in that case were not deprived of a remedy, but were simply required to seek their remedy through arbitration rather than litigation.

There is no evidence in the record that Respondent felt compelled in any way to sign the Arbitration Agreement, or that she had any absence of meaningful choice. The plain language of the Arbitration Agreement gives her choices, and she acknowledged them in writing. A determination of unconscionability is a fact-driven issue. There is no factual record. Respondent has argued, with no factual support, that the Arbitration Agreement was offered on a take it or no admission basis. There is no evidence in the record at all, beyond the terms of the Arbitration Agreement itself, that discloses the alleged unconscionable circumstances under this Respondent claims she signed the Arbitration Agreement. The record does establish three dispositive facts:

(1) Paulette Smith-Young was legally authorized to sign the Arbitration Agreement as her mother's attorney-in-fact;

(2) The Arbitration Agreement expressly stated that it was optional, revocable, and not a condition of admission; and

(3) Paulette Smith-Young signed it.

Arguments asking the Court of Appeals to find the Arbitration Agreement as a whole invalid have no place in this appeal of an Order denying a Motion to Compel Arbitration, and are more suited for an appeal granting such a motion. The arguments are speculative and are not based in facts developed in the record (because the parties did not participate in discovery). There is no evidence that Respondent did not read the Arbitration Agreement, understand the Arbitration

Agreement, or that that there was any fraud, duress, or other unconscionable conduct involved in the formation of the Arbitration Agreement.

CONCLUSION

Smith-Young, with express and uncontradicted authority, signed a valid Arbitration Agreement that bound over all of the claims raised in the Counterclaim and Third-Party Complaint against White Oak Management to arbitration. White Oak Management therefore respectfully requests that the Court of Appeals reverse the trial court's order holding otherwise.

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In The Court of Appeals

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Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2018-CP-42-04174

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v.

Paulette Smith-Young, ... Defendant,

AND

Paulette Smith-Young, Individually and as The Personal Representative of the Estate of Genobia Smith, Deceased, ... Third-Party Plaintiff,

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OF WHOM

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Paulette Smith-Young, Individually and as The Personal Representative of the Estate of Genobia Smith, Deceased is . . . . . Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Initial Reply Brief of Appellant was served upon the following on August 4, 2020 via electronic transmission and via United States Postal Service, with proper postage affixed thereto to the following address(es):

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August 4, 2020

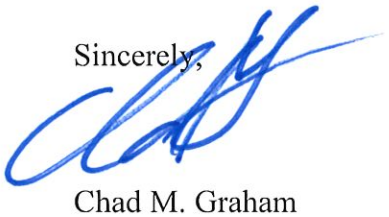
The Honorable Jenny Abbott Kitchings
Court of Appeals Clerk of Court
PO Box 11629
Columbia, South Carolina 29211

Re: White Oak Manor v. Paulette Smith-Young
Appellate Case No. 2020-000473

Dear Ms. Kitchings:

Enclosed find one (1) original and one (1) copy of the Initial Reply Brief of Appellant, White Oak Management, Inc. Also, please find a Certificate of Service enclosed herewith. Please file the originals and return the clocked copies to me in the postage-paid, self-addressed envelope provided.

Sincerely,



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