THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2018-CP-42-03421
Appellate Case No. 2020-001146

Armando J. Acevedo,
through his Attorney-in-Fact,
Marianne Acevedo,

Respondent,

v.

Hunt Valley Holdings, LLC;
THI of South Carolina, LLC; and
THI of South Carolina at Camp Care, LLC,
d/b/a Lake Emory Post Acute Care,

Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
Kate C. Mettler (SC Bar No. 103762)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Appellants make the following points in reply to Plaintiff's responsive brief.[1]

ARGUMENT

1. Even assuming, *arguendo*, it does not violate the FAA's "equal footing" rule, the "presumption against arbitration when enforcement is sought against a non-signatory"[2] is inapposite here.

In setting forth the standard of review, Plaintiff cites *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019), for the proposition that "there is a presumption against arbitration when enforcement is sought against a non-signatory." (Br. of Respondent p. 4.) But even assuming, *arguendo*, such a presumption does not violate the FAA's "equal footing" rule,[3] it has no application in this case.

---

[1] Shorthand references already defined in Appellants' principal brief are continued in this reply brief (e.g., the "Facility" is Defendant-Appellant THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post Acute Care; "THISC" is Defendant-Appellant THI of South Carolina, LLC; "HVH" is Defendant-Appellant Hunt Valley Holdings, LLC; collectively, the Facility, THISC, and HVH are "Appellants;" and "Plaintiff" is Plaintiff-Respondent, Armando J. Acevedo ("Mr. Acevedo"), through his Attorney-in-Fact, Marianne Acevedo ("Mrs. Acevedo").)

[2] (Br. of Respondent p. 4.)

[3] As explained in Appellants' principal brief, the FAA requires arbitration agreements to be placed on equal footing with other contracts under state law and prohibits courts from setting aside arbitration agreements based on state-law defenses "that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Thus, under the FAA, there cannot be a presumption against enforcement of arbitration agreements against nonsignatories unless the same presumption also applies to enforcement of all other contracts against nonsignatories. In recognizing "a presumption *against* arbitration . . . where the

"A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney." *Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) (quoting *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)) (internal quotation marks omitted). "[T]he holder of [the] power of attorney *steps into the shoes of the grantor and is basically the alter ego of the grantor*." *Bennett v. Carter*, 421 S.C. 374, 382, 807 S.E.2d 197, 201 (2017) (emphasis added). An attorney-in-fact who signs a document on behalf of the principal who granted him/her power of attorney is legally indistinct from the principal, and thus, the law does not view Mr. Acevedo as a nonsignatory to the instant Arbitration Agreement.

---

party resisting arbitration is a nonsignatory to the written agreement to arbitrate," the authority cited by the *Wilson* Court, none of which was in fact South Carolina authority, addressed arbitration in particular, not contracts generally. 426 S.C. at 337–38, 827 S.E.2d at 173 ("*Global Pac., LLC v. Kirkpatrick*, 88 N.E.3d 431, 435 (Ohio Ct. App. 2017) ('Because no party can be required to submit to arbitration when it has not first agreed to do so, in a case where the party resisting arbitration is not a signatory to any written agreement to arbitrate, a presumption against arbitration arises.'); *cf. Comer v. Micor, Inc.*, 436 F.3d 1098, 1103–04 (9th Cir. 2006) (noting 'the general rule that a nonsignatory is not bound by an arbitration clause')."").

2. Plaintiff's contention that "the Arbitration Agreement's arbitrator selection process is too vague to permit enforcement"[4] is without merit.

Plaintiff contends the "panel" process for arbitrator selection (i.e., the language in the Arbitration Agreement about "[t]he parties . . . select[ing] an arbitrator from a panel having experience and knowledge of the health care industry") is "inscrutable"[5] and prevents implementation of any alternative arbitrator selection process. (Br. of Respondent p. 9 n.3 ("Appellants may also argue the vagueness of the 'panel' is immaterial because both the Arbitration Agreement [(providing for selection of an arbitrator by the court)] and the FAA [(*see* 9 U.S.C. § 5)] provide an alternative mechanism for arbitrator selection. But, by its terms, this alternative mechanism may not be implemented unless the 'panel' process fails. The 'panel' process cannot fail (or even commence) because its parameters lack the clarity required to be attempted.") (internal citations omitted).) This is not so.

The Arbitration Agreement does not say that the "panel" process must first be tried and fail before any alternative can be implemented. It simply says, "*If the parties cannot reach a mutual decision on the selection of an arbitrator*, the *parties agree* that an arbitrator *shall be* selected by the Court." (Arbitration Agreement (emphasis added).) This language in no way conditions

---

[4] (Br. of Respondent p. 8.)

implementation of this alternative method of arbitrator selection on the parties having first tried the "panel" process and failed, or indeed on there being any particular reason at all why the parties cannot agree on an arbitrator.[6] And to construe the Arbitration Agreement as doing so would be absurd and contrary to the rules of contract interpretation. *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) ("An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided."); *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975) ("Where a construction of a contract makes it unusual or extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail.").

3. Plaintiff is wrong to suggest that the evidentiary and procedural provisions of Rule 12 of the South Carolina ADR Rules do not apply here.

The Arbitration Agreement expressly states that arbitration shall be as provided by the South Carolina ADR Rules. (Arbitration Agreement.) As Plaintiff herself recognizes, Rule 12 of these rules includes "substantive evidentiary and procedural provisions." (Br. of Resp. p. 8.) While she tries to cast these

---

[5] (Br. of Respondent p. v.)

provisions aside as applying only to non-binding arbitrations, she ignores the plain language of Rule 12(a) stating that the parties may agree to apply them in binding arbitration. *See* Rule 12(a), SCADR ("Arbitrations selected by the parties under these rules are deemed non-binding arbitrations *unless otherwise expressly agreed by the parties*.") (emphasis added). Here, the Arbitration Agreement expressly states both that arbitration is under the South Carolina ADR Rules and that arbitration is binding. (Arbitration Agreement.)

Again, as explained in Appellants' principal brief, the Arbitration Agreement does not lack any material term or suffer from any fatal ambiguity. Provided they meet their mutual obligations of good faith and fair dealing,[7] which obligations include, the Facility submits, the obligation to refrain from asserting disingenuous or absurd interpretations of the contract in an effort to undermine it, there is no good reason why the parties cannot arbitrate the instant dispute in accordance with the Arbitration Agreement.

4. Plaintiff's unconscionability argument is without merit.

Regarding Plaintiff's contention about the supposed incongruity between the arbitration process and the discovery needs in medical malpractice cases (to

---

[6] FAA § 5 has no such condition either. By its plain language, it applies "if for *any other reason* there shall be a lapse in the naming of an arbitrator . . . or in filling a vacancy . . . ." (emphasis added). 9 U.S.C. § 5.

include her contention about the supposed unfairness resulting from the requirements of S.C. Code Ann. § 15-79-125[8]), first off, this amounts to a wholesale attack on the enforceability of arbitration agreements in the medical malpractice context, which violates the FAA. *See Concepcion*, 563 U.S. at 339. Similarly, and besides being unfounded factually—given that the Arbitration Agreement is a one-page instrument with the words "***PLEASE READ CAREFULLY***" / "**FACILITY-RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT**" at the top[9]—Plaintiff's argument about the supposed "lack of conspicuousness"[10] of the Arbitration Agreement amounts to an improper attempt to invalidate it on the basis of a state-law defense that does not apply to contracts generally,[11] which, again, violates the FAA. *See Concepcion*, 563 U.S. at 339.

---

[7] There is, of course, an implied covenant of good faith and fair dealing in every contract. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995).

[8] Plaintiff says this allowed Appellants to "kn[o]w the identity of [her] expert and an outline of her [expert's] opinions before the Complaint was even filed." (Br. of Respondent p. 14.) Appellants submit there is nothing unfair about them being made aware of the accusations against them.

[9] (Arbitration Agreement (emphasis in original).)

[10] (Br. of Respondent p. 11)

[11] Pursuant to S.C. Code Ann. § 15-48-10, "Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." There is no such requirement under the FAA.

In any event, Plaintiff's concerns are unfounded. She herself recognizes that the Arbitration Agreement calls for arbitration to be conducted under the South Carolina ADR Rules, that the South Carolina ADR Rules *must* ("shall") be "construed to secure the just, speedy, inexpensive and collaborative resolution" of disputes, and that "an arbitration proceeding amounting to a trial by ambush" would *not be consistent* with the South Carolina ADR Rules. (Br. of Respondent p. 13; *see also* Rule 1, SCADR.) Accordingly, by her own logic (indeed all logic), there is no cause for concern. The Arbitration Agreement expressly calls for arbitration *consistent with* the South Carolina ADR Rules, the very same rules that Plaintiff acknowledges *are geared toward* "secur[ing] the just, speedy, inexpensive and collaborative resolution" of disputes and *do not allow for* "an arbitration proceeding amounting to a trial by ambush."

Further still, both the South Carolina ADR Rules (*see* Rule 12) and the FAA itself (*see* § 7[12]) provide all the tools necessary for the proceedings, including

[12] FAA § 7 provides:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a

discovery therein, to be conducted in a way that affords Plaintiff a fair and meaningful opportunity to present her case in arbitration, with no more limitation thereon than that which is inherent in the arbitration process generally as an alternative to litigation, an alternative, which, again, "both state and federal policy favor . . . ." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

5. Plaintiff mischaracterizes Appellants' Argument II.

Plaintiff contends, "Appellants' Argument 2 should also fail because, while Appellants fault the circuit court for ruling on Hunt Valley's jurisdiction-based motion, Appellants' motion to alter or amend judgment specifically asked the circuit court to address that motion." (Br. of Respondent p. 5 n.1.) The main point of Appellants' Argument II is not to fault the circuit court, but rather to confirm

---

> majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

that the matter of the Motion to Dismiss having been withdrawn without prejudice is *not* something that constitutes error that must be corrected on appeal or else go uncorrected. It is expressly only "*to the extent that* it constitutes error that HVH must seek to correct on appeal, as opposed to a matter that HVH may address in the circuit court directly (via Rule 60 or any other appropriate procedural vehicle for relief)," that error is argued. (Br. of Appellant p. 22 (emphasis added).)

By way of further explanation regarding this issue. The Motion to Dismiss was withdrawn without prejudice by agreement of the parties at the February 1, 2019, hearing on Appellants' principal motions. (2/1/19 Tr. pp. 3:1–6:5.) In the interim between that hearing and the filing of the circuit court's corresponding order on October 21, 2019, the attorney in Appellants' counsel's firm who had appeared at the hearing switched firms. (Notice of Transfer Within Firm.) Unaware that the Motion to Dismiss had been withdrawn, but seeing on the clerk of court's online public index that all of the motions that had been set for hearing on February 1, 2019, were shown as having been completed on that date, via Rule 59(e) motion, the undersigned asked the circuit court to "clarify" what motions were disposed of by the October 21, 2019, order. (Motion to Reconsider and Exhibit A.) It was not until after this appeal had been taken, upon review of the

---

9 U.S.C. § 7.

February 1, 2019, hearing transcript, that the undersigned realized the Motion to Dismiss had been withdrawn by agreement without prejudice.

While, again, if it must, HVH contends it was error for the circuit court to rule on the Motion to Dismiss after it had been duly withdrawn without prejudice; however, its primary point is that it seems rather obvious, especially in view of the "just" construction of the rules mandated by Rule 1, SCRCP, that this matter is more fairly characterized as an oversight than as a legal error and it ought to be correctable in the circuit court directly (via Rule 60 or any other appropriate procedural vehicle for relief) at such time (procedurally speaking) as that court is granted leave or otherwise empowered to do so.

6. The Court should reject Plaintiff's additional sustaining ground.

(a) Plaintiff has already conceded Mrs. Acevedo's authority to sign the Arbitration Agreement for Mr. Acevedo under the power of attorney.

As stated in Appellants' principal brief, "It is undisputed that Mrs. Acevedo was duly authorized to sign the Arbitration Agreement for Mr. Acevedo as his attorney-in-fact." (*See, e.g.,* Memo in Opposition to Motion to Compel Arbitration p. 2 ("[Mrs. Acevedo] . . . has power of attorney over [Mr. Acevedo] who was admitted into [the Facility] on July 12, 2017."); *see also* 2/1/19 Hr'g Tr. p. 6:12–14.) Moreover, Mrs. Acevedo has brought this lawsuit on behalf of Mr. Acevedo on the basis that she holds power of attorney over him—which power she

necessarily concedes authorizes her to affect his legal rights, including the right to waive his right to a jury trial[13]—and there is no indication anywhere in the record of any other power of attorney that Mrs. Acevedo holds over Mr. Acevedo besides the one that she now, for the first time, says does not authorize her to agree to arbitration on Mr. Acevedo's behalf. Plaintiff has already conceded Mrs. Acevedo's authority to sign the Arbitration Agreement for Mr. Acevedo and cannot argue this issue now. *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal.").

(b) The power of attorney granted Mrs. Acevedo authority to sign the Arbitration Agreement on Mr. Acevedo's behalf.

In *Kindred Nursing Centers Limited Partnership v. Clark*, the United States Supreme Court rejected Kentucky's "clear statement rule," which provided a power of attorney could not entitle a representative to enter into an arbitration agreement without specific language granting that authority. 137 S. Ct. at 1421, 1426–27 (2017). The Court explained, "Because that rule singles out arbitration agreements for disfavored treatment . . . it violates the FAA." *Id.* at 1425. South Carolina law does not require an act to be specifically enumerated in a power of attorney in order for the agent to be authorized to perform the act on behalf of the

[13] In this regard, Appellants note that agreeing to arbitration is not the only way to waive the right to a jury trial. Agreeing to settle a lawsuit is to agree

principal. *See First S. Bank v. Rosenberg*, 418 S.C. 170, 181, 790 S.E.2d 919, 925–26 (Ct. App. 2016) (rejecting appellant's contention "that an agent cannot sign a guaranty on behalf of his principal pursuant to a power of attorney unless the power of attorney specifically authorized the execution because this assertion is unsupported by South Carolina law"). Accordingly, under the FAA's "equal footing" rule, a power of attorney does not need to explicitly refer to arbitration in order to grant the agent authority to execute an arbitration agreement as long as the powers granted are broad enough to include such an act.

Plaintiff's reliance on *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), is misplaced. The *Coleman* Court's analysis of the meaning of "health care" was specifically in reference to the determination of the "nature and scope of authority granted a surrogate by the Adult Health Care Consent Act," S.C. Code Ann. §§ 44-66-10 to -80 (the "AHCCA"). *Coleman*, 407 S.C. at 350, 755 S.E.2d at 453. The power of attorney at issue here is a South Carolina Statutory Health Care Power of Attorney, *see* S.C. Code Ann. §§ 62-5-500 to -518 (the "Health Care POA Act"), and the relevant statutory language is materially different from that of the AHCCA.

In accordance with the Health Care POA Act, the power of attorney granted Mrs. Acevedo broad authority:

---

to forego the right to a jury trial.

> To take any other action necessary to making, documenting, and assuring implementation of decisions concerning [Mr. Acevedo's] health care, *including, but not limited to*, granting *any waiver of release from liability* required by any hospital, physician, nursing care provider or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and *pursuing any legal action* in [Mr. Acevedo's] name, and at the expense of my estate to force compliance with my wishes as determined by [Mr. Acevedo's] agent.

(Power of Attorney p. 3 ¶ 4(D)) (emphasis added).) *See* § 62-5-504.

The power of attorney explicitly granted Mrs. Acevedo the authority to admit Mr. Acevedo to a skilled nursing facility and to take any actions necessary to assure implementation of his health care decisions, including: (i) pursuing legal actions, (ii) settling legal actions, (iii) waiving claims and liability, and (iv) forcing compliance with Mr. Acevedo's wishes.[14] These broad powers, expressly stated to be *without limitation*, are not limited in any way in paragraph 4(E) of the power of attorney. (Power of Attorney p. 4 ¶ 4(E) (providing space, marked "N/A" on Mrs. Acevedo's power of attorney, for the grantor to exclude or limit powers grated) (emphasis added).) *See* § 62-5-504. Mrs. Acevedo was duly empowered under the power of attorney to sign the Arbitration Agreement on Mr. Acevedo's behalf.

[14] The matter of the forum for the enforcement of compliance with Mr. Acevedo's health care wishes, and the selection thereof, is directly related to the matter of forcing compliance with Mr. Acevedo's health care wishes.

CONCLUSION

For the foregoing reasons, along with those set forth in their principal brief, Appellants ask this Honorable Court to reverse the circuit court, specifically, to compel Plaintiff's claims against the Facility to arbitration (or, alternatively, to remand the case to the circuit court with instructions that it do so); to stay this action until any and all arbitration proceedings are completed (or, alternatively, to remand the case to the circuit court with instructions that it either do so or conduct any further proceedings necessary to decide the Motion to Stay on the merits); and, to the extent that it constitutes error that HVH must seek to correct on appeal, as opposed to a matter that HVH may address in the circuit court directly (via Rule 60 or any other appropriate procedural vehicle for relief), to vacate the circuit court's denial of the Motion to Dismiss (or, alternatively, to remand the case to the circuit court with instructions that it do so).

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
Kate C. Mettler (SC Bar No. 103762)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

Charleston, South Carolina

February 19, 2021