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SC Court of Appeals

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.

RESPONDENT'S PETITION FOR REHEARING

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Respondent, pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, hereby petitions for a rehearing or rehearing *en banc* of the decision in this appeal based on the following grounds:

In its opinion, the Court misapprehended or overlooked three key things. First, the Court misapprehended or overlooked the fact that the Dispute Resolution Program ("DRP") was not found to be an ambiguous contract. If a contract is not ambiguous, then it must be construed according to the terms the parties have used. Second, the Court misapprehended or overlooked the fact that the DRP was drafted by Appellants. Even if the DRP were found to be ambiguous, the Court would have to construe the ambiguous language against Appellants as the drafting party. Third, the Court misapprehended or overlooked the fact that the language on which it bases its opinion—that the parties wish to "have all disagreements resolved through the dispute resolution program[]"—is general language, while the definition of "Dispute" is a specific term, and the Court is required to give effect to specific terms over any general language.

1. **The Court misapprehended or overlooked the fact that the DRP was not found to be ambiguous, and that without a finding that the DRP was ambiguous, the Court was required to enforce the DRP as written instead of giving its interpretation**

It is well settled that "[w]hen a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc., 588 S.E.2d 112, 115 (S.C. 2003). Nowhere in the opinion did the Court find that the language of the DRP was ambiguous, and yet it interprets the contract as if it were ambiguous. The Court overlooked or misapprehended the requirement that it must first find that the DRP was ambiguous before it could interpret the contract. In its Order, the Court even tacitly admits that the DRP is not ambiguous by stating "[t]his ruling makes sense if one isolates

his or her focus to the literal reading of the agreement's 'dispute' definition." (Order p. 4). "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). Here, the Court overlooked or misapprehended the fact that the DRP was not ambiguous, so that the plain language of the DRP is binding. That plain language includes the definition of "Dispute" which is "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*).

2. **The Court misapprehended or overlooked the fact that Appellants, which are a sophisticated group of large corporations, drafted the Dispute Resolution Program so that the Dispute Resolution Program must be construed against them in the event of any ambiguity**

In its Order, the Court misapprehended or overlooked the fact that the Dispute Resolution Program ("DRP") was drafted by Appellants. If a court finds that a contract is ambiguous, then any doubts and ambiguities in a contract must be construed against the drafter. See Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 309, 698 S.E.2d 773, 778 (S.C. 2010). Further, "[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). 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, the Court is required to construe that ambiguity against Appellants who drafted the contract. This is even more imperative in the present case where Appellants are a group of sophisticated corporations operating throughout the United States, while Respondent was an unsophisticated individual. See Impac Mortg. Holdings, Inc. v. Timm, 226 A.3d 323, 342 (Md. Spec. App. 2020), cert. granted, 232 A.3d 257 (Md. 2020), and aff'd, 255 A.3d 89 (Md. 2021)("There are sophisticated parties on both sides of this preferred stock relationship, and they are bound by the unambiguous terms of the documents memorializing that relationship."); see also Progressive Intern. Corp. v. E.I. Du Pont de Nemours & Co., C.A. 19209, 2002 WL 1558382, at 1 (Del. Ch. July 9, 2002)("Sophisticated parties are bound by the unambiguous language of the contracts they sign."). In its opinion, the Court took the extraordinary step of construing a contract against the non-drafting unsophisticated party, and in favor of the drafting sophisticated party.

3. **The Court misapprehended or overlooked the fact that "Dispute" was a specifically defined term while the language it cited was general**

In its opinion, the Court states that:

> "[t]he agreement begins by stating the parties' desire to 'have all disagreements resolved through the dispute resolution program.' In similar fashion, the agreement closes with a reference to the parties 'agreeing to have all disagreements resolved through the dispute resolution program.' The obvious intention is that most disputes will go through arbitration—claims of lesser value are defined to not even be 'disputes'—and one cannot come away from the agreement without the idea that the parties intended for the agreement to comprehensively describe how they would handle all of their disputes and disagreements." (Order p. 5).

Under any interpretation, the DRP does not apply to disputes for less than $50,000.00. Therefore, the language cited by the Court at the beginning and the end of the DRP that the

parties intend to "have all disagreements resolved through the dispute resolution program[]" does not match with the remaining language of the DRP. Further, it does not match up with what the Court deems to be the "obvious intention"- that most disputes "will go through arbitration—claims of lesser are defined to not even be 'disputes'—and one cannot come away from the agreement without the idea that the parties intended for the agreement to comprehensively describe how they would handle all of their disputes and disagreements." (Order p. 5). While this portion of the DRP discusses applying to all "disagreements," the language of the DRP itself makes clear that the DRP only applies to "Disputes." 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*). "Parties 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). In its order, the Court misapprehends or overlooks the fact that disputes and disagreements are not synonymous in the DRP. Instead of giving effect to the definition of "Dispute" contained in the DRP, the Court relies on the general language regarding "hav[ing] all *disagreements* resolved through dispute resolution program." (*emphasis* added). This interpretation misapprehends or overlooks two key principals of contract interpretation. First, "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., 357 S.E.2d 714, 715 (S.C. App. 1987), aff'd, 373 S.E.2d 584 (S.C. 1988). The parties in this case defined "Dispute" in the DRP and are now bound by that definition. Second, it is well settled

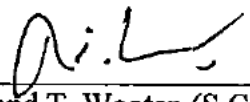
that "[a] proper construction of a contract requires the court to give effect to specific terms over any general language." Crenshaw v. Erskine College, 850 S.E.2d 1, 15 (S.C. 2020), reh'g denied (Nov. 30, 2020). Here, the Court should have given effect to the definition of "Dispute" specifically set forth by the parties in the DRP instead of relying on the general language regarding "hav[ing] all disagreements resolved through dispute resolution program."

The Court later states "[p]utting aside the practical question of how one would enforce a contract binding someone to arbitrate claims with precisely $50,000 in controversy—could a plaintiff simply plead damages of one cent more or less and completely avoid arbitration?—the agreement's purpose was directly advertised as covering all disagreements, not discussing some and ignoring others." (Order p. 5). Under any interpretation of the DRP, arbitration could be avoided by pleading damages that are one cent less than $50,000.00. This shows that, despite general language in the DRP, it's true purpose was not to "cover all disagreements." The Court overlooked or misapprehended the specific definition of "Dispute" and instead looked to general language in the DRP. While the Court points out what it perceives to be the intention of the parties to the DRP, it cannot rewrite the DRP same *sua sponte*. Instead, the Court must enforce the contract, as written.

CONCLUSION

Respondent therefore respectfully requests a rehearing or rehearing *en banc* in this case on the grounds raised above.

RESPECTFULLY SUBMITTED,



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October 20, 2021

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Appellants.

PROOF OF SERVICE

I certify that I have served the RESPONDENT'S PETITION FOR REHEARING on the counsels addressed below, by email and by depositing a copy of it in the United States mail, postage prepaid, on October 20, 2021, addressed to the counsels of record and unrepresented parties at the following addresses:

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October 20, 2021

VIA ELECTRONIC FILING, EMAIL TO CTAPPFILINGS@SCCOURTS.ORG AND FIRST CLASS MAIL

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

RE: Betty Herrington v. SSC Seneca Operating Company, LLC, d/b/a Seneca Health & Rehabilitation Center; SavaSeniorCare Administrative Services, LLC; SavaSeniorCare Consulting Services, LLC
C.A. No.: 2018-CP-37-00271
Appellate Case No.: 2018-002088

Dear Ms. Kitchings:

Please find enclosed the original and six (6) copies of the Respondent's Petition for Rehearing as well as the original and two (2) copies of the Proof of Service in the above captioned matter. Further, please find enclosed a check for the filing fee.

I ask that you please file the original and return the clocked copies to me in the envelope provided.

Please contact me if you have any questions.

Sincerely,

Raymond T. Wooten

RTW/amr
Enclosures
cc: Clients
Stephen L. Brown
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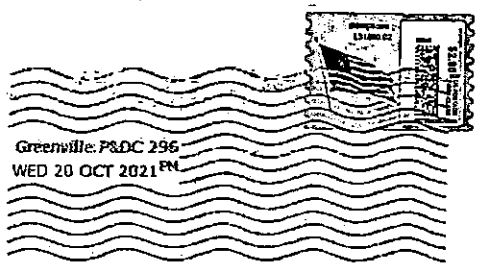

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