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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2020-CP-42-03818
Case No. 2020-CP-42-03819
Appellate Case No. 2021-000681

Terry Putman, Individually and as Personal Representative
of the Estate of Margaret Hensley, ... Respondent,

v.

White Oak Estates, Inc.; White Oak Management, Inc.; and
White Oak Manor, Inc., ... Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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1. THE FEDERAL ARBITRATION ACT'S STRICT CONSTRUCTION RULE APPLIES TO FORMATION AND ENFORCEMENT OF AN ARBITRATION AGREEMENT.

The parties agree 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 her Standard of Review section that Appellants 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:

> 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, Appellants submit 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).

2. THE ARBITRATION AGREEMENT FAILS TO MEET THE UNCONSCIONABILITY TEST SET FORTH IN SOUTH CAROLINA LAW.

As the party arguing that the Arbitration Agreement is unconscionable,

Respondent bears the burden of proving "(1) she lacked a meaningful choice as to whether to arbitrate because the Agreement's provisions were one-sided, and (2) the terms were so oppressive no reasonable person would make them and no fair and honest person would accept them." Doe v. TCSC, LLC, 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020). "[C]ourts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." Id. Respondent has failed to meet this burden.

Appellants reiterate their prior argument that anyone who enters into a written contract has a duty to read the contract which she signs. Maw v. McAlister, 252 S.C. 280, 284-285, 166 S.E.2d 203, 204 (1969). Likewise, anyone who is capable of reading and understanding, but fails to read a contract before signing is bound by the terms thereof. Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms). Additionally, "inequality of bargaining power alone will not invalidate an arbitration agreement." Id.

These considerations, which the trial court cannot alter in the context of a contract for arbitration, underpin Respondent's inability to carry her burden in proving

unconscionability. Respondent cannot avoid the following facts:

1. Respondent previously admitted Ms. Hensley to White Oak in November 2012 and May 2014, executing substantially similar admission and arbitration agreements on both occasions. (R. p. 164 – 222). She, as a reasonable person, agreed to arbitration two times previously and cannot claim surprise at the August 2017 Arbitration Agreement she signed.

2. There was no medical emergency or urgency which interfered with Appellant's ability to make a knowing choice in executing the Admission Agreement and Arbitration Agreement. The Agreements were executed five days before admission to White Oak Estates, while Plaintiff was still hospitalized. (R. p. 223 – 259).

3. Appellant affirmed that she was given a copy of the Arbitration Agreement and advised of her right to consult with an attorney before and after signing it. (R. p. 257 – 258).

4. Appellant voluntarily had the choice to enter the Arbitration Agreement, as evidenced by the opt-out provision she specifically initialed. (R. p. 258).

Respondent was familiar with what she was doing, given ample notice of what she was being asked to sign, and given the opportunity to reflect on her agreement to arbitrate and rescind it. She, therefore, cannot carry her burden of establishing unconscionability, and the Arbitration Agreement should be enforced.

3. THE ARBITRATION AGREEMENT IS SUPPORTED BY VALUEABLE CONSIDERATION.

Appellants' primary argument is that the Admission and Arbitration Agreements expressly merge and are supported by numerous forms of consideration, including admission to White Oak Estates, services at White Oak Estates, and the opportunity for dispute resolution in a more convenient forum.

Still, even absent merger, the Arbitration Agreement is a separately enforceable agreement for which valuable and adequate consideration was given. Contrary to Respondent's representation in her brief that "Appellants offer no suggestion of

consideration to support" the agreement to arbitrate (Respondent's Brief p. 15), Appellants offer numerous forms of consideration Respondent received in in exchange for the promise to arbitrate claims (Appellants' Brief p. 12). This consideration expressly includes but is not limited to:

1. The ability to be represented by someone other than an attorney, thereby reducing litigation expenses (R. p. 256);
2. The ability to have a speedy resolution of a claim, not encumbered by the formalities of a litigation forum (R. p. 255 - ;
3. The ability to present all evidence in an arbitration forum, not strictly limited by the rules of evidence (R. p. 256);
4. The guarantee of payment within 90 days of an arbitration ruling, not limited by any appeals or other post-trial procedures to limit the enforcement of judgments, etc. (R. p. 257); and,
5. The ability to recover all costs, fees, and expenses of the arbitration, (except any attorney's fees) (R. p. 257).

Whether the Admission Agreement and Arbitration Agreement are viewed as merged documents or the Arbitration Agreement is viewed as a stand-alone contract, valuable and adequate consideration was given to Appellant in exchange for the promise to arbitrate. The trial court, therefore, erred in finding that the agreement to arbitrate was not supported by valuable consideration.

4. RESPONDENT HAD THE RIGHT AND POWER TO BIND A WRONGFUL DEATH CLAIM TO ARBITRATION.

Appellants reiterate their extensive briefing as to why Respondent had both the right and the power to bind a wrongful death claim to arbitration.

Ms. Hensley's Power of Attorney authorized Respondent to bind Ms. Hensley, her Estate, and her personal representative. (R. p. 217). Respondent then exercised that authority to expressly bind Ms. Hensley and her heirs, her personal representatives,

successors, assigns, and beneficiaries to the requirements of the merged Admission and Arbitration Agreements. (R. p. 253, 259). These Agreements conspicuously state that "all claims" between Ms. Hensley, her personal representative, her heirs, her beneficiaries, White Oak Estates, White Oak Manor, Inc., and White Oak Management, Inc.—these parties forming the direct and third-party beneficiaries of the Merged Agreements—will be submitted to arbitration. (R. p. 255).

Respondent's agreement to submit the wrongful death claims to arbitration is permissible under South Carolina. See Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727, 731 n.3 (2014) (Courts "may not refuse to compel arbitration simply because a wrongful death claim is involved."); THI of South Carolina at Magnolia Manor-Inman, LLC v. Gilbert, 2015 WL 1268185, *3 (D.S.C. March 19, 2015) ("[T]he South Carolina Supreme Court made clear in Dean that, under South Carolina law, an arbitral agreement is still indeed binding on a decedent's estate for a claim in wrongful death.").

The trial court, therefore, erred in failing to require Respondent to submit her wrongful death action to arbitration.

5. THE ARBITRATION AGREEMENT APPLIES TO DEFENDANTS WHITE OAK MANAGEMENT, INC. AND WHITE OAK MANOR, INC.

Again, Respondent attempts to argue around the law of contracts and the clear intent of the Arbitration Agreement in claiming that the Arbitration Agreement does not apply to White Oak Management, Inc. and White Oak Manor, Inc.

Here, Respondent agreed to arbitrate "all claims," a defined term "intended to include not only all claims between the Resident and the Facility, as well as claims

between the Resident's heirs/beneficiaries, but **also all other claims that allegedly exist between the Resident and all other "White Oak" entities, including specifically White Oak Manor, Inc. and White Oak Management, Inc.**" (R. p. 255) (emphasis added). 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 can be no clearer and unambiguous language than stating that the agreement to arbitrate extends to all claims Respondent has against the two Appellants at issue.

Whether viewed under the direct beneficiary theory set forth in Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012) or the consenting non signatory theory set forth in S.C. Pub. Serv. Authority v. Great Western Coal, et al., 312 S.C. 559, 437 S.E.2d 22 (Ct. App. 1993), White Oak Management, Inc. and White Oak Manor, Inc. properly demanded arbitration pursuant to the Arbitration Agreement, and the trial court erred in holding otherwise.

CONCLUSION

Respondent, with express authority provided by a lawful power of attorney, executed valid Admission and Arbitration Agreements which compel all claims raised in Respondent's Complaints to be submitted to binding arbitration. Appellants, therefore, respectfully request that this Court reverse the judgment of the circuit court.

December 23, 2021

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CERTIFICATE OF COUNSEL

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

December 29, 2021

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