



Appellate Reports and Shorter Takes

FAA does not apply when son with power of attorney signs arbitration agreement with hospital, later sues for elder abuse in father's death

By JEFFREY I. EHRLICH

Avila v. Southern California Specialty Care, Inc.

(2018) __ Cal.App.5th __ (4th District, Div. 3.)

Who needs to know about this case?

Lawyers dealing with arbitration agreements signed by the plaintiff's decedent, particularly when the decedent was admitted to a hospital or senior-care facility.

Why it's important: Affirms denial of petition to compel arbitration of wrongful death, negligence, and elder-abuse claims against hospital, based on arbitration agreement signed by decedent, and holds that MICRA does not apply.

Synopsis: Decedent, Antonio Avila "Antonio" signed a power-of-attorney form naming his son, Alex Avila ("Alex") as his agent. In March 2015, Antonio, then 87, was transferred to defendant Kindred's facility, an acute-care hospital, suffering from various conditions. The day after his father began receiving care, Avila was presented with a stack of documents by Kindred, including a "Voluntary Alternative Dispute Resolution Agreement ("ADR agreement"). Alex signed on Antonio's behalf. The ADR agreement provided for arbitration "as provided by California law" of any dispute as to medical malpractice and "any legal claim or civil action arising out of or relating to your hospitalization." It also said that it applied to "any claim or action brought by a party other than you (e.g., an action by your spouse, legal representative, agent, heir) arising out of or relating to your hospitalization."

According to the complaint, Antonio died within five days of admission as a result of Kindred's neglect. A dislodged feeding tube began infusing into his throat and/or esophagus instead of the stomach, and his impaired gag reflex was unable to clear his lungs. He aspirated, resulting in cardiopulmonary arrest and rapid decline until his death.

In March 2016, the initial complaint was filed on behalf of Antonio, "by and through his successor-in-interest" Alex, and individually on Alex's behalf. The first cause of action for "negligence/willful misconduct" and the second cause of action for elder abuse and neglect was on behalf of both plaintiffs. A third and final cause of action for wrongful death was filed on Alex's behalf only. In May, defendants filed an answer, demand for jury trial, and notice of posting of juror fees. They also sent a letter to plaintiffs' counsel demanding dismissal of the lawsuit and proceeding to arbitration. Plaintiffs declined.

In July, Kindred filed a petition to compel arbitration and motion to stay. They argued there was a written agreement between plaintiffs and defendants providing for arbitration of all disputes, and plaintiffs had refused their demand. Kindred argued, among other things, that the Federal Arbitration Act (9 U.S.C. § 1, et seq. (FAA)) applied to the agreement, that no traditional defenses to contract law applied, and the agreement was enforceable as to Alex as well as to Antonio. Defendants also contended the agreement was enforceable under California law as well as the FAA.

The trial court denied the motion, concluding defendants had failed to show

a valid arbitration agreement with respect to Alex. The court exercised its discretion under section 1281.2, subdivision (c), to refuse to order arbitration of the remaining claims, citing the risk of inconsistent rulings. Affirmed.

1. *The FAA does not apply:* The procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement. Here the ADR agreement does not mention the FAA, much less expressly adopt its procedural rules. Accordingly, the FAA's procedural rules do not apply. The provision in the California Arbitration Act giving courts the right to deny arbitration of claims based on the potential for inconsistent rulings does not violate the FAA and is not preempted.

2. *MICRA does not apply:* Section 1295 of the Code of Civil Procedure is part of MICRA. It created certain requirements for arbitration agreements of "any dispute as to professional negligence of a health care provider." (§ 1295, subd. (a).) It defines "professional negligence" as "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (§ 1295, subd. (g)(2).)

In *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 849, the California Supreme Court held that section 1295 permits patients who consent to arbitration to bind their heirs in actions for wrongful death where



the language of the agreement manifests an intent to do so. Whether *Ruiz* controls here requires the court to determine whether this case is about “professional negligence,” as defined by MICRA, or something else.

The court held that *Ruiz* did not control, and instead followed *Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674, 680, which held that an action against a residential care facility for elder abuse, negligence, and wrongful death, was not subject to section 1295, because claims for elder abuse and neglect are not claims for medical negligence under MICRA.

Kindred argued that *Daniels* was irrelevant because the defendant in that case was not a licensed healthcare provider. The court disagreed, stating, “What matters is not the license status of the defendant, but the basis of the claims as pleaded in the complaint.” If the primary basis for the wrongful death claim sounds in professional negligence as defined by MICRA, then section 1295 applies. If, as plaintiffs claim here, the primary basis is under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) (the Act), then section 1295 does not apply and neither does *Ruiz*’s exception to the general rule that one who has not consented cannot be compelled to arbitrate.

While the complaint does include some allegations that could be seen to claim either medical negligence or elder abuse or neglect, it was pleaded as a claim for elder-abuse and neglect and wrongful death. The complaint alleges a “conscious and continued pattern of withholding the most basic care and services,” which included a lack of monitoring, supervision, assistance, and other adequate care and services. It alleges the lack of availability of a physician, failure to provide properly trained staff and nursing, among other things.” These allegations are directed to a failure to provide care, not to providing care negligently.

3. *The ADR agreement did not bind Alex, who only signed as Antonio’s agent.* There is no

evidence that when Alex signed the agreement as his father’s agent, he had any intent to waive his right to a jury trial for any personal claims, such as a personal claim for wrongful death. Accordingly, we find the trial court did not err by finding that no agreement to arbitrate existed as to Alex.

4. *No abuse of discretion in relying on section 1281.2, subd.(c) to deny arbitration.* Section 1281.2, subdivision (c) allows a court to refuse to order arbitration where “a party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party ... aris[ing] out of the same transaction or series of related transactions; and ... ‘there is a possibility of conflicting rulings on a common issue of law or fact.’” Here, both parties are litigants in both the survivorship and wrongful death claims. Those claims involve the same set of operative facts. If the survivorship claims were arbitrated while the wrongful death claim was litigated, there is a strong possibility of inconsistent rulings.

Short(er) takes:

Admissibility of denials of RFAs at trial; impact of trial-court questioning of witnesses; cumulative error: *Victaulic Company v. American Home Assurance Company* (2018) __ Cal.App.5th __ (First Dist., Div. 2.) Victaulic brought insurance bad-faith claim against its liability insurers, and recovered \$9.5 million in compensatory damages and \$46 million in punitive damages. Reversed. The trial court erroneously allowed plaintiff to admit into evidence and cross-examine the defendant’s claims adjuster about the defendant’s denials of RFAs. In essence, the cross-examination equated the manner in which the defendants and the particular adjuster handled claims with the legal position asserted in the answers to the RFAs. This ultimately led to the trial court questioning the adjuster in front of the jury, in which the court suggested that she had committed perjury when signing the

verification of the RFAs, and her invocation of her right against self-incrimination under the Fifth Amendment. Although the Discovery Act provides that a party’s *admissions* are conclusively binding on the responding party, it makes no parallel provision for the use of a denial. The trial court erred in admitting the denials in evidence and allowing the adjuster to be cross-examined about them.

In addition, the trial court’s examination of the adjuster effectively amounted to it assuming the role of cross-examiner, questioning the adjuster in a way that was overtly hostile and sarcastic, and ultimately accusing her of perjury in front of the jury. Without attempting to analyze separately these issues of prejudice, the court concluded that the cumulative effect of the errors unquestionably made it reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the errors.

Intentional interference with contractual relations; elements; interference with prospective economic advantage:

Redfearn v. Trader Joe’s Company (2018) __ Cal.App.5th __ (Second Dist., Div. 7.) Caliber represents manufacturers of food products and assists them in marketing their products, operating like an outside sales team in placing products in retail outlets and processing order flow once the relationship is established. Caliber began acting as a broker for Seneca Foods in 2003 and Sunsweet Growers in 2006 and successfully introduced their products into Trader Joe’s stores.

In 2010 Trader Joe’s stopped working with brokers to find new products for its stores, but it generally continued to deal with food brokers on existing accounts. Caliber alleged that in a meeting with a Seneca representative in January 2014, Trader Joe’s executive Jon Basalone falsely accused Caliber of spreading rumors that Trader Joe’s employees were soliciting bribes and that paying a bribe was the only way to do business with them. Caliber alleged Basalone made these false statements to encourage Seneca to stop using



Caliber as a broker in Seneca's sales to Trader Joe's and further alleged that Basalone had stated, although he was aware Seneca might have a contract with Caliber, Seneca must terminate its relationship with Caliber or Trader Joe's would replace Seneca as a supplier. As a result of this conversation, Seneca terminated its contract with Caliber with respect to supplying its products to Trader Joe's.

Caliber also alleged Trader Joe's exerted pressure on Sunsweet and made similar false statements to Sunsweet designed to tarnish Caliber's professional reputation, causing Sunsweet to terminate its contract with Caliber to supply food products to Trader Joe's.

The trial court dismissed Caliber's claims against Trader Joe's for intentional interference with contract and intentional interference with prospective economic advantage. Reversed.

The elements of a cause of action for intentional interference with contractual relations are (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. The defendant's conduct need not be wrongful apart from its interference with the contract.

Caliber's brokerage contracts were contingent upon the decision of Trader Joe's to purchase products from Seneca and Sunsweet. Unless that occurred, Caliber's contracts could not be performed. Caliber did not allege that Trader Joe's simply stopped purchasing from Seneca and Sunsweet, thereby disrupting Caliber's brokerage contracts. Rather, it alleged that Trader Joe's pressured the two suppliers to stop using Caliber as a broker, which allowed Trader Joe's to purchase food products directly from Seneca and Sunsweet while eliminating the cost of brokerage fees. The court concluded that one, like Trader Joe's here, who is not a party to the contract or an agent of a party to the contract is a "stranger" for purpose of the tort of intentional interference with contract. A nonparty to a contract that contemplates the nonparty's performance, by that fact alone, is not immune from liability for contract interference. Liability is properly imposed if each of the elements of the tort are otherwise satisfied. (The Court refused to follow a contrary decision in *PM Group, Inc. v. Stewart* (2007) 154 Cal.App.4th 55.)

The elements of intentional interference with prospective economic advantage are (1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowl-

edge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action. In addition, a plaintiff alleging a claim for intentional or negligent interference with prospective economic advantage has the burden to plead and prove as an element not only that the defendant interfered with an economic relationship, but also that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.'

Caliber met that burden here by alleging that a Trader Joe's executive falsely accused Caliber of spreading rumors that Trader Joe's employees were soliciting bribes and that the only way to do business with them was to pay the bribes demanded.



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