# STATE OF SOUTH CAROLINA
## IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2017-CP-10-05984
Appeal No. 2018- 001142



Victor Rawl as Personal Representative of the Estate of Vera Brown,

Respondent,

v.

West Ashley Rehabilitation and Nursing Center-Charleston, SC, LLC d/b/a Heartland of West Ashley Rehab and Nursing Center,

Appellant.

# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Did the Trial Court err in finding that the Voluntary Arbitration Agreement executed by the Patient upon admission to the Rehabilitation and Nursing Center is unenforceable on the grounds of lack of consideration? Or, as otherwise restated, are mutual promises and valuable consideration sufficient to create an enforceable arbitration agreement?

II. Did the Trial Court err in finding that the Voluntary Arbitration Agreement executed by the Patient upon admission to the Rehabilitation and Nursing Center is unenforceable on the grounds of unconscionability? Or, as otherwise restated, did the Plaintiff present any evidence to support a finding that the Patient was deprived of a meaningful choice to execute the arbitration agreement?

## STATEMENT OF THE CASE

Vera Brown died on August 29, 2014 while a patient at the West Ashley Rehabilitation and Nursing Center-Charleston. Victor Rawl, as Personal Representative of the Estate of Vera Brown, filed a summons and complaint on November 20, 2017, asserting wrongful death and survival claims against the Rehabilitation and Nursing Center for alleged negligence. [ROA 8; Complaint.] The Defendant Nursing Center filed a motion to compel arbitration and an answer on January 8, 2018. [ROA 27, 36; Answer, Motion.] The motion to compel came for hearing before the Honorable Dianne Goodstein on March 21, 2018. [ROA 52; Transcript.] The Trial Court issued an order denying the motion to compel on the grounds that:

> A. The Arbitration Agreement lacks valuable consideration and is unenforceable where there was no additional consideration in Plaintiff's agreement to the Arbitration Agreement and future promises are not valuable consideration.
>
> and;
>
> B. Plaintiff's agreement to the Arbitration Agreement was unconscionable in the absence of meaningful choice on part of Plaintiff due the one-sided contract provisions, the relative disparity in the parties' bargaining power, and the Defendants' relative sophistication over Plaintiff's decedent.

[ROA 2, 4; Order, filed May 25, 2018, pages 2, 4.] The Nursing Center served a Notice of Appeal on June 18, 2018. [ROA 66; Notice of Appeal.]

## STATEMENT OF THE FACTS

The only undisputed facts, as alleged in the Complaint and admitted in the Answer, are that Vera Brown was admitted to the Rehabilitation and Nursing Center on August 24, 2014, and she died on August 29, 2014. The only piece of evidence submitted is the Voluntary Arbitration Agreement, executed by Vera Brown on August 24, 2014. [ROA 39; Attachment to Motion to Compel Arbitration.] The Agreement is a separate document from the admission agreement. It is clearly identified in all caps, bold type as:

**VOLUNTARY ARBITRATION AGREEMENT ("AGREEMENT")**

**THE PARTIES ARE WAIVING THEIR RIGHT TO A TRIAL BEFORE A JUDGE OR JURY OF ANY DISPUTE BETWEEN THEM. PLEASE READ CAREFULLY BEFORE SIGNING. THE PATIENT WILL RECEIVE SERVICES IN THIS CENTER WHETHER OR NOT THIS AGREEMENT IS SIGNED. ARBITRATION IS DESCRIBED IN THE VOLUNTARY ARBITRATION PROGRAM BROCHURE COPY, ATTACHED AND MADE PART OF THIS AGREEMENT.**

As addressed below, the Trial Court has made certain other findings regarding the Patient's medical condition and the circumstances of the execution of the admission paper work that are not supported by any evidence of record.

## STANDARD OF REVIEW

As a general rule, the question of the arbitrability of a claim is an issue for judicial determination, and on appeal, the trial court's denial of a motion to compel arbitration is subject to do novo review. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." Id. (citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91 (2000)). Plaintiff bears the burden of showing that the arbitration agreement is unenforceable on the ground of unconscionability. Joyner v. GE Healthcare, No. 4:08-2563-TLW-

TER, 2009 WL 3063040, at *3 (D.S.C. Sept. 18, 2009) (citing Green Tree Fin. Corp. v. Randolph.) Any factual findings made by the trial court incident to that decision will be overruled if there is no evidence reasonably supporting the findings. Deloitte & Touche, LLP v. Unisys Corp., 358 S.C. 179, 182, 594 S.E.2d 523, 525 (Ct.App. 2004).

## ARGUMENT

***Arbitration Agreements ~ Generally***

Since an arbitration agreement is a contract, its enforceability is to be determined in accordance with general principles of contract law. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435, 438 (2009) (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001)). However, there are both state and federal statutes which may apply to arbitration agreements. Federal Arbitration Act, 9 U.S.C. §§1-14; S.C. Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10, et seq. Section 2 of the Federal Arbitration Act, 9 U.S.C. §2, provides that:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof ... shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract.

Section 15-48-10 of the South Carolina Act provides:

> (a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. 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.

As our Appellate Courts have stated often, both state and federal policy, as evidenced in the statutes, favor the arbitration of legal disputes. Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc., 355 S.C. 605, 586 S.E.2d 581, 585 (2003); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001). Consistent with and in support of that policy, the court should resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. Zabinski v. Bright Acres Assocs., *id.*

In this case, the Trial Court has erred in finding that the Voluntary Arbitration Agreement executed by the Patient upon admission to the Rehabilitation and Nursing Center is unenforceable on the grounds of lack of consideration because mutual promises are valid, sufficient consideration under settled contract law. The Trial Court also has erred in finding that the Voluntary Arbitration Agreement executed by the Patient upon admission to the Rehabilitation and Nursing Center is unenforceable on the grounds of unconscionability because there is no evidence of record to support the Court's factual findings or legal conclusions.

## I. The Voluntary Arbitration Agreement is enforceable because mutual promises constitute a good consideration to support an arbitration agreement.

As the Trial Court correctly states: "The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003)." [ROA 2.] On the element of valuable consideration, the Trial Court incorrectly holds that: "The Arbitration Agreement lacks valuable consideration and is unenforceable where there was no additional consideration in Plaintiff's agreement to the Arbitration Agreement and future promises are not valuable consideration." [ROA 2.] In so holding, the Trial Court cites to opinions that do not support the stated legal premise:

> Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Riedman Co. v. Jarosh, 290 S.C. 252, 253, 349 S.E.2d 404, 405(1986); see also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274-5 (4th Cir. 1997). [ROA 3.]

First, the Supreme Court's opinion in Riedman did not address any issue involving arbitration; in that case, the Court actually held that: "We now hold that a covenant not to compete may be enforced where the consideration is based solely upon the at-will employment itself." 349 S.E.2d at 405. Second, while the Fourth Circuit's opinion in O'Neil does address an issue of sufficient consideration for an arbitration agreement, the Court's opinion actually cites South Carolina law for the proposition that: "A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement. Rickborn v. Liberty Life Insurance Co., 321 S.C. 291, 468 S.E.2d 292, 300 (1996)." O'Neil, 115 F.3d at 275. In addition to the cited case of Rickborn v. Liberty Life Insurance Co., other cases support the proposition that mutual promises do constitute a good consideration, i.e. Callaham v. Ridgeway, 138 S.C. 10, 135 S.E. 646, 649 (1926); Evatt v. Campbell, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959); *see also* Joyner v. GE Healthcare, No. 4:08-2563-TLW-TER, 2009 WL 3063040, at *4 (D.S.C. Sept. 18, 2009).

In O'Neil the arbitration issue arose in an employee's claim of wrongful discharge when the plaintiff employee argued that the agreement to arbitrate was not supported by adequate consideration because the agreement was not binding on the employer hospital. However, the Fourth Circuit found the agreement to be bound by arbitration was a mutual one. Likewise, in this case, the agreement to be bound by arbitration is a mutual one, binding on both the Patient and the Nursing Center, as evidenced by Paragraph 9:

> 9. Binding on Parties & Others: The Parties intend that this Agreement shall benefit and bind the Center, its parent, affiliates, and subsidiary companies, and shall benefit and bind the Patient (as defined herein), his/her successors, spouses, children, next of kin, guardians, administrators, and legal representative." [ROA 40.]

No additional consideration is necessary to make it enforceable in the case. Accordingly, the Trial Court's order should be reversed and the case should be remanded for entry of an order compelling arbitration.

## II. There is no evidentiary foundation to support the finding that the Voluntary Arbitration Agreement Center is unenforceable on the grounds of unconscionability.

As provided in Section 15-48-10(a), a party may seek revocation of the contract under "such grounds as exist at law or in equity." This includes unconscionability. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

> In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.

Id. (citing Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). The question is "whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms." Id. at 669.

> Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *See* Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," *id.* at 295, courts 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.* at 293.

Id. "A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005). As noted above, the Plaintiff bears the burden of proof on this point.

The Trial Court held that "it is clear that the Arbitration Agreement is unconscionable because Vera Brown lacked absence of meaningful choice and the terms in the Arbitration Agreement are oppressive, one-sided terms," based on its finding that:

> Vera Brown was admitted into Defendants' facility on August 25, 2014. She passed away at Defendants' facility four (4) days later on August 29, 2014. Upon admission the standard Arbitration Agreement form was presented to an ill Vera Brown on a take-it-or leave it basis. Ms. Brown did not contribute to the drafting of the Arbitration Agreement or possess the bargaining power to negotiate the terms of the Arbitration Agreement. [ROA 5.]

However, the Trial Court relied on "facts" and "circumstances" that are not supported by any evidence.

Regardless of whether the Patient did or did not participate in drafting the Agreement, the law is that standard form contracts serve a useful purpose in commerce and they are not per se unconscionable. Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct.App.1998). Plaintiff makes no argument as to how the arbitration agreement is unconscionable other than to say it was offered on a "take-it-or-leave-it" basis, and fails to present any evidence to support such an argument. In fact, this claim is wholly without merit because it ignores the undisputed facts – evidenced on the Agreement itself – that (1) it was VOLUNTARY, and it was NOT part of the admission agreement.

The separate, voluntary agreement clearly states in bold, all caps that admission was not conditioned upon agreement to arbitration: "THE PATIENT WILL RECEIVE SERVICES IN THIS CENTER WHETHER OR NOT THIS AGREEMENT IS SIGNED." [ROA 39.] In the Voluntary Arbitration Agreement, the Patient also stipulated that "there [were] other health care facilities in this community currently available to meet the Patient's needs." [ROA 40.] The Patient had a simple choice to simply refuse to sign the agreement without any adverse consequences. Thus, it was not even an adhesion contract. *See* Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 260, 743 S.E.2d 868, 873 (Ct. App. 2013).

In holding the agreement unconscionable, the Trial Court also made findings that:

> [There was] an inherent disparity in bargaining power between the parties as this was a transaction between an ill patient who died four (4) days after executing the Arbitration Agreement and a commercial entity. Vera Brown was transferred from the hospital via ambulance to Defendants' facility with diagnosis that included chronic kidney disease, Anemia, dementia, urinary tract infection, upper respiratory disease, acute kidney failure, congestive heart failure, hypertension, weakness, and difficulty in walking. She was also marked as a fall risk.
>
> Furthermore, the arbitration agreement was inconspicuously buried in the admission paperwork and "hastily" presented to Ms. Brown for her signature. This is evident by the "x's" where Ms. Brown was asked to print and sign her name, and date. Moreover, Vera Brown's injuries include death as this is a wrongful death claim. [ROA 6.]

Although the Plaintiff bears the burden of proving unconscionability, he did not submit any EVIDENCE in this record regarding the Patient's diagnosis or the circumstances of her admission.

The Trial Court's apparent presumption of some level of heightened vulnerability based on the Patient's medical diagnoses (even if proven) would have serious implications to the validity of any arbitration agreement between a patient and nursing home because the very nature of a nursing home admission presupposes that the patient/resident is in some degree of physical and/or mental impairment/infirmity.[1] Further, there is no evidence of the other admission paperwork or the circumstances of the admission to support a finding that the arbitration agreement was "buried" or that it was "hastily" presented for signature. The mere fact that there are "x's" marking the place for signature – a fairly common practice – does not establish any basis for a finding of unconscionability. Finally, the fact that this is a wrongful death claim serves as no proper legal

[1] The law places limits on the ability of those other than the patient to agree to a separate voluntary arbitration agreement. For example, in Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 353–54, 755 S.E.2d 450, 454 (2014), the Court held that an individual exercising authority to consent to decisions concerning a patient's health care under the Adult Health Care Consent Act, S.C. Code Ann. § 44–66–10 et seq., did not have the capacity to bind the patient to a voluntary arbitration agreement which involved neither health care nor financial terms for payment of such care.

basis for refusing to enforce the arbitration agreement because the Supreme Court has clearly held that "the courts may not refuse to compel arbitration simply because a wrongful death claim is involved." Dean v. Heritage Healthcare, 759 S.E.2d at 731. Accordingly, in the absence of any evidence regarding the Patient's cognitive condition and/or the circumstances of the admission process, there is no evidence to support the Trial Court's finding that the Patient was deprived of a meaningful choice in regards to the Voluntary Arbitration Agreement.

## CONCLUSION

Wherefore, based on the foregoing, the Appellant submits that the Trial Court erred in denying the motion to compel arbitration because (1) mutual promises are valuable consideration sufficient to create an enforceable arbitration agreement, and (2) Plaintiff did not present any evidence to support a finding that the Patient was deprived of a meaningful choice to execute the arbitration agreement. Accordingly, the Appellant respectfully requests that this Court reverse the Trial Court's ruling and remand the matter for entry of an order compelling arbitration under the terms of the Voluntary Arbitration Agreement.

Respectfully submitted,

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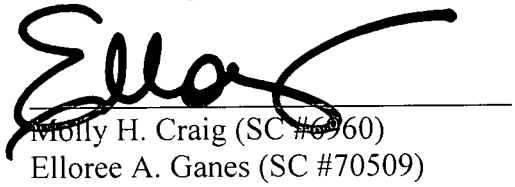

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October 30, 2018

## Certification of Counsel

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

October 30, 2018

Elloree A. Ganes

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**Certificate of Service**

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The undersigned certifies that on this 31st day of October, 2018, a copy of the Record on Appeal and the Final Brief on behalf of Appellant West Ashley Rehabilitation and Nursing Center-Charleston, SC, LLC d/b/a Heartland of West Ashley Rehab and Nursing Center, were served by depositing said copy in the U.S. Mail, with sufficient first class postage, on the following counsel at the addresses listed below:

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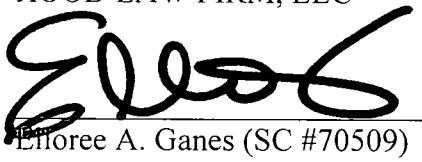

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