

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2016-001732

**RECEIVED**

MAY 30 2019

SC Court of Appeals

Hilda Stott, individually and as ..... Respondent  
Personal Representative of the  
Estate of Jolly P. Davis, deceased  
and as Personal Representative of  
the Statutory Beneficiaries

v.

White Oak Manor, Inc., White ..... Appellants.  
Oak Management, Inc., and White  
Oak Manor-Spartanburg, Inc. d/b/a  
White Oak of Spartanburg

**RESPONDENT’S RETURN TO PETITION FOR REHEARING**

Pursuant to Rule 221(a), SCACR, Respondent Hilda Stott, individually and as Personal Representative of the Estate of Jolly P. Davis, deceased and as Personal Representative of the Statutory Beneficiaries respectfully submits her return to the Petition for Rehearing.

This appeal arises out of a nursing home negligence claim for which Appellants unsuccessfully attempted to compel arbitration, citing an Arbitration Agreement signed by Appellants and Ms. Stott. Appellants argue Ms. Stott had authority to enter the Arbitration Agreement on behalf of Mr. Davis, who became a resident of Appellants’ facility and whose care is the basis for Respondent’s negligence claim. Appellants cite two power of attorney documents naming Ms. Stott as Mr. Davis’ agent to support their claim—(1) a “durable power of attorney for

finance” which had been signed but not recorded when Mr. Davis entered Appellants’ facility; and (2) a “durable health care power of attorney” which would become effective only during any period of Mr. Davis’ incompetence. The Court held neither power of attorney document was effective when the Arbitration Agreement was signed and, therefore, Ms. Stott lacked authority to enter the Arbitration Agreement on Mr. Davis’ behalf. Stott v. White Oak Manor, Inc., Op. No. 5644 (S.C. Ct. App. filed May 1, 2019) (Shearouse Adv. Sh. No. 18 at 53, 61).

Appellants’ first proposed ground for relief incorrectly asserts the Court’s ruling misconstrued South Carolina contract interpretation principles and the Arbitration Agreement in finding the Arbitration Agreement’s opt-out provision delayed the Arbitration Agreement’s effectiveness date until after the “durable power of attorney for finance” had been recorded. Pet. at ¶ 1. In determining the Arbitration Agreement’s effectiveness date, the Court properly applied a basic contract interpretation rule requiring a contract’s language be given its plain and ordinary meaning. Callawassie Island Members Club, Inc. v. Dennis, 425 S.C. 193, 203, 821 S.E.2d 667, 672 (2018) (quoting Jordan v. Sec. Grp., Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) (“Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument’s force and effect”)). The opt-out provision’s plain language states that a resident’s decision to opt-out of arbitration would cause the contract, already in effect, to thereafter cease to be effective. (R. p. 101, ¶ 16) (providing that opting out means resident is “no longer” bound by Arbitration Agreement’s terms). The language cannot be construed to say the opt-out period must expire before the contract becomes effective because a resident choosing not to opt out means the Arbitration Agreement would “remain and continue” to be effective. In its plain and ordinary usage, the verb “remain” means “to continue unchanged.” Merriam-Webster’s Collegiate Dictionary (11th ed. 2005).

Appellants' second proposed ground for relief seeks to withdraw a concession made by trial counsel on a crucial factual issue. Pet. at ¶ 2. The "durable health care power of attorney" was ineffective at the time Ms. Stott signed the Arbitration Agreement because Mr. Davis was not mentally incompetent at that time. Respondents' counsel admitted this during the circuit court proceedings. (R. p. 43, lines 4-8) ("we don't take issue with the fact that Mr. Jolly appeared to be mentally competent. So **we're not here today saying that this man was incompetent and just couldn't manage his own affairs. Mentally speaking, we're not saying that at all.**") (emphasis added). Moreover, as the Court noted, the medical record supports Respondents concession. See e.g., R. p. 126 (indicating Mr. Davis's mental status was "independent" and not even "occasionally confused").

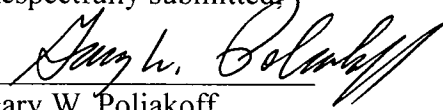
Appellants' third proposed ground for relief improperly seeks to raise a new issue. Appellants seem to argue that, even if the power of attorney documents naming Ms. Stott as agent were ineffective, she still had authority to sign the Arbitration Agreement because she signed it at the same time as Mr. Davis' Admission Agreement which is important because "these agreements worked together and must be interpreted together." Pet. at ¶ 3. The Court's ruling does not specifically address this argument because Appellants did not raise it in their briefs. Accordingly, they may not raise it at this stage. Moreover, on its merits, this argument fails under recent South Carolina precedent. While generally two or more contracts signed at the same time by the same parties for the same purpose may "merge," that rule does not apply when the contracts themselves show the parties' intent that they remain separate. Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014). For nursing home admission and arbitration contracts, the parties' intent that the contracts remain separate is demonstrated by a provision in the arbitration contract allowing a resident to disclaim (or opt-out) of arbitration while remaining a resident of

the facility. Id. (“the [Arbitration Agreement] could be disclaimed . . . evidencing an intention that each contract remain separate”); Thompson v. Pruitt Corp., 416 S.C. 43, 53, 784 S.E.2d 679, 685 (Ct. App. 2016) (finding resident’s “right to disclaim the [Arbitration Agreement] without having to terminate her residency at the facility indicates the parties’ intent to keep the [Arbitration Agreement] separate”). Here, the Arbitration Agreement allowed Mr. Davis to disclaim arbitration through the opt-out provision. Accordingly, there is no merger. (R. p. 101, ¶ 16).

Finally, Appellants’ fourth proposed ground for relief should be denied because it misconstrues the Court’s ruling. Appellants argue the “durable health care power of attorney” should have been applied because Ms. Stott was “formally appointed” by that document to act on Mr. Davis’ behalf. Pet. at ¶ 4. However, the “durable health care power of attorney” was ineffective not because of any problems with its formation but because, by its terms, it was a “springing” power of attorney which became effective only once Mr. Davis became mentally incompetent. Stott, Op. No. 5644 (Shearouse Adv. Sh. No. 18 at 59-60). Since Appellants’ counsel conceded Mr. Davis was mentally competent at the time of his admission to Appellants’ facility, the “durable health care power of attorney” was ineffective even if it was properly formed.

For all these reasons, Respondent respectfully requests the Court deny Appellants’ petition for rehearing.

Respectfully submitted



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May 27, 2019  
Spartanburg, SC

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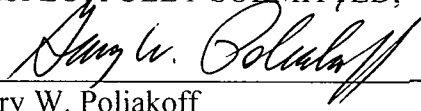
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that the Return to Appellants' Petition for Rehearing was served upon the following on May 28, 2019 via electronic transmission and via United States Postal Service, with proper postage affixed thereto to the following address(es):

THE WARD LAW FIRM, P.A.  
John E. Rogers, II  
Ginger D. Goforth  
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RESPECTFULLY SUBMITTED,



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May 27, 2019

The Honorable Jenny Abbott Kitchings  
Court of Appeals Clerk of Court  
PO Box 11629  
Columbia, SC 29211

RE: Hilda Scott, individually and as Personal Representative of the Estate of Jolly P. Davis, deceased, and as Personal Representative of the Statutory Beneficiaries v. White Oak Manor, Inc.; White Oak Management, Inc.; and White Oak Manor – Spartanburg, Inc. d/b/a White Oak of Spartanburg  
Case No. 2016-001732

Dear Judge Kitchings:

Enclosed please find one (1) original and seven (7) copies of Respondents' Petition for Rehearing, as well as a Certificate of Service for the same for all counsel of record. Please return a filed copy to me in the self-addressed stamped envelope provided.

Please contact us if you should need any additional information.

With kindest regards, I am,

Yours very truly,

Gary W. Poliakoff  
POLIAKOFF & ASSOCIATES, P.A.

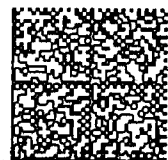
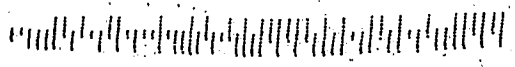
GWP/maw  
Enclosures

cc: John E. Rogers, II and Ginger D. Goforth (via U.S. mail, w/ enclosures)  
Jordan C. Calloway (via email, w/enclosures)

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