THE STATE OF SOUTH CAROLINA
In The Supreme Court



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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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Opinion No. 5644 (S.C. Ct. App. Filed May 1, 2019)

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

v.

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

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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## INDEX



## CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 6, 2019.

## QUESTIONS PRESENTED

1. Did the Court of Appeals err in failing to properly construe the law applicable to the Arbitration Agreement and its interpretation to find that the provision of the opt-out clause served to make Hilda Stott's execution of the Arbitration Agreement both timely and binding on the claims of Jolly Davis and his Estate, thereby depriving Petitioners of their right to resolve this case in the manner lawfully contracted?
2. Did the Court of Appeals err in determining on the record before it that Petitioners had conceded that Jolly Davis had mental capacity to sign the Arbitration Agreement himself?
3. Did the Court of Appeals err in failing to address the issues raised by Petitioners regarding the fact that Hilda Stott signed the Admission Agreement, Authorized Representative Agreement, AND Arbitration Agreement on behalf of Jolly Davis, and that the terms of these agreements worked together and must be interpreted together to validate the Arbitration Agreement and to bind Jolly Davis to arbitration of his claims with Petitioners?
4. Did the Court of Appeals misconstrue the nature of Hilda Stott's appointment as Jolly Davis's health care power of attorney, and the fact that she was formally appointed by a Health Care Power of Attorney, and not by virtue of resort to the terms of the Adult Health Care Consent Act?

## STATEMENT OF THE CASE

On December 16, 2015, Respondent Hilda Stott, individually and as Personal Representative of the Estate of Jolly P. Davis, deceased, and as Personal Representative of the Statutory Beneficiaries ("Ms. Stott") filed a Summons and Complaint raising claims for negligence, recklessness, and gross negligence, negligence per se, unjust enrichment, breach of fiduciary duty, joint venture, alter ego, and wrongful death. Appellants White Oak Manor, Inc., White Oak Management, Inc., and White Oak Manor-Spartanburg, Inc. d/b/a White Oak of Spartanburg (collectively "White Oak" for purposes of reference in this appeal) timely answered on January 19, 2016. White Oak raised the issue of binding arbitration as an affirmative defense, and also filed a Motion to Dismiss and/or Motion to Compel Arbitration.

The trial court heard arguments on White Oak's Motion to Dismiss and/or Compel Arbitration on March 22, 2016. The trial court issued a Form 4 denying White Oak's Motion to Compel Arbitration, and a formal Order followed. White Oak timely filed its Notice of Appeal. The Court of Appeals issued its decision denying White Oak's Appeal on May 1, 2019. The Court of Appeals denied White Oak's Petition for Rehearing on June 6, 2019.

## ARGUMENTS

The Court of Appeals erred in upholding the trial court's finding that Hilda Stott was not an authorized agent to execute the Arbitration Agreement on behalf of Jolly Davis, and violated the strong state policy of favoring resolution of disputes through alternative dispute resolution, including arbitration. The record is clear that Jolly Davis met the requirements for effectiveness of the Durable Power of Attorney for Finance that he gave in favor of Hilda Stott at the time of his admission to White Oak, even though it was not filed until January 8, 2013.

The language of the Durable Power of Attorney for Finance ("DPOAF") provided it was effective upon disability, and that disability, incapacity, or partial incapacity shall include "my inability to manage my property and affairs or car[e] for myself effectively" and "may be evidenced by a written statement of my regularly attending physician or two other qualified physicians or by court order." This language is permissive ("may"), not mandatory ("shall").

While the improperly executed Progress Note indicates that one physician noted that Jolly Davis could make healthcare decisions, this note was not properly executed according to its own requirements. Most important, Respondent alleges in the complaint that Mr. Davis was a vulnerable adult as defined by statute, and therefore suffered a physical or mental condition that substantially impaired him from adequately providing for his own care or protection, which conditions included the infirmities of aging. This allegation of Mr. Davis's condition dovetails with the requirements of the DPOAF, which provided for its effectiveness upon Mr. Jolly's inability to manage his property and affairs or care for himself effectively. Nothing in the statute relied on by Respondent or the DPOAF required incompetence on the part of Mr. Davis as the measure of Ms. Stott's right to exercise her authority as attorney-in-fact. The DPOAF gave Ms. Stott explicit authority to "submit to arbitration claims or litigation" on behalf of Mr. Davis.

The DPOAF was drafted by the decedent, who was free to include whatever language and provisions he wished. The DPOAF does not reference any other law or guideline, but self-defines "disability" and provides an example of one manner in which the disability might be established.

Respondent relies upon the improperly executed Progress Note concerning Mr. Davis's condition. This meager evidence does not supplant the clear record that Mr. Davis was under a disability as set forth in his own DPOAF. Mr. Davis admittedly met the requirements of a statutory vulnerable adult, as pled in the Complaint. The DPOAF provided for effectiveness upon Mr.

Jolly's inability to manage his property and affairs or care for himself effectively. As emphasized before, nothing in the statute relied on by Respondent or the DPOAF itself required incompetence on the part of Mr. Davis as the measure of Ms. Stott's right to exercise her authority as attorney-in-fact, which included the express authority to "submit to arbitration claims or litigation" on behalf of Mr. Davis.

Further, a power of attorney is an instrument in writing by which one person appoints another as his agent and confers upon that person the authority to perform certain specified acts or kinds of acts on behalf of the principal. A "durable" power of attorney allows the agent to act even if the principal becomes incompetent. Watson v. Underwood, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014).

S.C. Code Ann. § 62-5-501 (c) provides that a power of attorney executed under the provisions of this section must be executed and attested with the same formality and with the same requirements as to witnesses as a will. There is no dispute concerning the execution and attestation of either the Durable Power of Attorney for Finance or the Health Care Power of Attorney. In addition, the statute provides that the instrument is to be recorded in the same manner as a deed in the county where the principal resides at the time the instrument is recorded. It may be recorded before or after the onset of the principal's physical disability or mental incompetence, it is effective notwithstanding the same. Finally, this section provides that if the authority of the attorney in fact relates solely to the person of the principal, the instrument is effective without being recorded.

Also, the Arbitration Agreement contained an opt out provision. Specifically, the resident had seven days from the date of signing, and another 10 days thereafter, to opt out of the Arbitration Agreement. If written notice is not given within that period, **only then** did the Arbitration Agreement obtain binding authority.

The Arbitration Agreement was signed by Mr. Davis's attorney-in-fact Hilda Stott on January 2, 2013. Pursuant to its terms, Mr. Davis could opt out of the Arbitration Agreement on or before January 19, 2013. Ms. Stott's signature could not bind Mr. Davis until January 19, 2016. So, even though the Durable Power of Attorney for Finance was not recorded on January 2, 2016, it was recorded – and therefore effective – well prior to the expiration of the opt out window. Because no action was taken to opt out before that time, the Arbitration Agreement is valid and binding.

The timing of the filing of the DPOAF is NO impediment to its effectiveness. S.C. Code Ann. § 62-5-501(c) requires recording, and provides that "whether recorded before or after the onset of the principal's physical disability or mental incompetence, it is effective notwithstanding the same." The Arbitration Agreement expressly provided in its opt out provision that it was only binding if written notice is not given within the op out period. Hilda Stott signed the Arbitration Agreement on January 2, 2013, setting the opt out date as January 19, 2013. Ms. Stott's signature could not bind Mr. Davis until January 19, 2016. The DPOAF was recorded on January 8, 2013. Because the DPOAF was filed at the time the Arbitration Agreement became effective, it is both valid and binding.

Furthermore, the Coleman v. Mariner, 407 S.C. 346, 755 S.E.2d 450 (2014) is not dispositive of this action. In Coleman, the Court held that the Adult Health Care Consent Act does not grant a surrogate appointed pursuant to the Act the authority to execute a voluntary arbitration agreement. Specifically, the Court held that "The sole question before the Court is the scope of the surrogate's authority" under the Adult Health Care Consent Act. Id. at 359, f.n. 4.

Coleman is easily distinguishable from the present situation because Hilda Stott was not identified as a surrogate for Jolly Davis pursuant to the Adult Health Care Consent Act, S.C. Code

Ann. § 44-66-10, et seq. Rather, she was formally appointed by Mr. Davis pursuant to a valid Health Care Power of Attorney executed some eight months prior to his admission to White Oak. In fact, the Supreme Court in Coleman expressly acknowledged that there exist financial decisions that are necessitated by traditional health care decisions. A holding that the Adult Health Care Consent Act does not extend those decisions to a surrogate under the Act does nothing prevent a private, properly executed document from so doing. The Adult Health Care Consent act does not apply to this case because there exist private contractual agreements concerning Hilda Stott's authority to act on behalf of Jolly Davis.

Finally, the wrongful death beneficiaries are bound by the collective agreements comprising the admission documentation, including the Admission Agreement and the Arbitration Agreement. Under South Carolina law, "whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured." S.C. Code Ann. § 15-51-10. "Every such action shall be brought for the benefit of the . . . heirs of the person whose death shall have been so caused." S.C. Code Ann. § 15-51-20. The cause of action inheres to the personal representative of the deceased's estate; the statutory beneficiaries cannot proceed in their own names. See, e.g., Wyatt v. Spartan Mill Co., 287 S.C. 334, 338 S.E.2d 341 (1985).

A wrongful death action in South Carolina is derivative in nature. For example, if the statute of limitations has expired against the decedent for an injury that led to his death, then any wrongful death action is likewise barred, even though it may be commenced within the limitations period of the Wrongful Death Act. 26 South Carolina Jurisprudence §32 Wrongful Death Actions,

(December 2016 update); see also Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988).

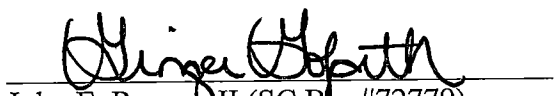
Where wrongful death actions are derivative and place beneficiaries in the legal shoes of the decedent – even though the damages are for the exclusive benefit of the wrongful death beneficiaries – arbitration provisions in an agreement that bind the decedent also bind the beneficiaries. In re Labatt Food Service, L.P., 279 S.W.3d 640, 645-646 (2009). Any other finding would violate the FAA's express requirement that states place arbitration contracts on equal footing with other contracts. Id. at 646, citing Volt Info. Scs., Inc. v. Board of Trs. Of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989).

## CONCLUSION

For these reasons, Petitioners respectfully request that the Supreme Court grant their Petition for Writ of Certiorari to the Court of Appeals

Respectfully submitted,

THE WARD LAW FIRM, P.A.
Attorneys for Petitioners



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July 8, 2019.

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**PROOF OF SERVICE**

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I certify that I have served the Petition for Writ of Certiorari to the Court of Appeals by depositing a copy of it in the United Stated Mail, postage prepaid, on July 8, 2019, addressed to her attorney(s) of record: Gary W. Poliakoff and Raymond P. Mullman, Jr., P.O. Box 1571 Spartanburg, SC 29304 and Jordan C. Calloway, 1539 Health Care Drive, Rock Hill, SC 29732.

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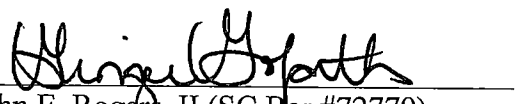

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