THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2019-001102
Lower Court Case No. 2019-NI-02-00001

Grace Gray, Individually and as Wife of Willie J. Gray, deceased, and as Personal Representative of the Estate of Willie J. Gray, deceased,

Respondent,

v.

PruittHealth-North Augusta, LLC; UHS Pruitt Corporation a/k/a PruittHealth, Inc.; PruittHealth Consulting Services, Inc.; United Health Services of South Carolina, Inc.; John Doe, and Richard Roe Corporation,

Appellants.

REPLY BRIEF OF APPELLANTS

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Plaintiff's argument in support of the Circuit Court's Order suffers from multiple fundamental and fatal flaws. First, Plaintiff erroneously asserts that Ms. Gray lacked actual authority based on the General POA not being recorded in accordance with South Carolina Uniform Power of Attorney Act. Next, Plaintiff attempts to rewrite the General POA to impose both general subject matter limitations on the scope of her authority and specific exclusions of authority that Mr. Gray did not include when the General POA was drafted and executed. Finally, Plaintiff incorrectly concludes that the wrongful death beneficiaries are not subject to the Arbitration Agreement based on contract law defenses.

I. PLAINTIFF MISCONSTRUES THE FILING REQUIREMENT UNDER SOUTH CAROLINA LAW IN DETERMINING THAT THE GENERAL POA WAS NOT EFFECTIVE AT THE TIME THE ARBITRATION AGREEMENT WAS EXECUTED.

Plaintiff argues that the General POA is not in compliance with the statutory recordation requirements set forth in the South Carolina Uniform Power of Attorney Act and, therefore, the General POA was not effective and did not confer actual authority upon Ms. Gray to execute the Arbitration Agreement. (Pl.'s Response, p. 9.) Essential to the analysis of this section, Plaintiff states that Mr. Gray was "cognitively intact and able to communicate via body language." *Id.* at p. 2. Further, at the hearing before the Circuit Court, Plaintiff's counsel stated that "when he got to [] [the] facility[, Mr. Gray] was alert and oriented" and "had the ability to communicate via body language[.]" (Transcript of Hearing, p.12.) This clearly shows that Mr. Gray had capacity at the time of the execution of the Arbitration Agreement.

Plaintiff attempts to confuse the Court by citing to the sections of the South Carolina Uniform Power of Attorney Act that require a power of attorney to be recorded when the principal becomes incapacitated in order for it be effective. (Pl.'s Response, p. 9-12.) Specifically, Plaintiff

cites to S.C. Code Ann. § 62-8-109(d), which states "[a]n agent may exercise a power of attorney executed in another jurisdiction if its execution complies with Section 62-8-106 if, **after the principal's incapacity**, it is recorded as required in subsection (c)." S.C. Code Ann. § 62-8-109(d). Further, subsection (c) provides that:

> **After the principal's incapacity**, an agent may exercise the authority granted unto the agent under the power of attorney only if the power of attorney has been recorded in the same manner as a deed in the county where the principal resides at the time the instrument is recorded. If the principal resides out of State, the power of attorney may be recorded in any county where property of the principal is located at the time the instrument is recorded. The power of attorney may be recorded before or after the principal's incapacity. **After the principal's incapacity** and before recordation, the agent's authority cannot be exercised.

S.C. Code Ann. § 62-8-109(c). However, based on Plaintiff's assertions that Mr. Gray had capacity at the time the Arbitration Agreement was executed, the sections noted above would not apply because they are only applicable "after the principal's incapacity." Thus, the General POA did not need to be recorded for it to be effective as alleged by Plaintiff.

The appropriate analysis for when the General POA was effective starts with S.C. Code Ann. 62-8-109(a). It states that "[e]xcept as provided in subsection (c), a power of attorney is effective when executed pursuant to Sections 62-8-105 and 62-8-106 unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency." S. C. Code Ann. 62-8-109(a). As previously noted, subsection (c) does not apply because Mr. Gray, the principal, had not become incapacitated at the time of the execution of the Arbitration Agreement. Also, the General POA was effective at the execution and not at a future date or upon a future event. (*See generally*, General POA.) Therefore, the General POA was effective when executed pursuant to Sections 62-8-105 and 62-8-106.

Considering the General POA was executed outside the state of South Carolina, specifically, in the state of Georgia, the next step in the analysis is to look to S.C. Code Ann. 62-8-106(c), which states:

> A power of attorney executed other than in this State that is not otherwise valid under subsection (a) or (b) is valid in this State if, when the power of attorney was executed, the execution complied with the: (1) law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to 62-8-107; or (2) requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b, as amended.

S.C. Code Ann. 62-8-106(c). The General POA is valid under subsection (a) and, therefore, we can direct the analysis to S.C. Code Ann. § 62-8-105. *See* S.C. Code Ann. § 62-8-106(a) (stating that a power of attorney executed on or after the effective date of this article is valid if its execution complies with Section 62-8-105). Under S.C. Code Ann. § 62-8-105, a power of attorney is valid when three (3) elements are met.

First, the power of attorney must be "signed by the principal or in the principal's presence by another individual directed by the principal to sign the principal's name on the power of attorney." S.C. Code Ann. § 62-8-105(1). This element is satisfied as Mr. Gray's signature is clearly placed on page four (4) of the General POA. (General POA, p. 4.) Next, the power of attorney must be "attested with the same formality and with the same requirements as to witnesses as a will in South Carolina." S.C. Code Ann. § 62-8-105(2). This element is satisfied because the General POA is in writing, signed by the principal, and signed by two witnesses. (General POA, p. 4.); *see also* S.C. Code Ann. § 62-2-502 (stating that every will shall be: (1) in writing; (2) signed by the testator or signed in the testator's name by some other individual in the testator's presence and by the testator's direction; and (3) signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will). Finally, the power of attorney must be "acknowledged or proved pursuant to Section 30-5-30."

S.C. Code Ann. § 68-8-105(3). This element is satisfied based on the notary's signature on page (4) of the General POA. (General POA, p.4.); *see also* S.C. Code Ann. § 30-5-30(A)(1)(e) (requiring that the execution of an out of state document be proved by a notary public by affixing to the document his or her official seal).[1] Accordingly, the General POA was effective when the Arbitration Agreement was executed by Ms. Gray and the recordation requirements set forth by Plaintiff are not applicable to this case.

II. PLAINTIFF'S BRIEF TOO NARROWLY LIMITS BOTH THE GENERAL SCOPE OF THE AUTHORITY GRANTED BY THE GENERAL POA AND THE SPECIFIC LANGUAGE CONTAINED IN THE GENERAL POA.

Contrary to Plaintiff's narrowly focused argument in this case, this Court must apply the traditional rules of contractual interpretation to read the General POA as a whole document in order to give effect to the true meaning of the General POA. A power of attorney authorizes an agent to "perform certain specified acts or kinds of acts" on behalf of a principal. *First South Bank v. Rosenberg*, 418 S.C. 170, 179, 790 S.E.2d 919, 924 (Ct. App. 2016) (emphasis added). Where a dispute centers on the scope of the "kinds of acts" an agent may perform under a power of attorney, the traditional rules of contractual interpretation apply. *Id.* "The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties, and, in determining that intention, the court looks to the language of the contract." *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019) (quoting *Watson v. Underwood*, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014)). "Whe[n] the language of the contract is plain and

[1] To the extent Respondent argues that the General POA does not meet the requirements set forth in S.C. Code Ann. § 62-8-105, the General POA would also be valid if the General POA was effective under the law of the jurisdiction in which it was executed which, in this case, is Georgia. *See* S.C. Code Ann. § 62-8-107. In Georgia, a power of attorney must be signed by the principal (or by another individual in the principal's presence at the principal's direction), and attested and signed by one or more witnesses and a notary public. *See* G.A. Code Ann. § 10-6B-5. Each of these elements are satisfied. (General POA, p. 4.)

capable of legal construction, that language alone determines the instrument's force and effect." *Id.* (quoting *Watson*, 407 S.C. at 455, 756 S.E.2d at 161).

Here, Plaintiff attempts to interpret the plain language of the General POA in a way that limits the plain language of the General POA. Plaintiff claims that the General POA is limited to "financial and property decisions" and that the General POA is not broad enough to include the power to execute an arbitration agreement.[2] (Pl.'s Response, p. 12-13.) However, in reaching this conclusion, Plaintiff ignores the plain language of the General POA and does not interpret the whole document, which, in turn, does not give effect to the true intention of the parties to the General POA. Plaintiff also argues that a "catch-all provision" must be included in the General POA in order for it to be broad enough for it to include the execution of an arbitration. All of Plaintiff's positions are misplaced.

A. Plaintiff's argument that the General POA is only limited to financial and property decisions is improper considering the plain language of the General POA involves rights exceeding financial and property decisions.

Plaintiff's analysis is misdirected in concluding that the General POA is only related to financial and property decisions. (Pl.'s Response, p. 13.) In Plaintiff's Brief, the focus starts on the "including specifically" language in the opening paragraph and, then, leads to a summarized version of the enumerated list of rights. *Id.* By taking this approach, Plaintiff reaches the conclusion that the General POA only pertains to "things" that are financial in nature and property-related, which wholly limits the scope and subject matter of Ms. Gray's rights. *Id.* However, a full review of the opening paragraph and the enumerated list of rights is necessary to determine

[2] Plaintiff refers to the General POA as the "General POA for Finance" throughout her brief. However, this title is wholly missing from the General POA and, further, there is no particular title for the General POA. Plaintiff's inclusion of "for Finance" also shows her attempt to limit the scope and subject matter of the General POA and to avoid arbitration here.

the true meaning of the General POA. In doing so, it is clear the plain language of the General POA far exceeds the Plaintiff's limited conclusion.

Specifically, the opening paragraph of the General POA states that Ms. Gray is able "to do and perform...**any and all things** that she may think desirable and proper in as full and complete a manner as [] [Mr. Gray] could do if present and acting in person, including specifically, **but without limitation**, upon the foregoing generality of statement[.]" (General POA, p. 1.) Following this opening paragraph, the General POA sets forth an enumerated list of rights, which are addressed below. Nonetheless, this opening paragraph clearly shows that Ms. Gray's powers were "**without limitation**" and that she could do "**any and all things**." *Id.* Of note, Plaintiff ignores the "without limitation" language and never addresses it in the brief. This broad, overarching language shows that the General POA is not limited to the rights "specifically included" in the enumerated list of rights as alleged by Plaintiff. Rather, the General POA appointed Ms. Gray as the general attorney-in-fact for Mr. Gray and she was able to do "any and all things" on his behalf "without limitation." Plaintiff cannot escape the significance of these words, and her silence in this regard is deafening.

Going further, when provided in whole, the enumerated list of rights show that Ms. Gray had more power than the summarized version of rights set forth by Plaintiff. In whole, the first paragraph of the enumerated list of rights reads as follows:

> The attorney-in-fact has the right to act upon insurance and/or annuity policies claims or any and all matters related thereto. **To receive, collect and receipt for any and all payments of money, debts, accounts, interest, dividends, and any and all demands whatsoever which are now or shall hereafter become due, owing, payable or belonging to me**; **to have, use and take all lawful means** in my name or otherwise for the recovery thereof by any process of law or equity that may be available for said purpose; **to compromise any such amounts**, in the sole discretion of my said attorney-covering the same, for me and in my name; including specifically **the right to acknowledge service upon any suit or suits** that may be filed against me, to waive call and notice of the time, place and purpose of holding

> any and all meetings of stockholders of any corporation in which I may hold stock, and to consent to the arising with reference thereto, in the same manner and to the same extent as I might or could do if personally present and acting, and **to consent to the entry of any judgement or decree** that my said attorney-in-fact may approve.

(General POA, p. 1-2.) Additionally, the fourth paragraph of the enumerated list of rights states the following:

> I further authorize my said attorney-in-fact, for me and in my name, place and stead, to **negotiate and conclude** any and all sales, loans, rentals, **contracts**, encumbrances **or other instruments** relating to or including or affecting any portion or all of the real estate or interest in real estate or **personal property**, including any motor vehicles, **which I may now or hereafter own**, as well as any portion or all of the corporate securities, stocks, bonds, debentures or other forms of securities or **any other personal property which I may now own or hereafter own**, and wherever the same may be located, with the **full right to execute** any and all deeds, mortgages, security deeds, endorsements, leases, transfers, assignments or **other contracts or other documents** with respect thereto on such terms and upon such conditions as my attorney-in-fact in his sole discretion, deems appropriate.

Id. at 2-3. As noted above, the Court must review each of these paragraphs in full and look to the plain language in order to determine the true meaning of the General POA.

Starting with the first paragraph, Plaintiff attempts to limit its scope and subject matter to only give Ms. Gray the right "to act upon insurance claims." (Pl.'s Response, p. 13.) While it is true that the first sentence of the first paragraph is related to insurance claims, the first sentence does not limit the scope and subject matter for the entire paragraph. *See McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (stating that "[a] contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause"). Going beyond the first sentence, Ms. Gray was given the power to "receive, collect and receipt for any and all payments of money, debts, accounts, interest, dividends, and any and all demands whatsoever which are now or shall hereafter become due, owing, payable or belonging to [] [Mr.Gray]." She was able to "have, use and take all lawful means" in Mr. Gray's name for

recovery of the same. This, in and of itself, permits her to arbitrate claims on his behalf. She was also able to "compromise" those amounts in her discretion as Mr. Gray's attorney-in-fact. Finally, she was able to "acknowledge service upon any suit or suits" and "consent to the entry of any judgement or decree" as Mr. Gray's attorney-in-fact. Of note, these sentences are not limited to insurance claims in any way. Further, Plaintiff claims that the General POA "confers no authority on [] [Ms. Gray] to perform any act 'resolve legal claims.'" Based on the above, Plaintiff overlooked the explicit language that allows Ms. Gray to resolve legal claims, which supports Plaintiff's limited approach in analyzing the General POA.

As it relates to the fourth paragraph of the General POA, Plaintiff attempts to limit Ms. Gray's powers strictly to "real estate or personal property interest." (Pl.'s Response, p. 13.) Important to this Court's analysis, "South Carolina courts construe the term 'property' broadly. The term 'property' is a general term that is used to designate a right of ownership and it includes every subject of whatever nature upon which the right of ownership can legally attach, including choses in action." *Bowman v. Bowman*, 357 S.C. 146, 155, 591 S.E.2d 654, 659, n. 6 (Ct. App. 2004) (*quoting Ball v. Ball*, 312 S.C. 31, 33, 430 S.E.2d 533, 534 (Ct. App. 1993)). The plain language of this paragraph gives Ms. Gray the right to negotiate, conclude, and execute any and all contracts or other instruments related to any personal property that Mr. Gray had at the time or would thereafter own. Of great significance, when considering the broad interpretation of "property" under South Carolina law and, specifically, that "property" includes choses in action, any causes of action related to Mr. Gray that he had at the time or would thereafter arise would be included. Therefore, the fourth paragraph grants Ms. Gray the power to execute an arbitration agreement on behalf of Mr. Gray.

When provided in full, the paragraphs noted above clearly give more power to Ms. Gray than the summarized versions provided by Plaintiff. Ms. Gray was specifically given powers that are legal in nature and involve the execution of contracts related to property, including causes of action. These "kinds of acts" granted to Ms. Gray encompass the right to execute the Arbitration Agreement at issue in this case. This is especially true when coupled with the broad, overarching language included in the opening paragraph of the General POA that grants Ms. Gray the power to do "any and all things...without limitation." Accordingly, after considering the plain language of the General POA and interpreting the whole document, this Court must conclude that Ms. Gray had authority to execute the Arbitration Agreement on behalf of Mr. Gray.

B. Plaintiff's Argument that the General POA must include a "catch-all provision" to be broad enough to execute the Arbitration Agreement is misleading.

Plaintiff also argues that, in order for a power of attorney to be broad enough, it must include "a catch-all provision giving the attorney-in-fact the authority to sign any and all releases or consent required." (Pl.'s Response, p. 12.) Plaintiff relies on *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 570, 813 S.E.2d 292, 306 (Ct. App. 2018), in asserting that the General POA must include such a provision. As an initial matter, it is important to note that *Hodge* involved a plaintiff that had not executed a power of attorney at the time she was admitted to her facility or when her husband signed the arbitration agreement at issue in that case. *Hodge*, 422 S.C. at 553, 813 S.E.2d at 297. Further, the argument in *Hodge* centered around common law agency based on plaintiff's husband taking over her medical affairs and, thus, becoming her agent. *Id.* at 564-74. This is not the case here.

Plaintiff's argument that *Hodge* requires a power of attorney to include a "catch-all" provision is simply overstated. Plaintiff asserts that the "catch-all" provision is required based on

a single sentence in the *Hodge* analysis related to a Florida Appellate Court case finding authority to sign an arbitration agreement because the durable power of attorney included a catch-all provision giving the attorney-in-fact the authority "to sign any and all releases or consent required." *Id.* at 570 (citing *Sovereign Healthcare of Tampa, LLC v. Estate of Huerta*, 14 So. 3d 1033 (Fla. Dist. Ct. App. 2009)). Interestingly, Plaintiff failed to note the additional cases that were included in *Hodge* and cited by the Florida Appellate Court in finding that there was authority to execute an arbitration agreement. The Florida Appellate Court further referenced two additional cases. The first case found that a son had authority when he had general power of attorney executed by his father. *Id.* (citing *Triad Health Mgmt. of Ga., III, LLC v. Johnson*, 298 Ga. App. 204, 679 S.E.2d 785 (Ga. Ct. App. 2009)). The second case found that a daughter had authority when she had a durable power of attorney granting her the power to prosecute, defend and settle all actions or other legal proceedings and to "do anything" regarding resident's estate. *Id.* (citing *Five Points Health Care, Ltd. V. Mallory*, 998 So. 2d 1180 (Fla. Dist. Ct. App. 2008).

The *Hodge* case never references the "catch-all" provision outside of the above single sentence, and it is clearly not a holding in *Hodge* to require a "catch-all" provision in order to give an attorney-in-fact authority to execute an arbitration agreement. In fact, if this was a requirement, it would cut counter to the equal-treatment principle set forth in *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*. *See* 137 S. Ct. 1421, 1426, 197 L. Ed. 2d 806 (2017) (finding that the statutory provision of the FAA establishes an equal-treatment principle wherein a court may not invalidate an arbitration agreement based on legal rules that only apply to arbitration contracts (as opposed to all contracts) or that derive their meaning from the fact that an agreement to arbitrate is at issue). Additionally, the cases cited by the Florida Appellate Court and referenced in *Hodge* support that a "catch-all" provision is not required and, further, support that the General POA here is broad

enough to grant authority considering the General POA has similar language as those cases that were cited, specifically, the right to do "any and all things" and the right to handle matters that are legal in nature.

In sum, the *Hodge* case relied on by Plaintiff does not require that a "catch-all" provision be included in the General POA. Actually, the *Hodge* case suggests that the General POA was broad enough to grant Ms. Gray authority to execute the Arbitration Agreement based on the language giving Ms. Gray authority to do "any and all things" on behalf of Mr. Gray. This broad, overarching language shows that Ms. Gray had the necessary authority to execute the Arbitration Agreement on Mr. Gray's behalf.

III. PLAINTIFF'S BRIEF REACHES THE WRONG CONCLUSION AS IT RELATES TO THE CIRCUIT COURT'S RULING DENYING THE MOTION TO DISMISS AND COMPEL ARBITRATION BASED ON CONTRACT LAW DEFENSES.[3]

A. Plaintiff overstates the Circuit Court's ruling by including contract law defenses as an appropriate and sustainable basis, when each are inapplicable.

The Circuit Court's secondary ruling related to the contract law defenses states that "even if [] [Ms. Gray] had actual or apparent authority/agency to sign the Arbitration Agreement on behalf of [] [Mr. Gray], the Arbitration Agreement is unenforceable against [] [Mr. Gray's] wrongful death beneficiaries under South Carolina contract law defenses. (May 3, 2019 Order, p. 3.) In explaining the contract law defenses, the Circuit Court stated that the Arbitration Agreement "neither covers the wrongful death beneficiaries' claims within the scope of the agreement nor was

[3] Plaintiff initially argued that the Appellants waived their argument related to the contract law defenses. However, Appellants specifically noted the secondary ruling by the Circuit Court in a footnote, which reserves this matter on appeal. Further, the Circuit Court's ruling is secondary to the authority issue and is completely conclusory in nature. Therefore, the Appellants limited its analysis on that issue to a footnote considering it appeared that the conclusory secondary ruling was simply addressed by the *Dean* case. Now that Plaintiff has expanded the contract defenses argument outside of the Circuit Court's ruling, Appellants will respond to the same.

the Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries." *Id.*

However, in Plaintiff's brief, she asserts that the Circuit Court "concluded the Arbitration Agreement is unenforceable due to contract law defenses, including defenses of Respondent's wrongful death beneficiaries." Further, Plaintiff asserts that the Circuit Court's ruling relates to "any contract law defense, including but not limited to no meeting of the minds, lack of consideration, and/or unconscionability." (Pl.'s Response, p. 14.) Both of these assertions misstate the Circuit Court's ruling. There is no mention that the Circuit Court's ruling includes "any contract law defense" as alleged by Plaintiff. (*See generally* May 3, 2019 Order). In fact,

meeting of the minds[4], lack of consideration[5], and/or unconscionability[6] are never mentioned in the Circuit Court's order. *Id.* Clearly, the contract defenses are non-existent as it relates to the Arbitration Agreement here.

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[4] Clearly, there was a meeting of the minds. The Arbitration Agreement is a separate and distinct agreement that explicitly sets forth the subject matter and rights waived. Further, the Arbitration Agreement acknowledges that Ms. Gray "has read this Agreement in its entirety[] and understands the language in which it is written. Put simply, Ms. Gray knew the document that she was signing, acknowledged that she understood the same, and, by placing her initials and signature on the Arbitration Agreement, a meeting of the minds was created as to the essential terms of the Arbitration Agreement.

[5] As it relates to lack of consideration, Appellants also waived their right to a jury trial by entering into the Arbitration Agreement and explicitly agreed to submit any and all claims to arbitration. "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit, accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." *Furman Univ. v. Waller*, 124 S.C. 68, 74, 117 S.E. 356, 358 (1923). Clearly, when both parties gave up their right to a jury trial and agreed to arbitration of all claims, consideration was satisfied.

[6] By definition, Ms. Gray cannot prove she did not have a meaningful choice as this was a voluntary and separate arbitration agreement and admission was not contingent upon its execution. In her dissent in *Coleman*, Chief Justice Toal explained the benefits of using a separate contract for an arbitration agreement as follows: "[u]sing a separate contract for arbitration agreements is conducive to greater freedom of choice for the consumer. It also better protects the nursing home from a contention that the arbitration contract is unconscionable." *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 357, 755 S.E.2d 450, 456 (2014) (Toal, C.J., dissenting) (citing *Hayes v. Oakridge Home*, 122 Ohio St. 3d 63, 2009- Ohio 2054, 908 N.E.2d 408, 413 (Ohio 2009) (holding an arbitration agreement that was a free standing document and its execution "was voluntary and not a condition of [ ] admission" into the nursing home was not unconscionable)). Thus, the Arbitration Agreement should be lauded as voluntary rather than challenged as unconscionable. Moreover, assuming *arguendo*, the Arbitration Agreement was an adhesion contract, "[t]he fact that a contract is one of adhesion does not make it unconscionable." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 901 (Ct. App. 1998). Here, Ms. Gray has made no showing to meet the strenuous test to invalidate a mutually agreed to arbitration agreement as an adhesion contract. Moreover, the terms of the Arbitration Agreement are not one-sided. The subject matter and rights waived were explicit, the Arbitration Agreement clearly states the arbitration was to be conducted by "an independent impartial entity that is regularly engaged in providing arbitration services," and Appellants agreed to pay for up to five (5) days of arbitration and, thereafter, payment is to be split evenly between the parties. Ms. Gray also was given the opportunity to ask questions, seek advice from an attorney, and revoke the agreement within thirty (30) days. Therefore, unconscionability is not a valid argument in this case.

Focusing on the actual ruling of the Circuit Court's Order, it states that the Arbitration Agreement was unenforceable against the wrongful death beneficiaries and then spells out the basis, although incorrect, for its ruling. (May 3, 2019 Order, p. 3.) Contrary to Plaintiff's assertions, the actual basis for the Circuit Court's ruling on contract law defenses is centered around two issues. First, that the wrongful death beneficiaries' claims are not covered within the scope of the Arbitration Agreement and, second, that the Arbitration Agreement is not signed by an individual who had authority to bind the statutory beneficiaries. However, both of these conclusions are inaccurate based on clear South Carolina law and the express language of the Arbitration Agreement.

B. Mr. Gray's estate and wrongful death beneficiaries are bound by the terms of the Arbitration Agreement.

Stating the obvious, Mr. Gray's estate did not exist when he executed the General POA or when Ms. Gray executed the Arbitration Agreement on his behalf. Additionally, South Carolina law is clear that a personal representative's ability to sue for wrongful death or survival can be no greater than that of the decedent. S.C. Code Ann. § 15-51-10. Therefore, the "right to bring a wrongful death claim is thus conditioned upon the decedent's right to maintain a claim or action." *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939 (D.S.C. 1989). But, where the decedent does not have certain rights, his estate cannot acquire greater rights than he had. *Id.* Thus, Ms. Gray's authority to bind Mr. Gray's estate before he died is irrelevant to the matter before the Court.

Further, in *Dean v. Heritage Healthcare of Ridgeway, LLC*, the South Carolina Supreme Court found that "courts may not refuse to compel arbitration simply because a wrongful death claim is involved." 408 S.C. 371, 378 n.3, 759 S.E.2d 727, 731 (2014) (citing *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-04, 182 L. Ed. 2d 42 (2012) (per curium)

(invalidating West Virginia's policy refusing to refer wrongful death claims against a nursing home to arbitration)). The United States District Court for the District of South Carolina has also embraced the *Dean* opinion, stating, "the 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." *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, Civil Action No. 7:13-2929-BHH, 2015 U.S. Dist. LEXIS 33998, at *7 (D.S.C. Mar. 19, 2015). Accordingly, this Court must follow clear South Carolina law and enforce the Arbitration Agreement against the wrongful death beneficiaries because the Arbitration Agreement was entered into by Ms. Gray on behalf of Mr. Gray and, therefore, is binding on his estate.

The argument that Plaintiff is not a party to the Arbitration Agreement based on *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016) is also misplaced. In *Thompson*, the resident's estate was not bound by an arbitration agreement that was executed by the resident's son because the son was not authorized to execute the arbitration agreement on the resident's behalf and, further, the resident never assented to the arbitration agreement so as to bind her estate to the same. *Thompson*, 416 S.C. 43, 56-57 784 S.E.2d 679, 687 (Ct. App. 2016). However, the facts in this case are completely distinct from those in *Thompson*. Here, the General POA is fully executed, enforceable and grants powers to Ms. Gray that would include execution of the Arbitration Agreement. With the powers granted by Mr. Gray, Ms. Gray executed the Arbitration Agreement on his behalf. In doing so, Ms. Gray effectively bound Mr. Gray's estate to the

Arbitration Agreement because Mr. Gray assented to the execution Arbitration Agreement through the General POA.[7]

As additional support to the argument that the wrongful death beneficiaries are subject to the Arbitration Agreement, the Court must consider the express language of the Arbitration Agreement. The Arbitration Agreement clearly covers the wrongful death beneficiaries' claims and, also, provides that Ms. Gray had authority to sign on behalf of the wrongful death beneficiaries. Plaintiff argues that the Arbitration Agreement is limited "solely to Mr. Gray and Tamara Gray." (Pl.'s Response, p. 19.) However, in defining the parties, the Arbitration Agreement states that "[t]he term 'Patient/Resident' shall include the Patient/Resident, his or her guardian, attorney-in-fact, agent, sponsor, representative, **or any person whose claim is derived through or on behalf of the Patient/Resident, including, in addition to those already listed in this Paragraph, any parent, spouse, child, executor, administrator, heir, or survivor entitled to bring a wrongful death claim**. (Arbitration Agreement, p. 2.) Also, the scope of the Arbitration Agreement is set forth as follows: "[a]ny and all claims or controversies arising out of or in any way relating to this [Arbitration] Agreement or the Patient/Resident's Admission Agreement, including....any acts or omissions in connection with such care or services..., whether sounding in breach of contract, tort or breach of statutory or regulatory duties, ...**any claim based in negligence, any claim for damages resulting from death or injury to any person arising**

[7] Additionally, Plaintiff's argument that the claims in this case arise out of the Admissions Agreement is not valid because Mr. Gray's estate is bound by the Arbitration Agreement and the scope of the Arbitration Agreement includes claims arising out of the separate Admissions Agreement. (Arbitration Agreement, p. 1.) Thus, it is of no relevance that the claims being asserted by Plaintiff arise out of the Admissions Agreement because Mr. Gray's estate is bound by the Arbitration Agreement regardless.

out of care or service rendered by the Healthcare Center or by any officer, agent or employee...shall be submitted for arbitration." *Id.* at 1.

Clearly, the express terms of the Arbitration Agreement encompass the wrongful death beneficiaries as a party and include claims brought by a wrongful death beneficiary. Further, Ms. Gray was given the power to act on behalf of Mr. Gray through the General POA in executing the Arbitration Agreement. Therefore, when she executed the Arbitration Agreement on his behalf, she bound his estate to the same based on the express language.[8]

In sum, Mr. Gray's estate and wrongful death beneficiaries are bound by the Arbitration Agreement. This is supported by clear South Carolina case law enforcing arbitration agreements against a decedent's estate when a wrongful death claim is involved. Additionally, Mr. Gray clearly assented to the Arbitration Agreement through the General POA granting Ms. Gray the power to enter into such agreements on his behalf. Finally, the explicit language of the Arbitration Agreement includes the wrongful death beneficiaries and their claims, which provides further support that they are to be bound by the Arbitration Agreement.

CONCLUSION

For the reasons stated above, this Court should reverse the Circuit Court's denial of Appellant's Motion to Dismiss and Compel Arbitration.

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[8] Plaintiff also notes that Appellants are not signatories to the Arbitration Agreement. (Pl.'s Response, p. 19) In a footnote, Plaintiff "recognizes that these corporate Appellants may invoke the Arbitration Agreement, even though they are non-signatories." *Id.* Further, Plaintiff notes that the definition of "Healthcare Center" as used in the Arbitration Agreement includes "its operator, management company, governing body, officers, directors, shareholders, partners, managers, agents, and any parent, affiliate or subsidiary." *Id.* However, Plaintiff raises an issue with Appellant UHS Pruitt Corporation a/k/a PruittHealth, Inc. alleging that it does not manage, administer, or operate PruittHealth-North Augusta, LLC, which is a true assertion. What Plaintiff fails to realize is the fact that there can be a parent, affiliate, or subsidiary that does not manage, administer, or operate the facility.

Respectfully submitted,

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Attorneys for Appellants

January 6, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2019-001102
Lower Court Case No. 2019-NI-02-00001

Grace Gray, Individually and as Wife of Willie J. Gray, deceased, and as Personal Representative of the Estate of Willie J. Gray, deceased,

Respondent,

v.

PruittHealth-North Augusta, LLC; UHS Pruitt Corporation a/k/a PruittHealth, Inc.; PruittHealth Consulting Services, Inc.; United Health Services of South Carolina, Inc.; John Doe, and Richard Roe Corporation,

Appellants.

PROOF OF SERVICE

I certify that I have served a copy of Appellants' Reply Brief by depositing it in the United States Mail, postage prepaid, on January 6, 2020, addressed to Respondent's attorneys of record at Connor & Connor, LLC located at 302 Park Ave SE, Aiken, South Carolina 29801.

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SMYTH WHITLEY, LLC
ATTORNEYS AT LAW

January 6, 2020

VIA UNITED STATES MAIL
Honorable Jenny Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Grace Gray, Individually and as Wife of Willie J. Gray, deceased, and as Personal Representative of the Estate of Willie J. Gray, deceased v. PruittHealth-North Augusta, LLC; UHS Pruitt Corporation a/k/a PruittHealth, Inc.; PruittHealth Consulting Services, Inc.; United Health Services of South Carolina, Inc.; John Doe, and Richard Roe Corporation
Aiken County Civil Case No.: 2019-NI-02-00001
Appellate Case No.: 2019-001102

Dear Ms. Kitchings:

Enclosed for filing please find an unbound original and one (1) copy of Appellant's Reply Brief and Proof of Service in this matter.

Please file the original and return the clocked copy in the enclosed self-addressed envelope. By copy of this correspondence, I am serving Respondent's counsel with the same.

With warm personal regards, I remain,

Very truly yours,

Joshua S. Whitley

JSW:tmm
Enclosures

cc: C. Caleb Connor, Esq.
Kenneth Connor, Esq.
Kip McAlister, Esq.
Anne Moore, Esq.

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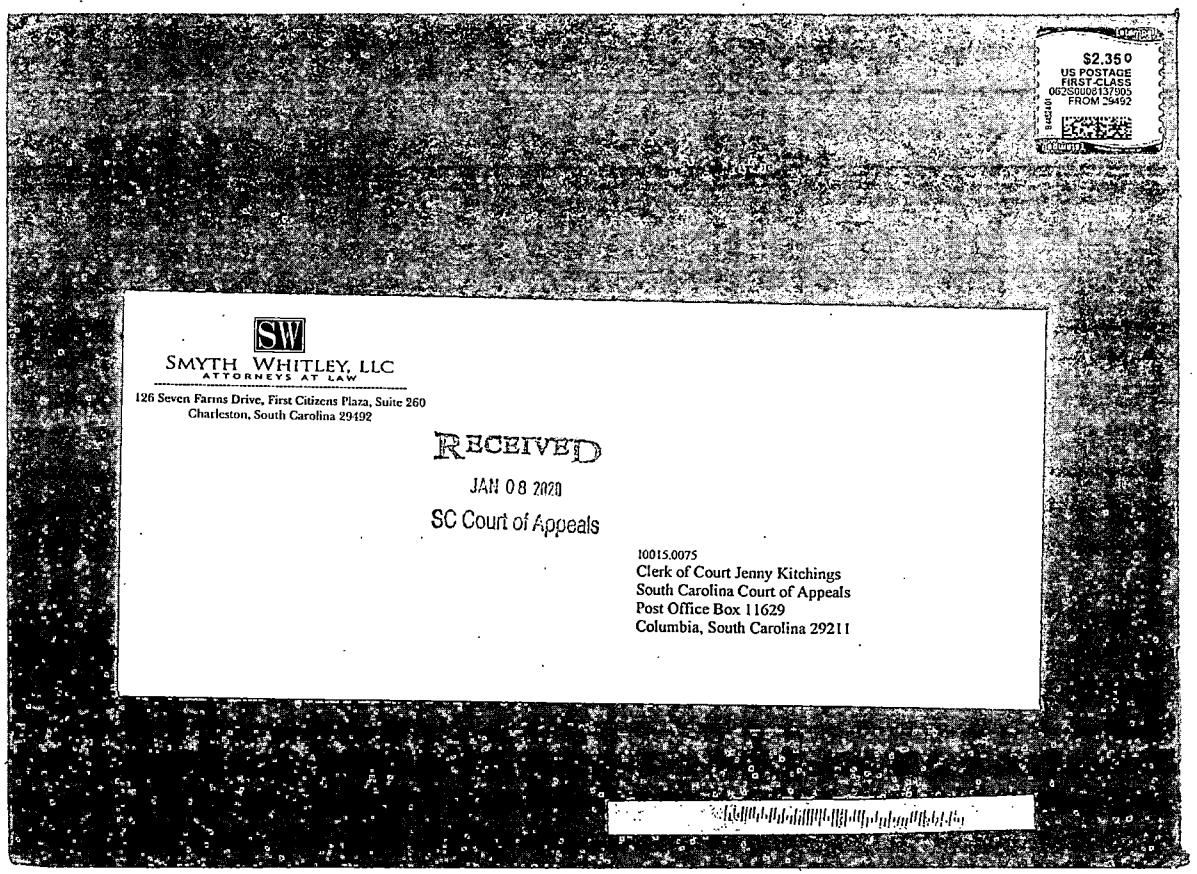

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