THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

RECEIVED
FEB 21 2020
SC Court of Appeals

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.

INITIAL BRIEF OF APPELLANTS

Joshua S. Whitley (SC Bar No. 77824)
S. Tyler Graves (SC Bar No. 103173)
Smyth Whitley, LLC
126 Seven Farms Drive, Suite 260
Charleston, South Carolina 29492
Tel: (843) 606-5635
Fax: (843) 654-4095

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

STATEMENT OF THE FACTS 3

ARGUMENT 6

I. THE COURT'S ANALYSIS IS SUBJECT TO A STRONG POLICY IN FAVOR OF ARBITRATION 7

II. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE ARBITRATION AGREEMENT IS UNENFORCEABLE BASED ON THE POWER OF ATTORNEY NOT CONFERRING THE NECESSARY AUTHORITY TO EXECUTE THE ARBITRATION AGREEMENT 10

A. Ms. Gray's authority under the General POA is not strictly limited to the specific authorities expressly conferred by the General POA 10

B. The General POA unambiguously shows an intent for Ms. Gray to possess actual authority to execute contracts like the Arbitration Agreement, especially when construed in favor of arbitration 13

C. South Carolina appellate courts have implicitly recognized agents holding a power of attorney are authorized to execute arbitration agreements with their principal's healthcare provider 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 8

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) 9

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 8

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014) 17

Curto v. Illini Manors, Inc., 405 Ill. App. 3d 888, 940 N.E.2d 229 (2010) 11

Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014) 3, 9, 17, 18

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) 9

First South Bank v. Rosenberg, 418 S.C. 170, 790 S.E.2d 919 (Ct. App. 2016) 10, 11, 12, 13, 14

Gen. Equip. & Supply Co. v. Keller Rigging & Constr., S.C., Inc., 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001) 3

Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010) 7

In re Thames, 344 S.C. 564, 544 S.E.2d 854 (Ct. App. 2001) 13

Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 788 S.E.2d 216 (2016) 3, 7, 16

Jordan v. Sec. Grp., Inc., 311 S.C. 227, 428 S.E.2d 705 (1993) 14, 15

Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017) 12, 13

Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012) 8, 18

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 9, 13

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 8

Partain v. Upstate Auto. Grp., 386 S.C. 488, 689 S.E.2d 602 (2010) 3

Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) 13

Scott v. Heritage Healthcare of Estill, LLC, No. 2014-UP-317, 2014 WL 3845113 (S.C. Ct. App. Aug. 6, 2014) 16, 17

Shearson/Amer. Exp., Inc. v. McMahon, 482 U.S. 220 (1987) 8

Sovereign Healthcare of Tampa, LLC v. Estate of Huerta, 14 So. 3d 1033 (Fla. Dist. Ct. App. 2009) 11

Sphere Drake Ins. v. Litchfield, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993) 13

Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016) 17

Towles v. United HealthCare Corp., 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) 7, 9

Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000) 3

Watson v. Underwood, 407 S.C. 443, 756 S.E.2d 155 (Ct. App. 2014) 13, 15

Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001) 3

STATUTES

Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* 5

9 U.S.C. § 2 8

9 U.S.C. § 4 ..... 8, 9

RULES

South Carolina Rules of Civil Procedure Rule 59(e) 2

OTHER AUTHORITIES

H. R. Rep. No. 97-542 (1982) 8

STATEMENT OF THE ISSUES ON APPEAL

(1) Whether the circuit court erred in holding that the Arbitration Agreement signed by a resident's duly authorized power of attorney is unenforceable because it does not specifically grant authority to enter into an arbitration agreement but is a broad general power of attorney explicitly granting the authority to the agent to do all such things that the principle could do himself?

STATEMENT OF THE CASE

This is an appeal from the circuit court's denial of Defendants' Motion to Dismiss and Compel Arbitration. On January 3, 2019, Plaintiff/Respondent Grace Gray, Individually and as Wife of Willie J. Gray, deceased, and as Personal Representative of the Estate of Willie J. Gray, deceased (hereinafter "Plaintiff" or "Respondent") filed a Notice of Intent to File Suit. (R. pp. 9-19). In the Notice of Intent to File Suit, Plaintiff alleges nursing home negligence against the Defendants/Appellants PruittHealth-North Augusta, LLC ("PruittHealth-North Augusta"), UHS Pruitt Corporation a/k/a PruittHealth, Inc. ("PruittHealth, Inc."), PruittHealth Consulting Services, Inc. ("PruittHealth Consulting"), and United Health Services of South Carolina, Inc. ("UHS of SC") (collectively referred to hereinafter as "Appellants" or "Defendants" or "PruittHealth"). *Id.* Defendants were served with Plaintiff's Notice of Intent to File Suit on January 7, 2019.[1] *Id.*

Defendants timely filed a Motion to Dismiss and Compel Arbitration on February 11, 2019. (R. pp. 48-78). A hearing was held on Defendants' Motion to Dismiss and Compel Arbitration on March 5, 2019. (R. pp. 20-47). On April 1, 2019, the Circuit Court sent correspondence to the parties informing them that Defendants' Motion to Dismiss and Compel Arbitration was denied. (R. p. 213). Although the Circuit Court's Order denying Defendants' Motion to Dismiss and Compel Arbitration was not entered until May 3, 2019, Defendants filed their Motion to Reconsider on April 11, 2019.[2] (R. pp. 211-213). On July 3, 2019, Defendants received a Form

[1] PruittHealth, Inc. was served with Plaintiff's Notice of Intent to File Suit on January 8, 2019, and the remaining Defendants were served on January 7, 2019.

[2] Considering the parties were notified of the Circuit Court's decision to deny the Motion to Dismiss on April 1, 2019, Defendants filed the Motion to Reconsider on April 11, 2019. This was done out of an abundance of caution in order to adhere to the ten (10) day deadline set forth in Rule 59(e) of the South Carolina Rules of Civil Procedure.

4 Order denying their Motion to Reconsider.[3] (R. pp. 6-8). On July 5, 2019, Defendants filed a Notice of Appeal.

STANDARD OF REVIEW

Whether a claim is subject to arbitration is an issue for judicial determination. *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). Therefore, "[a]rbitrability determinations are subject to de novo review." *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016) (quoting *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014)). "The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration." *Id.* (citing *Dean*, 408 S.C. at 379, 759 S.E.2d at 731; *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., S.C., Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001)). "The policy of the United States and South Carolina is to favor arbitration of disputes." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (citing *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000)).

STATEMENT OF THE FACTS

Plaintiff has filed a Notice of Intent to File Suit alleging that Defendants failed to provide adequate care and treatment to Mr. Willie Gray ("Mr. Gray" or "Resident"), which resulted in the development and deterioration of pressure ulcers, other injuries and infections, and eventual death. (R. pp. 9-19).

On August 10, 2017, Mr. Gray executed a General Durable Power of Attorney ("General POA") that appointed his daughter, Ms. Tamara Donnelle Gray ("Ms. Gray"), as his "true and

[3] Defendants note that the Circuit Court filed a subsequent Order on July 31, 2019, amending its initial Order due to a scrivener's error wherein the Circuit Court erroneously stated that the Circuit Court denies Plaintiff's Motion, when it should have stated the Circuit Court denies Defendants' Motion.

lawful agent and attorney-in-fact." (R. pp. 50-53). Mr. Gray also executed a Georgia Advance Directive for Health Care ("Healthcare POA") that appointed Ms. Gray as his health care agent and potential guardian.[4] (R. pp. 54-61). Subsequently, on September 22, 2017, Mr. Gray sought admission into PruittHealth-North Augusta, a skilled nursing facility. As part of the admissions process, Ms. Gray executed various admissions documents on behalf of Mr. Gray, including the Arbitration Agreement at issue in this case. (R. pp. 74-78). Two documents—the General POA and the Arbitration Agreement—are the main focus of the issues at hand.

1. The General POA

The opening paragraph of the General POA states:

> I, WILLIE JAMES GRAY, of Baltimore County, Maryland, do hereby nominate, constitute and appoint TAMARA DONNELLE GRAY or GRACE WARD GRAY, of Montgomery County, Pennsylvania, ***my true and lawful agent and attorney-in-fact, to do and perform in my name and behalf any and all things that she may think desirable and proper in full and complete a manner as I could do if present and acting in person***...

(R. p. 50). The opening paragraph concludes by stating that Ms. Gray's rights are "without limitation, upon the foregoing generality of statement[.]" *Id.* Following the opening paragraph, the General POA sets forth an enumerated list of rights. (R. pp. 50-52).

Further, the clear language of the General POA states that it is a "durable power of attorney." (R. p. 52). Of note, the General POA does not place any limitations upon Ms. Gray's authority to enter into agreements, waivers, or releases of his rights. Finally, the General POA concludes by stating:

> I[, Mr. Gray,] specifically ratify and confirm all that my said attorney-in-fact shall do at any time and from time to time by virtue of these presents, ***which shall cover and include the right to do any***

[4] The General POA and the Healthcare POA are collectively referred to as the "POAs."

> ***act or thing that I might do as above set forth***, in the same manner and to the same effect as if I were personally present and acting.

Id.

2. The Arbitration Agreement

Ms. Gray, acting on behalf of Mr. Gray pursuant to the General POA, entered into the Arbitration Agreement, which sets forth its scope in pertinent part as follows:

> Any 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 out of care or service rendered by the Healthcare Center or by any officer, agent or employee...shall be submitted for arbitration.

(R. p. 74). Further, in conspicuous bold, underlined, and all caps writing at the immediate beginning of the Arbitration Agreement, it states:

> **THE PATIENT/RESIDENT AND THE HEALTHCARE CENTER UNDERSTAND AND ACKNOLWEDGE THAT THIS AGREEMENT IS A VOLUNTARY AGREEMENT TO SUBMIT FOR RESOLUTION BY ARBITRATION ANY DISPUTES THAT MAY ARISE IN THE FUTURE BETWEEN THE PARTIES. THE PARTIES FURTHER UNDERSTAND AND ACKNOWLEDGE THAT, AS TO ALL DISPUTES THAT ARE GOVERNED BY THIS AGREEMENT, EACH OF THE PARTIES IS WAIVING THE RIGHT TO TRIAL BY JURY, AND INSTEAD, ANY DISPUTES BETWEEN THE PARTIES SHALL BE RESOLVED THROUGH BINDING ARBITRATION.**

Id. The Arbitration Agreement is titled in all caps and bold writing "**ARBITRATION AGREEMENT**." *Id.* Accordingly, both the subject matter and the rights waived are conspicuous and explicitly set forth. Also, under the clear terms of the Arbitration Agreement, the governing law is the Federal Arbitration Act ("FAA"), codified at 9 U.S.C. §§ 1- 16. (R. p. 77) (stating "this [Arbitration] Agreement shall be governed by and enforced under federal law, specifically, the

Federal Arbitration Act (9 U.S.C. §§ 1- 16), as opposed to state arbitration law ...[t]he parties specifically exclude the application of South Carolina's Uniform Arbitration Act").

In bold writing prior to the signature block, the Arbitration Agreement states "the Patient/Resident's Representative [] has read this [Arbitration] Agreement in its entirety, and understands the language in which it is written." *Id.* Moreover, the Arbitration Agreement has a provision that allows a resident or his or her representative to revoke the Arbitration Agreement within thirty (30) days of signature. (R. p. 78). The Arbitration Agreement further advises a resident or his or her representative to seek legal counsel, if desired. *Id.*

Ms. Gray, on behalf of Mr. Gray, agreed to the Arbitration Agreement, as is evidenced by her initials on each page of the Arbitration Agreement and her signature on the final page. (R. pp. 74-78). In the Notice of Intent to File Suit, Plaintiff claims broadly that Defendants were negligent with respect to the care and treatment of Mr. Gray, which caused his death. (R. pp. 9-19). Accordingly, Plaintiff's claims fall squarely within the scope of the Arbitration Agreement – i.e., it regards the care and services rendered to Mr. Gray, and it arises in tort. However, despite the clear terms of the Arbitration Agreement, Plaintiff now seeks to circumvent or breach the Arbitration Agreement and proceed with litigation.

Defendants filed their Motion to Dismiss and Compel Arbitration based on the executed Arbitration Agreement and the General POA granting Ms. Gray the power to execute the same. However, the Circuit Court denied Defendants' Motion to Dismiss and Compel Arbitration. (R. pp. 2-5). It is from the denial of this motion that Defendants appeal.

ARGUMENT

The Circuit Court committed error in holding that the Arbitration Agreement is unenforceable in this case. (R. p. 4). The Circuit Court's Order denying Defendants' right to litigate this dispute through arbitration must be reversed for several reasons.

First, the law is clear that an agent may act beyond what is "expressly granted in the power of attorney." However, the Circuit Court ignored this standard when analyzing the POAs. In fact, the Circuit Court did the complete opposite and limited the powers granted to Ms. Gray to only the specific acts expressly conferred by the POAs. Second, the law is clear that the "cardinal rule" is to look to the language of a contract when determining the intention of the parties to a contract. However, the Circuit Court also failed to apply this standard when analyzing the POAs. Instead of looking to the language of the POAs, the Circuit Court focused on language that was not included in the POAs and completely ignored the express language that granted Ms. Gray the authority to do "any and all things" on Mr. Gray's behalf. Third, the Circuit Court effectively applied a heightened standard for interpreting powers of attorney that South Carolina courts do not apply in other contexts and, thus, failed to acknowledge the FAA's guiding policy in favor of arbitration agreements. Contrary to the Circuit Court's approach, determining the scope of actual or apparent authority conferred by the POAs requires deference to the "emphatic federal policy" establishing a "strong presumption" in favor of arbitration.

The Circuit Court's denial of Defendants' Motion to Dismiss and Compel Arbitration is immediately appealable and subject to de novo review. *See, e.g., Johnson*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). Under the de novo standard, the party opposing arbitration bears the burden" to demonstrate "a valid defense." *Johnson*, 416 S.C. at 512; 788 S.E.2d at 218. This is a burden Plaintiff cannot carry.

I. THIS COURT'S ANALYSIS IS SUBJECT TO A STRONG POLICY IN FAVOR OF ARBITRATION.

"[T]here is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." *Herron v. Century BMW*, 387 S.C.

525, 531, 693 S.E.2d 394, 397 (2010). In enacting the FAA, Congress established a strong federal policy in support of arbitration agreements, "requiring that [courts] 'rigorously enforce agreements to arbitrate.'" *Shearson/Amer. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

This strong federal policy in favor of arbitration reflects Congress's and the Supreme Court's belief that arbitration is fair and beneficial. The United States Supreme Court decisions reflect a determination that "there are real benefits to the enforcement of arbitration provisions." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-123 (2001). "The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . . ." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H. R. Rep. No. 97-542, p. 13 (1982)). The United States Supreme Court has specifically held that this federal policy in favor of arbitration includes claims involving a skilled nursing facility's care. *See Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (finding that a prohibition against pre-dispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA).

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving commerce. 9 U.S.C. § 2 (2006). Section 4 of the FAA specifically states that "[t]he court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall

make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. 9 U.S.C. § 4 (2006) (emphasis added). "By its terms, the [] [FAA] leaves no place for the exercise of discretion by a [] court, but instead mandates that [] courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

The FAA establishes the foundational policy lens through which Defendants' Motion to Dismiss and Compel Arbitration must be viewed. The FAA places arbitration agreements "on equal footing with all other contracts" by making them "valid, irrevocable, and enforceable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333 (2011). Under the FAA, a court may not refuse an arbitration agreement unless the party opposing arbitration establishes "a generally applicable contract defense," and not some defense that singles out arbitration agreements. *Id.* Congress enacted the FAA to replace an "ancient judicial hostility to arbitration" with an "emphatic federal policy" in favor of arbitration that requires courts to "generously construe[]" the "intention of the parties" in accordance with the "strong presumption" in favor of arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

A strong presumption in favor of arbitration is also a well-settled policy in South Carolina. Specifically, South Carolina appellate courts have consistently recognized that arbitration agreements "enjoy a strong presumption of validity" arising from "the strong policy favoring arbitration" under both federal and state law. *Towles*, 338 S.C. at 35, 524 S.E.2d at 842. In short, both the FAA and South Carolina law require that courts resolve any doubt in favor of enforcing arbitration.

Here, the FAA governs the Arbitration Agreement at issue. (R. p. 77); *see also Dean*, 408 S.C. at 382, 759 S.E.2d at 733 (applying the FAA to skilled nursing facility arbitration

agreements). However, the Circuit Court did what the FAA prohibits: it applied a heightened standard for interpreting powers of attorney that South Carolina courts do not apply to powers of attorney in other contexts. (R. pp. 2-5). In doing so, the Circuit Court failed to acknowledge the FAA's guiding policy in favor of arbitration agreements. *Id.* The correct approach, unlike what the Circuit Court applied, requires deference to the "emphatic federal policy" establishing a "strong presumption" in favor of arbitration when determining the scope of actual or apparent authority under a power of attorney.

II. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE ARBITRATION AGREEMENT IS UNENFORCEABLE BASED ON THE POWER OF ATTORNEY NOT CONFERRING THE NECESSARY AUTHORITY TO EXECUTE THE ARBITRATION AGREEMENT.

The sole question before the Court on authority is whether Plaintiff met her burden of proving the scope of Ms. Gray's authority, pursuant to the POAs, did not encompass executing an arbitration agreement with Mr. Gray's skilled nursing facility. Considering the execution of the Arbitration Agreement is one of the kinds of acts that were authorized or reasonably appeared to be authorized under the General POA, the Circuit Court's Order must be reversed.

A. Ms. Gray's authority under the General POA is not strictly limited to the specific authorities expressly conferred by 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.* Outside of referencing the traditional rules of contractual interpretation, neither this Court nor the Supreme Court of South Carolina has established a uniform approach to interpret the scope of the "kind of acts" authorized by a specific power of attorney. This Court has, however, unambiguously rejected the interpretation advocated by Plaintiff and erroneously adopted by the

Circuit Court in this case. *Id.* (refusing to adopt the position that authority must be expressly granted in the power of attorney).

The Circuit Court interpreted the POAs to exclude the signing of the Arbitration Agreement because the POAs "did not confer the necessary authority to execute an arbitration agreement" and the POAs did not "confer sufficient authority to enter into contracts generally, to enter into releases on behalf of [] [Mr. Gray], to waive the constitutional right to a jury trial, nor does it include the 'catch-all provision giving the attorney-in-fact the authority to sign any and all releases or consent required.'" (R. pp. 2-3). The Circuit Court based its analysis on a ruling from an Illinois state appellate court, which does not have any binding precedent on South Carolina law. *Id.* (citing *Curto v. Illini Manors, Inc.*, 405 Ill. App. 3d 888, 895, 940 N.E.2d 229, 235 (2010) (quoting *Sovereign Healthcare of Tampa, LLC v. Estate of Huerta*, 14 So. 3d 1033, 1035 (Fla. Dist. Ct. App. 2009))). Additionally, the Circuit Court founded its rationale on a case analyzing the existence of, not the scope of, an agency relationship in a case that did not have a power of attorney. (R. p. 3). But here it is the scope, not the existence, of an otherwise conceded agency relationship that is in dispute.

Under facts similar to this case involving a power of attorney, this Court rejected the approach utilized by the Circuit Court below. In *Rosenburg*, a principal attempted to repudiate a guaranty executed under a power of attorney authorizing his agent to sign documents necessary to close a real estate transaction, but that did not specifically list a guaranty among the documents that could be signed. 418 S.C. 170, 790 S.E.2d 919. The principal argued this "court should adopt the position that the authority to bind under a guaranty must be expressly granted in the power of attorney." *Id.* at 179, 790 S.E.2d at 924. This Court's response was direct: "We disagree." *Id.*

Contrary to the Circuit Court's narrowly focused analysis in this case, which would have held the guaranty in *Rosenburg* invalid since it was not specifically listed in the power of attorney, this Court applied the traditional rules of contractual interpretation to read the power of attorney as a whole document and give effect to the intention of the parties. *Id.* The Court held that South Carolina law does not support the position that every potential authorized act must be specifically spelled out in a power of attorney: "we reject Brust's contention that an agent cannot sign a guaranty on behalf of his principal pursuant to a power of attorney unless the power of attorney specifically authorized the execution because this assertion is unsupported by South Carolina law." *Id.* at 181, 790 S.E.2d at 925-26. Pursuant to this Court's reasoning, the Arbitration Agreement here must be enforced. If treated different than other contracts, it would violate the FAA.

That is, this Court's rejection of the "expressly granted" argument interpreting a power of attorney in other contexts (i.e. real estate guarantees) dictates that applying the "expressly granted" argument in the context of arbitration agreements would violate the FAA. The FAA's "equal-treatment principle" prohibits states from "disfavoring contracts that" waive the "right to go to court and receive a jury trial." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424 (2017) (reversing an order denying a motion to compel arbitration based on the purported scope of a power of attorney). Shortly after this Court's order in *Rosenburg*, the United States Supreme Court in *Kindred* confirmed that a circuit court may not require "an explicit statement" of authority in a power of attorney for "an agent" to be authorized to "relinquish her principal's right" to a jury trial unless the law of the state uniformly limits powers of attorney to only what is explicitly stated therein. *Id.* The United States Supreme Court held that such requirement is "exactly what [] has [been] barred." *Id.*

Just as the United States Supreme Court did in *Kindred*, this Court has rejected the same kind of requirement for an explicit statement of specific authority to act under a power of attorney. *Rosenburg*, 418 S.C. at 179, 790 S.E.2d at 924. The Circuit Court nonetheless required the POAs to expressly confer authority to sign the Arbitration Agreement on Mr. Gray's behalf. (R. pp. 2-3). Just like the circuit court's order in *Kindred*, the Circuit Court's order in this case is "exactly what [the Supreme Court of the United States] has barred" and, further, it violates the FAA. *Kindred*, 137 S. Ct. at 1424. The Circuit Court's failure to look beyond what was expressly conferred by the POAs cannot stand under South Carolina or federal law. Rather, the Circuit Court must read the General POA as a whole document and give effect to the intention of the parties in accordance with the traditional rules of contractual interpretation.

B. The General POA unambiguously shows an intent for Ms. Gray to possess actual authority to execute contracts like the Arbitration Agreement, especially when construed in favor of arbitration.

South Carolina courts have looked to contract law when evaluating actions to set aside or interpret a power of attorney. *See In re Thames*, 344 S.C. 564, 571, 544 S.E.2d 854, 857 (Ct. App. 2001) (analyzing an action to set aside a power of attorney under contract law); *see also Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) (analyzing an action to interpret a power of attorney under contract law). "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." *Watson*, 407 S.C. at 454-55, 756 S.E.2d at 161 (quoting *Sphere Drake Ins. v. Litchfield*, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993)). The "intention of the parties" must be "generously construed" in accordance with the "strong presumption" in favor of arbitration even if the authority to execute an arbitration agreement is not "expressly granted in the power of attorney." *Mitsubishi Motors Corp.*, 473 U.S. at 626;

Rosenburg, 418 S.C. at 179, 790 S.E.2d at 924. "Whe[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Watson*, 407 S.C. at 455, 756 S.E.2d at 161 (quoting *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993)). "The [c]ourt's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Id.* at 455, 756 S.E.2d at 162 (quoting *Jordan*, 311 S.C. at 230, 428 S.E.2d at 707).

The Circuit Court's Order held that the Arbitration Agreement was unenforceable based on the POAs not conferring the necessary authority to execute an arbitration agreement on Mr. Gray's behalf.[5] (R. pp. 2-4). Specifically, the Circuit Court found that "the Power of Attorney does not encompass the executing of an agreement to resolve legal claims, but rather, deals with the limited circumstances enumerated therein of making financial or healthcare decisions for Decedent[]" and, "[t]herefore, no actual authority existed for [] [Ms.Gray] to sign the Arbitration Agreement." (R. p. 3). However, this is wholly incorrect as the General POA granted Ms. Gray the necessary powers to execute the Arbitration Agreement on Mr. Gray's behalf.

By its express language, the General POA clearly encompasses more than "the limited circumstances...of making financial or healthcare decisions." Analyzing the General POA in light of the traditional rules of contractual interpretation and the holding in *Rosenburg*, the general, broad, and unlimited language included in the opening paragraph of the General POA in particular evidences Mr. Gray's intent to authorize Ms. Gray to execute agreements such as the Arbitration

[5] The Circuit Court mistakenly construed the General POA and the Healthcare POA as a single document when in fact they are completely separate and distinct. Of note, the POAs each have their own signature page, the POAs each have exclusive page numbers, and the POAs do not reference each other in anyway.

Agreement at issue in this case. The General POA authorized Ms. Gray "to do and perform in [] [Mr. Gray's] name and behalf any and all things that she may think desirable and proper in full and complete a manner as [] [Mr. Gray] could do if present and acting in person[.]" (R. p. 50). Clearly, Mr. Gray intended this authority to be as broad as possible as is evidenced by the language allowing Ms. Gray to do "any and all things." *Id.*

To further show that Ms. Gray's power is not limited in anyway and that she in fact had the power to do "any and all things," the General POA prefaces the enumerated list by stating that her powers are "without limitation, upon the foregoing generality of statement[.]" *Id.* This language clearly shows the enumerated list does not limit Ms. Gray's ability to do "any and all things" on behalf of Mr. Gray. The General POA then concludes by confirming that Ms. Gray's powers "shall cover and include the right to do any act or thing that [] [Mr. Gray] might do[.]" (R. p. 52). Put simply, the General POA is as broad as possible and not subject to any limitation whatsoever and demonstrates Mr. Gray's unambiguous intent to grant Ms. Gray this unlimited authority.[6]

Analyzing the General POA as a whole, and the opening paragraph in particular, reveals a clear "intention of the parties" for Ms. Gray to "perform…any and all things" including executing the Arbitration Agreement. This becomes inescapable when the General POA is construed

---

[6] The Circuit Court noted that Ms. Gray's Affidavit "further reflects that [] [Mr. Gray] was never aware that [] [Ms. Gray] had signed the Arbitration Agreement and never authorized [] [Ms. Gray] to sign such contracts or agreements." (R. pp. 3-4.) However, the Affidavit cannot subsequently limit the authority that was expressly granted to Ms. Gray in the General POA. The language in the General POA controls the authority that was granted and it is "the [c]ourt's duty to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Watson*, 407 S.C. at 455, 756 S.E.2d at 162 (quoting *Jordan*, 311 S.C. at 230, 428 S.E.2d at 707). Further, under South Carolina law, a person who signs a contract or other written document cannot avoid the effect of the document by claiming they did not read it. *See Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (internal citations omitted).

generously to accomplish the "emphatic federal policy" establishing "a strong presumption" in favor of arbitration. Moreover, accepting the Plaintiff's argument and limiting the General POA to only allow Ms. Gray to make financial and healthcare decisions cuts against clear South Carolina law that calls for the court to "look to the language of contract." Here, the true intention of the parties should be given effect, which was to allow Ms. Gray to do "any and all things...without limitation, upon the foregoing generality of statement."[7]

C. South Carolina appellate courts have implicitly recognized agents holding a power of attorney are authorized to execute arbitration agreements with their principal's healthcare provider.

The South Carolina appellate courts have analyzed on several occasions the authority to execute arbitration agreements with healthcare providers. Those opinions are instructive here. Specifically, the Supreme Court of South Carolina has upheld arbitration agreements in the nursing home context where the plaintiff "held a general power of attorney for [the resident], and as such, signed an arbitration agreement with [defendant nursing home] on her mother's behalf upon [her mother's] admission." *Johnson*, 416 S.C. at 510; 788 S.E.2d at 217. In addition, this Court has held an agent lacked authority to sign an arbitration agreement because she "did not possess a health care power of attorney to sign either contract on Jones' behalf." *Scott v. Heritage Healthcare of Estill, LLC*, No. 2014-UP-317, 2014 WL 3845113, at *1 (S.C. Ct. App. Aug. 6,

---

[7] Additionally, the enumerated list includes rights related to legal actions, which provides additional support for Ms. Gray's authority to enter into the Arbitration Agreement on Mr. Gray's behalf. (R. pp. 50-52). Defendants also note that the Circuit Court gave weight to the fact that the POAs were titled "Power of Attorney" and not identified as a "General Durable Power of Attorney" when determining the scope of the POAs. However, the Circuit Court failed to look to the language of the contract and only relied on the title of the document. In doing so, the Circuit Court missed the clear language included in the General POA stating "[t]his is a durable power of attorney" as well as the general language granting Ms. Gray the ability to do "any and all things" on behalf of Mr. Gray. In sum, if the Circuit Court would have looked to the clear language of the General POA, it would have found that the General POA is in fact a "General Durable Power of Attorney."

2014). It follows that in *Scott* the agent would have possessed the required authority to sign an arbitration agreement if she possessed a power of attorney—like the one in this case.

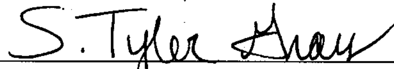
In fact, no located South Carolina appellate court decision has struck down an arbitration agreement within the nursing home context based on an agent's purported lack of authority where the signatory possessed a power of attorney to act on behalf of the resident. *See generally Thompson v. Pruitt Corp.*, 416 S.C. 41, 49, 784 S.E.2d 679, 682 (Ct. App. 2016), reh'g denied (Apr. 21, 2016), cert. denied (Dec. 2, 2016) (finding no authority to enter into an arbitration agreement under "common law agency principles" where the agent did not possess a power of attorney); *Dean*, 408 S.C. at 388, 759 S.E.2d at 736 (expressing concern that the agent did not "possess a health care power of attorney to sign" an arbitration agreement); *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 351, 755 S.E.2d 450, 453 (2014) (refusing to enforce an arbitration agreement where the agent lacked a power of attorney). Clearly, in each of the cases our appellate courts have not enforced arbitration, the court was explicit that had there been a power of attorney, the result would have been enforcement of arbitration. Further, authority can be conferred even without a power of attorney, but the presence of a power of attorney is absolute and irrefutable evidence of authority. Thus, the presence of the General POA here requires reversal of the circuit court's order.

CONCLUSION

When Mr. Gray was admitted to PruittHealth-North Augusta, Ms. Gray presented Defendants with two Powers of Attorney. The General POA vested her with broad authority to do "any and all things" on behalf of Mr. Gray. Acting upon this power, Ms. Gray chose to execute a clear and conspicuous agreement to arbitrate matters like the present case. Because she had actual

authority to enter into the Arbitration Agreement, this Court should reverse the Circuit Court's denial of Defendants' Motion to Dismiss and Compel Arbitration.[8]

Respectfully submitted,



Joshua S. Whitley (SC Bar No. 77824)
S. Tyler Graves (SC Bar No. 103173)
Smyth Whitley, LLC
126 Seven Farms Drive
First Citizens Plaza, Suite 260
Charleston, SC 29492
Tel: (843) 606-5635
Fax: (843) 654-4095

Attorneys for Appellants

February 14, 2020

[8] The Circuit Court made a secondary ruling in its Order when it found that "even if [Ms. Gray] had actual or apparent authority to sign the Arbitration Agreement on behalf of [] [the Resident], the Arbitration Agreement is unenforceable against the [] [Resident's] wrongful death beneficiaries." (R. p. 4). However, the Circuit Court's secondary ruling directly conflicts with South Carolina state law as well as federal law related to this issue. The Supreme Court of South Carolina and the Supreme Court of the United States have both ruled that a wrongful death claim will not prevent a court from compelling arbitration in this very context. *See Dean*, 408 S.C. 371, 378 n.3, 759 S.E.2d 727, 731 (2014) (stating courts may not refuse to compel arbitration in a nursing home action simply because a wrongful death claim is involved); *see also Marmet*, 565 U.S. 530, 533 (invalidating West Virginia's policy refusing to refer wrongful death claims against a nursing home to arbitration). Further, the Arbitration Agreement is applicable to wrongful death beneficiaries based on the clear language stating that the Patient/Resident shall include "any parent, spouse, child, executor, administrator, heir, or survivor entitled to bring a wrongful death claim." (R. p. 75).