THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate 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 Wille 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.

FINAL BRIEF OF RESPONDENT

C. Caleb Connor, SC Bar No. 100517
Kenneth L. Connor, SC Bar No. 100298
A. Keith McAlister, Jr., SC Bar No. 78213
Anne K. Moore, SC Bar No. 101018
CONNOR & CONNOR, LLC
302 Park Avenue SE
Aiken, South Carolina 29801
P: (803) 226-0543
F: (800) 480-9715
caleb@theconnorfirm.com

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate 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 Wille 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.

FINAL BRIEF OF RESPONDENT

C. Caleb Connor, SC Bar No. 100517
Kenneth L. Connor, SC Bar No. 100298
A. Keith McAlister, Jr., SC Bar No. 78213
Anne K. Moore, SC Bar No. 101018
CONNOR & CONNOR, LLC
302 Park Avenue SE
Aiken, South Carolina 29801
P: (803) 226-0543
F: (800) 480-9715
caleb@theconnorfirm.com

Attorneys for Respondent

TABLE OF CONTENTS

Contents

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE CIRCUIT COURT CORRECTLY HELD THAT THE ARBITRATION AGREEMENT SIGNED BY A RESIDENT'S DAUGHTER IS UNENFORCEABLE BECAUSE SHE LACKED ACTUAL AUTHORITY TO ENTER SUCH AN AGREEMENT?

II. WHETHER THE CIRCUIT COURT CORRECTLY HELD THAT THE ARBITRATION AGREEMENT SIGNED BY A RESIDENT'S DAUGHTER IS UNENFORCEABLE AGAINST DECEDENT'S WRONGFUL DEATH BENEFICIARIES DUE TO SOUTH CAROLINA CONTRACT LAW DEFENSES?

STATEMENT OF THE CASE

This is an appeal from an order denying a motion to dismiss and compel arbitration filed by Appellants PruittHealth-North Augusta, LLC, UHS Pruitt Corporation a/k/a PruittHealth, Inc., PruittHealth Consulting Services, Inc., and United Health Services of South Carolina, Inc. (collectively "Appellants"). The case involves a purported arbitration agreement (hereinafter "Arbitration Agreement") signed by Tamara Gray when her father, Willie J. Gray ("Mr. Gray"), entered PruittHealth-North Augusta, a skilled nursing facility, located at 1200 Talisman Drive in North Augusta, South Carolina (the "Facility"). During his short residency at the Facility, Mr. Gray suffered skin breakdown, including development and deterioration of pressure ulcerations and skin tears, infection, severe sepsis, cellulitis, abscess, and other injuries that ultimately resulted in his wrongful death.

On January 3, 2019, Grace Gray, individually and as wife of Mr. Gray, and as Personal Representative of the Estate of Mr. Gray ("Respondent"), filed her notice of intent to file suit pursuant to S.C. Code Ann. § 15-79-125. (R. pp. 000009-000019). On February 11, 2019, Appellants filed their Notice of Motion and Motion to Dismiss Respondent's Notice of Intent and to compel arbitration. (R. pp. 000048-000049) ("Motion"). As exhibits in support of their Motion, Appellants submitted for the Circuit Court's review Tamara Gray's Power of Attorney and Georgia Advance Directive for Healthcare. (R. pp. 000050-000061). Appellants also made the Facility's

Admission Agreement and Arbitration Agreement exhibits to their Motion. (R. pp. 000062-000078). Appellants failed to support their Motion with an affidavit of a representative.

In their Motion, Appellants expressed doubt regarding the enforceability of the Arbitration Agreement and requested "discovery." (R. p. 000049). On February 11, 2019, Respondent emailed Appellants to request such discovery as prescribed under S.C. Code Ann. § 15-79-125(B). (R. p. 000081). Despite Respondent's requests and the proposal of a consent stipulation as to any waiver, Appellants declined. On March 1, 2019, Respondent filed her Response in Opposition to Defendants' Notice of Motion and Motion to Dismiss Respondent's Notice of Intent. (R. pp. 000079-000210).

On March 5, 2019, the Honorable R. Keith Kelly held a hearing on the Motion. On April 11, 2019, Appellants untimely filed[1] a motion to reconsider. (R. pp. 000211-000213). On May 3, 2019, the Circuit Court issued an Order Denying Appellants' Motion to Dismiss Respondent's Notice of Intent. (R. pp. 000002-000005). On July 3, 2019, Judge Kelly issued a Form 4 Order denying Appellants' motion to reconsider. (R. pp. 000006-000008). On July 3, 2019, Appellants filed a Notice of Appeal.

FACTS

Respondent is the surviving spouse of the decedent, Mr. Gray. (R. p. 000009). Mr. Gray was admitted to the Facility on September 22, 2017, for short-term rehabilitation after a prolonged hospitalization due to an automobile accident that left him paralyzed. (R. pp. 000012-000019). Once his rehabilitation was completed, the plan was to transfer Mr. Gray to a nursing facility closer

[1] At the time Appellants' motion to reconsider was filed, the Circuit Court had not yet entered its order denying Appellants' underlying Motion.

to family in Pennsylvania for long-term care. *Id.* Although paralyzed, Mr. Gray was cognitively intact and able to communicate via body language. *Id.*

On August 10, 2017, during his hospital stay, Mr. Gray executed a power of attorney ("General POA for Finance") and a healthcare power of attorney ("Healthcare POA"). (R. pp. 000050-000061). The General POA for Finance was executed in the State of Georgia and identifies Mr. Gray's county of residence as Baltimore County, Maryland. (R. p. 000050). It names Mr. Gray's daughter, Tamara Gray, or his wife, Grace Gray, as his lawful agents and attorneys-in-fact. *Id.*

The language of the General POA for Finance relates solely to property and financial-based decisions and is devoid of any reference to authority to agree to arbitration or to waive Mr. Gray's Constitutional right to a jury trial. Moreover, the General POA for Finance does not authorize Tamara Gray to act on behalf of any wrongful death beneficiary as such a right is not possessed by Mr. Gray and cannot be conferred.

The Healthcare POA also identifies Tamara Gray as the healthcare agent. (R. pp. 000055-000056). The document relates solely to health care treatment and is devoid of any language which can reasonably be construed as granting authority to waive Mr. Gray or his wrongful death beneficiaries' right to a jury trial. (R. pp. 000054-000061). The document provides Tamara Gray the authority to make healthcare decisions. (R. pp. 000055-000056). Further, it only becomes effective if Mr. Gray is unable or chooses not to make or communicate his own healthcare decisions. (R. p. 000060). There is no evidence of record that either the General POA for Finance or Healthcare POA were recorded in Baltimore County, Maryland.

On September 22, 2017, Appellants' representatives met with Tamara Gray to complete necessary paperwork. (R. p. 000096, ¶ 5). As part of the admissions process, Tamara Gray was

provided over 70 pages, which she was instructed needed to be signed in order for her father to be admitted to the Facility. *Id.* at ¶¶ 5-6. Appellants never explained the Arbitration Agreement included in the package nor was she informed that, by signing said agreement, she was waiving her father's right to a jury trial. (R. pp. 000096-000097, ¶¶ 6-10). Appellants also did not inform Tamara Gray that she could consult an attorney or that the agreement was optional or could be revoked. *Id.* at ¶¶ 6, 11. Tamara Gray did not seek her father's permission to sign any of the documents beforehand. (R. p. 000097, ¶¶ 12-13). Further, no one from the Facility reviewed the signed paperwork with her father after his arrival to the Facility nor did she ever discuss the documents with her father thereafter. *Id.* at ¶¶ 14-15.

The Arbitration Agreement at issue is a five-page document found in Section 1.D.02 of Appellants' "Admission Packet for South Carolina Healthcare Centers." (R. pp. 000074-000078, 000173-000177). The parties to the agreement are "PruittHealth – North Augusta (the 'Healthcare Center') and WILLLIE J GRAY and TAMARA GRAY ('Patient/Resident' or 'Patient/Resident's Representative,' together referred to as 'Patient/Resident')." (R. p. 000074). Tamara Gray signed as Patient/Resident Representative; however, it is unclear who executed the document on behalf of the Facility because the name Michele Rich, the "Healthcare Center's Authorized Agent," was crossed out. (R. p. 000078). There are no other signatories to the Arbitration Agreement. *Id.*

The Arbitration Agreement claims the parties "understand and acknowledge" the agreement was "voluntary" and covers "any disputes that may arise in the future between the parties." (R. p. 000074). The scope of agreement is defined to include "[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement, including . . . 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 office, agent, or partner thereof. . . ." *Id.*

The Arbitration Agreement also provides that it "shall inure to the benefit of and bind the Patient/Resident and the Healthcare Center, their successors, assigns, and intended and incidental beneficiaries." (R. p. 000075). The agreement states "'Healthcare Center' shall include its operator, management company, governing body, officers, directors, shareholders, partners, managers, agents, and any parent, affiliate or subsidiary," and defines "Patient/Resident" as "any person whose claim is derived through or on behalf of the Patient/Resident, including . . . any parent, spouse, child, executor, administrator, heir, or survivor entitled to bring a wrongful death claim." *Id.*

Furthermore, the Arbitration Agreement provides "Patient/Resident or the Patient/Resident's Representative, has read this Agreement in its entirety, and understands the language in which it is written." (R. p. 000077). It also states "the Patient/Resident's Representative has explained to the Patient/Resident . . . the nature of this Agreement and its essential terms." (R. pp. 000077-000078). Neither of these things occurred, and Appellants knew they did not occur.

Though a resident of the Facility for only thirty-four (34) days, Mr. Gray suffered numerous injuries while under the care of Appellants, including development and deterioration of a Stage IV sacral decubitus ulcer and other pressure ulcerations, development and worsening infection, severe sepsis, malnutrition, and dehydration, amongst others. (R. p. 000010). On October 26, 2017, the Facility deemed Mr. Gray "stable" for discharge and arrangements were made to transfer Mr. Gray via ambulance to a nursing facility in Pennsylvania. (R. p. 000016). During transport, emergency medical services (EMS) determined Mr. Gray was unstable and his

blood sugars were assessed as dangerously out of range. *Id.* EMS diverted to the nearest hospital, which was in Wilson, North Carolina. *Id.*

Upon arrival to the emergency department, Mr. Gray was diagnosed and suffering from severe sepsis. *Id.* He was admitted and remained at the hospital for ten (10) days where he underwent wound therapy, including two (2) painful debridements of what is a described as a "mammoth," "pus-filled," "abscessed" sacral decubitus ulcer measuring 17.0 x 15.0 cm in size. *Id.* Mr. Gray was ultimately transferred to a nursing home in Pennsylvania but was unable to recover from the injuries he sustained while under the care of Appellants, and he passed away from those injuries on June 19, 2018. Litigation then ensued.

On May 3, 2019, the Circuit Court issued its Order denying arbitration. (R. pp. 000002-000005). The Circuit Court found Tamara Gray did not have authority[2] to enter the Arbitration Agreement and waive Mr. Gray's Constitutional right to a jury trial. (R. p. 000002). The Circuit Court also found Mr. Gray was never aware Tamara Gray had signed the purported agreement and never authorized her to sign such contracts or agreements. (R. pp. 000003-000004). Furthermore, the Circuit Court determined, even if Tamara Gray had actual or apparent authority to sign the Arbitration Agreement, it was unenforceable due to South Carolina contract law defenses against Mr. Gray's wrongful death beneficiaries. (R. p. 000004). The Circuit Court's Order did not specifically address all arguments or defenses raised by Respondent. This appeal followed.

---

[2] During the hearing, Judge Kelly raised the issue of the effectiveness and scope of the power of attorney. (R. p. 000039, line 23-p. 000040, line 4). The effectiveness of a power of attorney is defined by statute. *See* S.C. Code Ann. §§ 62-8-101 to 403.

STANDARD FOR REVIEW

"Arbitrability determinations are subject to de novo review." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016). "The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration." *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016). "[A] circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Smith*, 417 S.C. at 48.

ARGUMENT

This case arises out of Appellants' negligent care of Mr. Gray that resulted in his death. His wife and personal representative, Grace Gray, initiated this action in Circuit Court seeking survival and wrongful death damages for Mr. Gray's injuries and death. Appellants seek to enforce an arbitration of those claims based on an Arbitration Agreement executed by his daughter, Tamara Gray, during Mr. Gray's admission to the Facility.

Prior to the underlying Motion being heard, Appellants declined Respondent's repeated requests for limited discovery regarding the enforceability of the Arbitration Agreement.[3] Appellants then use Respondent's inability to discover additional defensible and disqualifying evidence regarding the enforceability of the purported contract as a shield and a sword.[4] As argued

---

[3] When Respondent requested Appellants engage in pre-suit mediation as required by S.C. Code Ann. § 15-79-125(C), Appellants claimed they could not participate due to the Supreme Court's decision in *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 788 S.E.2d 216 (2016). In *Johnson*, the court found that defendants waived their right to enforce an arbitration agreement because they engaged in dilatory and improper discovery tactics, which caused the plaintiff to incur unreasonable expense and delay. *Johnson*, 416 S.C. at 514-15. Like this case as well as many other recent arbitration-related decisions of our appellate courts, *Johnson* involved the same corporate Appellants.

[4] Because Appellants filed their motion for reconsideration in violation of Rule 59(e), SCRCP, prior to this appeal, Respondent filed her Summons and Complaint on May 10, 2019. In response, Appellants again filed a motion to dismiss and compel arbitration. Ironically, in that motion, Appellants state: "[w]ithout jurisdictional discovery, there is no way this Court can follow the

at the hearing, Respondent contends the Arbitration Agreement was unenforceable due to Tamara Gray's lack of authority **as well as** other applicable contract law defects or defenses, including **no meeting of the minds**,[5] **lack of consideration**,[6] and **unconscionability**.[7] (R. pp. 000029-000036, 000079-000210).

As explained below, Tamara Gray had no effective actual authority to execute the Arbitration Agreement. In addition, the agreement could not be enforced against Mr. Gray's wrongful death beneficiaries. (R. pp. 000004). Further, Appellants do not appeal the Circuit Court's wrongful death beneficiaries holding and, therefore, it is the law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."). This Court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

I. THE CIRCUIT COURT CORRECTLY DETERMINED TAMARA GRAY DID NOT HAVE ACTUAL AUTHORITY TO EXECUTE THE ARBITRATION AGREEMENT.

---

dictates of *Dean* and conduct a full inquiry regarding the enforceability of the Arbitration Agreement." *See also* Appellants' Mot. to Dismiss Cmplt. p. 3, *Gray v. PruittHealth-North Augusta, LLC, et al.*, 2019-CP-02-01157 (June 14, 2019).

[5] Even if Tamara Gray had authority, uncontroverted testimonial evidence confirms Tamara Gray did not comprehend the essential and material terms of the Arbitration Agreement. (R. pp. 000032-000035; R. pp. 000096-000097, ¶¶ 6-13.) Appellants' documentation also illustrates Tamara Gray lacked the requisite understanding to enter a binding agreement. (R. pp. 000133, 000143, 000172).

[6] After signing the Admission Agreement, no additional valuable consideration was given to Tamara Gray for execution of the Arbitration Agreement. (R. pp. 000087-000092). As unambiguously concluded by this Court in *Thompson*, "any possible benefit emanating from the [Arbitration Agreement] alone is offset by the [Arbitration Agreement's] requirement that [Mr. Gray] waive [his] right to access the courts and [his] right to a jury trial." *Thompson v. Pruitt Corp.*, 416 S.C. 43, 60, 784 S.E.2d 679 (Ct. App. 2016).

[7] Tamara Gray lacked meaningful choice when she executed the Arbitration Agreement, and its terms are oppressive and one-sided. (R. pp. 000093- 000095).

The Circuit Court correctly concluded the powers of attorney did not confer actual authority upon Tamara Gray to execute the Arbitration Agreement. This is consistent with the South Carolina Uniform Power of Attorney Act and is demonstrated by a review of the full language and meaning of the powers of attorney.

"A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts." *McCall v. Finley*, 294 S.C. 1, 6, 362 S.E.2d 26, 29 (Ct. App. 1987). "The existence of an agency relationship is . . . determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal." *Langdale v. Carpets*, 395 S.C. 194, 201, 717 S.E.2d 80, 83 (Ct. App. 2011). "[I]t is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority." *McCall*, 294 S.C. at 6. "A true agency relationship may be established by evidence of actual or apparent authority." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "[A]n agency may not be established solely by the declarations and conduct of an alleged agent." *Cowburn v. Leventis*, 366 S.C. 20, 39-40, 619 S.E.2d 437, 448 (Ct. App. 2005).

A. The General POA for Finance was not effective and did not confer actual authority upon Tamara Gray to execute the Arbitration Agreement.

During the hearing, the Circuit Court raised factual and legal concerns regarding the effectiveness and scope of the General POA for Finance at issue.[8] (R. p. 000039, line 23-p. 000040, line 4.) South Carolina law provides it is the duty of the Facility to exercise due care in determining whether facts and evidence establish "actual authority." (R. pp. 000083-000085).

[8] Following submission of briefs and the Motion hearing in this case, this Court issued its decision in *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 828 S.E.2d 82 (Ct. App. 2019). The *Stott* decision is directly applicable and instructive as to the effectiveness of the General POA for Finance here.

This analysis includes determining whether a purported power of attorney is effective and conferred "the necessary authority to execute an arbitration agreement," including compliance with statutory recordation requirements. (R. p. 000002).[9]

Powers of attorney are prescribed in the South Carolina Uniform Power of Attorney Act (the "Act"), which took effect on January 1, 2017. S.C. Code Ann. §§ 62-8-101 to 403. According to the Act, a "[p]ower of attorney" is a "writing or other record that grants authority to an agent to act in place of the principal." S.C. Code Ann. § 62-8-102(7); *Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) ("A power of attorney is an instrument in writing [which] appoints another as his agent and confers . . . authority to perform certain specified acts. . . .").

"The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed." S.C. Code Ann. § 62-8-107. If designated as "durable," the power of attorney "contains language establishing the principal's intent that the attorney-in-fact or agent's authority be exercisable during periods of the principal's physical or mental incapacity." *Stott*, 426 S.C. at 574; S.C. Code Ann. § 62-8-102(2) ("Durable . . . means not terminated by the principal's incapacity.")

When a power of attorney is executed in another jurisdiction, "[a]n agent may exercise a power of attorney . . . 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) (emphasis added). Subsection (c) provides:

> 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**

[9]"The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

> **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) (emphasis added).[10]

In *Stott*, although applying South Carolina's former power of attorney statute, when signing a nursing home arbitration agreement, this Court held "a durable power of attorney for finance must be recorded in order to be effective." *Stott*, 426 S.C. at 574; S.C. Code Ann. 62-5-501(C) (2009 & Supp. 2013). Like the former statute, this Court confirmed the Act also "requires durable powers of attorney to be recorded" as prescribed at Section 62-8-403(c). *Stott*, 426 S.C. at 574, n. 4. This Court further explained that the *Stott* "durable power of attorney for finance was not recorded until" after the arbitration agreement was signed; therefore, the "durable power of attorney was not effective to authorize [execution of] the [a]rbitration [a]greement on [d]ecedent's behalf." *Id.* at 574.

In this case, the General POA for Finance was executed in the State of Georgia by Mr. Gray on August 10, 2017. (R. p. 000050). It indicates Mr. Gray, the principal, resides in Baltimore County, Maryland. *Id.* There is no evidence of record that the General POA for Finance was ever recorded in Baltimore County or any other county as required by statute to take effect. (R. pp. 000050-000053). The General POA for Finance bears no stamp or other marking signifying its recordation to ensure compliance with the provisions of S.C. Code Ann. § 30-5-30. *Id.* Accordingly, the General POA for Finance was not effective on September 22, 2017, and Tamara

---

[10] "Incapacity" is defined as "means inability of an individual to manage property or business affairs because the individual . . . has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance. . . ." S.C. Code Ann. § 62-8-102(5).

Gray could not exercise any authority, regardless of whether it existed, to execute the Arbitration Agreement.[11]

B. The General POA for Finance does not confer broad enough power to execute the Arbitration Agreement.

For sources of actual authority, Appellants rely upon two (2) provisions of the General POA for Finance[12], which they allege authorized Tamara Gray to execute the Arbitration Agreement. (Br. of App. pp. 4-5). However, a review of the full language of these provisions, and the agreement as a whole, shows that these provisions do not confer actual authority upon Tamara Gray to execute or waive the right to a jury trial of Mr. Gray or his wrongful death beneficiaries.

"[A]ctual authority is expressly conferred upon the agent by the principal . . . ." *Roberson v. Southern Fin. of S.C., Inc.*, 365 S.C. 6, 11, 615 S.E.2d 112, 115 (2005). Such authority may be conferred by a power of attorney when effective. *Stott*, 426 S.C. at 574. While the power of attorney does not have to specifically enumerate all covered acts, if the power of attorney is relied upon to bind the principal to a contract which waives his fundamental right to a jury trial, the powers granted must be broad enough to include execution of an arbitration agreement. *See First S. Bank v. Rosenberg*, 418 S.C. 170, 181, 790 S.E.2d 919, 925-26 (Ct. App. 2016). As examined by this Court in *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 570, 813 S.E.2d 292, 306 (Ct. App. 2018), such language must include "a catch-all provision giving the attorney-in-fact the authority to sign any and all releases or consent required." *Curto v. Illini*

---

[11] Likewise, there is no indication the Healthcare POA was recorded either. (R. pp. 000054-000061). However, even if recorded, the Healthcare POA only covers healthcare-related decisions and does not spring into effect until Mr. Gray is incapacitated. *Id.* Thus, the Healthcare POA could not confer any authority.

[12] Although made an exhibit to their Motion, it appears the Appellants have abandoned any argument with respect to the Healthcare POA because they concede it solely addresses medical decision-making and was not triggered due to Mr. Gray's incapacity.

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 ex rel. Huerta*, 14 So. 3d 1033, 1035 (Fla. Dist. Ct. App. 2009). Moreover, "the authority conveyed by a principal to an agent to handle finances or makes health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Hodge*, 422 S.C. at 572; *citing Thompson*, 416 S.C. at 55.

In this case, the powers afforded to Tamara Gray by the General POA for Finance relate to financial and property decisions. In opening, the General POA for Finance states that Tamara Gray may do:

> any and all things that she may think desirable or proper . . . as I could if present and acting in person, **including specifically**, but without limitation, upon the foregoing generality of statement, **the right**. . . .

(R. pp. 000050) (emphasis added). Tamara Gray's specific financial rights are then set forth, including but not limited to: (1) to act upon insurance claims; (2) to access any safe deposit box; (3) to endorse, collect, cash or otherwise handle any checks or drafts; and (4) to negotiate and conclude any sales, loans, rentals, contracts, encumbrances, or other instruments relating to any real estate or personal property interest. (R. pp. 000050-000052). In closing, the General POA for Finance reiterates it covers only "the right to do any act or thing that I might do as **above set forth**." (R. p. 000052) (emphasis added).

Although the General POA for Finance includes a "generality of statement" provision, the scope and subject matter of the agreement only pertains to "things" that are financial in nature and property-related. Despite claims by Appellants that the powers conferred do "not place any limitations" upon Tamara Gray to enter "agreements, waivers, or releases," the General POA for Finance does not "set forth" any of these terms. It also fails to include any "catch-all provision,"

which allows Tamara Gray to sign releases or consents. In fact, the only use of the term "contracts" is specifically related to real estate or personal property, such as motor vehicles or corporate securities.

Moreover, the General POA for Finance confers no authority[13] on Tamara Gray to perform any act "or resolve legal claims" on behalf of Mr. Gray's wrongful death beneficiaries, including execution of an arbitration agreement. As addressed in detail below, Mr. Gray held no right to such claims and could not convey such authority as such claims arise only in his statutory beneficiaries after death. Accordingly, execution on behalf of such statutory beneficiaries was impossible as the General POA for Finance only allows acts that Mr. Gray "could do if present and acting in person."

II. THE TRIAL COURT CORRECTLY DENIED APPELLANTS' MOTION TO DISMISS BECAUSE THE PURPORTED ARBITRATION AGREEMENT IS UNENFORCEABLE UNDER SOUTH CAROLINA CONTRACT LAW DEFENSES.

As additional sustaining grounds, the Circuit Court correctly concluded the Arbitration Agreement is unenforceable due to contract law defenses, including defenses of Respondent's wrongful death beneficiaries. In finding in favor of Respondent on any contract law defense, including but not limited to no meeting of the minds, lack of consideration, and/or unconscionability, the Circuit Court's ruling is dispositive, and it need not reach the issue of authority. *Rosenberg*, 418 S.C. at 181, n. 7; *See also Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598 (1999). Further, because Appellants' brief only addresses the Court's contract defense analysis in a conclusory footnote, this issue is waived and becomes the law of the case.

---

[13] Appellants do not appeal whether Tamara Gray lacked "apparent authority" as argued by Respondent at the Motion; therefore, it is the law of the case. *Shirley's Iron Works,* 403 S.C. at 573; Rule 220(c), SCACR.

Shirley's Iron Works, 403 S.C. at 573; Rule 220(c), SCACR. However, Respondent responds as a matter of precaution.

While there is a presumption in favor of arbitration agreements, including those contracts governed by the Federal Arbitration Act (FAA), this presumption only applies where a valid arbitration agreement exists. *EEOC v. Waffle House*, 534 U.S. 279, 293-294, 122 S.Ct. 754; 764, 151 L.Ed.2d 755 (4th Cir. 2014). If the existence of a valid agreement is disputed, the "presumption disappears." *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir. 2002); *Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.,* 157 F.3d 775, 779 (10th Cir.1998) ("[W]hen the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away."). Appellants then bear the burden of establishing the existence of a valid contract, *Hinson-Barr, Inc. v. Pinckard*, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1987), and to prove that waiver of Respondent's fundamental right to a jury trial was knowing, voluntary, and intentional. *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Colo. 1982).

"Congress did not intend for the FAA to force parties who [have] not agreed to arbitrate." *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001); 9 U.S.C. § 4. "The FAA thereby places arbitration agreements on an equal footing with other contracts," which "may be invalidated by generally applicable contract defenses." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67-68, 130 S. Ct. 2772, 2776 (2010). "[R]evocation of a contract [may apply] under such grounds as exist at law or in equity." *Sydnor*, 252 F.3d at 305 (internal citations omitted); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238, 1241 (1985). Accordingly, "[g]eneral contract principles of state law apply," even if an agreement is subject to the FAA.

Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920 (1995).

Contract formation remains "a matter of judicial determination," and the trial court must "consider general contract defenses to ensure a meeting of the minds to arbitrate existed, and that such an agreement was not the result of fraud, duress, [or] unconscionability." *York v. Dodgeland*, 406 S.C. 67, 78, 749 S.E.2d 1139, 145 (2013); *citing Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001). Further, the court "must engage in a full inquiry . . . prior to any attempt to enforce the [a]greement," including "whether there was a meeting of the minds between the parties." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 388, 759 S.E.2d 727, 736 n. 13 (2014). When faced with a motion to compel arbitration that is opposed based on enforceability of the contract, the opposing party is given "the benefit of all reasonable doubts and inferences that may arise." *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980).

Despite Appellants' attempt to incorporate wrongful death claims into its Arbitration Agreement, Tamara Gray nor Mr. Gray had authority to bind non-signatory statutory beneficiaries. A wrongful death cause of action only arises in statutory beneficiaries when a wrongful act causes death; therefore, the claim at issue does not derive through or on behalf of Mr. Gray and cannot be waived by a party without proper probate appointment.

South Carolina law is clear that wrongful death and survival actions are different claims for different injuries. *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 218, 734 S.E.2d 142, 146 (2012); S.C. Code Ann. §§ 15-51-10 to 60; S.C. Code Ann. § 15-5-90. In part, South Carolina's Wrongful Death Act provides:

> 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 and 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. . . .

S.C. Code Ann. § 15-51-10. Thus, "a new statutory right" of action "is created by § 15–51–10 in the **personal representative of the decedent**." *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 348, 699 S.E.2d 143, 146 (2010) (emphasis added); *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 940 (D.S.C. 1988). A wrongful death claim exists to compensate the statutory beneficiaries[14] for their loss, including wife and children of the decedent. *Bennett v. Spartanburg Ry., Gas & Elec. Co.*, 97 S.C. 27, 81 S.E. 189, 189 (1914); S.C. Code Ann. § 15-51-20. Damages include, but are not limited to, pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of decedent. *Self v. Goodrich*, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989). A survival action is brought on behalf of the estate of the recently deceased for injuries the deceased sustained prior to his death, including conscious pain and suffering. *Gowan v. Thomas*, 237 S.C. 223, 116 S.E.2d 761 (1960). These claims are not derivative of each other.

Like South Carolina, where claims are independent, courts in many other states "have held that a person's agreement to arbitrate his or her personal injury claim does not bind the wrongful death claimants to arbitration, because they were not parties to the agreement and do not derive their claim from a party." *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 598 (Ky. 2012); *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009); *Pisano v. Extended Homes, Inc.*, 2013

---

[14] Every such action shall be brought by or in the name of the executor or administrator of the deceased. S.C. Code Ann. § 15-51-20. Only a duly appointed personal representative, S.C. Code Ann. § 62-1-201(33), shall have the authority to settle wrongful death or survival actions. S.C. Code Ann. § 15-51-42. Tamara Gray was not and has never been personal representative. Her mother, Respondent, has been appointed personal representative by the State of Maryland. (R. p. 000009).

PA Super 232, 77 A.3d 651 (Pa. 2013); *Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008); *Peters v. Columbus Steel Castings Co.*, 115 Ohio St. 3d 134, 873 N.E.2d 1258 (Ohio 2007); *Woodall v. Avalon Care Center–Federal Way, LLC*, 155 Wash. App. 919, 231 P.3d 1252 (Wash. 2010). As Kentucky's Supreme Court explicated:

> [A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that *tort* claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. . . . It is something else entirely, however, to say that incidental beneficiaries of a contract—individuals or entities with no substantive rights under the contract and no direct benefits—may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants. This is what [the Defendant] purports to do. Arbitration is a matter of contract, however; it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. . . . Since [Defendant's] theory would allow just that, *i.e.*, would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a 'third party beneficiary' of the arbitration agreement, we reject it out of hand.

Ping, 376 S.W.3d at 599–600 (Ky. 2012) (internal citations omitted). "[U]nless the third-party beneficiary in some way assents to a contract containing an arbitration clause, the contracting parties have waived the beneficiary's right to a jury trial without her consent." *Drury v. Assisted Living Concepts, Inc.*, 245 Or. App. 217, 262 P.3d 1162, 1166, n.5 (Or. 2011).

In prior rulings against these same Appellants (excepting the licensee-Facility) in *Thompson* and *Hodge*, this Court determined that "there can be no third-party beneficiary unless a valid contract exists." *Thompson*, 416 S.C. at 57; *Hodge*, 422 S.C. at 574-75; *See Dickerson v.*

Longoria, 414 Md. 419, 995 A.2d 721 (2010). This Court further explained that "a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement." *Id.* (*quoting Dickerson*, 995 A.2d at 742). Notably, this Court held that the *Thompson* plaintiff was "not attempting to enforce the [Arbitration Agreement] on behalf of [m]other's estate . . . [but] asserted tort claims against Appellants arising out of the patient-provider relationship created by the separate Admission Agreement." *Id.*

In this case, the Arbitration Agreement by its own terms is an agreement between "Willie Gray and Tamara Gray," as Patient/Resident, and "PruittHealth – North Augusta," as the Healthcare Center. (R. p. 000074). In fact, though Mr. Gray did not execute the purported agreement, it limits its applicability *solely* to Mr. Gray and Tamara Gray:

> NOTE: In signing this Agreement, Patient/Patient Representative binds both Patient/Resident and Patient/Resident Representative **individually**.

(R. p. 000078). Mr. Gray's estate nor his wrongful death beneficiaries are signatories. *Id.* Furthermore, Appellants UHS Pruitt Corporation a/k/a PruittHealth, Inc., PruittHealth Consulting Services, Inc., and United Health Services of South Carolina, Inc., although named in Plaintiff's Notice of Intent and identified as Appellants for purposes of this appeal, are not signatories to the Arbitration Agreement either. *Id.*[15]

---

[15] Respondent recognizes that these corporate Appellants may invoke the Arbitration Agreement, even though they are non-signatories. Respondent also recognizes the Arbitration Agreement states "'Healthcare Center' **shall include its operator, management company, governing body, officers, directors, shareholders, partners, managers, agents, and any parent, affiliate or subsidiary**." (R. p. 000075) (emphasis added.) Yet, upon information and belief, in continued litigation – whether in the trial court or by arbitration – Appellants will assert and *attest* that Appellant UHS Pruitt Corporation a/k/a PruittHealth, Inc. does not manage, administer or operate PruittHealth-North Augusta, LLC. They cannot have it both ways.

Other than a passing footnote, Appellants' brief fails to acknowledge this critical analysis in an apparent attempt to avoid these issues which have been litigated on multiple occasions before this Court to no avail. (Br. of App. p. 18.) Appellants' brief not only misconstrues the Circuit Court's order but it overstates a footnote in *Dean*. In *Dean*, our Supreme Court held the lower court "may not refuse to compel arbitration simply because a wrongful death claim is involved." *Dean* at 408 S.C. at 378, n. 3. However, in this case, the Circuit Court's Order was not solely premised on the wrongful death claim, but instead, the Circuit Court found the "Arbitration Agreement is unenforceable against [Mr. Gray's] wrongful death beneficiaries under South Carolina contract law **defenses**." (R. p. 000004) (emphasis added).

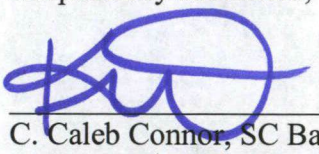
As in *Thompson* and *Hodge*, Respondent was not a party to the Arbitration Agreement. In this lawsuit, Respondent asserts wrongful death claims which arise independently of claims held by Mr. Gray. Such wrongful death claims are not Mr. Gray's to give or confer because "he held no right to those claims." *Woodall*, 155 Wash. App. at 929. "[W]rongful death actions are derivative of decedents' injuries but are not derivative of decedents' rights." *Pisano*, 77 A.3d at 660. More importantly, Respondent is not attempting to enforce the contract containing the Arbitration Agreement. Rather, she brings her claims in tort against Appellants arising out of the separate Admission Agreement.

CONCLUSION

The Circuit Court correctly found that Tamara Gray lacked authority to execute the Arbitration Agreement and that the agreement was unenforceable due to contract law defenses. For the reasons set forth herein, and any others appearing in the Record on Appeal, Respondent requests this Court affirm the decision of the Circuit Court and remit the case to the Circuit Court.

This the 18th day of February, 2020.

Respectfully submitted,



C. Caleb Connor, SC Bar No. 100517
A. Keith McAlister, Jr., SC Bar No. 78213
Kenneth L. Connor, SC Bar No. 100298
Anne K. Moore, SC Bar No. 101018
CONNOR & CONNOR, LLC
302 Park Avenue SE
Aiken, South Carolina 29801
P: (803) 226-0543
F: (800) 480-9715
caleb@theconnorfirm.com

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate 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 Wille 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.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that Final Brief of Respondent complies with Rule 211(b), SCACR.

A. Keith McAlister, Jr., SC Bar No. 78213
C. Caleb Connor, SC Bar No. 100517
Kenneth L. Connor, SC Bar No. 100298
Anne K. Moore, SC Bar No. 101018
CONNOR & CONNOR, LLC
302 Park Avenue SE
Aiken, South Carolina 29801
P: (803) 226-0543
F: (800) 480-9715
Email: kip@theconnorfirm.com

Attorneys for Respondent

February 18, 2020