

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Spartanburg County
Court of Common Pleas
Grace Gilchrist Knie, Circuit Court Judge

Case No. 2018-CP-42-04405
Appellate Case No. 2019-001731

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JUN 22 2020

SC Court of Appeals

The Estate of Mary Solesbee, by her personal
representative, Connie Bayne,

Respondent,

v.

Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC; THI of
South Carolina at Magnolia Manor-Inman, LLC d/b/a
Magnolia Manor-Inman; Inpatient Consultants of North
Carolina, P.C.; and Angela Brown, ACNP,

Defendants,

Of which Fundamental Clinical and Operational
Services, LLC; Fundamental Administrative Services,
LLC; and THI of South Carolina at Magnolia Manor-
Inman, LLC d/b/a Magnolia Manor-Inman are the

Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

YOUNG CLEMENT RIVERS, LLP

Stephen L. Brown (SC Bar No. 66468)

D. Jay Davis, Jr. (SC Bar No. 12084)

Russell G. Hines (SC Bar No. 72100)

Gaillard T. Dotterer, III (SC Bar No. 103620)

25 Calhoun Street, Suite 400

Charleston, South Carolina 29402

P.O. Box 993 (29402)

(843) 720-5488

Attorneys for Appellants

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Appellants¹ would make the following points in reply to Plaintiff's responsive brief.

ARGUMENT IN REPLY

1. **The Facility does not rely on the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 ("AHCCA"), but rather the principles of merger and estoppel.**

According to Plaintiff, one of the issues in this appeal is "[w]hether a nursing home can use the [AHCCA's] limited authority for 'health care' decisions to bind a nursing home resident to an independent arbitration contract to which she did not assent." (Br. of Resp. p. viii.) This is just not so. There is literally nothing in Appellants' principal brief about the AHCCA. (*See generally* Br. of Apps.)²

What the Facility is relying on are the principles of merger and estoppel. (*See* Br. of Apps. pp. 7–15.) Plaintiff's argument that the Facility cannot show the core requirements to form a contract³ is misplaced. The success of the Facility's argument does not depend on proving that the Arbitration Agreement is

¹ Shorthand references already defined in Appellants' principal brief (e.g., the "Facility" is Defendant/Appellant THI of South Carolina at Magnolia Manor-Inman, LLC, d/b/a Magnolia Manor-Inman; the "Other Appellants" are Defendants/Appellants Fundamental Clinical and Operational Services, LLC, and Fundamental Administrative Services, LLC; and "Appellants" refers to the Facility and the Other Appellants, collectively) are continued in this reply brief.

² Plaintiff's contention that the Facility makes inconsistent arguments about Mr. Dover's authority under the AHCCA (Br. of App. p. 8) is thus misguided, too. The Facility makes no argument about Mr. Dover's authority under the AHCCA at all. (*See generally* Br. of Apps.)

³ (Br. of Resp. pp. 6–8.)

enforceable but rather on proving that Plaintiff should be estopped from denying its enforceability, which it has done by showing that the Admission Agreement and the Arbitration Agreement are effectively one contract (merger) and that, Ms. Solesbee having embraced and directly benefitted from the Admission Agreement, equity prohibits Plaintiff from denying the enforceability of the Arbitration Agreement with which it is merged (estoppel).⁴

- 2. Our Supreme Court has already confirmed that, insofar as the question of merger is concerned, the Admission Agreement and the Arbitration Agreement constitute documents executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, giving rise to the presumption of merger.**

Plaintiff's contention that the Admission Agreement and the Arbitration Agreement serve different purposes⁵ has already been debunked by our Supreme Court. *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (confirming the validity of the general proposition of law on which the arbitration proponents (the appellants) based their merger/equitable estoppel argument: “Appellants’ equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . [T]he documents were executed at the same time, by the

⁴ To be clear, Plaintiff does not challenge the enforceability of the Admission Agreement, but the Facility’s estoppel argument applies to it with equal force.

⁵ (Br. of Resp. p. 9.)

same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.”) (emphasis added). While the material facts of this case are different from *Coleman* as to whether the presumption of merger is upset by evidence of a contrary intention (the facts do not support such a conclusion here), the material facts (admission agreements and arbitration agreements signed upon a resident’s admission to a skilled nursing facility) are the very same as to whether the presumption of merger arises in the first place, as *Coleman* confirms it does.

3. The Arbitration Agreement applies with equal force to the wrongful death claim.

Conceptually, Plaintiff’s argument here is completely separate and independent from any other challenge to the enforceability of the Arbitration Agreement. In effect, her contention is that an arbitration agreement—any arbitration agreement—is unenforceable with respect to a claim of wrongful death, even if it is in all other respects a valid and enforceable arbitration agreement under South Carolina’s general contract law. The only way this could be true (i.e., legally correct) is if the claim of wrongful death (i.e., the substantive right of action) belongs to the wrongful death beneficiaries themselves. If this were the case, then general principles of contract law would indeed apply to prevent wrongful death beneficiaries from having to arbitrate “their” claims if they themselves had not agreed to do so. A wrongful death claim, however, does not

belong to the wrongful death beneficiaries. It belongs to the decedent's personal representative, and a specific rule prohibiting enforcement of otherwise valid agreements to arbitrate wrongful death claims would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts,⁶ as indeed our Supreme Court has already recognized in *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 389, 759 S.E. 727, 737 n.3 (2014) (“[C]ourts *may not* refuse to compel arbitration simply because a wrongful death claim is involved.”) (emphasis added).

“The right of action for wrongful death is purely statutory and did not exist at common law” *Glenn v. E. I. DuPont Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970). As explained in Appellants’ principal brief, a wrongful death claim must be a claim that, had the decedent lived, they could have maintained themselves. S.C. Code Ann. § 15-51-10 (“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, notwithstanding the death of the person injured.”) (emphasis added); *see also Maxey v. Sauls*, 242 S.C. 247, 250, 130 S.E.2d 570, 572 (1963)

⁶ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

("[T]he right to maintain the [wrongful death] action is based upon the condition that 'the act, neglect or default' must be 'such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damage in respect thereof.' In other words, '*if the deceased never had a cause of action, none accrues under the wrongful death statute.*'") (discussing prior statutory language that is identical to that in present § 15-51-10) (quoting *Scott v. Greenville Pharmacy*, 212 S.C. 485, 489, 48 S.E. 324, 326 (1948) (emphasis added)). Accordingly, a claim of wrongful death is derivative in nature, in that it derives from (and does not arise without) a cause of action arising in favor of the *decedent*. *See Id.*; *see also* 26 S.C. Jur. Limitation of Actions § 32 ("A wrongful death action is derivative in nature"); *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 942 (D.S.C. 1988) ("If the decedent never had a cause of action, none accrues under the wrongful death statute. Furthermore, anything that would have defeated the decedent's recovery had he survived the accident, such as contributory negligence, a valid release, or similar acts on his part, would defeat the right of recovery in behalf of his family in case of his death. It follows logically that the decedent's failure to file a timely claim . . . is an act, or omission, on his part which should defeat the right of recovery of his personal representative.") (internal citations and quotation marks omitted); *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010)

(“*Quattlebaum* was correctly decided and adheres to the principle that a decedent’s estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived.”).

“[T]he substantive right to bring . . . a wrongful death action . . . is determined by the Probate Code.” *Fisher on behalf of estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 240, 811 S.E.2d 739, 742 (2018); *see also id.* at 242, 811 S.E.2d at 743 (“The Probate Code defines who may act on behalf of the estate of a deceased person. The Probate Code, therefore, is the substantive law by which the identity of the ‘*real party in interest*’ is determined for all civil actions *brought on behalf of the estate of a deceased person.*”) (emphasis added). “Under the Probate Code . . . *wrongful death actions must be brought by the personal representative . . .*” *Id.* (emphasis added); *see also* S.C. Code Ann. § 15-51-20 (“Every [wrongful death] action shall be brought by or in the name of the executor or administrator of [the] person [whose death was wrongfully caused].”);⁷ *Glenn*, 254 S.C. at 134, 174 S.E.2d at 158 (“If an action for wrongful death is instituted by one other than the

⁷ As explained by the *Fisher* Court, “Under the Probate Code . . . the terms ‘executor’ and ‘administrator’ do not have separate meaning, but are included within the defined term ‘personal representative.’” 422 S.C. at 240, 811 S.E.2d at 742 (citing S.C. Code Ann. § 62-1-201(33) (defining “Personal representative” to “include[] executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.”)). “Therefore, wrongful death actions must be brought by the personal representative, despite the language ‘shall

personal representative of a decedent, duly appointed by the Probate Court, it should be dismissed.”).

Even though it is for their “benefit,” a wrongful death claim does not belong to the wrongful death beneficiaries themselves. It is a claim that is brought on behalf of the estate of the deceased person. The substantive right to bring the claim belongs to decedent’s personal representative, who must bring the claim and is the real party in interest under South Carolina law. And consistent with Judge Anderson’s “correct” analysis in *Quattlebaum* (which explains that anything that would have defeated the decedent’s recovery had he survived, such as, for instance, a valid release, will apply to the wrongful death claim), it follows logically that a valid arbitration agreement must also apply to the wrongful death claim.

CONCLUSION

For the foregoing reasons, along with those in Appellants’ principal brief, the Facility asks this Honorable Court to reverse the trial court and stay this lawsuit in favor of arbitration (or remand the case to the trial court with instructions for it to do so) or, alternatively, remand the case to the trial court for it to engage in or allow any such other proceedings (including, without limitation, discovery) as may be necessary to properly determine and/or enforce the Facility’s rights under the

be brought by . . . the executor or administrator’ that still appears in section 15-51-

Arbitration Agreement, and the Other Appellants ask the Court to stay this action pending arbitration of Plaintiff's claims against the Facility (or remand the case to the trial court with instructions that it do so) or, alternatively, remand the case to the trial court for any further proceedings necessary to decide their motions to stay on the merits.

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: 

Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
Gaillard T. Dotterer, III (SC Bar No. 103620)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29402
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

Charleston, South Carolina

Dated: 6/15/20

20.” *Id.*

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PROOF OF SERVICE

YOUNG CLEMENT RIVERS, LLP

Stephen L. Brown (SC Bar No. 66468)

D. Jay Davis, Jr. (SC Bar No. 12084)

Russell G. Hines (SC Bar No. 72100)

Gaillard T. Dotterer, III (SC Bar No. 103620)

25 Calhoun Street, Suite 400

Charleston, South Carolina 29402

P.O. Box 993 (29402)

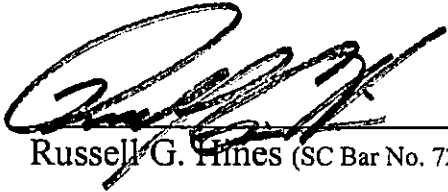
(843) 720-5488

Attorneys for Appellants

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Appellants, hereby certify that the **INITIAL REPLY BRIEF OF APPELLANTS** was served on all other parties to this matter by depositing a copy of the same in the U.S. Mail on June 19, 2020, properly posted for delivery to the following addressees:

W. Harold Christian, Jr., Esquire
Matthew W. Christian, Esquire
Christian & Davis, LLC
P.O. Box 332
Greenville, SC 29602
Attorneys for Respondent

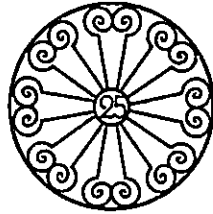
Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: 

Russell G. Hines (SC Bar No. 72100)
Attorneys for Appellants

Charleston, South Carolina

Dated: 6/19/20



YCR LAW

Pollyana Bell
Project Assistant

Direct Dial: (843) 724-6616
Direct Fax: (843) 579-1369
E-mail: pbell@ycrlaw.com

June 19, 2020

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SC Court of Appeals

VIA US MAIL

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: The Estate of Mary Solesbee, by her personal representative, Connie Bayne vs. Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolin at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman are the Appellants
Appellate Case No.: 2019-001731
Case No.: 2019-001731
Claim No.: HBLM# 1825909
YCR File: 14347-20180793

Dear Ms. Kitchings:

Please find enclosed an original and one (1) copy of an Initial Reply Brief of Appellants as well as the original and one (1) Proof of Service. Kindly return one (1) court stamped copy to us in the self-addressed envelope.

If additional copies or a filing fee are needed please let us know. With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

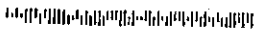
Pollyana Bell
Project Assistant

RGH/pbb

Enclosures

cc via US mail:

Matthew W. Christian, Esquire
W. Harold Christian, Jr., Esquire



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YCRLAW 25 Calhoun Street, Suite 400
P.O. Box 998
Charleston, SC 29402-0993

PSN
14347-
10180793

Jenny Abbott Kitchings, Clerk of
Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

