THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2018-CP-23-05088

Estate of Mozana Clinkscales, by and through the appointed Personal Representative Charlie E. Clinkscales, Individually, and on behalf of Statutory Beneficiaries,

Respondents,

v.

Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville,

Appellants.

FINAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in denying the Facility's[1] motion to compel arbitration (and, in turn, the Other Appellants'[2] corresponding motions for a stay)?

A. Did the circuit court err in finding that the Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances?

B. Did the circuit court err in finding that the Arbitration Agreement does not govern the wrongful death claim (in this wrongful death and survival action)?

STATEMENT OF THE CASE

Mr. Clinkscales[3] is the personal representative of Mrs. Clinkscales's estate. (R. pp. 20 ¶ 1, 404.) He filed this wrongful death and survival action on October 4, 2018, in the Greenville County Court of Common Pleas,[4] asserting claims arising out of alleged deficiencies in the care/treatment provided to Mrs. Clinkscales while she was a resident of the Facility. (*See generally* R. pp. 20–79.)

In response to the suit, the Facility moved to compel arbitration, pursuant to an Arbitration Agreement Mr. Clinkscales had signed on behalf of Mrs.

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[1] The "Facility" is Defendant-Appellant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville. It is a skilled nursing facility in Greenville County.

[2] The "Other Appellants" are Defendants-Appellants Fundamental Clinical and Operational Services, LLC, and Fundamental Administrative Services, LLC. "Appellants" refers to the Facility and the Other Appellants, collectively.

[3] "Mr. Clinkscales" is Plaintiff/Respondent, Charlie Clinkscales, son of the late Mozana Clinkscales ("Mrs. Clinkscales").

[4] (*See generally* R. pp. 18–79.)

Clinkscales[5] on August 30, 2013. (R. pp. 155–159.) The Other Appellants filed motions to stay the action until the arbitrability issue (i.e., the issue raised by the Facility's motion) was finally decided and any/all arbitration proceedings were completed (the "Motions to Stay"). (R. pp. 160–163.)

The circuit court heard the motions on December 18, 2018, the Honorable Robin B. Stilwell presiding. (*See generally* R. pp. 80–125; *see also* R. pp. 387–467.) The court denied the Facility's motion to compel arbitration by order filed February 5, 2019, finding (A) that "[t]he Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances" and (B) that "[t]he Arbitration Agreement does not govern the wrongful death claim." (R. pp. 1–4.)[6] Appellants' respective Rule 59(e) motions

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[5] Mr. Clinkscales signed the Arbitration Agreement on his own behalf, too. (R. p. 159 ("It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident"); *id.* ("By his/her signature below, the executing party represents that he/she has authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.").

[6] The order effectively disposed of the Motions to Stay, too, though not on the merits. These motions sought a stay of this action until the arbitrability issue was finally decided and any/all arbitration proceedings were completed. (R. pp. 155–157, 160–163, 420–429.) Obviously, the arbitrability issue will not be finally decided until this appeal is decided, but the relationship between the Facility's motion to compel arbitration and the Motions to Stay is such that, insofar as the circuit court was concerned, its denial of the former mooted the latter. Thus, while the circuit court did not grant the relief the Other Appellants sought, it did not rule against them on the merits, and final the determination of the arbitrability issue in this appeal will at least determine whether the Motions to Stay are moot, if

were timely filed February 14, 2019,[7] heard April 22, 2019,[8] and denied by order filed May 13, 2019. (R. pp. 15–17.)

This appeal timely follows.[9]

STATEMENT OF FACTS

Mrs. Clinkscales was originally admitted to the Facility on January 15, 2011, and on that date, Mr. Clinkscales signed the original Admission Agreement on her behalf. (R. pp. 18–79, 467.) Mrs. Clinkscales was discharged from the Facility from August 18, 2013, to August 30, 2018. (R. p. 467.) When Mrs. Clinkscales returned to the Facility on August 30, 2018, Mr. Clinkscales signed a new

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not determine them on the merits in favor of the Other Appellants. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement. However, the Circuit Court included in its order the requirement that all parties be included in one arbitration proceeding. Federal has signed no arbitration agreement and cannot be forced into compulsory arbitration. We feel it was erroneous to condition the relief to which respondents are plainly entitled upon the voluntary submission of Federal to arbitration proceedings. This provision has been deleted from the foregoing Order of the lower court.").

[7] (R. pp. 448–482.)

[8] (R. pp. 126–154.)

[9] Appellants' notice of appeal was served and filed May 28, 2019. (R. pp. 491–493.)

Admission Agreement for her and the subject Arbitration Agreement. (R. pp. 159, 448–466.) At the time he did so, Mr. Clinkscales was Mrs. Clinkscales's duly appointed attorney-in-fact, pursuant to a durable power of attorney recorded in Greenville County on January 24, 2011 (the "Power of Attorney"). (R. pp. 404–407.)

STANDARD OF REVIEW

A circuit court's determination of whether a claim is subject to arbitration is reviewed de novo on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes de novo review of the determination of whether an arbitration agreement is enforceable against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.*

ARGUMENT

I. The circuit court erred in denying the Facility's motion to compel arbitration (and, in turn, the Other Appellants' corresponding motions for a stay).

A. The circuit court erred in finding that the Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances.

The circuit court erroneously ruled that the Arbitration Agreement lacked valid, legal consideration, and, as a result, could not be enforced. It found that the

parties' mutual and concurrent promises to forfeit their respective rights to a jury trial in favor of arbitration was not sufficient consideration despite clear precedent to the contrary. *See Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996) ("Valuable consideration for a contract may consist of some forbearance given or detriment suffered."); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274–75 (4th Cir. 1997) ("O'Neil first argues the contract to arbitrate was not supported by adequate consideration because the agreement was not binding on the hospital. O'Neil's argument fails because its premise is mistaken. . . . It is true that courts have refused to enforce arbitration agreements where the agreement specifically allows the employer to ignore the results of arbitration. That is not the case here, however. There is no such clause in the arbitration agreement signed by O'Neil, and we decline to read such a clause into the contract. *A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.*") (citing *Rickborn*, *supra*) (internal citation omitted) (emphasis added); *id.* at 275 ("O'Neil's argument is especially misplaced in the circumstances of this case. Not only has the hospital consistently argued that it is bound by the arbitration agreement, it has, by virtue of this suit, shown its commitment to the arbitration process. Indeed, the only party to this case who has shown a desire to avoid binding arbitration is O'Neil herself.") (applying South Carolina law); *Towles v. United HealthCare Corp.*, 388 S.C. 29, 40, 524 S.E.2d 839, 846 n.4 (Ct. App.

1999) (favorably citing *O'Neil* for the proposition that "a mutual promise to arbitrate constituted sufficient consideration to enforce an arbitration agreement where the employer proffered, and the employee signed, an employee handbook and acknowledgment form over three and one-half years after employment began.").

Moreover, to require additional consideration for the Arbitration Agreement beyond the parties' mutual promises to arbitrate violates the FAA[10]. "[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate"[11] and "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). "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) (emphasis added); *see also* 9

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[10] The "FAA" is the Federal Arbitration Act, 9 U.S.C §§ 1–16. Unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce. *Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273–77 (1995). There is no dispute that the FAA applies here. (R. pp. 4–5.) Moreover, *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014), our state Supreme Court held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA.

[11] *Allied–Bruce*, 513 U.S. at 270.

U.S.C. § 4 ("The 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.*") (emphasis added).

While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)); *see also* 9 U.S.C. § 2 (providing that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). The FAA requires that the Court place the Arbitration Agreement "on *equal footing with other contracts . . . .*" *Concepcion* at 339 (emphasis added). To do, as the circuit court has here, and require something more of the Facility as a contracting party just because the contract in issue is an arbitration agreement violates the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion* at 339.

Further, the circuit court improperly found that the Facility's promise to arbitrate was "illusory" because it was unlikely that it would commence claims that would require arbitration under the Arbitration Agreement. "An 'illusory promise'

is one which is so indefinite that it cannot be enforced, or by its terms makes performance optional or entirely discretionary on the part of the promisor. In other words, a promise is illusory when it fails to bind the promisor, who retains the option of discontinuing performance." 17A Am. Jur. 2d Contracts § 125 (internal citations omitted). An example of an illusory promise would be, "I promise to sell you my car for $10,000 if I want to." Under this scenario, the "promisor" has really made no promise at all. That is not what we have here.

Without question, the Arbitration Agreement binds both sides to arbitrate any/all disputes within its scope, affording no one the option or discretion to do otherwise. (*See* R. p. 159.) Besides being wholly speculative, the probability of a claim arising in favor of the Facility is wholly immaterial—it matters only that it is bound to arbitrate any one that does. *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998) ("A forbearance to exercise a legal right is valuable consideration."); *cf. Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 19, 738 S.E.2d 480, 490 (Ct. App. 2013) ("[A] promise is not illusory merely because its enforceability depends upon the performance of a reciprocal promise."). But even assuming, *arguendo*, it were, there are a multitude of potential offensive claims that the Facility would be required to arbitrate, including, but not limited to, disputes concerning the payment of services for care rendered.

Further still, the circuit court erred in finding that "[m]any of the arguments [the Facility] raises in support of the Arbitration Agreement are misguided because they conflate the Arbitration Agreement and the Admission Agreement which . . . are distinct documents that do not merge." (R. p. 6.) While it is true that merger/estoppel is one of several theories South Carolina has recognized that could bind nonsignatories to arbitration agreements,[12] it is not the theory the Facility relies on here.[13] Here, Mr. Clinkscales had power of attorney for Mrs. Clinkscales at the time he signed the Arbitration Agreement for her.

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[12] *See Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel."); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) ("Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . Here, the documents were executed at the same time, by the 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).

[13] Similarly, where the circuit court references the lack of a "benefit" to Mrs. Clinkscales from the Arbitration Agreement, it appears to be conflating a merger/estoppel analysis (*see Wilson*, 426 S.C. at 340, 827 S.E.2d at 175 (addressing "direct benefits estoppel")) with a consideration, and explained above, a "benefit" to Mrs. Clinkscales is determinative of the latter. *See, e.g., O'Neil*, 115 F.3d at 275 ("A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.") (citing *Rickborn, supra*); *Prestwick Golf Club*, 331 S.C. at 389, 503 S.E.2d at 186 ("A forbearance to exercise a legal right is valuable consideration."). But assuming, *arguendo*, it were, the benefit is the Facility's mutual promise to arbitrate. *See Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to *favor* arbitration of disputes.") (emphasis added).

Even further, the circuit court erred in finding the Arbitration Agreement unenforceable because it constitutes "other consideration" in violation of pertinent Medicare and Medicaid regulations. Specifically, the court appears to have found that the Arbitration Agreement violated 42 U.S.C. §1396r(c)(5)(A), which prohibits Medicare and Medicaid certified facilities from receiving other consideration "in addition to any amount otherwise required to be paid under the State's Medicaid plan . . . as a *precondition* of admitting (or expediting the admission of) the individual to the facility . . . ." This notion fails of its essential premise: namely, that the Arbitration Agreement is such a *precondition*. As the circuit court itself expressly recognized, it is not. (R. p. 7 ("Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is *not required* to gain admission to the home.") (emphasis added).)[14]

Lastly, to the extent that the circuit court ruled that the Arbitration Agreement lacked consideration because it was not executed when Mrs. Clinkscales was originally admitted to the Facility in January of 2011 but when she was re-admitted in August of 2013, this, too, is an error. For one thing, the court's order does not actually mention Mrs. Clinkscales's discharge and re-admission in August of 2013; thus, to the extent the court found that the Arbitration Agreement was not presented to Mr. Clinkscales until some two and a half years into Mrs.

[14] The Facility would also note that the court's analysis is conclusory and unsupported by any case law.

Clinkscales's uninterrupted residency at the Facility, this is simply not so. (*See* R. pp. 448–467.) In any event, however, as supported by the above analysis/authorities, it is unclear how this would have any material impact on the question of consideration at all.

B. The circuit court erred in finding that the Arbitration Agreement does not govern the wrongful death claim.

The circuit court erred in ruling finding that the Arbitration Agreement did not apply to the wrongful death claims because "no one with legal authority" signed the agreement on behalf of the statutory beneficiaries and the Arbitration Agreement did not cover such claims.

As an initial matter, the plain language of the Arbitration Agreement binds "successors, assigns, heirs, personal representatives, guardians or other persons deriving their claims through or on behalf of Resident." (R. p. 159.) Obviously, there is an explicit intent to bind third parties that would include statutory beneficiaries.

Under S.C. Code Ann. § 15-51-10, a personal representative is clearly bound to an Arbitration Agreement to the same extent as his or her decedent:

> 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). Additionally, S.C. Code Ann. § 62-3-703 provides: "a personal representative of a decedent domiciled in this State at his death *has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to his death.*" (emphasis added).

A wrongful death claim must be a claim that, had the decedent lived, they could have maintained themselves. A claim for wrongful death is derivative of the decedent's rights. 26 S.C. Jur. Limitation of Actions § 32 ("A wrongful death action is derivative in nature . . . ."); *see also*, *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939 (D.S.C. 1988). The *claim* for wrongful death belongs to the decedent's estate and must be brought by the personal representative of their estate. The *claim* does not belong to the statutory beneficiaries, only the *recovery*—they are the "beneficiaries" of the claim. *See* S.C. Code Ann. § 15-51-20; *see also* S.C. Code Ann. § 15-51-40.

The court's reliance on the Kentucky Supreme Court's decision in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012) is misplaced. The *Ping* Court ultimately ruled that the plaintiff, a patient's daughter who executed the arbitration agreement, lacked authority to do so. It was because of this that the Court found the document could not bind the statutory beneficiaries. Here, there is

no dispute over Mr. Clinkscales's authority to bind his mother. Further, Kentucky law regarding wrongful death actions differs drastically from South Carolina law. As noted above, wrongful death actions in South Carolina are derivative. Under Kentucky law, a wrongful death action accrues independently.

Moreover, the arbitrability of wrongful death claims was addressed by our South Carolina Supreme Court in *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E. 727 (2014), and it held that "courts may not refuse to compel arbitration simply because a wrongful death claim is involved." *Id.*, 408 S.C. at 389, 759 S.E.2d at 737 n.3 (emphasis added).[15] And, indeed, South Carolina's wrongful death statute cannot create a situation that renders (whether expressly or effectively) FAA-covered arbitration agreements inapplicable to wrongful death claims. *See Kindred Nursing Centers*, 137 S. Ct. at 1423; *see also* 9 U.S.C. § 2 (providing that an arbitration agreement is "valid, irrevocable, and

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[15] Courts in South Carolina interpreting *Dean* have found that statutory beneficiaries are subject to arbitration to the same extent as the decedent. *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, 2015 WL 1268185 at *3 (D.S.C. Mar. 19, 2015) ("Additionally, the South Carolina Supreme Court made clear in *Dean* that, under South Carolina law, an arbitral agreement is still indeed binding on a decedent's estate for a claim in wrongful death."). The Facility also submits that *Long v. Silver*, 248 F.3d 309 (4th Cir. 2001), supports the arbitrability of the wrongful death claim on the alternative basis that the statutory beneficiaries' claims are "so closely intertwined" with those relating to the survival action. *See also Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir.1993) (holding that because claims against the non-signatory were "intimately founded in and intertwined with" a contract containing an arbitration clause, signatory was estopped from refusing to arbitrate those claims (internal quotation marks omitted).

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). To do would plainly violate violates the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion* at 339.

Lastly, in any event, Mr. Clinkscales' portion of the wrongful death must be submitted to arbitration because he personally signed the Arbitration Agreement in his individual capacity. (R. p. 159.)

CONCLUSION

For the foregoing reasons, Appellants ask this Honorable Court to reverse the circuit court and compel Mr. Clinkscales's claims against the Facility to arbitration (or, alternatively, to remand the case to the circuit court with instructions that it do so) and to stay this action as to FCOS and FAS (or, alternatively, remand the case to the circuit court with instructions that it either do so or conduct any further proceedings necessary to decide the Motions to Stay on the merits).

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Dated: 6/22/20

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APPELLANTS' CERTIFICATION FOR FINAL BRIEF

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I, Russell G. Hines, do hereby certify that the Final Brief of Appellants complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

Respectfully submitted,

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