STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2017-CP-10-05984
Appeal No. 2018- 001142

Victor Rawl as Personal Representative of the Estate of Vera Brown,

Respondent,

v.

West Ashley Rehabilitation and Nursing Center-Charleston, SC, LLC d/b/a Heartland of West Ashley Rehab and Nursing Center,

Appellant.

RECORD ON APPEAL

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INDEX

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO: 2017-CP-10-5984

VICTOR RAWL as Personal Representative of the ESTATE OF VERA BROWN,

Plaintiff,

v.

WEST ASHLEY REHABILITATION AND NURSING CENTER-CHARLESTON, SC, LLC d/b/a HEARTLAND OF WEST ASHLEY REHAB AND NURSING CENTER,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION

This matter came before the court on March 21, 2018 on Defendant's Motion to Dismiss and Compel Arbitration. For the reasons set forth below, Defendant's Motion to Dismiss and Compel Arbitration is **DENIED**.

BACKGROUND FACTS

Vera Brown was admitted to Defendant's facility on August 25, 2014. Upon admission, Ms. Brown was asked to sign admission paperwork as well as the Arbitration Agreement, which was separate from the admission paperwork. The Arbitration Agreement was not necessary for admission. Additionally, there was no bargain for exchange nor consideration in Ms. Brown's agreement to the Arbitration Agreement. Ms. Brown passed away approximately four (4) days after her admission into Defendant's facility, while under Defendant's care.

LEGAL ANALYSIS

While there is a presumption in favor of arbitration agreements, this presumption only applies where there is a valid arbitration agreement. EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v.

Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 D.E.2d 581 (2003). However, not all arbitration clauses are enforceable. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreement. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'"). Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

A. The Arbitration Agreement lacks valuable consideration and is unenforceable where there was no additional consideration in Plaintiff's agreement to the Arbitration Agreement and future promises are not valuable consideration.

The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d 161, 166 (S.C. 2003) "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)). Where a contract lacks valuable consideration, the contract will be deemed unenforceable.

Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Riedman Corp. v. Jarosh, 290 S.C. 252, 253, 349 S.E.2d 404, 405 (1986); see also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274-5 (4th Cir. 1997). However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confides of the four corners of the instrument. State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). Therefore, our courts must assess whether the arbitration agreement itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate.

In the case at hand, it is clear that the Arbitration Agreement lacks valuable consideration. Paragraph 3 of the Arbitration Agreement states that the FAA applies to the Agreement. Therefore, we must look at state law to decide the threshold question of contract formation and whether consideration exists. Munoz, 343 S.C. at 542 S.E.2d 360, 364; Towles, 338 S.C. at 37, 524 S.E.2d at 844; Rent-A-Center, West, Inc, 561 U.S. at 130 S. Ct. at 2776, 177 L.Ed.2d 403; Simpson, 373 S.C at 14, 644 S.E.2d at 663. Upon admission Ms. Brown was asked to sign the admission paperwork. Ms. Brown then signed the Arbitration Agreement separate from the admission paperwork. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. In fact, the Arbitration Agreement states "[t]he patient will receive services in this center whether or not this agreement is signed." Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party,

when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself. Consequently, where the Arbitration Agreement is guided by the FAA and principles of contract law - the Arbitration Agreement is unenforceable where the Arbitration Agreement lacks valuable consideration.

B. Plaintiff's agreement to the Arbitration Agreement was unconscionable in the absence of meaningful choice on part of Plaintiff due to the one-sided contract provisions, the relative disparity in the parties' bargaining power, and the Defendants relative sophistication over Plaintiff's decedent.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the agreement. S.C. Code Ann. § 36–2–302(1) (2003).

In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that courts must determine whether a contract is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. See Carlson v. General

Motors Corp., 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," id. at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17A Am.Jur.2d Contracts § 279 (2004))).

In the case at hand, it is clear that the Arbitration Agreement is unconscionable because Vera Brown lacked absence of meaningful choice and the terms in the Arbitration Agreement are oppressive, one-sided terms. Vera Brown was admitted into Defendants' facility on August 25, 2014. She passed away at Defendants' facility four (4) days later on August 29, 2014. Upon admission the standard Arbitration Agreement form was presented to an ill Vera Brown on a take-it-or leave it basis. Ms. Brown did not contribute to the drafting of the Arbitration Agreement or possess the bargaining power to negotiate the terms of the Arbitration Agreement. See Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms). Nevertheless, finding a contract to be one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable. Lackey, 330 S.C. at 395, 498 S.E.2d at 902.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). In determining whether there

is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power; the parties' relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id.

In the case at hand, there was an inherent disparity in bargaining power between the parties as this was a transaction between an ill patient who died four (4) days after executing the Arbitration Agreement and a commercial entity. Vera Brown was transferred from the hospital via ambulance to Defendants' facility with diagnosis that included chronic kidney disease, Anemia, dementia, urinary tract infection, upper respiratory disease, acute kidney failure, congestive heart failure, hypertension, weakness, and difficulty in walking. She was also marked as a fall risk.

Furthermore, the arbitration agreement was inconspicuously buried in the admission paperwork and "hastily" presented to Ms. Brown for her signature. This is evident by the "x's" where Ms. Brown was asked to print and sign her name, and date. Moreover, Vera Brown's injuries include death as this is a wrongful death claim.

Moreover, we must also consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences. The loss of the right to a jury trial is an obvious result of arbitration. However, this particular arbitration clause also required Vera Brown to forego certain remedies that were otherwise required by statute. While certain phrases are in bold, the arbitration clauses in their entirety are written in the standard small print, and embedded in paragraphs one (1) through fourteen (14). The Court cannot ignore the inconspicuous nature of these provisions, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Ms. Brown by law.

Therefore, this Court denies Defendant's Motion to Dismiss and Compel Arbitration where the Arbitration Agreement is guided under the FAA and principles of contract law because the Arbitration Agreement lacks valuable consideration and was unconscionable.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss and Compel Arbitration is **DENIED.**

IT IS SO ORDERED!

Dated this 27 day of April 2018

The Honorable Dianne Goodstein
Presiding Judge, Ninth Judicial Circuit

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO: 2017-CP-10-5984

VICTOR RAWL as Personal Representative of the ESTATE OF VERA BROWN,

Plaintiff,

v.

WEST ASHLEY REHABILITATION AND NURSING CENTER-CHARLESTON, SC, LLC d/b/a HEARTLAND OF WEST ASHLEY REHAB AND NURSING CENTER

Defendant.

COMPLAINT
(Jury Trial Demanded)

The Plaintiff, complaining of the Defendant, alleges and says as follows:

CASE SYNOPSIS

1. Vera Brown was admitted to Defendant's facility on August 25, 2014. Upon admission, Ms. Brown was full code, meaning if she was found in cardiac arrest every intervention would be attempted, including cardiopulmonary resuscitation (hereinafter "CPR"), to revive her. Neither Ms. Brown or a legal designee consented to a Do Not Resuscitate (DNR) order, nor did a legal designee or a physician sign off on a DNR. Regularly, Ms. Brown's daughter would visit her, and afterwards would have dinner at the restaurant across the street. On August 29, 2014, while eating dinner across the street from Defendant's facility. Ms. Brown's daughter received a phone call stating Ms. Brown was experiencing a shortness of breath. Ms. Brown's daughter, an experienced nurse, rushed over to the hospital to find Ms. Brown unresponsive while several of Defendant's staff simply stood there at her bedside. Ms. Brown's daughter immediately started CPR and verbally requested Defendant's staff to "go get oxygen, she needs oxygen."

Unfortunately, there were only empty oxygen canisters in Ms. Brown's room at the time. By the time the Charleston Fire Department (hereinafter "CFD") arrived, Ms. Brown was unconscious and unresponsive. However, the CFD immediately initiated basic life support which included CPR. Despite Ms. Brown's daughter's and the CFD's efforts to revise Ms. Brown, she was pronounced dead upon her arrival at the emergency room - due to Anoxic Brain Injury and Congestive Heart Failure.

PARTIES & JURISDICTION

2. That the Plaintiff, Victor Rawl, (herein referred to collectively with the Estate of Vera Brown as "Plaintiff") is a citizen and resident of Charleston County, State of South Carolina.
3. That the Estate of Vera Brown was probated in Charleston County, State of South Carolina, and that Victor Rawl is the duly appointed Personal Representative of said Estate.
4. That Decedent, Vera Brown, was a citizen and resident of Charleston County, State of South Carolina at the time of her death.
5. That upon information and belief, Defendant West Ashley Rehabilitation and Nursing Center-Charleston, SC, LLC d/b/a Heartland of West Ashley Rehab and Nursing Center, is incorporated in the State of Delaware, with its principal place of business in Charleston County, and CT Corporation System is the representative agent who can be served with process at 2 Office Park Court, Suite 103, Columbia, State of South Carolina 29223.
6. That the wrongful death and the nursing home abuse and neglect that is the subject of this action occurred in Charleston County, State of South Carolina.

7. That Plaintiff filed Notice of Intent, Expert Affidavit, and Plaintiff's Responses to Standard and First Interrogatories on July 26, 2017. Pursuant to S.C. Code Ann § 15-36-100.

8. That the parties conducted pre-suit mediation on November 9, 2017, and an ADR Report was filed with the Court. Pursuant to S.C. Code Ann § 15-36-100.

9. "[N]ot every action taken by a medical professional in a hospital or doctor's office necessarily implicates medical malpractice and, consequently, the requirements of [S.C. Code Ann.] [S]ection 15-79-125." Dawkins v. Union Hosp. Dist., 408 S.C. 171, 178, 758 S.E.2d 501, 504 (2014).

10. "However, at all times, the medical professional must 'exercise ordinary and reasonable care to ensure that no unnecessary harm [befalls] the patient.'" Id. at 178, 758 S.E.2d at 504 (further citations omitted).

11. "The statutory definition of medical malpractice found in section 15-79-110(6) does not impact medical providers' ordinary obligation to reasonably care for patients with respect to nonmedical, administrative, ministerial, or routine care." Id. (further citation omitted).

12. "Thus, medical providers are still subject to claims sounding in ordinary negligence." Id. (further citations omitted).

13. That Defendant principal place of business is located in Charleston County, State of South Carolina.

14. That this court has jurisdiction over the parties and subject matter of this cause of action and venue is proper in Charleston County, State of South Carolina.

BACKGROUND FACTS

15. That on or about January 25, 2016, Vera Brown was admitted to Defendant's nursing home and/or long-term care facility, West Ashley Rehabilitation and Nursing Center-Charleston, LLC, d/b/a Heartland of West Ashley Rehab and Nursing Center, in Charleston, State of South Carolina.

16. That while residing at Defendant's facility, Vera Brown was improperly cared for and/or abused and/or neglected by Defendant's staff.

17. That Vera Brown's health rapidly declined while she was relying on Defendant's care at Defendant's facility.

18. That sometime between Vera Brown's admission and August 29, 2014, while at Defendant's facility, Vera Brown sustained serious injuries and Defendant's:

    a. failed to prevent said injuries;

    b. caused said injuries;

    c. never acknowledged said injuries;

    d. never documented said injuries;

    e. failed to assist Vera Brown; and

    f. failed to timely assist Vera Brown in obtaining treatment for said injuries.

19. That on or about August 28, 2014, Vera Brown was admitted to the hospital and her grave condition and serious injuries caused her to expire on August 29, 2014 as a result of Defendant's lack of care.

FOR A FIRST CAUSE OF ACTION
(Negligence / Gross Negligence)

20. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.

21. That Defendant owed a duty to Vera Brown as providers to act in a reasonable fashion, provide a safe and adequate facility and provide timely care to the Vera Brown in that of similar providers.

22. That the resulting injuries and damages to Vera Brown were caused proximately by one or more of the following negligent, grossly negligent, careless, reckless, willful, wanton, and unlawful acts, and/or omissions and/or breach of duty of Defendant in any one or more of the following respects:

    a. In deviating from the standard of care for medical and long-term care providers;

    b. In violating the Omnibus Adult Protection Act for South Carolina §43-35-25 which requires that any "physician, nurse, dentist, optometrist, medical examiner, coroner, other medical, mental health or allied health professional, Christian Science practitioner, religious healer, school teacher, counselor, psychologist, mental health or intellectual disability specialist, social or public assistance worker, caregiver, staff or volunteer of an adult day care center or of a facility, or law enforcement officer having reason to believe that a vulnerable adult has been or is likely to be abused, neglected, or exploited shall report the incident;"

    c. In violating the Nurse Practice Act of South Carolina §40-33-80 by failing to thoroughly investigate complaints and violations;

    d. In violating South Carolina Department of Health & Environmental Control (SC DHEC) Regulation Number 61-17, § 800 et. Seq., which requires that all

entries in the medical record for each resident are to be adequate and complete;

e. In violating 42 CFR §483.75 which requires that:

   i. Medical records be maintained in accordance with acceptable professional standards and practices that are "complete, accurately documented, and readily accessible;"

   ii. The facility be administered in a matter that allows the resident to maintain his/her highest level of physical well-being; and

   iii. The facility be operated and provide services in compliance with all applicable Federal, State, and local laws, regulations, and code and with accepted professional standards and principles that apply to professionals providing services in such a facility.

f. In violating 42 CFR §483.10 regarding the Vera Brown's right to a dignified existence including, but not limited to notification of changes, which required the Defendant to immediately consult with a resident's physician and notify a resident's legal representative when there is a significant change in the resident's physical, mental, or psychosocial status or need to alter treatment significantly due to adverse consequences;

g. In violating 42 CFR §483.10(b)(4) and (8) regarding if a resident experiences a cardia arrest;

h. In violating 42 CFR §483.25 regarding quality of care, which requires that:

i. Each resident must receive and the facility must provide necessary care and services in accordance with the comprehensive assessment and plan of care;

ii. "A resident who is unable to carry out activities of daily living received the necessary services to maintain good nutrition, grooming, and personal and oral hygiene;"

iii. The facility ensure a resident maintains acceptable parameters of nutritional status such as body with and protein levels and receives a therapeutic diet when there is a nutritional problem;

iv. "Each resident receives adequate supervision and assistance devised to prevent accidents;" and

v. The facility provide the resident with sufficient fluids to maintain proper hydration and health.

i. In violating 42 CFR §483.30, regarding nursing services, which requires nursing homes to have sufficient staff to provide nursing related services to attain or maintain the highest practicable physical well-being;

j. In failing to provide Vera Brown with the reasonably required care expected of and typically exercised by similarly situated professional medical care providers;

k. In failing to acknowledge and/or properly document and/or record Vera Brown's injuries and/or physical conditions while in Defendant's care;

l. In causing Vera Brown and/or her heirs to incur medical costs associated with numerous visits and extended stays at the hospital;

m. In causing Vera Brown and/or Plaintiff to incur the costs of transferring Vera Brown to another facility;

n. In causing and/or refusing to alleviate Vera Brown's severe pain and suffering prior to her death;

o. In causing Vera Brown's heirs to suffer from anxiety and/or mental anguish and/or emotional and/or psychological pain and suffering as a result of Defendant's abuse and/or neglect during and/or after Vera Brown resided at Defendant's facility;

p. In causing and/or accelerating and/or expediting Vera Brown's premature death;

q. In causing Vera Brown's heirs emotional and/or psychological pain and suffering and/or mental anguish as a result of the premature death of their loved one;

r. Failure to develop a plan of care for Vera Brown at any time prior to or during her stay at Defendant's facility;

s. Failure to conduct accurate assessments of Vera Brown during her time at Defendant's facility;

t. Failure to provide goods and services to prevent the development of UTI infection;

u. Failure to provide sufficient fluids to maintain health and adequate hydration and/or develop a plan for provision of the same;

v. Failure to provide the care, goods, and/or services necessary to maintain the health or safety of a vulnerable adult;

w. Failure to properly and/or adequately and/or timely record and/or document and/or monitor patient's blood pressure and/or intake of fluids;

x. Failure to properly and/or adequately and/or timely record and/or document patient's severe injuries;

y. In any such other particulars as may be ascertained through discovery or shown at trial; and

z. Additionally, Vera Brown's injuries were caused by the Defendant's deviations from the acceptable standards of care.

All of which were direct and proximate cause of the injuries and damages suffered by the Plaintiff and Vera Brown, said acts being in violation of the Laws of the State of South Carolina.

23. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness of Defendant, as is set forth more fully above, Vera Brown and her beneficiaries were injured, endured pain and suffering, have suffered mentally and emotionally, have incurred various expenses, and have otherwise been damaged and injured.

24. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness of all Defendant, as is set forth more fully above, Vera Brown suffered in various ways and wrongfully died because of receiving inadequate medical care while in Defendant's care.

25. That upon information and belief, Plaintiff is entitled to judgment against the Defendant for actual, compensatory, and exemplary or punitive damages for her personal injuries set forth herein in an amount that is fair, just and reasonable under the circumstances, plus

whatever costs, interest and attorney fees that she may be entitled, to be determined by a jury.

26. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, as is set forth more fully above, Vera Brown and her beneficiaries have been damaged and injured in the following respects:

    a. Vera Brown endured physical pain and suffering as a result of the serious injuries she sustained while in Defendant's care;

    b. Vera Brown endured physical pain and suffering as a result of her dehydration and dangerously low blood pressure which Defendant caused and/or exacerbated and/or failed to appropriately address and/or failed to properly monitor;

    c. Vera Brown suffered from anxiety, mental anguish, and emotional and/or psychological pain and suffering as a direct result of Defendant's breach of duty and/or neglect and/or abuse;

    d. Vera Brown died prematurely as a result of Defendant's deviation for the generally accepted standard of care exercised by similarly situated medical care providers and long-term care facilities;

    e. Plaintiff and/or Vera Brown incurred medical costs for the hospital visits and extended stay Vera Brown endured;

    f. Plaintiff and/or Vera Brown incurred costs associated with transferring Vera Brown to another facility;

    g. Plaintiff incurred costs associated with Vera Brown's funeral expenses; and

h. Plaintiff suffered from emotional and/or psychological pain and suffering as a result of the Defendant's neglect and/or abuse towards her loved one which caused and/or facilitated and/or accelerated Vera Brown's wrongful death.

27. Notwithstanding undertaking that duty and while Vera Brown was under the care of the Defendant, the Defendant departed from prevailing and acceptable professional standards of care and treatment of Vera Brown and were thereby negligent, careless, grossly negligent, reckless and in violation of the duties owed to Vera Brown, and they are liable for one of more of the following acts of omission or commission, any or all of which are departures from the prevailing and acceptable professional standards of care.

28. The Defendant deviated from the standard of care and skill exercised by nurses generally and under similar conditions and like surrounding circumstances as those presented by Vera Brown. In particular, without limitation, they deviated from the standard of care as set forth above.

29. That Defendant knew or should have known that Vera Brown would suffer foreseeable financial injury, including hospital and/or medical expenses and costs of transfer to another health care facility, as a result of Defendant's failure to exercise ordinary care as set forth more fully above.

30. The Defendant further deviated:

a. In failing to properly monitor the resident's physical well-being while residing at the Defendant's facility;

b. In failing to properly train and supervise the personnel and staff and employees at the Defendant's facility with regard to Vera Brown's care;

c. In failing to relieve incompetent and/or improperly trained and/or negligence staff and employees at the Defendant's facility;

d. In failing to properly revise and modify plans of care for Vera Brown in response to Vera Brown's needs;

e. In failing to properly utilize equipment, including medications and devices to prevent and to minimize or reduce injuries resulting from improper care;

f. In violating state and/or federal regulations requiring actions to protect the safety and health of Vera Brown, so as to constitute negligence per se;

g. In failing to ensure that the Defendant's personnel and employees had sufficient, adequate, and current training, credentials and skills to properly prevent Vera Brown from suffering injury and pain;

h. In failing to have in place proper and adequate policies, protocols, procedures, rules and regulations for the care and treatment of nutritional and infection control issues and fall prevention issues at the Defendant's facility, of if such policies, procedures, protocols, rules and regulations were in place, in failing to enforce them;

i. In failing to properly and adequately assess, monitor and update policies, procedures, protocols, rules and regulations in response to knowledge garnered from published guidelines and case reviews relating to proper nutritional and infection control procedures and fall prevention procedures;

j. In failing to ensure that manuals, instructions and warnings relating to appropriate nutrition and infection control procedures and fall prevention

procedures were available to agents, servants and employees of the Defendant;

k. In failing to properly train and educate its employees or, if properly trained and educated, in failing to allow its employees to exercise independent judgment and skill;

l. In failing to ensure that Vera Brown had proper care;

m. In failing to properly document the medical records of Vera Brown;

n. In failing to properly document significant clinical findings; and

o. In any such other particulars as may be ascertained through discovery or shown at trial.

31. That as a direct and proximate cause of the Defendant's conduct, as aforesaid, Plaintiff and/or Vera Brown and/or her beneficiaries under the Wrongful Death Act, for whom this action is brought, have experienced economic loss associated with Vera Brown's medical expenses and are entitled to relief for the same.

FOR A SECOND CAUSE OF ACTION
(Negligence *per se*)

32. Plaintiff restates and re-alleges every allegation set forth above as if states herein verbatim.

33. The Defendant is a long term health care provider who has a duty to abide by certain state regulations in the care and treatment of their residents.

34. The state regulations combine to form a minimum standards of care which the Defendant must meet and exceed in order to ensure proper treatment of patients, including, specifically, Vera Brown.

35. The Defendant failed to abide by said standards, rules and regulations promulgated by the State of South Carolina in their treatment and care of Vera Brown.

36. The standards, rules and regulations promulgated by the state of South Carolina were specifically enacted for the benefit of the class of persons for which Vera Brown was a member.

37. As a direct and proximate result of the Defendant's negligence, recklessness, carelessness, willfulness and wantonness in failing to abide by the standards of care, rules and regulations promulgated by the State of South Carolina, Vera Brown suffered severe injuries and resulting death as described above, constituting negligence *per se*.

FOR A THIRD CAUSE OF ACTION
(Elder Abuse)

38. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.

39. Pursuant to §45-35-10(11) of the South Carolina Omnibus Adult Protection Act, a "vulnerable adult" means a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for their own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical mental or emotional dysfunction.

40. Given Vera Brown's age and health, the latter of which included, but is not limited, at the time her exuberated health, was under the supervision and care of the Defendant, Vera Brown met the classification for "vulnerable adult" under the South Carolina Omnibus Protection Act §45-35-10(11).

41. Pursuant to §45-35-10(2) of the South Carolina Omnibus Protection Act a "caregiver" is defined as a person who provides care to a vulnerable adult, with or without compensation, on a temporary or permanent or full or part-time basis and includes, but is not limited to day care personnel, adult foster home sponsor, and personnel of a public or private institution or facility.

42. The Defendant was and is caregivers under the South Carolina Omnibus Adult Protection Act §45-35-10(2) and were responsible for the Decedent's care and well-being.

43. Under the South Carolina Omnibus Adult Protection Act §45-35-10(6), "neglect" means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health or safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult.

44. The Defendant as caregiver, neglected Vera Brown within the meaning of the South Carolina Omnibus Adult Protection Act §45-35-10(6). The neglect of Vera Brown was negligent, reckless, and malicious. The Defendant knew or should have known Vera Brown's advanced age required an increased level of care.

45. Defendant knew or should have known that a heightened level of observation was necessary and critical to Vera Brown's well-being, health and prognosis.

46. The Defendant knew or should have known that the patient care environment lacked the number of qualified staff necessary for proper observation and care critical to Vera Brown's health and recovery.

47. The Defendant knew or should have known that Vera Brown's was left in a patient care environment where the resources that were critical for recovery and to prevent injury were unavailable constituting neglect under South Carolina Omnibus Adult Protection Act §45-35-10(6).

48. The neglect caused serious personal injuries resulting in conscious pain and suffering, and ultimately an untimely death.

49. The Defendant's negligent, reckless, and malicious acts were a direct and proximate result of the damages herein.

50. As a result, punitive damages and attorneys' fees are appropriate pursuant to South Carolina Omnibus Adult Protection Act §43-35-80(A), which allows for private civil causes of action to be brought against a person or facility based on an action or failure to act that otherwise constitutes abuse, neglect or exploitation.

FOR A FOURTH CAUSE OF ACTION
(Survival Action S.C. Code Ann. § 15-5-90)

51. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.

52. That as a consequence of the events set forth in this Complaint, and as a direct and proximate cause of the negligence of the Defendant as aforesaid, Decedent was caused to sustain great conscious pain and suffering prior to her death, which injuries are compensable under South Carolina Code of Laws, Section 15-5-90.

53. That Decedent was painfully and seriously injured as a result of the negligence of the Defendant, for which a claim is hereby made by her estate and administrators for full and complete compensation for her pain and suffering.

FOR A FIFTH CAUSE OF ACTION
(Wrongful Death S.C. Code Ann. § 15-51-10)

54. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.

55. That Defendant knew or should have known that Vera Brown would suffer foreseeable injury, including death, as a result of Defendant's failure to exercise ordinary care as set forth more fully above.

56. That as a direct and proximate cause of the Defendant's conduct, as aforesaid, Vera Brown for whom this action is brought, lost her life, and as a result Plaintiff has experienced pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of Vera Brown's society, and are entitled to relief for the same.

FOR A SIXTH CAUSE OF ACTION
(Conversion)

57. Plaintiff restates and re-alleges every allegation set forth above as if fully stated herein verbatim.

58. That Vera Brown's legal representative requested her medical records from Defendant, who was granted full authority to, among other duties, obtain copies of Vera Brown's medical treatment records.

59. That these records belong to Vera Brown and her Estate, not to Defendant, and that the Estate has a right to obtain a copy of these records.

60. That the legal representative received Vera Brown's medical records from Defendant, which consisted of One-Hundred Twenty Nine (129) pages.

61. That upon information and belief, Plaintiff and/or Vera Brown's legal representative did not receive Vera Brown's entire medical chart from Defendant.

62. That upon information and belief, Defendant assumed and exercised the unauthorized right of ownership over the medical records of Vera Brown to the exclusion of Vera Brown's legal representative.

63. That as a result of Defendant's conversion of Vera Brown's medical file, Plaintiff has suffered:

    a. The loss of use of these records for impending litigation;

    b. Consequential and incidental damages;

    c. Aggravation;

    d. Inconvenience; and

    e. Embarrassment.

64. That Defendant's conduct, as described above, evidences a flagrant disregard of legal rights as to warrant the imposition of actual and punitive damages.

WHEREFORE, the Plaintiff prays for judgment against the Defendant, on behalf of the Estate and Decedent's statutory beneficiaries, for an amount to be ascertained by the jury at the trial of this action, for all damages, punitive and actual, for the cost and disbursements of this action, and both prejudgment and post judgment interest, and for such other and further relief, in law or in equity, as this court may deem just and proper.

[SIGNATURE ON FOLLOWING PAGE]

ANASTOPOULO LAW FIRM, LLC

Stefan B. Feidler, Esquire
S.C. Bar No.: 101918
Roy T. Willey, IV, Esquire
S.C. Bar No.: 101010
Eric M. Poulin, Esquire
S.C. Bar No.: 100209
32 Ann Street
Charleston, South Carolina 29403
(843) 614-8888

Dated at Charleston, South Carolina

This 15 day of 11/2017.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
Victor Rawl as Personal Representative of the Estate of Vera Brown, *Plaintiff,*	)	C/A No. 2017-CP-10-05984
Versus	)	**DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT** (***Jury Trial Requested***)
West Ashley Rehabilitation and Nursing Center – Charleston, SC, LLC d/b/a Heartland of West Ashley Rehab and Nursing Center, *Defendant.*	)	

The Defendant, West Ashley Rehabilitation and Nursing Center – Charleston, SC, LLC d/b/a Heartland of West Ashley Rehab and Nursing Center (hereinafter "Defendant") by and through its undersigned attorneys, hereby answers the allegations in the Plaintiff's Complaint, subject to all affirmative defenses and motions, as set forth below:

1. The Defendant denies each and every allegation contained in the Plaintiff's Complaint that is not specifically admitted in this Answer.

AS TO CASE SYNOPSIS

2. In response to the allegations contained in Paragraph 1 Plaintiff's Complaint, the Defendant admits only so much as alleges that Ms. Brown was admitted to Heartland on or about August 25, 2014. Further responding, the Defendant refers to the medical records pertaining to Ms. Brown (from all providers) for a more complete description of all complaints, diagnosis and treatment. All remaining and inconsistent allegations contained in Paragraph 1 of Plaintiff's Complaint are denied.

AS TO PARTIES AND JURISDICTION

3. The Defendant is without sufficient knowledge or information at this time upon which to form a belief as to the truth of the allegations contained in Paragraph 2 of the Plaintiff's Complaint. Therefore, those allegations are denied.

4. The allegations contained in Paragraphs 3, 4, 5 and 6 of the Plaintiff's Complaint state conclusions of law to which no response is required.

5. In response to the allegations contained in Paragraphs 7 and 8 of the Plaintiff's Complaint, the Defendant admits that Plaintiff served the documents identified in Paragraph 7 of the Plaintiff's Complaint and that the parties engaged in Pre-Suit mediation on November 9, 2017. Further responding, the allegations contained in Paragraphs 7 and 8 of the Plaintiff's Complaint state conclusions of law to which no response is required.

6. The allegations contained in Paragraphs 9, 10, 11, 12, 13 and 14 of the Plaintiff's Complaint state conclusions of law to which no response is required.

AS TO BACKGROUND FACTS

7. In response to the allegations contained in Paragraphs 15, 16, 17, 18 (including subparts a, b, c, d, e and f) and 19 of the Plaintiff's Complaint, the Defendant admits only so much as alleges that Ms. Brown was admitted to the Defendant facility on or about August 25, 2014. Further responding, the Defendant craves reference to the medical records of Ms. Brown (from all providers) for a more detailed description of all complaints, diagnosis and treatment. All remaining and inconsistent allegations contained in Paragraphs 15, 16, 17, 18 (including subparts a, b, c, d, e, and f) and 19 of the Plaintiff's Complaint are denied.

ANSWERING THE FIRST CAUSE OF ACTION
(Negligence/Gross Negligence)

8. In response to the allegations contained in Paragraph 20 of the Plaintiff's Complaint, the Defendant repeats, realleges and incorporates by reference all of the responses in the Answer as if fully set forth in their entirety in this Paragraph.

9. The allegations contained in Paragraph 21 of the Plaintiff's Complaint state conclusions of law to which no response is required.

10. The Defendant denies the allegations contained in Paragraphs 22 (including subparts a, b, c, d, e (including subparts i, ii and iii), f, g, h (including subparts i, ii, iii, iv, and v), i, j, k, l, m, n, o, p, q, r, s, t, u, v, w, x, y and z), 23, 24, 25, 26 (including subparts a, b, c, d, e, f, g, and h), 27, 28, 29, 30 (including subparts a, b, c, d, e, f, g, h, i, j, k, l, m, n and o) and 31 of the Plaintiff's Complaint.

ANSWERING THE SECOND CAUSE OF ACTION
(Negligence Per Se)

11. In response to the allegations contained in Paragraph 32 of the Plaintiff's Complaint, the Defendant repeats, realleges and incorporates by reference all of the responses in the Answer as if fully set forth in their entirety in this Paragraph.

12. The allegations contained in Paragraph 33 of the Plaintiff's Complaint state conclusions of law to which no response is required.

13. The Defendant denies the allegations contained in Paragraphs 34, 35, 36 and 37 of the Plaintiff's Complaint.

ANSWERING THE THIRD CAUSE OF ACTION
(Elder Abuse)

14. In response to the allegations contained in Paragraph 38 of the Plaintiff's Complaint, the Defendant repeats, realleges and incorporates by reference all of the responses in the Answer as if fully set forth in their entirety in this Paragraph.

15. The allegations contained in Paragraphs 39, 40, 41, 42 and 43 of the Plaintiff's Complaint state conclusions of law to which no response is required.

16. The Defendant denies the allegations contained in Paragraphs 44, 45, 46, 47, 48, 49 and 50 of the Plaintiff's Complaint.

ANSWERING THE FOURTH CAUSE OF ACTION
(Survival Action S.C. Code Ann. § 15-5-90)

17. In response to the allegations contained in Paragraph 51 of the Plaintiff's Complaint, the Defendant repeats, realleges and incorporates by reference all of the responses in the Answer as if fully set forth in their entirety in this Paragraph.

18. The Defendant denies the allegations contained in Paragraphs 52 and 53 of the Plaintiff's Complaint.

ANSWERING THE FIFTH CAUSE OF ACTION
(Wrongful Death S.C. Code Ann. § 15-51-10)

19. In response to the allegations contained in Paragraph 54 of the Plaintiff's Complaint, the Defendant repeats, realleges and incorporates by reference all of the responses in the Answer as if fully set forth in their entirety in this Paragraph.

20. The Defendant denies the allegations contained in Paragraphs 55 and 56 of the Plaintiff's Complaint.

ANSWERING THE SIXTH CAUSE OF ACTION
(Conversion)

21. In response to the allegations contained in Paragraph 57 of the Plaintiff's Complaint, the Defendant repeats, realleges and incorporates by reference all of the responses in the Answer as if fully set forth in their entirety in this Paragraph.

22. The Defendant denies the allegations contained in Paragraphs 58, 59, 60, 61, 62, 63 (including subparts a, b, c, d and e) and the WHEREFORE Paragraph, being the remaining allegations of the Plaintiff's Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(No Deviation from Standard of Care)

23. That the care and treatment administered by the Defendant facility conformed to and was in full compliance with the standard of care. All care and treatment administered by the

Defendant facility was within applicable medical standards and methods, and, at no time pertinent hereto, did the Defendant facility deviate from any medical standard while caring for or tending to Plaintiff. Consequently, the Plaintiff is barred from recovery against the Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(No Proximate Cause)

24. That, even if the Defendant was negligent, as alleged in the Complaint, which is specifically denied, the negligence of the Defendant was not the direct or proximate cause of any injury alleged by the Plaintiff and therefore The Defendant is not liable for any damages allegedly sustained by the Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(Superseding/Intervening Cause)

25. Whatever injuries and damages, if any, may have been sustained by the Plaintiff, were due to a superseding and/or intervening cause beyond the control of the Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(Pre-Existing Medical Condition)

26. Whatever injuries the Plaintiff sustained, which are specifically denied herein, were the result of pre-existing medical conditions of Ms. Brown whether disclosed or undisclosed, and were not related to the incidents complained of in the Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(Predisposition of Medical Condition)

27. Whatever injuries the Plaintiff sustained, which are specifically denied herein, were the result of the Ms. Brown's predisposition to medical conditions, whether disclosed or undisclosed, and were not related to the incidents complained of in the Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(Reasonableness and Good Faith)

28. The Defendant alleges that they acted reasonably and in good faith at all times material herein, based on all relevant facts and circumstances known by them at the time they so acted. Accordingly, Plaintiff is not entitled to the recovery of any damages.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(Natural Disease Process)

29. The Defendant alleges, upon information and belief, that any injuries or damages sustained by Plaintiff were due to, caused and occasioned by the natural disease process over which the Defendant has no control and as such, the Defendant pleads such a natural disease process as a complete bar to this action.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)

30. That any award or assessment of punitive damages as prayed for by the Plaintiff would violate the Defendant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(Comparative Negligence)

31. The Defendant alleges that any injuries of the Plaintiff, as alleged in the Complaint, may have been due to and caused by and may be the direct and proximate result of acts of negligence on the part of the Plaintiff or a third party, over whom the Defendant has no control, so as to bar the claims of the Plaintiff against the Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(Non-Economic Damage Awards)

32. No award for non-economic damages shall exceed the statutory limits contained in the Non-Economic Damages Awards Act of 2005, South Carolina Code Ann. §15-32-200, et. seq. The Defendant is a health care provider as defined by S.C. Code Ann. § 15-32-210 and pursuant to §15-32-220 of the Non-Economic Damage Awards Act of 2005, any potential recovery of non-economic damages is limited to the amounts stated therein.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(Limitation of Punitives)

33. Any punitive damages awarded in this case would be subject to the limitations described in S.C. Code §15-32-530.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(Motion to Dismiss Plaintiff's Second, Third and Sixth Causes of Action)

34. Pursuant to South Carolina Rules of Civil Procedure Rule 12(b)(6), this case should be dismissed for failure to state facts sufficient to constitute a cause of action against the Defendant. A memorandum in support of this motion to dismiss will be filed with the Court and served on opposing counsel in accordance with the South Carolina Rules of Civil Procedure.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(Motion to Compel Arbitration)

35. The Defendant has with this Answer filed a Motion to Compel Arbitration pursuant to the arbitration agreement between the parties and hereby plead that arbitration is the appropriate forum for this dispute.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(Statute of Limitations)

36. That the Plaintiff's causes of action against the Defendant is barred having been brought more than three years since the date of treatment or date of discovery of the alleged injury or the date the alleged injury reasonably ought to have been discovered, as a result of the alleged negligence.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:
(Reservation and Non-Waiver)

37. The Defendant reserves any additional and affirmative defenses as may be revealed or become available to them during the course of their investigation and/or discovery in the case and is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Plaintiff's Complaint and having asserted their affirmative defenses, the Defendant, West Ashley Rehabilitation and Nursing Center – Charleston, SC, LLC d/b/a Heartland of West Ashley Rehab and Nursing Center, pray that the Plaintiff's Complaint be dismissed with prejudice and that they be awarded the costs and reasonable fees associated with this matter, and such other relief as the Court may deem just and proper.

[SIGNATURE BLOCK ON NEXT PAGE.]

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com

Molly H. Craig (SC #6960)
Elloree A. Ganes (SC #70509)
Jean Marie Jennings (SC #100651)

Attorneys for the Defendant
West Ashley Rehabilitation and Nursing Center – Charleston, SC, LLC d/b/a Heartland of West Ashley Rehab and Nursing Center

11/8, 2018
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the **DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT (*Jury Trial Requested*)** was served on each party or counsel of record by ☒ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 8th day of November, 2018.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
Victor Rawl as Personal Representative of the Estate of Vera Brown,	)	C/A No. 2017-CP-10-05984
Plaintiff,	)	
Versus	)	**DEFENDANT'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION**
West Ashley Rehabilitation and Nursing Center – Charleston, SC, LLC d/b/a Heartland of West Ashley Rehab and Nursing Center,	)	
Defendant.	)	

TO: ERIC M. POULIN, ROY T. WILLEY, IV AND STEFAN B. FEIDLER, ATTORNEYS FOR THE PLAINTIFF:

The Defendant, West Ashley Rehabilitation and Nursing Center – Charleston, SC, LLC d/b/a Heartland of West Ashley Rehab and Nursing Center (hereinafter "Defendant"), will move before the presiding judge, at a time and place ten days hence or to be arranged at the convenience of the Court for an Order compelling the Plaintiff to arbitrate the claims alleged in the instant lawsuit and dismissing the case, or in the alternative, staying the case pending arbitration. This Motion is brought pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the Federal Arbitration Act ("FAA"), and the terms of the Arbitration Agreement entered into by Vera Brown, on August 25, 2016 (attached hereto as Exhibit 1). This Motion is based on the allegations of the Complaint and the terms of the Arbitration Agreement.

The FAA preempts state law and governs the arbitrability of the Plaintiff's claims. In this case, all elements required under the FAA are met (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision that covers the dispute; (3) the relationship of the transaction to interstate commerce; and (4) Arbitration has not occurred.

The FAA applies to this Agreement because the Agreement involves interstate commerce, preempting South Carolina law. There is a dispute, a written agreement providing for arbitration of the dispute, and the matter has not been arbitrated. The scope of the arbitration clause encompasses the claims asserted by Plaintiff.

Under the FAA, enforcement of the valid Arbitration Agreement is mandatory. Therefore, under the FAA, this Court must dismiss or stay the proceedings and compel arbitration.

CONCLUSION

Based on the foregoing and the accompanying attachment of the Arbitration Agreement, the Defendants respectfully request this Court to enter an Order dismissing Plaintiff's claims in favor of mandatory arbitration, or alternatively, an Order compelling arbitration and staying the case pending arbitration.

[SIGNATURE BLOCK ON NEXT PAGE.]

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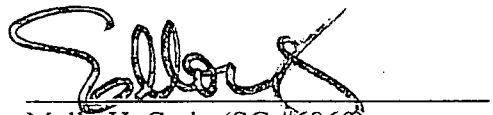


Molly H. Craig (SC #6960)
Elloree A. Ganes (SC #70509)
Jean Marie Jennings (SC #100651)

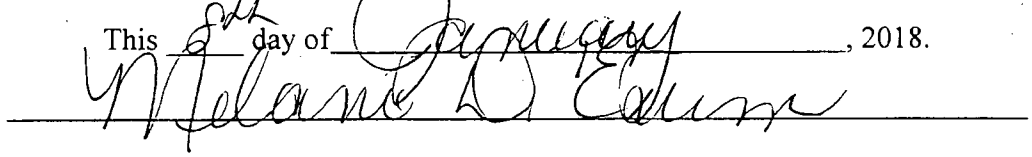
Attorneys for the Defendant
West Ashley Rehabilitation and Nursing Center – Charleston, SC, LLC d/b/a Heartland of West Ashley Rehab and Nursing Center

1/8, 2018
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 8th day of January, 2018.



VOLUNTARY A ITRATION AGREEMENT ("AGREE NT")

THE PARTIES ARE WAIVING THEIR RIGHT TO A TRIAL BEFORE A JUDGE OR JURY OF ANY DISPUTE BETWEEN THEM. PLEASE READ CAREFULLY BEFORE SIGNING. THE PATIENT WILL RECEIVE SERVICES IN THIS CENTER WHETHER OR NOT THIS AGREEMENT IS SIGNED. ARBITRATION IS DESCRIBED IN THE VOLUNTARY ARBITRATION PROGRAM BROCHURE COPY, ATTACHED AND MADE PART OF THIS AGREEMENT.

Made on 8/25/14 (date) by and between the Patient Vera Brown or Patient's Legal Representative _____ (collectively referred to as "Patient") and the Center HWA.

1. **Agreement to Arbitrate "Disputes":** All claims arising out of or relating to this Agreement, the Admission Agreement or any and all past or future admissions of the Patient at this Center, or any sister Center operated by any subsidiary of HCR ManorCare, Inc.("Sister Center"), including claims for malpractice, shall be submitted to arbitration. Nothing in this Agreement prevents the Patient from filing a complaint with the Center or appropriate governmental agency or from seeking review under any applicable law of any decision to involuntarily discharge or transfer the Patient.

2. **Demand for Arbitration:** shall be written, sent to the other Party by certified mail, return receipt requested.

3. **FAA:** The Parties agree and intend that this Agreement, the Admission Agreement and the Patient's stays at the Center substantially involve interstate commerce, and stipulate that the Federal Arbitration Act ("FAA") and applicable federal case law apply to this Agreement, preempt any inconsistent State law and shall not be reverse preempted by the McCarran-Ferguson Act; United States Code Title 15, Chapter 20, or other law. Any amendment to such version of the FAA is hereby expressly waived.

4. **Arbitration Panel:** Three (3) arbitrators (the "Panel") shall conduct the arbitration. Each Party will select one Arbitrator, the two selected Arbitrators will select a third. Each Arbitrator must be a retired State or Federal Judge or a Member of the State Bar where the Center is located with at least 10 years of experience as an attorney. The Panel will elect a Chief Arbitrator who will be responsible for establishing and resolving issues pertaining to procedure, discovery, admissibility of evidence, or any other issue.

5. **Sole Decision Maker:** Except as otherwise provided in 6 below, the Panel is empowered to, and shall, resolve **all** disputes, including without limitation, any disputes about the making, validity, enforceability, scope, interpretation, voidability, unconscionability, preemption, severability and/or waiver of this Agreement or the Admission Agreement, as well as resolve the Parties' underlying disputes, as it is the Parties' intent to avoid involving the court system. The Panel shall not have jurisdiction to certify any person as a representative of a class of persons and, by doing so, adjudicate claims of persons not directly taking part in Arbitration.

6. **Procedural Rules and Substantive Law:** The Panel shall apply the State Rules of Evidence and State Rules of Civil Procedure except where otherwise stated in this Agreement. Also, the Panel shall apply, and the arbitration award shall be consistent with, the State substantive law, including statutory damage caps, for the State in which the Center is located, except as otherwise stated in this Agreement or where preempted by the FAA. The Panel's award **must be unanimous** and shall be served no later than 7 working days after the arbitration hearing. The award must state the Panels' findings of fact and conclusions of law, shall be marked "confidential", and must be signed by all three Arbitrators. If any damages are awarded, the award must delineate specific amounts for each type of damages awarded, i.e. economic, non-economic, etc. The failure of the Panel to issue a unanimous award creates an appealable issue, appealable to the appropriate court, in addition to those set forth in paragraph 7, below. In the event the appellate court finds a non-unanimous award invalid as against law or this Agreement, the award shall be vacated and the arbitration dismissed without prejudice. A subsequent arbitration, if any, of the same claim or claims shall remain subject to the terms of this Agreement.

7. **Final with Limited Rights to Review (Appeal):** The Panel's award binds the Parties. The Parties have a limited right of appeal for only the express reasons allowed by the FAA or as provided in 6, above.

Brown, V. Bus Ofc 0054
Heartland/W Ashley

8. Right to Change Your Mind: . Agreement may be cancelled by writte otice sent by certified mail to the Center's Administrator within 30 calendar days of the Patient's date of admission. If alleged acts underlying the dispute occur before the cancellation date, this Agreement shall be binding with respect to those alleged acts. If not cancelled, this Agreement shall be binding on the Patient for this and all of the Patient's subsequent admissions to the Center or any Sister Center without any need for further renewal.

9. Binding on Parties & Others: The Parties intend that this Agreement shall benefit and bind the Center, its parent, affiliates, and subsidiary companies, and shall benefit and bind the Patient (as defined herein), his/her successors, spouses, children, next of kin, guardians, administrators, and legal representatives.

10. Fees and Costs: The Panels' fees and costs will be paid by the Center except in disputes over non-payment of Center charges wherein such fees and costs will be divided equally between the Parties. The Parties shall bear their own attorney fees and costs in relation to all preparation for and attendance at the arbitration hearing.

11. Confidentiality: The arbitration proceedings shall remain confidential in all respects, including all filings, deposition transcripts, discovery documents, or other materials exchanged between the Parties and the Panels' award. In addition, following receipt of the Panels' award, each Party agrees to return to the producing Party within 30 days the original and all copies of documents exchanged in discovery and at the arbitration Hearing.

12. Non-waiver of this Agreement: A waiver of the right to arbitrate a specific Dispute or series of Disputes, as described above, does not relieve any Party from the obligation to arbitrate *other* Disputes, whether asserted as independent claims or as permissive or mandatory counterclaims, unless each such claim is also individually waived. With multiple Patient admissions, the presentation of an arbitration agreement at a later admission to the Center or a Sister Center shall not constitute a waiver by the Center of a prior signed arbitration agreement.

13. Severability: Except as provided in 6, any provision contained in this Agreement is severable, and if a provision is found to be unenforceable under State or Federal law, the remaining provisions of this Agreement shall remain in force and effect. This Agreement represents the Parties' entire agreement regarding Disputes, supersedes any other agreement relating to disputes, and may only be changed in writing signed by all Parties. This Agreement shall remain in full force and effect notwithstanding the termination, cancellation or natural expiration of the Admission Agreement.

14. Health Care Decision: The Parties hereby stipulate that the decision to have the Patient move into this Center and the decision to agree to this Agreement are each a health care decision. The Parties stipulate that there are other health care facilities in this community currently available to meet the Patient's needs.

THE PARTIES CONFIRM THAT EACH OF THEM UNDERSTANDS THAT EACH HAS WAIVED THE RIGHT TO TRIAL BEFORE A JUDGE OR JURY AND THAT EACH CONSENTS TO ALL OF THE TERMS OF THIS VOLUNTARY AGREEMENT. PATIENT ACKNOWLEDGES THE RIGHT TO REVIEW THIS AGREEMENT WITH AN ATTORNEY OR FAMILY BEFORE SIGNING.

PATIENT:

X V E R A Brown 8-25-14
Printed Name (Date)

X Vera Brown
Signature of Patient

CENTER REPRESENTATIVE

Signature of Center Representative

PATIENT'S LEGAL REPRESENTATIVE:

Printed Name (Date)

Signature of Patient's Legal Representative[1] in his/her Representative capacity

Signature of Patient's Legal Representative in his/her Individual capacity

Brown, V: Bus Ofc 0055
Heartland/W Ashley

[1] Patient's Legal Representative should sign on both lines above containing the phrase "Patient's Legal Representative."

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO: 2017-CP-10-5984

VICTOR RAWL as Personal Representative of the ESTATE OF VERA BROWN,

Plaintiff,

v.

WEST ASHLEY REHABILITATION AND NURSING CENTER-CHARLESTON, SC, LLC d/b/a HEARTLAND OF WEST ASHLEY REHAB AND NURSING CENTER,

Defendant(s).

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION

TO: THE HONORABLE COURT AND ALL COUNSEL OF RECORD

Defendants' Motion to Dismiss and Compel Arbitration should be denied, because the Arbitration Agreement is procedurally and substantively unconscionable and the Defendants cannot argue that Plaintiff should be estopped from denying the validity of the Arbitration Agreement.

Plaintiff will also move to strike Defendants' Motion pursuant to Rule 7(b). Rule 7(b)(1), SCRCP requires that motions "shall state with particularity the grounds therefor, and shall set forth the relief or order sought." The particularity requirement is to be read flexibly in recognition of the peculiar circumstances of the case. Camp v. Camp. 386 S.C. 571, 575, 689 S.E.2d 634, 635 (2010). By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly. Lucey v. Meyer, 401 S.C. 122, 736 S.E.2d 274 (S.C. App. 2012). Therefore, when a motion is challenged for a lack of particularity, the court should ask whether any party is prejudiced by a lack of particularity or whether the court can comprehend the basis for the motion and deal with it fairly.

Camp, 386 S.C. at 575, 689 S.E.2d at 635 (quoting 5 Wright & Miller, Federal Practice and Procedure § 1192, at 42).

Additionally, our Courts and our modern Rules of Civil Procedure abhor trial by ambush. One cannot sufficiently sidestep Rule 7(b) by providing a Memorandum "at a later date" or immediately prior to the hearing. Such a practice does not give opposing counsel sufficient time to prepare a defense. While not specifically codified on a state-wide basis in South Carolina, former Chief Justice Toal no doubtly recognized this in instituting the Civil Motions Pilot Program (Order 2015-09-10-01) in the Third and Fifteenth Judicial Circuits requiring that "A written motion shall be filed and served with a supporting memorandum of law. A supporting memorandum of law is not required if a full explanation of the motion is contained within the motion and a memorandum would serve no useful purpose." Similarly, in interpreting Rule 7 of the Federal Rules of Civil Procedure (upon which our State Rule is modeled), the South Carolina District Court's Local Rule 7.04 requires "all motions made other than in a hearing or trial or to compel discovery shall be timely filed with an accompanying supporting memorandum that shall be filed and made part of the public record. However, unless otherwise directed by the court, a supporting memorandum is not required if a full explanation of the motion as set forth in Local Civ. Rule 7.05 (D.S.C.) is contained within the motion and a memorandum would serve no useful purpose. Where appropriate, motions shall be accompanied by affidavits or other supporting documents."

Here, Defendants' have not filed a memorandum in support of the Motion to Dismiss and Compel Arbitration. Therefore, Plaintiff moves to strike the Motion in its entirety with prejudice.

INTRODUCTION

Vera Brown was admitted to Defendants' facility on August 25, 2014. Upon admission, Vera Brown was required to fill out certain admission paperwork as well as the Arbitration Agreement (hereinafter the "Agreement"), which was separate from the admission paperwork. The Arbitration Agreement was not necessary for admission. Additionally, there was no bargain for exchange nor consideration in Ms. Brown's agreement to the Arbitration Agreement.

LEGAL ANALYSIS

While there is a presumption in favor of arbitration agreements, this presumption only applies where there is a valid arbitration agreement. EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 D.E.2d 581 (2003). However, not all arbitration clauses are enforceable. Additionally, arbitration agreements are subject to the same defenses applicable to all other contracts. Rent-A-Center, West , Inc. v. Jackson, 561 U.S. 63, 130 S.Ct 2772, 2776, 177 L.Ed.2d 403 (2010). Therefore, arbitration is a matter of law and South Carolina courts must determine the enforceability of an arbitration agreement based on principles of contract. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.").

The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d 161, 166 (S.C. 2003) A valid offer "identifies the bargained for exchange and creates a power of acceptance in the offeree." Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct.App.1993).

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the agreement. S.C. Code Ann. § 36–2–302(1) (2003).

In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that courts must determine whether a contract is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. See Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," id. at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17A Am.Jur.2d Contracts § 279 (2004))).

Finally, as it pertains to one-sided term the general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004).

ARGUMENT

In the case at hand, it is clear that the Arbitration Agreement is unconscionable because Vera Brown lacked absence of meaningful choice and the terms in the Arbitration Agreement are oppressive, one-sided terms.

Vera Brown was admitted into Defendants' facility on August 25, 2014. She passed away at Defendants' facility four (4) days later on August 29, 2014. Upon admission the standard arbitration agreement form was presented to an ill Vera Brown on a take-it-or leave it basis. Ms. Brown did not contribute to the drafting of the contract or possess the bargaining power to negotiate the terms of the arbitration agreement. See Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms). Nevertheless, finding a contract to be one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable. Lackey, 330 S.C. at 395, 498 S.E.2d at 902.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). In determining whether there is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power; the parties' relative sophistication; the nature of the injuries suffered by the

plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id.

In the case at hand, there was an inherent disparity in bargaining power between the parties as this was a transaction between an ill patient who died four (4) days after executing the Arbitration Agreement and a commercial entity. Vera Brown was transferred from the hospital via ambulance to Defendants' facility with diagnosis that included chronic kidney disease, Anemia, dementia, urinary tract infection, upper respiratory disease, acute kidney failure, congestive heart failure, hypertension, weakness, and difficulty in walking. She was also marked as a fall risk.

Furthermore, the arbitration agreement was inconspicuously buried in the admission paperwork and "hastily" presented to Ms. Brown for her signature. This is evident by the "x's" where Ms. Brown was asked to print and sign her name, and date. Moreover, Vera Brown's injuries include death as this is a wrongful death claim.

Moreover, we must also consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences. The loss of the right to a jury trial is an obvious result of arbitration. However, this particular arbitration clause also required Vera Brown to forego certain remedies that were otherwise required by statute. While certain phrases are in bold, the arbitration clauses in their entirety are written in the standard small print, and embedded in paragraphs one (1) through fourteen (14). The Court cannot ignore the inconspicuous nature of these provisions, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Ms. Brown by law.

CONCLUSION

For all the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration should be denied or in the alternative the Motion should be stricken for failure to comply with Rule 7(b).

Respectfully Submitted,

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Charleston, South Carolina
2/1, 2018

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES THAT (S)HE SERVED A COPY OF THE PLEADING OR FOREGOING PAPERS ON ALL COUNSEL OF RECORD THIS 1 DAY OF February, 2018

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO: 2017-CP-10-5984

VICTOR RAWL as Personal Representative of the ESTATE OF VERA BROWN,

Plaintiff,

v.

WEST ASHLEY REHABILITATION AND NURSING CENTER-CHARLESTON, SC, LLC d/b/a HEARTLAND OF WEST ASHLEY REHAB AND NURSING CENTER,

Defendant.

PLAINTIFF'S SUPPLEMENTAL RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION

TO: THE HONORABLE COURT AND ALL COUNSEL OF RECORD

Defendant's Motion to Dismiss and Compel Arbitration should be denied for lack of consideration where the Arbitration Agreement is guided by the Federal Arbitration Act ("FAA") and subject to the same defenses applicable to contract formation.

INTRODUCTION

Vera Brown was admitted to Defendant's facility on August 25, 2014. Upon admission, Ms. Brown was asked to sign admission paperwork as well as the Arbitration Agreement, which was separate from the admission paperwork. The Arbitration Agreement was not necessary for admission. Additionally, there was no bargain for exchange nor consideration in Ms. Brown's agreement to the Arbitration Agreement. Ms. Brown passed away approximately four (4) days later while under Defendant's care. This lawsuit was filed shortly thereafter.

LEGAL ANALYSIS

While there is a presumption in favor of arbitration agreements, this presumption only applies where there is a valid arbitration agreement. EEOC v. Waffle House, 534 U.S. 279, 293-

294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 D.E.2d 581 (2003). However, not all arbitration clauses are enforceable. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreement. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'"). Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d 161, 166 (S.C. 2003) "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)). Where a contract lacks valuable consideration, the contract will be deemed unenforceable.

Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Riedman Corp. v. Jarosh, 290 S.C. 252, 253, 349 S.E.2d 404, 405 (1986); see also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274-5 (4th Cir. 1997). However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confides of the four corners of the instrument. State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). Therefore, our courts must assess whether the arbitration agreement itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate.

ARGUMENT

In the case at hand, it is clear that the Arbitration Agreement lacks valuable consideration. Paragraph 3 of the Arbitration Agreement states that the FAA applies to the Agreement. Therefore, we must look at state law to decide the threshold question of contract formation and whether consideration exists. Munoz, 343 S.C. at 542 S.E.2d 360, 364; Towles, 338 S.C. at 37, 524 S.E.2d at 844; Rent-A-Center, West, Inc, 561 U.S. at 130 S. Ct. at 2776, 177 L.Ed.2d 403; Simpson, 373 S.C at 14, 644 S.E.2d at 663.

Upon admission Ms. Brown was asked to sign the admission paperwork. Ms. Brown then signed the Arbitration Agreement separate from the admission paperwork. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. In fact, the Arbitration Agreement states "[t]he patient will receive services in this center whether or not this agreement is signed." Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given,

suffered or undertaken by the other the party, when agreeing to the Arbitration Agreement. Id. Furthermore, in viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself. Consequently, where the Arbitration Agreement is guided by the FAA and principles of contract law - the Arbitration Agreement is unenforceable where the Arbitration Agreement lacks valuable consideration.

CONCLUSION

Therefore, the court should deny Defendant's Motion to Dismiss and Compel Arbitration where the Arbitration Agreement is guided under the FAA and principles of contract law because the Arbitration Agreement lacks valuable consideration and is unenforceable.

Respectfully Submitted,

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2/21/2018

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES THAT (S)HE SERVED A COPY OF THE PLEADING OR FOREGOING PAPERS ON ALL COUNSEL OF RECORD THIS 21 DAY OF Feb, 20 18

STATE OF SOUTH CAROLINA | COURT OF COMMON PLEAS

COUNTY OF CHARLESTON | 2017-CP-10-05984

VICTOR RAWL,

PLAINTIFF,

VS.

WEST ASHLEY REHABILITATION AND NURSING CENTER,

DEFENDANT.

TRANSCRIPT OF RECORD

MARCH 21, 2018
CHARLESTON, SC

B E F O R E:

HONORABLE DIANE GOODSTEIN, JUDGE

A P P E A R A N C E S:

ROY WILLEY, ESQUIRE
Attorney for the Plaintiff

JEAN MARIE JENNINGS, ESQUIRE
Attorney for the Defendant

* *

Ruth C. Weese, RDR
Official Court Reporter

(The following proceedings were held March 21, 2018, Charleston County, South Carolina, @ 10:20 a.m.)

THE COURT: The first matter is position No. 44, it is Victor Rawl versus West Ashley Rehab and Nursing Center. This is a motion to compel arbitration.

MS. JENNINGS: Yes, ma'am.

THE COURT: Okay.

MS. JENNINGS: I am Jean Marie Jennings. I represent West Ashley Rehabilitation and Nursing Center.

MR. WILLEY: I am Roy Willey. I represent Victor Rawl as the personal representative of the estate of Vera Brown.

THE COURT: Okay.

MS. JENNINGS: And, Your Honor, Ms. Brown signed a voluntary arbitration agreement as part of her admission packet when she entered into the rehab facility. A copy was filed with our motion. Do you have a copy of the --

THE COURT: Let me see.

MS. JENNINGS: I have one, Your Honor. May I approach?

THE COURT: Sure.

MS. JENNINGS: Your Honor, that arbitration agreement was signed by Ms. Brown. Ms. Brown was the resident at the facility. I think in a lot of our law in South Carolina the issues with these arbitration agreements have to do with the signatory and whether a husband signs or a sister signs and whether or not they are the power of attorney. In this case we actually have the resident signing it. Ms. Brown was competent at the time. Yes, she was ill. She had a hospital stay, but there's no argument or disagreement that she was incapacitated.

Because it is the Federal Arbitration Agreement Act governs, we are arguing that the claims with the FAA are met. No. 1, that there's a dispute between the parties as evidenced by the lawsuit; No. 2, there is a written agreement that includes an arbitration provision; No. 3, the relationship of the transaction to interstate commerce and, Your Honor, that is the Dean case in South Carolina. That is 408 S.C. 371 that has said that nursing homes are part of interstate commerce because of the meals and the supplies and then arbitration has not occurred.

As to Plaintiff's memorandum in

opposition, they cite that arbitration agreement is unconscionable, that there is absence of a meaningful choice and we would argue that the agreement clearly says it's voluntary. The agreement lays forward in bold capital letters at the top that they're waiving a jury trial. And there is also a provision in the agreement, the second page, No. 8, that you have the right to change your mind within 30 calendar days.

So Ms. Brown did not have to sign this and, in fact, many residents don't sign it when they come into the facility. So we argue that it's not unconscionable and I believe that Ms. Brown signed it, the facility signed it, it's a valid agreement and we would like to enforce the agreement.

THE COURT: All right. Mr. Willey.

MR. WILLEY: Your Honor, good morning. Roy Willey. I represent the Plaintiff. Ms. Brown was admitted in August of 2014 with a host of diagnoses to this facility, including chronic kidney disease, anemia, dementia, urinary tract infection, upper respiratory disease, acute kidney failure, congestive heart failure, hypertension, weakness and difficulty walking. That's important

when we get to the unconscionability piece, but first I would like to address what's addressed in our supplemental memorandum which is consideration.

And the law in this state is clear under the Rent-A-Center case and the Simpson case. The U.S. Supreme Court has also held arbitration agreements guided by the FAA of course are subject to the same defenses applicable to other contracts.

THE COURT: Got to slow down, please.

MR. WILLEY: Okay. So we have to have an offer and acceptance in consideration. And in reviewing offer, acceptance and consideration this Court can only look at the four corners of the contract. One of the reasons that we have asked in our initial memorandum in opposition to strike this motion is because it's the Defendant's burden to prove that the arbitration agreement is enforceable. And when they filed their motion they did not set out the basic elements of offer, acceptance and consideration to show that this contract would be enforceable under South Carolina law.

Still in Ms. Jean Marie Jennings' presentation today we do not have any consideration and that is a requirement. So if the contract

lacks valuable consideration of course it will be deemed unenforceable. And our courts specifically have held in the Riedman case and the O'Neil case which is 290 S.C. 252 cited in our memorandum and the Fourth Circuit case which is 115 F.3d 272 that where there is a promise to arbitrate there must be additional consideration from the admission.

And what you have here is an arbitration agreement that is at the end of the admission packet. So she has already been accepted for admission; she had already signed her admission agreement. And this agreement comes after that. There's no additional consideration for it, nowhere in the four corners of that contract does it speak to consideration.

And so under the State Accident Fund, the SC Second Injury Fund case, which is 388 S.C. 67, we have to look within the four corners to see is there some other consideration, is she paying a dollar, is she paying a hundred dollars, is she getting something. For example, in a lot of arbitration agreements they will say we will pay the parties fees and costs for the arbitration.

And in this there is none of that. And so in this case there's no consideration at all for

this arbitration agreement being separate from the admission paperwork. Already they had agreed to accept her from the hospital. Her admission paperwork had been signed. This comes after. So we have no consideration for the agreement.

THE COURT: This says on ten, it says the panel's fees and costs will be paid by the center except in disputes over nonpayment of the center.

MR. WILLEY: That's right. So the panel's fees and costs are being paid by the center if you get to a panel. But there's no consideration for the agreement in the first instance.

THE COURT: Okay.

MR. WILLEY: And so you have to have consideration at the time of the contract. You can't say we will have consideration later. And so that's the issue.

THE COURT: I just thought when you were arguing that you said there's no agreement to pay the fees. So --

MR. WILLEY: Right. There is an agreement to pay panel's fees, but not attorney's fees and costs is what I meant. Perhaps I was

inarticulate in that sentence.

The second issue is the unconscionability of the document. One of Ms. Browns's diagnoses when she was admitted and why she was admitted there was for dementia. And so when we are looking at the unconscionability of the document, obviously we do have a contract of adhesion, she is already in there, she is being given this. We know that she has dementia. That's part of her medical record. That's why they are accepting her. She is in an unequal bargaining situation. Obviously in looking at factors which is the disparity in the party's bargaining power, you have a lady, and she expired, by the way, four days later. So when she is entering this facility she is already in a weakened state. Our allegations in the underlying suit of course are that they didn't do anything to help that. And as a result she dies four days later.

So in the first element when you are looking at the disparity, clearly we have a disparity here. We have a large corporation that is putting this agreement in front of a lady whose in bed, weak, sick and demented.

The party's relative sophistication.

In this case, you know, same argument. She is obviously much less sophisticated than them, has unequal bargaining power in this situation.

It's important to note that this agreement is stuck sort of at the back of a packet of a bunch of documents that she is signing. And if you look at the agreement, you'll see where there is X's which are marked where she is to sign and date. So this is one of these situations where just sign everywhere you see an X which she does obviously. There's no dispute about her signature in this case.

The nature of the injuries suffered by the Plaintiff is a wrongful death action so obviously the injuries are severe in the instance. And whether there is an element of surprise in the inclusion of the challenge cause and the conspicuousness of the clause. And when you think about this document being part of a larger packet with the facility marking the X everywhere the individual is to sign and date, which she did in this case, clearly that's not conspicuous. It is not a separate document where we are saying Ms. Brown, here is the arbitration agreement, you know, and this is the consideration for it, this is what

you are agreeing to. And even if they had done that in this case this is a dementia patient that they are asking to hold to a contract posthumously.

And Ms. Jennings noted that she would have had 30 days to back out of the contract perhaps after family reviews it, they look at the admissions documents, et cetera, et cetera, the people that had power of attorney over her. In this case there was no opportunity for that because she died just four days later. So this was a very emergent situation.

So in this case the first instance there is no consideration for the contract so it wouldn't be binding under any circumstances. And in addition to that, it is unconscionable for all of the reasons we have stated. I mean it literally meets every element of unconscionability.

THE COURT: Got it. Yes. Response.

MS. JENNINGS: Your Honor, we think that there is consideration. I was going to point out what you pointed out No. 10, the fees and costs that the center does pay for arbitration. As to the unconscionability, again --

THE COURT: Let me ask you this question. Assuming, because that's the

representation to pay cost and expenses in the future, what is the consideration that is paid at the time of the -- or what is not necessarily paid, what is the consideration at the time of the offer and acceptance? What is the consideration?

MS. JENNINGS: Well, it's -- arguably it's -- a consideration is a promise to -- a promise -- a performance in exchange for something from the contract. So arguably I think you could say that maybe Ms. Brown didn't want to expend attorney's fees and costs and have a jury trial. Maybe that was part of her consideration. Maybe she didn't want to engage in that lengthy process and that's why she signed the arbitration agreement.

THE COURT: Okay. All right. And then if you could address the concerns about the fact that she was suffering from dementia.

MS. JENNINGS: I understand that's what Mr. Willey said. I didn't see that in our records that she had dementia. I saw the diabetes and the chronic kidney disease. She had shortness of breath. The records that I looked at from our facility said she was alert and oriented times three. The admission packet, we haven't done

discovery in this case so I don't know how it was presented to her, but typically there is a person who sits down with the resident and they go through each page in the admission packet and there's, you know, different kind of bed agreements and laundry, if you want your laundry done. There's all kinds of things that you can get signed.

But as to his point about the one sided, it's clearly voluntary. It's written in bold print that they don't have to sign. It's not actually part of the admission agreement. And the admission agreement has a paragraph that says if you don't sign the arbitration agreement, which you don't have to, then this venue provision controls and it will be in the state where the facility is located. And, again, it's unfortunate that she passed away four days after she signed it, but that doesn't change the term of the contract that it still has 30 days that you can change your mind.

So I would say as to that it's clear that it's voluntary. In South Carolina the law is that a person signing the document is responsible for reading the document and understanding it. That's the Regions Bank v. Schmauch case 354 S.C. 648 and the person that signs the contract can't

avoid the effect of the document by claiming that he didn't read it. That's the Sims v. Tyler case 276 S.C. 640 and Evans v. State Farm 269 S.C. 84.

In this case when Ms. Brown signed her admission packet and all the forms I believe that there was an admission person with her, that had she been incapacitated she would not have signed these forms. Someone else would have signed for her and they wouldn't have been signed at all.

THE COURT: Got it. Thank you so much. Appreciate it. Proposed orders, please, 30 days.

MS. JENNINGS: Yes, Your Honor.

THE COURT: Thank you so much.

(These proceedings were concluded at 10:35 a.m., March 21, 2018, Charleston County, South Carolina.)

CERTIFICATE OF REPORTER

I, Ruth C. Weese, Registered Diplomate Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 9th day of July, 2018 at Charleston, Charleston County, South Carolina.

Ruth C. Weese

Ruth C. Weese
Registered Diplomate
Reporter

87059

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
Diane Schafer Goodstein, Circuit Court Judge

Case No. 2017-CP-10-05984

Victor Rawl as Personal Representative of the Estate of Vera Brown,

Respondent-Appellant,

v.

West Ashley Rehabilitation and Nursing Center – Charleston, SC, LLC d/b/a Heartland of West Ashley Rehab and Nursing Center,

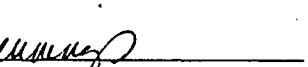
Appellant-Respondent.

NOTICE OF APPEAL

West Ashley Rehabilitation and Nursing Center – Charleston, SC, LLC d/b/a Heartland of West Ashley Rehab and Nursing Center appeals from the Order-Judgment of the Honorable Diane Schafer Goodstein, filed May 25, 2018.

June 18, 2018
Charleston, South Carolina

Hood Law Firm, LLC



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Certificate of Service

I, Jean Marie Jennings, attorney for the Appellant do hereby certify that on June 18, 2018, I served a copy of the Notice of Appeal on Counsel for Respondent-Appellant, via U.S. Mail, first class, postage prepaid to the following address:

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I further certify that I filed a copy of the Notice of Appeal with the Clerk of the Court for Charleston on this same date at:

Julie Armstrong, Clerk
Charleston County – Court of Common Pleas
100 Broad Street, Suite 106
Charleston, South Carolina 29401-2258

Jean Marie Jennings

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

The undersigned further certifies that the Record on Appeal has been redacted in compliance with the Order of the South Carolina Supreme Court, dated April 15, 2014, RE: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, Appellate Case No. 2013-002681.

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October 30, 2018