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

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Appeal from Charleston County
Court of Common Please

Diane Schafer Goodstein, Circuit Court Judge



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

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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.

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# FINAL BRIEF OF RESPONDENT

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

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## STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Court err by finding that the Arbitration Agreement executed by the Patient upon admission to the Rehabilitation and Nursing Center is unenforceable on the grounds of lack of consideration?

II. Did the Trial Court err in finding that the Arbitration Agreement executed by the Patient upon admission to the Rehabilitation and Nursing Center is unenforceable on the grounds of unconscionability?

## STATEMENT OF THE CASE

Vera Brown was admitted to the Rehabilitation and Nursing Center on August 24, 2014. Upon admission, Vera Brown executed the admission agreement paperwork and Arbitration the Agreement. [ROA_36; Attachment to Motion to Compel Arbitration.] On August 29, 2014, Vera Brown passed away.

On November 20, 2017, the Summons and Complaint was filed in the Clerk of Court for Charleston County. [ROA_8; Complaint.] On January 8, 2018, Rehabilitation and Nursing Center filed an answer and motion to dismiss and compel arbitration. [ROA_27; Answer; ROA_36; Motion.] The Motion was based on the allegations of the Complaint and the terms of the Arbitration Agreement, particularly the Rehabilitation and Nursing Center argued:

> 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.

[ROA_36; Motion.]

Respondent filed two (2) memorandums in opposition of Appellant's motion to dismiss and compel arbitration. The first was filed on February 7, 2018; the second was filed February 22, 2018. [ROA_41; Memorandum; ROA_48; Supplemental Memorandum.] The motion to compel arbitration was heard by the Honorable Dianne Goodstein on March 21, 2018. The Trial Court issued an order denying the motion to compel on the grounds that:

> 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;
>
> and;
>
> 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.

[ROA_1; Order.]

**STANDARD OF REVIEW**

Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, the Court of Appeals will not overrule those findings. Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct.App.2012).

**ARGUMENT**

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 Federal Arbitration Act ("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.").

## I. The Arbitration Agreement is not enforceable where the Arbitration Agreement lacks valuable consideration.

The Trial Court was correct when it held that: "The Arbitration Agreement lacks valuable consideration and is unenforceable where there was no additional consideration to Plaintiff's agreement to the Arbitration Agreement and future promises are not valuable consideration." [ROA_1; Order.] 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, or arbitration agreement guided by the FAA, lacks valuable consideration the contract will be deemed unenforceable. Rent-A-Center, 561 U.S. 63, 130 S. Ct at 2776; Simpson, 373 S.C at 14, 644 S.E.2d at 663.

In the case at hand, bearing down on the four-corners of the Arbitration Agreement there was no consideration for Plaintiff's agreement to the Arbitration Agreement. 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)). In fact, the Arbitration Agreement states: "The patient will receive services in this center whether or not this agreement is signed." [ROA_36; Motion.] Neither the Nursing Center nor Vera Brown 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. The Trial Court correctly assessed the Arbitration Agreement by viewing only the four-corners of the Arbitration Agreement, and could not go beyond the confines of the Arbitration Agreement itself. Accordingly, the Trial Court's order should be affirmed.

## II. The Trial Court correctly held that the Arbitration Agreement is unenforceable on the grounds of unconsionability.

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, 373 S.C. at 25, 644 S.E.2d at 669. 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, Vera Brown was admitted into Defendants' facility on August 25, 2014. On this same day, Vera Brown signed admission paperwork which contained the Arbitration Agreement buried in the admission paperwork. [ROA_36; Motion.] Vera Brown did not contribute to the drafting of Arbitration Agreement nor 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).

Additionally, there was an inherent disparity in bargaining power between the parties as this was a transaction between an elderly patient who passed away four (4) days after execution of the Arbitration

Agreement. [ROA_8; Complaint.] Furthermore, the Arbitration Agreement was inconspicuously buried in the admission paperwork. [ROA_36; Motion.] We must consider the otherwise inconspicuous nature of the Arbitration Agreement in light of its consequences. While certain phrases are in bold, the arbitration clauses in its entirety is written in the standard small print, and embedded in paragraphs one (1) through fourteen (14) of the Arbitration Agreement. [ROA_36; Motion.] The inconspicuous nature of this provision is hard to ignore. The Arbitration Agreement was also drafted by a superior party, and functioned to contract away certain significant rights and remedies otherwise available to Ms. Brown by law.

## CONCLUSION

Wherefore, based on the aforementioned the Trial Court's decision should be affirmed because: (1) the Arbitration Agreement lacked valuable consideration; and (2) the Arbitration Agreement is unenforceable on the grounds of unconscionability. Therefore, the Respondent respectfully requests that this Court affirm the Trial Court's ruling.

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT**

This 27 day of Oct 2018

Certification of Counsel

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Stefan B. Feidler

This 27 day of Oct 2018