THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2020-000473

White Oak Manor of Spartanburg . . . . . Plaintiff,

v.

Paulette Smith-Young, ... Defendant,

AND

Paulette Smith-Young, Individually and as The Personal Representative of the Estate of Genobia Smith, Deceased, ... Third-Party Plaintiff,

v.

White Oak Manor-Spartanburg, Inc., d/b/a White Oak of Spartanburg, and White Oak Management, Inc., ... Third-Party Defendants,

OF WHOM

White Oak Management, Inc. is . . . . . Appellant, and

Paulette Smith-Young, Individually and as The Personal Representative of the Estate of Genobia Smith, Deceased is . . . . . Respondent.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On July 23, 2018, White Oak Manor-Spartanburg, Inc. ("White Oak Manor-Spartanburg"), a former party to this lawsuit, filed a magistrate's court claim seeking payment of $2,250.00 in outstanding fees owed to White Oak Manor-Spartanburg for skilled nursing care rendered to Genobia Smith. (R. pp. 28-29). This claim was not within the purview of claims covered by the Arbitration Agreement between the parties because it did not exceed $25,000.00. Genobia Smith was deceased at the time that claim was filed, and White Oak Manor-Spartanburg named Genobia Smith's former Authorized Representative and current Personal Representative, Paulette Smith-Young ("Smith-Young"), as the defendant to seek payment from the Estate. (R. pp. 472-508).

On August 21, 2018, Smith-Young filed a Third-Party Complaint (among other claims) in this magistrate's court action alleging Wrongful Death and Survival claims against (among other parties) White Oak Management, Inc. ("White Oak Management"). (R. pp. 32-51).

The parties consented to transfer the case to the Court of Common Pleas for the Circuit Court to determine further issues in the oddly-postured case, including the White Oak entities' Motion to Dismiss. (R. pp. 25-27). The case was assigned Civil Action Number 2018-CP-42-04174. This consent order expressly preserved and did not waive White Oak Management and White Oak Manor-Spartanburg's motion to dismiss and/or the right to refile that motion if necessary.

On or about March 26, 2019, Smith-Young served requests for production on White Oak Management and White Oak Manor-Spartanburg. Smith-Young served requests for admission on White Oak Manor-Spartanburg. After evaluating the posture of the case, White Oak Manor Spartanburg, out of an abundance of caution, responded to the requests for admission on June 10, 2019. Neither White Oak Management nor White Oak Manor-Spartanburg responded to the remaining discovery requests. Neither party served any discovery requests on Smith-Young at this time. (R. pp. 64-67, 89-100) (R. pp. 513-518).

On June 9, 2019, White Oak Management and White Oak Manor-Spartanburg refiled their preserved motion to dismiss Smith-Young's counterclaim/Third-Party Complaint because these claims failed to comply with the requirements of S.C. Code Ann. § 15-79-125 (Notice of Intent to File Suit as prerequisite to filing action). (R. pp. 58-60, 123-126).

Smith-Young on July 9, 2019 filed a Motion to Compel Discovery from White Oak Manor-Spartanburg and White Oak Management, and on August 5, 2019, filed a Motion for Summary Judgment. (R. pp. 61-62, 86-87).

Only July 10, 2019, Smith-Young filed a Notice of Intent against White Oak Manor-Spartanburg, raising the same claims brought both White Oak Manor-Spartanburg AND White

Oak Management in C.A. No.: 2018-CP-42-04174 (R. pp. 119-120). White Oak Manor-Spartanburg filed its return on August 1, 2019. (R. pp. 121-122).

Prior to the hearing on the Motion to Dismiss, Motion to Compel, and Motion for Summary Judgment on September 6, 2019, the parties reached a mutual agreement to dismiss all motions and claims in this matter without prejudice save Smith-Young's claim against White Oak Management. White Oak Management's Motion to Dismiss was withdrawn without prejudice. The parties agreed to stay the action "for 60 days to allow for a pre-suit mediation in a related pending action," (which was Smith-Young's Notice of Intent, filed on July 10, 2019.) The consent order further provided that at the conclusion of the pre-suit mediation, the remaining claim against White Oak Management would either be consolidated with the Notice of Intent or dismissed "depending upon the outcome of the pre-suit mediation." Pursuant to the consent order, the parties intended to participate in pre-suit mediation in the Notice of Intent to resolve Smith-Young's claims against both White Oak Manor-Spartanburg and White Oak Management. (R. pp. 21-24).

White Oak Management and White Oak Manor-Spartanburg had moved to dismiss Smith-Young's claims because she did not comply with the statutory procedure for bringing such claims. The filing of the Notice of Intent on July 10, 2019 – unlike the Third-Party Complaint/Counterclaim – potentially triggered the arbitration issue. White Oak Management, in an effort to clarify the issues and work within the construct created by the unusual procedural history of this matter, thereafter filed its Motion to Compel Arbitration. (R. pp. 123-176).

While the Motion to Compel Arbitration was pending, and on the day of the parties failed mediation, Smith-Young filed her Second Motion to Compel Discovery to White Oak Management on October 14, 2019. (R. pp. 177-201).

On December 11, 2019, Smith-Young filed a second, separate action for Wrongful Death and Survival against White Oak Manor, Inc., **White Oak Management, Inc.**, White Oak Manor-Spartanburg, Inc. d/b/a/ White Oak of Spartanburg; Inpatient Consultants of North Carolina, P.C.; and Edward Warren, M.D. raising claims for "negligence, gross negligence, negligence per se, wrongful death, corporate negligence, breach of fiduciary duty, and joint venture" arising out of the same alleged occurrence/transaction as those in the Third-Party Complaint and Notice of Intent. C.A. No. 2019-CP-42-04347. (R. pp. 202-227).

White Oak Management's Motion to Compel Arbitration in this matter was heard on December 18, 2019. (R. pp. 421-454). The trial judge requested proposed orders from counsel. (R. pp. 455-468).

On January 13, 2020, the trial judge issued the order denying arbitration. (R. pp. 5-20). White Oak Management filed a Motion to Reconsider on January 23, 2020. (R. pp. 387-390). The trial judge denied the Motion to Reconsider without hearing on February 14, 2020. (R. pp. 1-4). This appeal followed.

STANDARD OF REVIEW

The determination of whether a claim is subject to arbitration is subject to de novo review. Gissel v. Hart, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). The question of whether a party waived its right to arbitrate is a legal conclusion that is subject to de novo review. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007).

FACTS

On or about March 22, 2016, Smith-Young, as attorney-in-fact and authorized representative for Genobia Smith, duly executed pursuant to those powers an Authorized Representative Agreement, Admission Agreement, and Arbitration Agreement with respect to

Genobia Smith's admission to the White Oak Manor-Spartanburg skilled nursing facility in Spartanburg, South Carolina. On or about May 19, 2016, Smith-Young signed a Re-Admission Agreement on behalf of Genobia Smith that properly incorporated the terms of the prior agreements, including the Arbitration Agreement. Smith-Young does not contest that she was authorized to execute these documents on behalf of Genobia Smith. (R. p. 7).

The Arbitration Agreement at issue provides that all claims **exceeding $25,000.00** shall be resolved exclusively by binding arbitration pursuant to the FAA. (R. p. 473).

The claim brought by White Oak Manor-Spartanburg on July 23, 2018 in Spartanburg County Magistrate's Court sought payment of $2,250.00 in unpaid fees, and was outside the scope of the Arbitration Agreement.

The claims brought by Smith-Young in the Third-Party Complaint/Counterclaim against White Oak Management and White Oak Manor-Spartanburg sought damages exceeding this amount. Those claims were deficient because they were not properly brought through the statutory Notice of Intent Process, which is why White Oak Management and White Oak Manor-Spartanburg moved to dismiss those claims in their entirety.

Over a year later, Smith-Young did file the requisite Notice of Intent pursuant to S.C. Code Ann. § 15-79-125 on July 10, 2019. While she named only White Oak Manor-Spartanburg in the caption of the Notice of Intent, this pleading alleged claims against both **White Oak Management** and White Oak Manor-Spartanburg to the same manner and extent as the Third-Party Complaint in this action.

Smith-Young's pleading stated the following:

> Paulette Smith-Young, as Personal Representative of the Estate of Genobia Smith, deceased, pursuant to § 15-79-125 of the South Carolina Code of Laws hereby submits this Notice of Intent to file suit against the Defendants named above. If Defendants do not raise arbitration, Plaintiffs will assume no arbitration

clause exists or Defendants have abandoned any alleged claim to arbitration. This notice is being filed on the following facts:

> Genobia Smith was a resident of Defendants' facility in Spartanburg, SC from March 22, 2016 through August 23, 2016. Defendants are and have been acting in a joint enterprise to operate and manage the facility in order to provide care and treatment to vulnerable adults including Genobia Smith.
>
> Numerous failures, deficiencies, omissions, and breaches of the standard of care have been committed by the Defendants with respect to Genobia Smith. These include, but are not limited to: neglect; corporate negligence and mismanagement; failure to exercise independent judgment as patient advocates; failure to ensure proper preventative measures were in place to keep resident safe; failure to properly assess resident; failure to properly train staff; failure to properly supervise; and failure to abide by applicable federal and state laws governing long term care facilities and skilled nursing facilities.

(R. pp. 119-120).

Arbitration was raised and invoked in the Return to Notice of Intent, with the Arbitration Agreement attached thereto (R. p. 121). The parties mediated the claims subject to the Notice of Intent on October 14, 2019, but did not resolve them.

At no time did White Oak Management ever serve any response to any discovery request. White Oak Manor-Spartanburg, which was dismissed from the case on September 6, 2019, did respond to Smith-Young's Request for Admissions out of an abundance of caution. No depositions were taken. At no time did Smith-Young ever participate in discovery with White Oak Management. Smith-Young did voluntarily file responses to standard interrogatories in the magistrate's court action when she filed the Third-Party Complaint, but those were not served by or requested by White Oak Manor-Spartanburg or White Oak Management. Further, the magistrate's court action was initiated by White Oak Manor-Spartanburg for an amount well below the arbitration limit of the parties' Arbitration Agreement.

ARGUMENTS

I. The trial court erred in finding that the Arbitration Agreement was not valid and binding on Smith-Young and White Oak Management

The trial court improperly applied the interpretive mandates of the FAA, 9 U.S.C.A. § 2 et seq., in determining that the Arbitration Agreement was not enforceable. The trial court briefly acknowledged the strong presumption in favor of arbitration agreements, then failed to apply it, skirting the issue by stating that it only applies "upon being satisfied that the make of the agreement . . .is not in issue." (R. pp. 8-9). There is no issue here concerning the making of the Arbitration Agreement. There is no dispute that Smith-Young had the authority to execute the Arbitration Agreement and all other documents she reviewed and executed in admitting Genobia Smith to White Oak Manor-Spartanburg. There is no lack of capacity that exists nor that is alleged.

As a result, the trial court's reliance on the cases of Hodge v. Unihealth Post-Acute Care of Bamberg, LLC, et al., 422 S.C. 544, 813 S.E.2d 292 (2018), Thompson v. Pruitt Corporation d/b/a UHS-Pruitt Corp., et al., 416 S.C. 43, 784 S.E.2d 679 (2016), Coleman v. Mariner Health Care, Inc., et al., 407 S.C. 346, 755 S.E.2d 450 (2014), and related cases are inapposite. In those cases, the health care defendant was seeking to confer binding signatory authority through other theories, such as the Adult Healthcare Consent Act, estoppel, equitable estoppel, agency, and apparent agency. In none of those cases did the individual signing the Arbitration Agreement and related documents possess, like Smith-Young, a Durable Power of Attorney granting them the authority to sign.

Arbitration agreements enjoy a strong presumption of validity in federal and state courts. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014) (holding that courts may not refuse to compel arbitration simply because a wrongful death claim is

involved). South Carolina has a strong policy favoring resolution of disputes through alternative dispute resolution, including arbitration. C-Sculptures, LLC v. Brown, 403 S.C. 53, 56, 742 S.E.2d 359, 361 (2013). The party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. Dean, 408 S.C. at 379, 759 S.E.2d at 731 (2014).

Arbitration is a matter of contract, and evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009); Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). A written agreement to submit a controversy to arbitration is valid, enforceable, and irrevocable, except upon such grounds as exist for the revocation of any contract. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). "Although the intention of parties is relevant, as a matter of policy, arbitration agreements are liberally construed in favor of arbitrability." Landers v. Federal Deposit Ins. Corp., 402 S.C. 100, 108-109, 739 S.E.2d 209, 213 (2013), citing American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 94 (4th Cir. 1996).

It is the policy of the state of South Carolina to favor the arbitration of disputes. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009); Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003).

The Federal Arbitration Act ("FAA") will preempt any state law that completely invalidates the parties' agreement to arbitrate. The basic purpose of the FAA is to ensure that arbitration will proceed in the event that a state law would have a preclusive effect on an otherwise valid arbitration agreement. Accordingly, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597,

553 S.E.2d 110, 118 (2001); Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. Zabinski, 346 S.C. at 597, 553 S.E.2d at 118–119.

The necessary elements of a contract are an offer, acceptance, and consideration. Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted only by the terms of the agreement. To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596-597, 553 S.E.2d 110, 118 (2001).

The Resident and Facility Admission Agreement contains the following arbitration provision:

> 21. **ARBITRATION.**
>
> WITH REGARD TO ALL MONETARY CLAIMS ARISING BETWEEN THE FACILITY AND RESIDENT/AUTHORIZED REPRESENTATIVE, TO THE EXTENT THAT THEY ARE FOR MORE THAN $25,000.00, ARBITRATION (PURSUANT TO THE FEDERAL ARBITRATION ACT) IS MANDATORY (SUBJECT TO THE "OPT OUT" PROVISIONS SET FORTH IN PARAGRAPH 16 OF THE ARBITRATION AGREEMENT), BINDING AND FINAL. THE EXACT TERMS FOR ARBITRATION ARE SET FORTH IN A SEPARATE DOCUMENT OF EVEN/RECENT DATE, ENTITLED "ARBITRATION AGREEMENT" AND ARE INCORPORATED HEREIN BY REFERENCE. WITH REGARD TO ANY NONMONETARY CLAIM, OR ANY CLAIM FOR LESS THAN $25,000.00, ARBITRATION SHALL NOT BE REQUIRED.
>
> (R. p. 505).

The Arbitration Agreement provides, in pertinent part, that "[a]ll monetary claims between the parties of $25,000.00 or more will be resolved by arbitration and will be subject to the terms

of this Agreement." (R. p. 473). Further, the Arbitration Agreement provides as follows (and expressly includes White Oak Management, Inc. and related entities within its coverage):

> 14. An award against the Facility will be paid within thirty (30) days after the arbitrators make their decision and notify the Facility in writing of that decision. Upon payment, the Facility, as well as all other "White Oak" facilities, **including specifically White Oak Manor, Inc., and White Oak Management, Inc., and their respective shareholders, directors, officers and employees**, will be deemed to be released and forever discharged from any and all other claims arising prior to the date of the hearing.

(R. p. 475).

The Arbitration Agreement also provides:

> 13. When a determination is made by a majority of the arbitrators, they shall also award the "prevailing party," as defined herein, reimbursement by the other party of all reasonable costs and expenses associated with the arbitration, such as the third arbitrator's fees, travel expenses, witness fees, deposition expenses, and other costs associated with the hearing, but excluding attorney's fees. . . .

(R. p. 474).

> 16. At the time of signing this Agreement, the Resident/Authorized Representative/Attorney-in-Fact acknowledges having received a copy; having been told that he/she has the right to have this Agreement reviewed by an attorney of his/her own choosing prior to signing it; and having been advised that, beginning seven (7) days from date hereof, and for another ten (10) days thereafter, he/she has the right to "opt out" of this Agreement, and no longer by bound by it. In the event the party signing below determines to opt out, he/she must give the Facility written notice thereof within the time provided. TIME IS OF THE ESSENCE. If written notification of the Resident/Authorized Representative/Attorney-in-Fact having opted out of this Agreement is not received within the time frame set forth, the within Agreement will remain and continue in full force and effect. By initialing here, the undersigned acknowledges having specifically read this paragraph. _____ (initials)

> 17. If signed below by the Resident, the Resident intends to indicate that he/she believes himself/herself to be mentally competent and, in signing this Agreement, is doing so freely and voluntarily. If instead of the Resident, it is the Authorized Representative/Attorney-in-Fact signing below for the Resident, he/she has the legal right to execute this document in behalf of the Resident, and to thereby bind the Resident, as well as the Resident's heirs/beneficiaries; that so far as he/she knows, other than himself/herself, no one else has the legal right to act in behalf of the Resident and that no on else is an attorney-in-fact for the Resident pursuant to

any Power of Attorney; and that all representations set forth in this paragraph are accurate.

23. By signing below, the undersigned certifies and affirms that he/she has been given sufficient time to read this Agreement, and that any questions that the undersigned had, if any, were satisfactorily answered.

(R. pp. 475-476).

Smith-Young initialed all sections requiring initials. She did not opt out of the Arbitration Agreement. She has not revoked or challenged the Arbitration Agreement in any forum, until resisting this motion.

There is no evidence in the record to indicate that Smith-Young did not willingly and with full understanding execute the Arbitration Agreement on behalf of Genobia Smith.

Further, the Arbitration Agreement is clear that it covers **all monetary claims** in excess of $25,000.00. The claims raised in Smith-Young's Third-Party Complaint meet this threshold, both on their face and by acknowledgment of the parties.

a. The trial court erred in finding that White Oak Management had waived its right to enforce the Arbitration Agreement

The trial court found that "White Oak Management waived the Arbitration Agreement by starting and participating in the civil litigation process." (R. p. 19). This is not a sufficient legal finding, nor is it supported by the facts of this case.

While parties may under certain circumstances waive their right to enforce arbitration, the FAA requires the courts to resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration, whether the problem at hand is the construction of the contract language itself or *an allegation of waiver, delay,* or a like defense to arbitrability." Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 387, 759 S.E.2d 727, 736 (2014), citing Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983) (emphasis added in Dean).

There is a presumption against finding that a party has waived its right to compel arbitration; moreover, a party seeking to prove waiver carries a heavy burden to prove "prejudice through an undue burden caused by delay and demanding arbitration." Id. 388, 759 S.E. 2d at 736.

Waiver decisions are fact-specific, but the court generally considers three factors: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the nonmoving party was prejudiced by the delay in seeking arbitration. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

In Dean, Plaintiff claimed that Heritage waived its right to enforce arbitration because it participated in discovery, including issuing subpoenas for documents and requesting limited discovery in order to engage in meaningful settlement talks. This process lasted approximately four months, between Plaintiff filing her Notice of Intent and prior to Plaintiff filing her formal complaint.

The court in Dean soundly rejected Plaintiff's argument, finding that Heritage had the right to engage limited discovery to effectively evaluate the claims against it and attempt settlement, and further finding that Plaintiff had not demonstrated any prejudice or undue burden.

This analysis squarely applies to the facts of this matter.

First, White Oak Management did not avail itself of the courts for any matter otherwise covered by the Arbitration Agreement. The initial collection action filed by White Oak Manor-Spartanburg in magistrate's court involved a small sum well below the Arbitration Agreement's express $25,000.00 limit.

Second, Smith-Young - not White Oak Management – filed the Third-Party Complaint alleging wrongful death and survival that divested the magistrate's court of jurisdiction.

Third, Smith-Young – not White Oak Management – served extensive discovery requests. White Oak Management did not engage in discovery, but filed its Motion to Dismiss based on Smith-Young's failure to comply with the notice requirements of S.C. Code Ann. § 15-79-125. Smith-Young in July of 2019 did file a Notice of Intent under this statute. White Oak Management sought to obtain medical records from Genobia Smith's third-party providers Spartanburg Regional Healthcare System, Mary Black Memorial Hospital, and Piedmont Internal Medicine. Smith-Young's counsel objected, claiming that White Oak Management waived arbitration by their issuance. White Oak Management disagreed, but did not pursue those subpoenas. Further, the Dean decision unambiguously and expressly holds that such limited attempts to obtain information sufficient to evaluate a claim do **not** constitute a waiver.

Fourth, Smith-Young has now filed, as of December 11, 2019, a formal action in circuit court raising all of her claims against White Oak Management (in addition to other parties).

Finally, and most important, Smith-Young has not established any prejudice or undue burden caused in any way by the timing of White Oak Management's Motion to Compel Arbitration. Mere inconvenience or delay is insufficient to establish prejudice on its own. Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 513, 788 S.E.2d 216, 219 (2016); Rich v. Walsh, 357 S.C. 64, 72, 590 S.E.2d 506, 510 (Ct. App. 2003)("[M]ere delay, regardless of its duration, should not be considered a factor independent of the actual prejudice it occasions."). The record plainly reflects that White Oak Management did not delay simply because it filed a Motion to Dismiss the Third-Party Complaint rather than file a Motion to Compel Arbitration.

Smith-Young's reliance on Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 513, 788 S.E.2d 216, 219 (2016) and Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011) is misplaced.

In Johnson, the parties engaged in significant written and deposition discovery after the lawsuit was filed and before Defendant filed its Motion to Compel Arbitration. Further, Judge Pleicones wrote a strong dissent in Johnson finding that Plaintiff did not meet its burden of proving waiver.

The decision regarding waiver of arbitration in KB Home was vacated by the Supreme Court on January 29, 2014.

b. The trial court erred in refusing to enforce the Arbitration Agreement because White Oak Management did not sign the Arbitration Agreement

While arbitration is generally a matter of contract and a party cannot ordinarily be required to submit to arbitration of a dispute that he has not agreed to arbitrate, "[w]ell-established common law principles dictate that in an appropriate case a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012) citing International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-17 (4th Cir. 2000).

Federal courts, interpreting contracts arising under the FAA, have expressly held that "[i]t does not follow . . . that under the [FAA] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision." Id. at 416.

South Carolina has recognized in this regard that "a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint . . . because this would

nullify the rule requiring arbitration." South Carolina Pub. Serv. Authority v. Great W. Coal, Inc., 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993) (citations omitted).

Here, the Arbitration Agreement expressly provides that claims against White Oak Management are covered by the terms of the Arbitration Agreement, and the lack of a signature on the document by a White Oak Management representative does nothing to change that fact.

c. The trial court erred in finding that the Arbitration Agreement lacks consideration, mutuality, definiteness, or is missing material terms

The trial court's finding in this regard is difficult to address because it lacks any specific factual references to issues actually experienced. The trial court generally finds that there was "no meeting of the minds" because the Arbitration Agreement did not contain "rules." There is no citation to any authority (R. pp. 15-16). A reading of the clear and concise Arbitration Agreement establishes that it indeed has a very specific procedures for conducting the arbitration proceeding.

Further, South Carolina courts have repeatedly upheld arbitration agreements and rejected lack mutuality of remedy claims. In Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (2001), the court found that "the doctrine of mutuality of remedy does not apply here. An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined." Id. at 543, 542 S.E.2d at 366. The court held – as here – that the plaintiffs had not been deprived of a remedy, they must simply seek their remedy through arbitration. "Moreover, under state law, a lack of mutuality of remedy does not invalidate a contract." Id.; citing Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998).

Finally, the Arbitration Agreement contains express consideration favorable to Smith-Young, including, but not limited to:

1. The ability to be represented by someone other than an attorney, thereby reducing litigation expenses;
2. The ability to have a speedy resolution of a claim, not encumbered by the formalities of a litigation forum;
3. The ability to present all evidence in an arbitration forum, not strictly limited by the rules of evidence;
4. The guarantee of payment within 30 days of an arbitration ruling, not limited by any appeals or procedures to enforce judgments, etc.; and,
5. The ability to recover all costs, fees, and expenses of the arbitration, (except any attorney's fees).

Also extremely persuasive is the order of Judge Robin Stilwell in the case of Weninger v. White Oak Management, Inc., et al., C.A. No. 2016-CP-10-02905, interpreting the identical Arbitration Agreement. Judge Stilwell found that the Arbitration Agreement was "clear, unambiguous, and complies with relevant law. It was signed by the Decedent's Attorney in Fact, who ultimately became the Personal Representative of the Estate. It is unpersuasive, and legally insufficient, for a signatory to feign oblivion and claim that he did not read or understand the agreement." (R. pp. 469-471).

Smith-Young submitted a number of circuit court orders at the hearing as well, none of which (1) supported striking down the Arbitration Agreement or (2) interpreted the exact Arbitration Agreement under review by the trial court.

d. <u>The trial court erred in finding that the Arbitration Agreement does not govern a wrongful death claim</u>

The Arbitration Agreement expressly covers claims against White Oak Management, Inc., and expressly provides that the parties intended the Arbitration Agreement to cover those claims.

The Arbitration Agreement does not specify that it only covers certain claims for monetary relief. No matter what theory of recovery Smith-Young is employing to sue White Oak Management (and the same numerous theories of recovery are alleged in both the Third-Party Complaint, the Notice of Intent, and the newly-filed Complaint, as set forth in the quoted language above), those claims are encompassed by the plain language of the Arbitration Agreement.

Further, in Dean v. Heritage Healthcare of Ridgeway, LLC, the Supreme Court of South Carolina held that courts "may not refuse to compel arbitration simply because a wrongful death claim is involved." 408 S.C. 371, 759 S.E.2d 727, 731 n.3 (2014); citing Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203-04 (2012). The Dean opinion is specifically relied upon in a later unpublished United States District Court opinion, THI of South Carolina at Magnolia Manor-Inman, LLC v. Gilbert, 2015 WL 1268185, wherein the District Court noted "the South Carolina Supreme Court made clear in Dean that, under South Carolina law, an arbitral agreement is still indeed binding on a decedent's estate for a claim in wrongful death." Id. at *3.

Although the trial court appears to cite generally to a number of circuit court cases - and one opinion from Kentucky that predates Dean - Appellant is unaware of any law that has overruled the clear and explicit ruling in Dean.

CONCLUSION

Smith-Young was properly identified as an authorized representative to act on behalf of Genobia Smith, the parties' Arbitration Agreement is clear, direct, unambiguous, contains sufficient consideration, and is expressly inclusive of claims against White Oak Management, and there are no other impediments to the enforcement of this valid Arbitration Agreement.

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