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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Grace Gilchrist Knie, Circuit Court Judge

Case No. 2020-CP-42-03818
Case No. 2020-CP-42-03819
Appellate Case No. 2021-000681

Terry Putnam, Individually and as Personal Representative
of the Estate of Margaret Hensley, ... Respondent,

v.

White Oak Estates, Inc., White Oak Management, Inc., and
White Oak Manor, Inc., ... Appellants.

RECORD ON APPEAL - VOLUME II

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS
Terry Putnam, Individually and as Personal Representative of the Estate Of Margaret Hensley, Plaintiff, v. White Oak Estates, Inc.; White Oak Management, Inc.; and White Oak Manor, Inc., Defendants.	)	**NOTICE OF AND MOTION TO ALTER OR AMEND** C.A. Number: 2020-CP-42-03818 C.A. Number: 2020-CP-42-03819

TO: MATTHEW CHRISTIAN, ESQ., ATTORNEY FOR THE PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that Defendants, through their undersigned counsel, will move to alter and/amend the Court's April 9, 2021 Order Regarding Defendants' Motion to Dismiss, Compel Arbitration, and for a Protective Order or, Alternatively, to Stay the Action Pending Arbitration (the "Order") pursuant to Rule 59(e), SCRCP and the applicable common law, on the tenth (10th) day after service hereof, at 10:00 a.m., or as soon thereafter as counsel can be heard, before the presiding judge of the Court of Common Pleas for Spartanburg County.

Defendants argue that these actions should be compelled to arbitration pursuant to the Federal Arbitration Act, the common law of this State, and Rules 12(b)(1), (2), (3), and (6), SCRCP because Terry Putman, as the Power of Attorney for Margaret Hensley, was authorized to arrange for the care, treatment, and living of Ms. Hensley and to bind Ms. Hensley, her Estate, and her Personal Representative concerning the same. In August 2017, Ms. Putman as Power of Attorney for Ms. Hensley executed an Admission Agreement and Arbitration Agreement on

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behalf of Ms. Hensley which conspicuously and voluntarily bound Ms. Hensley, her heirs, her successors, and her assigns to arbitrate any claims she had against Defendants.

More particularly and out of an abundance of caution, Defendants expressly raise and seek a ruling on all arguments set forth in their March 15, 2021 Memorandum in Support of Motion and their March 26, 2021 proposed Order. The proposed Order is attached hereto as Exhibit A. Specifically, the arguments that are not expressly referenced in the Court's Order include but are not limited to the following:

(a) Defendants have consistently argued that Terry Putman held Plaintiff's Power of Attorney ("POA"), executed the August 2017 Resident and Facility Admission Agreement and Arbitration Agreement as Ms. Hensley's daughter and POA, and derived power to bind Ms. Hensley, her Estate, her Personal Representative, and heirs and beneficiaries from said POA. In finding and concluding on pages 2 and 23 of the Order that Ms. Putman signed the Arbitration Agreement as only the "Resident Representative," Defendants respectfully argue that the Court has overlooked or misapprehended Defendants' argument and the pertinent Agreements.

The "Relationship" line of the Admission Agreement reads as follows:

RESIDENT / RESIDENT REPRESENTATIVE:

Margaret A Hensley
Printed Resident Name

Signature / Date

Terry Putman
Printed Resident Representative

Terry Putman 8/24/17
Signature / Date

Daughter & POA
Relationship

The "Relationship" line of the Arbitration Agreement reads as follows:

RESIDENT / RESIDENT REPRESENTATIVE:

Margaret Hensley
Printed Resident Name

Signature / Date

Terry H. Putman
Printed Resident Representative

Terry H. Putman 8/24/17
Signature / Date

Daughter & POA
Relationship

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(b) In finding and concluding on page 6 of the Order that the August 2017 Admission Agreement and Arbitration Agreement do not have a same purpose and address completely different issues, the Court has overlooked Defendants' argument that the Admission Agreement at ¶ 21 expressly recognizes and incorporates the Arbitration Agreement by name and subject matter:

21. ARBITRATION.

WITH REGARD TO ALL CLAIMS ARISING BETWEEN THE FACILITY AND RESIDENT/ RESIDENT REPRESENTATIVE, ARBITRATION (PURSUANT TO THE FEDERAL ARBITRATION ACT) IS MANDATORY (SUBJECT TO THE "OPT OUT" PROVISIONS SET FORTH IN PARAGRAPH 17 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.

(c) In finding and concluding on page 10 of the Order that Ms. Putman had no choice or time in making a decision on Ms. Hensley's nursing home admission, the Court has overlooked Defendants' argument that the Admission Agreement and Arbitration Agreement were signed on August 24, 2017 while Ms. Hensley was safely and securely admitted to Spartanburg Medical Center, five days prior to Ms. Hensley's discharge from Spartanburg Medical Center.

(d) In finding and concluding on page 10 of the Order that "no one made [Ms. Putman] aware of the Arbitration Agreement", the Court has overlooked Ms. Putman's sworn affidavit testimony concerning what she was allegedly told about the Arbitration Agreement:

6. That I was advised and led to believe I was required to sign the alleged arbitration agreement for Margaret Hensley's admission to White Oak Estates.

(e) In finding and concluding on page 12 of the Order that the Estate's lack of funds makes arbitration unconscionable, the Court has overlooked or misapprehended Defendants' argument that there is no binding legal precedent for such a legal conclusion under South Carolina law. If the Court is relying on Plaintiff's cited nonbinding out of state case law, the Court has overlooked Defendants' argument that those cases require Plaintiff to make an individualized and detailed showing that the expected cost of arbitrating is greater than litigating, that the arbitration costs are prohibitively expensive, and that she lacks a funding source such as her counsel's agreement in the fee agreement to forward costs. Plaintiff has made no such showings in this case.

(f) In finding and concluding on page 23 of the Order that the Arbitration Agreement "does not apply" to Defendants White Oak Management, Inc. and White Oak

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Manor, Inc., the Court has overlooked or misapprehended the binding precedence set forth in S.C. Pub. Serv. Authority v. Great Western Coal, et al., 312 S.C. 559, 437 S.E.2d 22 (Ct. App. 1993). Pursuant to Great Western Coal, arbitration is appropriate among all parties to these lawsuits because the claims against White Oak Management, Inc. and White Oak Manor, Inc. arise out of the relationship between Ms. Hensley and White Oak Estates and because White Oak Management, Inc. and White Oak Manor, Inc. agree to submit to binding arbitration.

Defendants respectfully argue that Defendants' arguments that have been overlooked or misapprehended support a conclusion that this matter should be dismissed and submitted to binding arbitration.

This motion is also supported by the pleadings, affidavits on file, deposition testimony, exhibits on file, legal memoranda which may be served and filed, and the entire record herein.

s/Joshua T. Thompson
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Attorney for Defendants

April 19, 2021

Spartanburg, South Carolina

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EXHIBIT A

Julie Wallace

From: Josh Thompson
Sent: Friday, March 26, 2021 4:24 PM
To: Knie, Grace Law Clerk (Brittany Biggs); mchristian@cclawfirm.com
Cc: Jenna Bynum; Julie Wallace
Subject: RE: 2020-CP-42-03818 AND 2020-CP-42-03819 - Terry Putman, et al vs. White Oak Estates, Inc., et al
Attachments: Defendants' Proposed Order.docx

Ms. Biggs:

I hope you are doing well. Per Judge Knie's instruction, please see Defendants' proposed Order attached.

Thank you,

Josh

Joshua T. Thompson
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864-606-9710
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BOULIER THOMPSON
& BARNES, LLC
ATTORNEYS AT LAW

From: Knie, Grace Law Clerk (Brittany Biggs) <gknielc@sccourts.org>
Sent: Thursday, March 18, 2021 5:02 PM
To: mchristian@cclawfirm.com; Josh Thompson <jthompson@btblawfirm.com>
Subject: 2020-CP-42-03818 AND 2020-CP-42-03819 - Terry Putman, et al vs. White Oak Estates, Inc., et al

Counsel,

Judge Knie has requested that each of you submit a proposed order regarding your positions within 10 days. Please email those to this email and please entitle them; "Proposed Order". Please copy them to each other as well.

Sincerely,

Brittany L. Biggs
Law Clerk to the Honorable Grace Gilchrist Knie
Seventh Judicial Circuit
180 Magnolia Street
Spartanburg, South Carolina 29306

Ph: (864) 596-4235
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STATE OF SOUTH CAROLINA)) COUNTY OF SPARTANBURG)	IN THE COURT OF COMMON PLEAS
Terry Putnam, Individually and as Personal Representative of the Estate Of Margaret Hensley, Plaintiff, v. White Oak Estates, Inc.; White Oak Management, Inc.; and White Oak Manor, Inc., Defendants.	**[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND COMPELLING ARBITRATION** C.A. Number: 2020-CP-42-03818 C.A. Number: 2020-CP-42-03819

This matter was before the Court on March 17, 2021 upon Defendants' Motion to Dismiss and Compel Arbitration. Counsel of record for all parties were present, including Matthew W. Christian for Plaintiff and Joshua T. Thompson for Defendants. Having reviewed the submissions by counsel and hearing all arguments advanced, the Court hereby GRANTS Defendants' Motion and ORDERS that this matter be dismissed and compelled to binding arbitration in accordance with the below findings.

FACTUAL BACKGROUND

On October 7, 2011, Margaret Hensley ("Ms. Hensley") executed a Durable Power of Attorney naming Plaintiff Terry Putnam ("Plaintiff") as her agent (the "POA"). The POA granted Plaintiff all lawfully delegated powers not specifically limited in the POA, including the powers to arbitrate; to provide a place of residence, health care, and custodial care; to employ health care personnel; and to arrange for hospitalizations and other care. Within the POA, Ms. Hensley expressly provided that all actions taken by Plaintiff pursuant to the POA "shall be binding on me, my estate and my personal representative."

In November 2012 and May 2014, Plaintiff exercised her POA powers to admit Ms.

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Hensley to White Oak Estates for care. On each occasion, Plaintiff executed merged admission and arbitration agreements. These prior agreements were provided to the Court and demonstrate Plaintiff's familiarity with White Oak Estates and its admissions process as well as Plaintiff's willingness to agree to arbitration on terms substantially similar to those at issue in this case.

Pertinent to the present claims, Hensley was admitted to White Oak Estates on August 29, 2017 for short term rehab following a twelve-day hospitalization at Spartanburg Medical Center during which she underwent a surgical repair for a right femur fracture.

On December 24, 2017, five days prior to Ms. Hensley's admission to White Oak Estates and while Ms. Hensley was still securely hospitalized at Spartanburg Medical Center, Plaintiff executed a merged Resident Facility Admission Agreement, Arbitration Agreement, and Resident Representative Agreement (the "Merged Agreements") as part of the process for having Ms. Hensley admitted to White Oak Estates.

The Admission Agreement defines White Oak Estates as the "Facility" and Ms. Hensley as the "Resident." Within the Admission Agreement, Plaintiff, as Ms. Hensley's daughter and Power of Attorney, agreed that the Admission "Agreement, the Resident Representative Agreement, and Arbitration Agreement, and the admission documentation represent the entire Agreement and understanding between the parties…." Likewise, Plaintiff agreed that all claims between the parties were subject to arbitration pursuant to the Federal Arbitration Act (the "FAA") and was pointed to the Arbitration Agreement which was incorporated by reference. Further, Plaintiff acknowledged that Ms. Hensley's obligations under the Admission Agreement "shall be binding upon all parties hereto and upon their respective heirs, personal representatives, successors and assigns." Finally, Plaintiff agreed that she had the opportunity to read the Admission Agreement, ask questions about it, and have it explained to her.

Turning to the merged Arbitration Agreement, Plaintiff again executed this document as

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Ms. Hensley's daughter and POA "for valuable consideration." Plaintiff agreed that the Arbitration Agreement would be pursuant to the FAA. The Arbitration Agreement reiterated that it "shall be considered" along and together with the Admission Agreement. Likewise, the Arbitration Agreement noted that all claims between Ms. Hensley, her heirs and beneficiaries, White Oak Estates, and all other White Oak entities would be subject to binding arbitration.

Next, Plaintiff agreed to the process for arbitration, including selection of arbitrators, discovery, and the arbitration hearing. Likewise, Plaintiff agreed that the Arbitration Agreement had been explained to her, that she the right to seek legal counsel before signing the Arbitration Agreement, that she had thirty days to opt out of the Arbitration Agreement on Ms. Hensley's behalf, and that she freely and voluntarily executed the Arbitration Agreement. Plaintiff also again agreed that the decision to arbitrate would be binding on Ms. Hensley and her heirs, beneficiaries, successors, and assigns.

Based on the merged Admission Agreement, Ms. Hensley was admitted to White Oak Estates and received skilled nursing care until her discharge on September 23, 2017.

On November 2, 2020, Plaintiff commenced actions 2020-CP-42-03818 and 2020-CP-42-03819, both alleging claims of negligence against all Defendants related to the care that Ms. Hensley received at White Oak Estates. Defendants simultaneously filed Answers and Motions to Compel Arbitration on February 19, 2021.

Because the Merged Agreements are valid and enforceable and Plaintiff's claims expressly fall within the scope of the arbitration provision at issue, the Court finds this matter should be dismissed and compelled to arbitration.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As an initial matter, this Court is mindful of the strong presumption in favor of the validity of arbitration agreements because of the policy favoring arbitration. O'Neil v. Hilton Head Hosp.,

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115 F.3d 272, 273 (4th Cir. 1997) ("The FAA embodies a strong federal policy in favor of arbitration, and, accordingly, there is a strong presumption in favor of the validity of arbitration agreements."); Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) ("Furthermore, it is the policy of this state to favor arbitration of disputes."). For this reason, both Federal and South Carolina courts have held that any doubts over arbitrability should be resolved in favor of compelling arbitration. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 – 25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved 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."); Towles v. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved 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.").

Viewed through the lens of presumed enforceability outlined above, the merged Admission and Arbitration Agreements, by their terms and by law, are governed by the FAA, 9 U.S.C. §§ 1-16. See Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (skilled nursing facility admission agreements and residencies implicate interstate commerce, and thus are governed by the FAA).

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2. Because Plaintiff has not contested Defendants' legal arguments and affidavit testimony establishing interstate commerce, the Court considers only whether a written agreement to arbitrate exists. The Court

finds and concludes that Defendants have made this showing and rules in Defendants' favor for the reasons set forth herein.

I. Plaintiff's execution of the Merged Admission and Arbitration Agreements was supported by valid, lawful consideration and applies to the claims at issue.

Ms. Hensley executed an October 7, 2011 Durable Power of Attorney naming Plaintiff her agent which gave her the authority to enter into the Merged Agreements. Further, the POA specifically authorized Plaintiff to bind Ms. Hensley, her estate, and her personal representative.

Against this backdrop, White Oak Estates presented Plaintiff with merged Admission and Arbitration Agreements. Plaintiff expressly agreed within the Merged Agreements that they constituted the entirety of the agreement between the parties, were to be considered together, and were incorporated within each other. Even if this were not the case, the Merged Agreements would still be construed together because they relate to the same subject matter—Ms. Hensley's admission to and care at White Oak Estates. See, e.g., Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 232 S.E.2d 20 (1977) (Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated.); Plaza Dev. Serv. v. Joe Hardin Builder. Inc., 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988) (Even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties.)

Plaintiff argues that decisional law of this state requires that the Admission Agreement and Arbitration Agreement be viewed as separate documents because the Arbitration Agreement provides a thirty-day opt provision that is not referenced in the Admission Agreement. First, this is not accurate. The Admission Agreement section concerning the Arbitration Agreement clearly

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recognizes the parties will participate in arbitration of claims subject to the opt out provision contained within the Arbitration Agreement. This harmonizes the reading of both Agreements, supporting the entirety of agreement clause. Second, this case is distinguishable from the cases cited by Plaintiff. Prior decisional opinions cited by Plaintiff have declined to find merger because the merger clauses did not expressly recognize the integration of the arbitration agreements. See, e.g., Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 355 – 356, 755 S.E.2d 450, 455 (finding the merger clause of the admission and arbitration agreements was ambiguous because it talked about the agreements as though they were to remain separate documents); Thompson v. Pruitt Corp., 416 S.C. 43, 53, 784 S.E.2d 679 (2016) (finding the merger clause of the admission agreement ambiguous because it did not incorporate the arbitration agreement by name). As set forth above, the Merged Agreements' entirety of agreement clause expressly notes that the Arbitration Agreement is part of the overall, singular agreement of the parties.

Having concluded that the Admission and Arbitration Agreement merge, this Court further concludes that proper consideration for the arbitration agreement was provided. Even for non-signatories, admission can serve as the direct benefit which supports arbitration where the admission and arbitration are governed by the same agreement as they are in these cases. See, e.g., Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 558, 813 S.E.2d 292, 299–300 (Ct. App. 2018) ("Restated, when a signatory seeks to enforce an arbitration agreement against a nonsignatory, the doctrine prevents the nonsignatory from averring he or she is not bound to the arbitration agreement when he or she receives a direct benefit from a contract that contains an arbitration clause.")

Beyond the offering of admission—and even if the Agreements did not merge, the Plaintiff expressly acknowledged in the arbitration agreement that "valuable consideration" was given for her agreement to bind Ms. Hensley, her heirs, and her beneficiaries to arbitration. The Court is

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bound by the ordinary meaning of this clear term that the parties used. See S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) ("When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense.").

Even if the parties did not clearly recognize consideration being given, the Court would not have to strain to identify the consideration. This consideration included, but was not limited to, a quicker resolution of the claims; the ability to choose any individual to represent the resident/claimant at the arbitration (or to represent oneself), thereby avoiding attorneys' fees; relaxed standards for presentation of evidence; the ability to choose an arbitrator; and payment within ninety days of an arbitration award being made. See, e.g., AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344–45 (2011) ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.... And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.")

Plaintiff argues that if the Agreements did not merge, the consideration discussed in the prior paragraph would be illegal "additional" consideration pursuant to 42 U.S.C. § 1396r(c)(5)(A)(iii). The Court disagrees. This statute does not identify an arbitration provision as additional consideration. Furthermore, Plaintiff does not cite any case law supporting this notion.

To the contrary, other courts have rejected Plaintiff's interpretation of this statute. In Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 989 (Ala. 2004), the plaintiff argued that requiring nursing home admittees whose fees are paid by Medicare or Medicaid to relinquish their right to a jury trial was a form of additional consideration that violated 42 U.S.C. § 1396r(c)(5)(A)(iii). The court rejected the argument, finding "an arbitration agreement sets a forum for future disputes," and requiring a nursing home admittee to sign one is not tantamount to

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"charging an additional fee or other consideration." Id. at 989. The court pointed out that the plaintiff's reasoning could arguably dispose of almost any term in the admission contract. Id. See also Sanford v. Castleton Health Care Center, LLC, 813 N.E.2d 411, 419 (Ind.App.2004) (finding that "other consideration" did not encompass an arbitration agreement); Owens v. National Health Corp., 263 S.W.3d. 876 (Tenn. 2007) (court rejected plaintiff's argument that waiver of jury trial through arbitration provision was "other consideration").

In exchange for this consideration, Plaintiff agreed that Ms. Hensley would pay for the services provided to her and that Ms. Hensley, her personal representative, her heirs, and her beneficiaries would engage in arbitration to settle any disputes. Plaintiff, as Ms. Hensley's lawfully empowered agent, freely and voluntarily accepted the offer by executing the Merged Agreements. The Arbitration Agreement, by its plain language, specifically said that binding arbitration would be required for all claims between Ms. Hensley, her heirs, her beneficiaries, White Oak Estates, White Oak Manor, Inc. and White Oak Management, Inc., those being the exact type of claims that Plaintiff now raises in the above-captioned actions.

This Court finds and concludes that just as any other competent adult entering a contract, Plaintiff, Ms. Hensley, her heirs, her successors, and her assigns are held to the merged Admission and Arbitration Agreements and must arbitrate their disputes with Defendants. See J.B. Colt Co. v. Britt, 129 S.C. 226, 123 S.E. 845, 847 (1924) (a person who enters a valid contract is, "of course, bound by the terms and conditions thereof"); Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("A person signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it."); Maw v. McAlister, 252 S.C. 280, 285, 166 S.E.2d 203, 205 (1969) ("The duty on the part of one who signs a written instrument to exercise reasonable care to protect himself requires that

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he read the contract which he signs....").

II. Plaintiff has failed to prove that the Admission and Arbitration Agreements are unconscionable.

A party arguing that a contract is unconscionable bears the burden of proving "(1) she lacked a meaningful choice as to whether to arbitrate because the Agreement's provisions were one-sided, and (2) the terms were so oppressive no reasonable person would make them and no fair and honest person would accept them." Doe v. TCSC, LLC, 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020). "[C]ourts 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.

To establish lack of meaningful choice, Plaintiff submits a contradictory affidavit which states on one hand that she was never made aware of the arbitration agreement and on the other hand that she was "advised and led to believe" she was required to it. The Court finds and concludes that Plaintiff's argument that she did not know about the arbitration clause fails as a matter of fact and law.

As a matter of fact, within the August 2017 Admission Agreement, Plaintiff agreed that all claims between the parties were subject to arbitration pursuant to the Federal Arbitration Act and was pointed through conspicuous capitalized font to the Arbitration Agreement which was incorporated by reference. Further, Plaintiff agreed that she had the opportunity to read the Admission Agreement, ask questions about it, and have it explained to her. Likewise, within the Arbitration Agreement, Plaintiff acknowledged that said Agreement had been explained to her, that she had the right to seek legal counsel before signing it, that she had thirty days to opt out of it on Ms. Hensley's behalf, and that she freely and voluntarily executed it. Plaintiff was familiar

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with what she was doing, given ample notice of what she was being asked to sign, and given the opportunity to reflect on her agreement to arbitrate and rescind it. Still, she executed the Merged Agreements and did not rescind her consent to binding arbitration.

As a matter of law, anyone who enters into a written contract has a duty to read the contract which she signs. Maw, 252 S.C. at 284-285, 166 S.E.2d at 204. Likewise, anyone who is capable of reading and understanding, but fails to read a contract before signing is bound by the terms thereof. Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms).

Next, though Plaintiff's affidavit states this was a stressful time, she does not explain how she lacked a choice or how she possibly was surprised by the arbitration agreement. Plaintiff admits that she signed the Merged Agreements while her mother was still hospitalized. In fact, she signed the Merged Agreements five days before her mother was discharged from the hospital and needed a long-term care placement. Plaintiff has failed to explain in any way what prevented her from shopping around, visiting facilities, and making the conscious and knowing choice she admitted to making in the Merged Agreements.

Likewise, Plaintiff cannot claim surprise at the terms. Plaintiff had previously admitted Ms. Hensley to White Oak in November 2012 and May 2014. Each time, Plaintiff executed merged admission and arbitration agreements. Though the wording of these agreements may have been revised over the years, the vast majority of the key terms which she now claims are unconscionable were present in the 2012 and 2014 agreements, including selection of three arbitrators who were

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not all required to be lawyers, the arbitration process, and the non-prevailing party paying all costs.

Finally, Plaintiff cites to out-of-state case law for the argument that Plaintiff's alleged inability to pay for arbitration makes the Merged Agreements unconscionable. This Court is not aware of any such case law in this state. Instead, in South Carolina, a person who enters a valid contract is, "of course, bound by the terms and conditions thereof." J.B. Colt Co., 129 S.C. 226, 123 S.E. at 847.

Still, even if the Court were to consider the two out-of-state cases Plaintiff cites, Plaintiff still would fail to carry her burden necessary to invalidate the Merged Agreements. Those cases require Plaintiff to make an individualized and detailed showing that the expected cost of arbitrating is greater than litigating, that the arbitration costs are prohibitively expensive, and that she lacks a funding source such as her counsel's agreement in the fee agreement to forward costs. The Clark case cited by Plaintiff makes clear that "conclusory allegations" as to inability to pay is not good enough. "Rather, parties must show that based on their specific income/assets, they are unable to pay the likely costs of arbitration." Clark v. Renaissance W., LLC, 307 P.3d 77 (Ariz. App. 2013). Plaintiff's conclusory allegations in her affidavit in no way carry this burden.

The Court, therefore, finds and concludes that Plaintiff has failed to establish that the Merged Agreements are unconscionable.

III. Plaintiff's claims in both lawsuits are encompassed within the scope of the merged Admission and Arbitration Agreement.

Plaintiff next argues that the Merged Agreements do not encompass her wrongful death claims. This Court disagrees.

Ms. Hensley's POA authorized Plaintiff to bind Ms. Hensley, her Estate, and her personal representative. Plaintiff then exercised that authority to expressly bind Ms. Hensley and her heirs, her personal representatives, successors, assigns, and beneficiaries to the requirements of the

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Merged Agreements. The Merged Agreements conspicuously state that "all claims" between Ms. Hensley, her personal representative, her heirs, her beneficiaries, White Oak Estates, White Oak Manor, Inc., and White Oak Management, Inc.–these parties forming the direct and third-party beneficiaries of the Merged Agreements–will be submitted to arbitration. Plaintiff's wrongful death action, -03818, is one such claim.

Besides the express authority provided in the POA, Plaintiff as Ms. Hensley's agent had the ability to obligate Ms. Hensley's wrongful death beneficiaries to arbitration because South Carolina's Wrongful Death Statute is a derivative action. See S.C. Code Ann. § 15-51-10 (The South Carolina Wrongful Death Act requires, as a condition of any suit, that the decedent herself, had she lived, could have "maintain[ed] an action and recover[ed] damages."); Estate of Stokes v. Pee Dee Family Physicians, LLP, 389 S.C. 343, 347 (2010) ("[O]ur law has remained steadfast to the principle of limiting the right of recovery under the wrongful death statute to those cases in which the party injured would have been entitled to recover if death had not ensued." (cataloguing cases)); Rish v. Seaboard Air Line Ry., 90 S.E. 704, 704-05 (S.C. 1916) ("The [Wrongful Death Act] gives a right of action where none existed before, and limited the right of recovery to those cases in which the party injured would have been entitled to recover if death had not ensued.")

Although the case law in South Carolina has not directly addressed the issue at hand, the court has not been hesitant to prohibit wrongful death actions in which the decedent had in some way barred herself from pursuing the underlying cause of action. In Price v. Richmond & D.R. Co., 33 S.C. 556, 12 S.E. 413 (1889), the court determined that a release executed by the decedent prior to his death prevented a wrongful death action brought by the decedent's wife. The Court's decision was premised upon the limiting language of the wrongful death statute. The Price Court held that if the defendant in some way deprived himself of the right to pursue a cause of action, "his administrator is, likewise, [also] barred of his right of action." Id. at 560, 12 S.E. at 413.

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Furthermore, the court in Reed v. Northeastern R. Co., 37 S.C. 42, 16 S.E. 289 (1892) affirmed the Price holding and found that "[a]nything that would have defeated [the decedent's] recovery would defeat that in behalf of his family in case he failed to survive." Reed at 53, 16 S.E. at 291.

In Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988), the South Carolina District Court interpreted the Wrongful Death statute, and held that a survivor cannot bring an action under the wrongful death statute to recover for the same wrong sued upon earlier by the decedent, if the personal injury statute of limitations has expired, but the specific wrongful death limitations period has not expired. This establishes that wrongful death cause of action is wholly derivative. The District Court, sitting in diversity, examined the issue as the highest court of South Carolina would if confronted with the same situation. It then traced the history of wrongful death claims starting with Lord Campbell's Act. It further held that the same defenses that would have been available to use against the decedent, had he lived, were also available against those asserting the wrongful death claim.

Based on the legal nature of a wrongful death claim, the South Carolina Supreme Court has found that like here, where a decedent or her agent executes an arbitration agreement in connection with the decedent's admission to a nursing home, wrongful death actions can be subject to binding arbitration. Dean, 408 S.C. 371, 759 S.E.2d 727 at n. 3. District Courts in South Carolina interpreting Dean have found that statutory beneficiaries are subject to arbitration. See, e.g., THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, 2015 WL 1268185, at *3 (D.S.C. Mar. 19, 2015) ("Additionally, the South Carolina Supreme Court made clear in Dean that, under South Carolina law, an arbitral agreement is still indeed binding on a decedent's estate for a claim in wrongful death.")

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IV. White Oak Management, Inc. and White Oak Manor, Inc. may enforce the Merged Agreements even though they are not signatories to the same.

Finally, the Court finds and concludes that Plaintiff is required to arbitrate her claims against non-signatories White Oak Management and White Oak Manor as a matter of contract and pursuant to the settled law of this State.

First, Plaintiff's freely and voluntarily contracted to arbitrate any claims against the two non-signatory Defendants within the Arbitration Agreement: "When reference is made to 'ALL' claims, 'all claims' is intended to include not only all claims between the Resident and the Facility, as well as claims between the Resident's heirs/beneficiaries, but also all other 'White Oak' entities, including specifically White Oak Manor, Inc. and White Oak Management, Inc." Therefore, Plaintiff agreed that "this Agreement also makes it such that no separate action or claims may be asserted against the Facility, or any other "White Oak" entities…"

Even if Plaintiff had not contractually obligated Ms. Hensley, her heirs, and her beneficiaries to pursue arbitration against White Oak Management and White Oak Manor, those entities still would be entitled to compel arbitration. Though White Oak Management and White Oak Manor are not signatories to the merged Agreements, Plaintiff alleges in both actions that these Defendants were involved in and responsible for Ms. Hensley's care provided at White Oak Estates and alleges causes of action against these Defendants based on the care provided to Ms. Hensley at White Oak Estates. Likewise, as evident through White Oak Management and White Oak Manor joining in the Motions to Dismiss and Compel Arbitration, White Oak Management and White Oak Manor agree to participate in binding arbitration as envisioned by the merged Admission and Arbitration Agreements. In such circumstances, South Carolina law recognizes that White Oak Management and White Oak Manor have the right to seek arbitration notwithstanding the fact that they are not a signatory to the Merged Agreements.

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In S.C. Pub. Serv. Authority v. Great Western Coal, et al., the plaintiff contracted with Great Western Coal for the provision of coal. 312 S.C. 559, 437 S.E.2d 22 (Ct. App. 1993). The contract contained an arbitration clause. The plaintiff later brought suit against Great Western Coal, its president, and another employee, alleging that they had increased coal prices while lowering quality. Id. at 561, 437 S.E.2d at 23 – 24. Defendant president, a non-signatory to the contract, filed a motion to dismiss and compel arbitration. Id. at 561, 437 S.E.2d at 24. The trial judge denied defendant president's motion because he did not sign the contract in his individual capacity, and defendant president appealed. Id. at 563, 437 S.E.2d at 24 – 25.

The Court of Appeals reasoned that "a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint, or signatory parties in their individual capacity because this would nullify the rule requiring arbitration." Id. at 563, 437 S.E.2d at 24 - 25, citing Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990). The Court of Appeals further reasoned that "when the nonsignatory parties are willing to submit to arbitration, the case should be arbitrated." Id. The Court of Appeals therefore, concluded, that the defendant president was seeking arbitration and held that the trial judge erred in denying the same simply because the defendant president did not sign the contract. Id.

This Court finds that Great Western Coal is directly on point. Just like Great Western Coal's president, White Oak Management and White Oak Manor are not signatories to the Merged Agreements in question, but the claims against White Oak Management and White Oak Manor arise out of and relate to the relationship between Ms. Hensley and White Oak Estates. Also, like Great Western Coal's president, White Oak Management and White Oak Manor join in the Motions to Dismiss and Compel Arbitration and thus agree to submit to binding arbitration.

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V. The Court Declines to Rule on Defendants' Request for Protection from Responding to Plaintiff's Written Discovery.

Defendants seek protection pursuant to Rule 26(c), SCRCP from being required to object and respond to Plaintiff's First Set of Interrogatories to Defendant White Oak Estates, Inc., First Requests for Production to White Oak Estates, Inc., First Set of Interrogatories to White Oak Management, Inc., First Requests for Production to White Oak Management, Inc., First Set of Interrogatories to White Oak Manor, Inc., and First Requests for Production to White Oak Manor, Inc. Because this Court dismisses this case, Defendants' request for protection is moot.

CONCLUSION

For the reasons set forth herein, Defendants' Motion to Dismiss and Compel Arbitration is hereby **GRANTED** and this matter is **DISMISSED.** Should Plaintiff opt to pursue this claim in arbitration, she is **COMPELLED** to do so by initiating her claim pursuant to the procedures set forth in the August 24, 2017 Arbitration Agreement.

IT IS SO ORDERED!

STATE OF SOUTH CAROLINA)
) IN THE COMMON PLEAS COURT
COUNTY OF SPARTANBURG)

Terry Putman, Individually and as Personal Representative of the Estate of Margaret Hensley,

Plaintiff,

-vs-

White Oak Estates, Inc., White Oak Management, Inc., and White Oak Manor, Inc.,

Defendants.

TRANSCRIPT OF RECORD
2020-CP-42-03818;03819

March 17, 2021
Spartanburg, South Carolina

B E F O R E:

HONORABLE GRACE GILCHRIST KNIE, JUDGE

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

MATTHEW W. CHRISTIAN, ESQUIRE
Attorney for the Plaintiffs

JOSHUA TATE THOMPSON, ESQUIRE
Attorney for the Defendants

Linda D. Moffitt
Circuit Court Reporter

INDEX

No sworn testimony; no exhibits entered into evidence.

(The following hearing was held by virtual court.)

THE COURT: Let me make sure that our court reporter is with us.

THE COURT REPORTER: I'm here, Judge. Thanks.

THE COURT: Thank you.

Okay. We will now commence the afternoon term.

I am Judge Grace Knie in Spartanburg, South Carolina, and this is a term of common pleas court. This is nonjury.

We're conducting the hearings today via my virtual courtroom. The court reporter is Linda Moffitt. The host is my assistant, Ashley Searcy, and my law clerk is Brittany Biggs, and Mary Bell Martinez is with us. She is the deputy clerk at the courthouse here in Spartanburg for common pleas.

And so, Ms. Martinez, are you with us?

THE CLERK: Yes, ma'am. I am here.

THE COURT: Okay. And so we will be going down the roster. I understand there have been a few changes for the afternoon's roster, and please understand that everyone is going to be muted and will be unmuted by my assistant as your case is called and then I call upon you. It's not being rude. I think that it's more trial and error. We've learned that background noise is a big problem.

So I will call upon Ms. Martinez to call the case.

THE CLERK: Yes, Your Honor.

The first matter we have for this afternoon is on case 2020-CP-42-3818, Terry Putman vs. White Oak Estates, Inc.

THE COURT: Okay. Thank you. Bear with me one moment.

(Pause.)

THE COURT: Okay. And I note there are two different action numbers, but the motions seem to be very similar, and okay.

All right. And so let me ask Ashley if you'll unmute, first, Mr. Christian.

Mr. Christian, are you here today on behalf of the plaintiff?

MR. CHRISTIAN: Yes, ma'am. I am.

THE COURT: Okay. Thank you.

And also Mr. Thompson.

MR. THOMPSON: Yes, ma'am.

THE COURT: Are you here representing the defendants?

MR. THOMPSON: Yes, ma'am.

THE COURT: Okay. All right. And so are you going to argue them separately or together?

MR. THOMPSON: Your Honor, I would request that the motions be argued together and contained on the same record if that suits the Court and Mr. Christian.

MR. CHRISTIAN: Sure.

THE COURT: Okay. And so just to be clear, then it's

going to be -- this matter is before me upon defendants, White Oaks Estates, Inc., and White Oak Management, Inc., and White Oak Manor, Inc., with regard to civil action Nos. 20-CP-42-3818 and 3819.

Both of these motions were filed on February the 19th of 2021, and they are motions to dismiss or, and/or, compel arbitration, and for a protective order or alternative -- alternatively to stay the action pending arbitration.

And so I will at first hear from Mr. Thompson and then I will allow Mr. Christian to respond.

Mr. Thompson, you will have an opportunity to reply to anything you believe you need to that was raised at that new -- anything new.

If you'll give me one moment, let me pull up the file electronically again. As well, I have copies of the motions printed.

(Pause.)

THE COURT: Okay. And just to be clear, I see that both a memorandum in opposition and in support were filed on yesterday -- or I'm sorry -- on Monday. Is that correct?

MR. THOMPSON: Yes, ma'am, Your Honor.

THE COURT: Okay. Has there been -- from the -- from the moving party, from the defendant, Mr. Thompson, has

there been anything filed since then?

MR. THOMPSON: No, ma'am.

THE COURT: Okay. Mr. Christian, anything since then?

MR. CHRISTIAN: No, ma'am.

THE COURT: Again, experience is a great teacher, and I've had hearings where we find out afterward that there was something in the email that came in or something that was pending in the clerk's office.

All right. Okay. And I didn't thank you all, but thank you for attending today via my virtual courtroom and being prompt and making sure that your electronic equipment was working properly.

Okay. Mr. Thompson, sir, I will hear from you first.

MR. THOMPSON: Yes, ma'am.

Your Honor, again, my name is Josh Thompson. I'm with the Boulier firm.

I represent in this matter the defendants, White Oak Estates, White Oak Management and White Oak Manor.

As Your Honor recognized, there are two case numbers or two actions pending here. The action pending 3818 is a wrongful death action and the action pending 3819 is a survival action. However both actions --

(Inaudible. WebEx dropped.)

MR. THOMPSON: That being claims relating to Ms. Margaret Hensley's residency at White Oak Estates in August

and September of 2017. Your Honor --

THE COURT: Mr. Thompson, can you do me a favor?

I believe that if you will face the monitor it might be -- I can hear you, but I'm not transcribing this, okay, and I want to make sure our court reporter can hear you. If you could just make sure that your -- your -- I have to do this too because I move around when I talk. Just make sure that you're facing your monitor. And I think -- I think that will help. Okay. Thank you.

MR. THOMPSON: Is that better, Your Honor?

THE COURT: Yes, yes, it is.

MR. THOMPSON: Your Honor, as I mentioned, both of these actions arise out of Ms. Hensley --

(Inaudible. WebEx dropped.)

MR. THOMPSON: -- at White Oak estates in August through September of 2017.

As we go on today, I may refer to Ms. Hensley as the resident, and I'm referring Ms. Putman who is the P.R. and daughter of Ms. Hensley as the power of attorney and P.O.A.

Our argument, Your Honor, though I believe is expansive. Our argument, Your Honor, is somewhat summed up in --

(Inaudible. WebEx dropped.)

MR. THOMPSON: Your Honor, the P.O.A. held a valid durable power of attorney that authorized her to take care,

treatment and living arrangements of the resident. It also authorized her to bind the resident, the resident's estate and the resident's performances. The resident and P.O.A. were familiar with White Oak Estates.

This resident was admitted to the facility by the P.O.A. in 2012 and 2014. Both times the P.O.A. executed arbitration agreements as part of the admissions process.

Number three, in August of 2017 the P.O.A. signed a merged admission agreement and arbitration agreement on behalf of the resident five days before the resident was admitted to White Oak while the resident was still safely and securely hospitalized at Spartanburg Regional Medical Center.

At that time the arbitration -- the merged admission and arbitration agreements contained a conspicuous voluntary arbitration provision which the P.O.A. did sign and was authorized to sign, for the admission and arbitration agreement reaches all claims between the resident, her heirs, her personal representative, her successors and assigns and all three defendants.

For those reasons, Your Honor, as I will elaborate more as we go on today, we believe that these actions should be dismissed pursuant to the Federal Arbitration Act, Rule 12 of the South Carolina Rules of Civil Procedure.

In the alternative we believe that the action should at a minimum be stayed while the parties submit to binding arbitration.

And finally and cogmitally [sic], Your Honor, we believe that we're entitled to a protective order from written discovery served by Mr. Christian in this case because that written discovery is improper being that this is an improperly commenced action.

First, Your Honor, I believe the background of this Honor -- of this matter is very important. Unlike the vast majority of cases under South Carolina Appellate Law, which deny arbitration or consider arbitration good, bad or indifferent, this case is not one built on the principles of estoppel and this case is not one where there are separate or non-merged admission and arbitration agreements.

So as a matter of background again, Your Honor, in 2011 the resident gave her daughter, the P.O.A. and current plaintiff in this case, a durable power of attorney.

The power of attorney provided for all lawful powers to bind the resident, her estate and her personal representative to contracts. The powers expressly included the powers to provide for the care and custody of the resident, as well as the resident's living arrangements.

I'm not aware of any argument in Mr. Christian's brief

that the power of attorney doesn't allow, did not allow, Ms. Putman lawfully to admit this resident to the facility.

In 2012 and 2014, again, the resident was admitted to White Oak Estates. On both occasions the power of attorney was the one who admitted her. On both occasions the power of attorney was presented with admission and arbitration agreements which merged and provided for arbitration on very similar grounds to what is present in the 2017 merged admission and arbitration agreement.

Again, while that, those agreements, from 2012 don't bind the resident or the resident's estate in the current case, I believe as to unconscionability they show a pattern of conduct, a willingness and familiarity with the White Oak Estates admission process and the fact that this P.O.A. for this resident had gone through this process two times before and on both occasions had agreed to submit to the arbitration process.

So we fast forward to August of 2017. The resident's admitted to Spartanburg Regional Medical Center where she has a femur fracture repaired surgically. That hospitalization is ongoing for, I believe, Your Honor, approximately 12 days. But that's in Attachment C to our memorandum.

At any rate, five days before this resident was to be discharged from Spartanburg Regional the power of attorney

came to White Oak on August 24th and signed these agreements.

At that point the resident's care was being provided for. She was securely hospitalized. There was no emergent or urgent need to make an alternate care plan that day, yet the P.O.A. came and signed those agreements.

The admission agreement expressly states that the admission agreement, resident representative agreement and arbitration agreement attached to our memoranda as Exhibit 4 constitute one entire agreement and understanding between the parties as to this admission.

In all capital letters in the admission agreement the P.O.A. is put on notice that there's an arbitration clause that she will be asked to consider as part of the admission process, and she's put on notice that it's part of an arbitration agreement which is incorporated into the admission agreement.

Again, she agrees that she's had time to read, understand and ask questions about the admission agreement.

Turning to the arbitration agreement, first, the arbitration agreement notes, again, that it is -- that it, along with the admission agreement and representative agreement, are the entire agreements of the parties and should be construed together.

The arbitration agreement expressly provides -- and

it's given for, quote, unquote, valuable consideration, and the resident both initialed that agreement and -- I mean, I'm sorry -- the P.O.A. both signs and initials that agreement as the resident's representative daughter and power of attorney.

Within that agreement the P.O.A. agrees that it will be binding on the resident, her heirs, her beneficiaries, White Oak Estates, White Oak Management and White Oak Manor. All of those parties are expressly mentioned in the arbitration agreement.

Further, the arbitration agreement provided a 30-day opt-out period. It was made clear that it was not a condition to admission and that the P.O.A. or the resident had 30 days to opt out of that clause.

Again, that was not exercised. We have no record of any sort of revocation on file.

The P.O.A.'s affidavit, which was filed on Monday in this case, is contradictory on the point of arbitration and, frankly, to me that calls into question the reliability of the testimony.

In paragraph 5 and 12 of the affidavit the P.O.A. claims that she was not made aware of the arbitration provision. In paragraph 6 she claims that she was indeed aware of the arbitration provision and thought she was required to sign it.

Either way, the P.O.A. was the lawfully authorized agent of the resident who was a competent adult. She's not excused from her contractual duties because she didn't read or didn't take time to understand what she was signing when she admitted her power of attorney to the facility.

As an initial argument, Your Honor, we note that both South Carolina law and federal law are in favor of enforcement of arbitration provisions. We note that the arbitration agreement and the admission agreement which, again, are one merged document, that both of them recognize the F.A.A., the Federal Arbitration Act, applies. Case law across the country says that the F.A.A. strongly compels arbitration.

And along those lines there then become two end questions, is there a written agreement to arbitrate and does that agreement involve interstate commerce.

Your Honor, we submitted a thorough memoranda, or two thorough memoranda, in which we establish why we believe a valid contract exists and why we believe that it involves interstate commerce.

We also submitted an affidavit to establish interstate commerce even though, frankly, under current state and federal law the affidavit isn't even necessary because it's presumed in these occasions that interstate commerce is at issue.

So with that in mind, I'd like to turn -- knowing that we've briefed those issues thoroughly, I'd like to turn to the five arguments that the plaintiff raises in the memorandum in opposition.

First, the plaintiff alleges that there was no consideration given for the arbitration agreement.

As we know, a written agreement requires an offer, consideration and acceptance. We've argued in our brief why those principles are present, but taking the plaintiff's argument head on, first, the plaintiff boldly asserts that the admission and arbitration agreements don't merge, citing to the Coleman and Thompson cases that have previously been cited by our appellate courts.

However, in both of those cases the admission agreement did not expressly incorporate the arbitration provision.

In this case, as I mentioned, Your Honor, the admission agreement and the arbitration agreement both expressly incorporate and reference one another and put the parties on notice these are to be considered one document.

In a case where that is true our appellate courts have held in cases such as Klutz and Plaza Development that the agreements who are -- that are signed on the same day for the same purpose or even around the same days for the same purpose are considered one document even if the agreements

didn't expressly make out a case.

As this Court has previously recognized in a prior order, relying on Hodge vs. UniHealth, admission itself can serve as the direct benefits supporting arbitration when admission and arbitration are governed by the same agreement.

Even if that were not the case, the arbitration agreement expressly provides that it's for valuable consideration. That quote is used. It starts "for valuable consideration."

South Carolina law of course requires that contracts be given their expressed and ordinary meaning. There's nothing much more expressed than saying the parties are agreeing to it for valuable consideration. That consideration includes mutuality of agreement.

I know Your Honor has considered a prior iteration of a White Oak arbi -- admission or arbitration agreement where the claims required to be submitted were only those above $25,000.

So the argument there was in a case like that there's the possibility that the facility can sue for bills in court but the resident has to bring her claims otherwise.

Here, that's not the case in this arbitration agreement. All claims arising between the parties, their heirs, personal representatives, successors, beneficiaries,

White Oak Management, White Oak Manor, all are compelled to be arbitrated. So there's a mutuality.

Number two, our U.S. Supreme Court has found in AT&T Mobility that the types of considerations and concessions mutually given by the parties here are the exact reasons that we allow arbitration.

For example, the parties are free to choose their own arbitrators. They don't have to be attorneys. They can represent themselves. There's relaxed evidentiary standards. There is swift payment of any award within 90 days.

These are all things that benefit both parties and provide consideration for the agreement even if the agreements were merged and the direct-benefit argument didn't apply and even if the agreement didn't recognize it was for valuable consideration.

Plaintiff along these same lines argues that even if the agreements are merged they're illegal because federal law states that White Oak cannot charge additional consideration for admission above and beyond what it receives from Medicare or Medicaid.

Your Honor, the plaintiffs cite zero case law in support of that proposition, and, respectfully, we argue that plaintiff misinterprets the application of that provision of federal law.

Courts across the country agree with us, Your Honor. In Owens vs. Coosa Valley Healthcare, 890, Southern 2d, 983, the plaintiff argued that requiring a nursing home admittees whose fees are paid by Medicare and Medicaid to relinquish rights to a jury trial violated the provision of federal law stated by plaintiffs.

The Court rejected that argument finding that an arbitration agreement sets a forum for disputes and that requiring an admittee to sign one is not tantamount to charging an additional fee or consideration.

Your Honor, there's at least two other very good opinions on that which we believe would bear on South Carolina reasoning -- Sanford vs. Castleton out of Indiana, as well as Owens vs. N.H.C. out of Tennessee.

Third, Your Honor, plaintiff argues that the contract shouldn't be enforced because it's unconscionable.

As we argue in our brief, Your Honor, the signatory -- there's U.S. case law which states that an arbitration agreement is not unenforceable as unconscionable simply because it requires arbitration.

The analysis is much deeper than that and the general proposition of law both federally and in our state is that a competent adult who agrees to a contract is bound by that agreement.

Here, the type was conspicuous in all capital letters

in the admission agreement that there was an optional arbitration agreement for consideration. The capital letters should have drawn -- drew the P.O.A.'s attention to that term.

Likewise, the P.O.A. agreed in both the merged admission agreement and arbitration agreement that she had read them, asked questions and had the ability to ask for understanding.

That's, again, contradictory to the plaintiff's affidavit where she says she was not offered that opportunity.

Third, the P.O.A. agreed to arbitration with this facility for the third time. This is not somebody who walked in to the facility while the resident was in dire health, emergency, and signed paperwork that they had never seen.

Ms. Putman as the P.O.A. had gone through this process two times prior. Each time she signed the admission agreement and the arbitration provision. All three times she signed it she had the ability to read and ask questions about it and understand the contract.

Further, her mom was securely hospitalized at Spartanburg Regional Medical Center. The agreements were reviewed and signed five days prior to her mom's discharge from the hospital, and, despite the stressful situation

that Ms. Putman described in her affidavit, this was not a situation where she had no meaningful choice.

At any time during those five days she could have taken the agreement home and read it. She also had the 30-day opt-out provision which she could have exercised but didn't.

In this situation we have a hard time understanding how this could be unconscionable. This was an educated, competent adult who made this decision for the third time in six years.

Plaintiff argues that there's terms within the arbitration agreement which make it unconscionable, whether those be at the fact that nonlawyers can be arbitrators or that if two arbitrators chosen by the parties can't agree to a third, then the third arbitrator will be chosen by a coin flip, or the fact that there's always an offer and a demand submitted and the arbitrators have to choose between them.

Again, if no reasonable person would sign this agreement it begs the question of why the plaintiff did it three times.

Furthermore, Your Honor, nursing homes are routinely criticized for not defining the process. In this case we defined the process from start to finish -- how the arbitration will be had, how the arbitrators will be

chosen, who pays for what, how the decision will be made and how quickly it will be paid.

So in a case like this where the plaintiff had everything in front of her and was considering it, we believe that there's no argument for unconscionability of the agreement. Instead, the plaintiff should be held to it.

Plaintiff makes an argument that the inability to pay the cost of arbitration should be a defense to enforcement of the contract.

Addressing that briefly, there's no South Carolina case law that supports that. The plaintiff hasn't cited to any. I'm not aware of any precedent in South Carolina which says a competent adult can avoid the consequences of a contract because she says she can't see payment or satisfy.

Regardless, even if this were the law of South Carolina, the Clark case cited by plaintiff in the brief makes it clear that a bold allegation of inability to pay is not good law. Instead, there's got to be specific evidence of in-common assets put before the Court, and the plaintiff has to satisfy the burden of showing she cannot pay for this process.

Likewise, in the courts or in the cases cited by plaintiff there was a consideration of whether the

plaintiff and plaintiff's counsel had an agreement that plaintiff's counsel would forward costs. If that's the case that, again, cuts on the plaintiff bearing the burden of establishing the inability to pay.

Here that has not been addressed at all, and we have no idea whether plaintiff's counsel has agreed to --

(Inaudible. WebEx dropped.)

MR. THOMPSON: Of these matters of their --

(Inaudible. WebEx dropped.)

MR. THOMPSON: Fourth, Your Honor, plaintiff argues that the agreement, even if it is enforceable, doesn't cover the lawful death beneficiaries.

First, the P.O.A. and the contractual language at issue all make clear that the P.O.A. was invested with the power to bind Ms. Hensley, her heirs and her estate and her personal representative and that she did, in fact, do so. Those are explicitly set forth in both the P.O.A. and the contract.

As we set forth in our brief, this language causes the wrongful death claim to fall within the clear scope of all claims governed by the arbitration agreement.

Beyond the clear language of the P.O.A. and the merged agreements which make the wrongful death beneficiaries third-party beneficiaries of the agreement, we cite the South Carolina case law which makes clear that a wrongful

death recovery is a derivative action.

If there are things that would prohibit or affect the decedent's ability to collect or the decedent's ability to maintain a claim, then those things also follow through or carry on to the beneficiaries of the decedent's estate and wrongful death claims.

For this reason the Dean court, Your Honor, and T.H.I. of South Carolina courts both make clear that arbitrable agreements can and are binding on wrongful death beneficiaries.

Finally, Your Honor, the plaintiff argues that even if there is a valid arbitration agreement it doesn't reach White Oak Manor and White Oak Management.

Your Honor, we, again, disagree. First, White Oak Manor and White Oak Management are expressly named third-party beneficiaries at the merged agreements.

The arbitration agreement in paragraphs two and three expressly provides that the P.O.A. is agreeing to arbitrate any claim she has against White Oak Estates, White Oak Manor and White Oak Management and that she will not maintain a separate action against White Oak Manor or White Oak Management.

As the Pearson court held, this is certainly one of the five ways that a nonsignatory may be governed by an arbitration agreement.

Furthermore, Your Honor, we cite to the Great Western Coal case in our brief. That case stands for the proposition that where a nonsignatory is being sued for problems arising out of the relationship between the signatories, and the nonsignatory agrees to submit to arbitration, the nonsignatory has the power to enforce arbitration provision.

In that case it was the president of the company who enforced the right to arbitrate through the agreement entered into by the plaintiff and the company.

That case is directly on point, and even if the agreement didn't expressly cover manner and management the Great Western Coal case would.

The plaintiff cites to the Wilson case for the proposition that third parties can be bound only in slow scenarios. Wilson actually applies the cases where the nonsignatories aren't willing to arbitrate. As we note here, by joining in the motions to compel arbitration White Oak Manor and White Oak Management have made clear their agreement within the case and, there again, Great Western Coal would appear to compel arbitration as to those entities as well.

Your Honor, again, valid P.O.A. that covered the admission process had gone through it on two prior occasions, agreed to go through it on this occasion. And

we believe she is now bound to follow through with that. We're happy to answer any questions of the Court.

THE COURT: Okay. Thank you very much.

I was able to follow along in your memorandum, as well as the memorandum of Mr. Christian when you were arguing. I appreciate that.

Okay. So, Mr. Christian, sir, I'm happy to hear from you.

MR. CHRISTIAN: Yes, ma'am. Thank you.

I think, first of all, a couple of things.

I don't believe that our client's affidavit is contradictory. I think that if you read the affidavit in its entirety what she is communicating is that, number one, she was not aware of the arbitration agreement because she was required to sign so many documents in such a large amount.

I think what she's saying is she doesn't deny signing it. She was just not made aware of it when she did sign it because she was asked to sign so many things and she was never explained the terms and provisions of an arbitration agreement, which I believe are those two statements coexist without being contradictory.

I think the second and more important, or maybe one of the more important, points to make is that to argue that these agreements did merge would be to ignore the vast

majority of South Carolina appellate authority.

Coleman, Hodge and a number of other cases have held that these agreements do not merge.

I'm not aware of any South Carolina appellate court case or any South Carolina authority that has found that an arbitration agreement and admission agreement have merged.

And, in fact, if we look at those cases, this particular instance has many of the same problems, if you will, that the arbitration agreements had in those cases.

The arbitration agreement and admission agreement are separate in this case, as they were in Coleman and Hodge and Thompson.

Also, the agreements as in those cases that the Court noted have different laws that govern them. The arbitration agreement here says federal law governs and the admission agreement says state law governs.

Also, as similar to those cases, the facility can modify the admission agreement, but no one can modify the arbitration agreement.

Also, in line with those cases there's 30 days supposedly to opt out of the arbitration agreement.

The admission agreement can be disclaimed or the -- can be terminated at any time by the resident with three days notice. And so there is a lot of distinctions between the arbitration agreement and admission agreement

indicating that they do not merge.

Then as we -- as we move on into our arguments about why this arbitration agreement is unenforceable, I believe the first one is that -- and I think our brief covers this very well, so I'm not going to take too much of the Court's time -- but it's unconscionable, Your Honor.

The affidavit sets forth the -- really the manner in which this is unconscionable. Defense counsel has pointed out that my client allegedly signed two different arbitration agreements from three to five years ago.

I don't think that parole evidence is relevant or bearing on this issue, but I would note that even if we are going to talk about that, number one, we don't know the circumstances that those were executed under. And, more importantly, those were completely different arbitration agreements with significantly different provisions that did not contain all of the same owners and conscionable provisions in this agreement.

As we move on to the unconscionability issue, my client's affidavit sets forth the manner in which it was done. She was trying to move her loved one from the hospital to the facility and it was done in a hurried fashion. She didn't have that many options. We know that it wasn't explained to her. All of those factors are set forth in her affidavit.

We look at some of the substantive issues with the agreement.

Number one, I've never seen an arbitration agreement like this, but it essentially leaves to sheer luck the person who is going -- the party that is going to win on all of the issues in the arbitration.

There is supposed to be a panel of three arbitrators, one chosen by the facility, one chosen by the resident. Concerning to me and part of the unconscionability of all of that is neither of those people have to be neutral or unbiased.

They can be anybody that they select with very few exceptions. They don't have to have any knowledge of nursing home or healthcare related issues. They don't have to have any knowledge of the law.

And so it seems to be a bit of a circus as to -- as to two of the arbitrators and how that's going to go.

But, more importantly, is the way that the third arbitrator is chosen. If -- if the third arbitrator cannot be agreed upon by the first two, which is very likely given the fact that these folks don't even have to be neutral, the third arbitrator is chosen by a coin toss leaving really the determination as to sheer luck, because as to whoever wins, because who wins the coin toss is going to be who wins all of the issues really surrounding discovery

motions and the final decision, because it's going to be somebody that's chosen by one -- by -- the two arbitrators will be chosen by one party. And of course they don't have to be biased in any -- I mean, neutral in any way. So to me that's a bit of sordine, very unconscionable.

Number two, the arbitration -- the way it's supposed to go provides at least a 7-month delay before discovery would ever even start.

The whole purpose of arbitration is supposed to be more efficient and quicker, and that's not the way this works.

It gives 90 days before the facility has to name their own -- their own arbitrator, then another 90 days before another one might be -- before the third one might be chosen, then another 30 days for that third arbitrator to identify whether he's willing to serve or not. And of course if he's not the process starts over. And that's before we even start discovery.

Another reason that this is unconscionable is because the arbitrated -- arbitration panel has no choice and no discretion in what to award except -- or they have to pick an offer and/or a demand submitted by both parties 24 hours prior to the hearing.

So there's no -- there's no discretion for them to choose any number other than one of those numbers.

Whichever number they choose, the party that did not choose is considered the nonprevailing party, the losing party. And the arbitration agreement says the loosing party must pay for the third arbitrator, their own arbitrator and all of the costs for the other side.

And based upon all of these factors there's no way a reasonable person who would understand all of these issues would have signed this agreement under any other circumstance.

There's no evidence my client was an educated lady, and clearly the facility that drafted the agreement is much more sophisticated in these matters than someone like my client would be.

And so for all those reasons we believe that the arbitration agreement is unconscionable. As we mentioned also and as she mentions in her affidavit, the estate has zero assets. That would really be the party here. No assets is very specific. There's no way they can pay -- pay for the arbitration agreement. And, so, in any event, Your Honor, we believe that it's unconscionable.

Second of all, there is a lack of consideration here. And one of the things that defense counsel pointed out is that the arbitration agreement says that it's for valuable consideration. Well, there still has to be evidence of what that is. There is no valuable consideration.

Payment for the care that was rendered is the consideration for admission, not for the arbitration agreement. The care that was rendered by the facility is the consideration for the payment that was given.

There is no consideration for the arbitration agreements. And we can't say that the agreement to arbitrate is the consideration, because the agreement to arbitrate -- the resident owes no duty to the facility. And the resident's only duty is to pay bills, which is exclusively the consideration for the admission agreement, not for the arbitration agreement.

And so the resident owes no duty to the facility other than to pay those bills, and those bills and the payment for those bills is the admission agreement consideration, not the consideration for the arbitration agreement. And therefore they owe no duty and there is no consideration. Your Honor, that's set forth in much more detail in our brief.

Third, this agreement is illegal and unenforceable, Your Honor.

The separate arbitration agreement gives a 30-day opt-out provision. The arbitration -- there is a snippet in the admission agreement that discusses arbitration. And it says in the admission agreement arbitration is mandatory and is contained in the admission agreement. And there is

no opt-out provision in the admission agreement.

So when the client -- excuse me. When my client signed the admission agreement she had no opportunity to cross out or opt out the admission agreement contained -- excuse me -- the arbitration agreement contained within the admission agreement.

And also it says that it's mandatory. If we believe that, which, by the way, is incontradictory to the separate arbitration agreement, another reason they don't merge, but, if we believe that, federal law, which we have cited, says that the facility cannot charge, solicit, accept or receive any other consideration except for Medicare and Medicaid.

As Mr. Thompson pointed out, that's not been considered by our appellate courts. I don't think we're bound in any way by what Mississippi or Indiana has done. But, in any event, we know what federal law says. We've cited the cites here.

The only consideration that the facility can accept from the resident is the Medicare or Medicaid payment. They're not allowed to accept or receive any other consideration at all, which would include the arbitration agreement.

And so for that reason it makes the arbitration agreement illegal, and illegal contracts and agreements are

unenforceable as we've noted in our memo and in our brief.

The next reason that -- Your Honor, if -- if for some reason the Court decided that this was an enforceable agreement, this agreement cannot and does not reach the wrongful death claims.

We've provided the Court with a number of other orders that a number of other judges in our state have -- where they have agreed with this proposition.

The wrongful death statutory beneficiaries are not parties or signatories to this agreement.

If you look at the admission agreement, which the defendants contend, say it merged, the admission agreement says that it's only between the resident and the facility, not anyone else.

And the arbitration agreement does not in my opinion encompass that. It indicates that the parties to the agreement are the statutory -- are not the statutory beneficiaries but rather the resident's representative and the facility signatory.

And if we look at Wilson vs. Willis we know that the Court, our Supreme Court, has said that third parties should not be compelled to arbitrate to agreements that they were not signatories to except on -- only exceptional circumstances, and that they should be compelled. That should be used with restraint and that estoppel should be

used sparingly to compel arbitration and that it should be used more as a shield instead of a sword to compel arbitration.

And Mr. Thompson raised the issue of the Dean case. And what the Dean case simply said, Your Honor, was that courts cannot refuse to enforce an arbitration agreement simply because a wrongful death claim is involved, and I agree with that.

Courts can refuse to enforce an arbitration agreement based off contractual grounds, and the contractual grounds are that there was -- statutory beneficiaries are not signatories or parties to the agreement.

Had the statutory beneficiaries been signatories and parties to the agreement, then perhaps the unlawful death claim could be bound.

We're not asking the Court to determine as a matter of in every circumstance wrongful death claims aren't bound, but when there's a contractual defense it's the defendant's burden to prove that a valid contract existed with them. We can see that they were not parties and are not bound.

And we've listed a significant amount of law that I'm not going to go through, but it's identified in our brief, unless the Court wishes for me to go through it, but identifies in great detail how the claims for the wrongful death and survival actions, those of the statutory

beneficiaries, are independent and separate.

And, finally, Your Honor, the arbitration agreement does not reach that -- if it was enforceable does not reach that of White Oak Management, Inc. and White Oak Manor, Inc.

As I've already mentioned, they are not parties to the admission agreement where the defendants contend that this merged. They are not signatories or parties to the arbitration agreement. The arbitration agreement was only signed by a representative on behalf of the facility, not on behalf of White Oak Management or White Oak Manor.

And defense counsel raised the issue of the Pearson case. And what the Pearson case said is that you can't sue under a contract and then disclaim the arbitration provision as part of that contract.

We are not suing under either the admission agreement or the arbitration agreement. Our claims arise in independent tort for personal injury out of an independent duty that the healthcare provider, which is the facility, owes to my client.

There was -- I didn't anticipate the Pearson case coming up, and I apologize for not remembering the name right this second, but there is a recent case by our Court of Appeals involving, I believe, a Brookdale facility out of Charleston where they said, our courts said, that the

duty that a nursing home owes does not arise out of contract, it arises out of independent tort -- independent duty in tort required by the healthcare provider.

And the Pearson case involved a doctor who was suing his employer under a breach-of-contract theory, and the very same contract that he was suing under had the arbitration agreement. The Court said you can't avoid arbitration when you're suing under the same contract, which is what we are not trying to do here today, Your Honor.

So for all of those reasons, Your Honor, we believe that the arbitration agreement and the defendants' motion should be denied and that it is unenforceable. But if for some reason the Court did find it to be enforceable, we do not believe that it reaches either the wrongful death claim or the defendants White Oak Management, Inc. and White Oak Manor, Inc. Thank you.

THE COURT: Okay. Thank you.

Make sure I'm not muted.

Okay. So, Mr. Thompson, sir, is there anything new that you would wish to address?

MR. THOMPSON: Your Honor, I know we're right at the 40 minutes we asked for. So I'll make it very, very brief. Just three things in clarification.

The mention of the arbitration provision within the

admission agreement most certainly does say subject to the opt-out provision set forth in paragraph 17 of the arbitration agreement. So that provision expressly recognizes the opt-out provision, which, again, supports merger of these agreements.

Number two, as to the persons who can enforce or who are bound by the arbitration, I do not contend that White Oak Manor or White Oak Management or the beneficiaries and heirs are signatories.

We contend that the expressed language of the P.O.A. authorized her to bind the estate, the beneficiaries and the personal representative, and we argue that the expressed language of these agreements of paragraph 22 of the arbitration agreement, of the admission agreement, 25 of the arbitration agreement, say this agreement is binding upon the parties, their respective heirs, successors and assigns.

Furthermore, as I mentioned earlier, paragraph two and three expressly note that White Oak Manor and White Oak Estates -- that any claims against White Oak Manor and Management are bound for arbitration as well.

And then, finally, I think on the last note there I did not hear any sort of argument as to Great Western Coal, and I go back to the case of Great Western Coal.

That proposition is very simple, Your Honor, where the

claims subject to the lawsuit arise out of the relationship between the signatories. A willing nonsignatory is allowed to compel arbitration and participate. And that's what we have here, Your Honor. Thank you.

THE COURT: Mr. Thompson, were the prior agreements different from the exhibits that I have reviewed, the exhibits attached to your memorandum?

MR. THOMPSON: No, ma'am. The proper agreements are attached. They're Exhibit -- they're Exhibit 2 to my complaint.

THE COURT: Okay. Wait a minute. Let me go back and look at that then.

MR. THOMPSON: The 2012 and 2014 agreements are attached as exhibits. The power of attorney is Exhibit A and the two medicals are three, the '17 agreement and the affidavits are five and six.

THE COURT: And, sir, it's your position that those agreements are the same, exactly the same, or similar to the documents that she signed on the last admission to the facility or that were signed on her behalf?

MR. THOMPSON: Yes, ma'am. I believe they are extremely similar as to all terms pointed out by Mr. Christian.

For example, the choice of the arbitrators, the timeline for choice of arbitrators, the relaxed evidentiary

standards, the way that the costs and fees are split, the submitting of the fast demand and offer of settlement, all of those dictate that the costs be paid by the non-prevailing party. All of those things are the exact same, Your Honor.

If the dates -- I believe those is that in that case if the two arbitrators could not agree on a third arbitrator they would apply Triple A, the arbitration association, to seek appointment of a third arbitrator.

As your Honor is probably well aware from hearing these, the Triple A no longer accepts pre-injury arbitration agreements. So that provision of course had to change and we had to recognize for a third arbitrator.

Your Honor, the second thing that I mentioned earlier that varies from the prior White Oak case that you considered is that the 2012 and '14 applied to the claims above $25,000, whereas, the '17 that's at issue here applies to all claims between the parties.

THE COURT: Okay.

MR. THOMPSON: But, Your Honor, if I've -- if I've misstated anything in my haste, they are attached as Exhibit 2.

THE COURT: Okay. Thank you.

And I now understand that I had pulled up -- I've got Exhibit 4, and now I'm looking -- I understand.

Okay. Thank you.

Okay. Anything else from either party?

Mr. Christian.

MR. CHRISTIAN: Your Honor, the only two things I would say is with regards to the arbitration provision that's contained within the admission agreement, at best it is ambiguous because it does say it's subject to the 30-day opt-out provision, but it also says it's mandatory. So that should be construed against the facility as the drafter.

And, second of all, I'm sure it goes without saying, but defense counsel pointed out that the P.O.A. in this case would have had the authority to sign for the statutory beneficiaries. And I'm not -- she indicates in her affidavit that there's more than one statutory beneficiary. It's not just her.

So there is not any evidence which of course is the defendant's burden to show that she had the authority to sign for anyone else, and so that's essentially what I would -- what I would note.

THE COURT: Okay. Thank you.

MR. CHRISTIAN: Yes, ma'am.

THE COURT: I know I'm giving y'all a little bit more leeway, but I know it's a lot to cover.

So, anything else?

MR. THOMPSON: No, ma'am. Your Honor, I believe we've sufficiently addressed all issues on my side.

THE COURT: Okay. You all watch your email and look for a communication from my law clerk, okay, from -- but it'll show up as gknielc anyway. All right. Her name is Brittany Biggs.

All right. Thank you all very much for your preparation. I know it takes so much to get ready for these. Thanks so much.

MR. CHRISTIAN: Yes, ma'am. Thank you.

END OF REQUESTED TRANSCRIPT OF RECORD

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 17th day of March 2021.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

July 7, 2021

s/Linda D. Moffitt

Linda D. Moffitt
Circuit Court Reporter

ELECTRONICALLY FILED - 2021 Mar 15 11:04 AM - SPARTANBURG - COMMON PLEAS - CASE#2020CP4203819

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS C.A. No.: 2020-CP-42-03818 & 2020-CP-42-03819
Terry Putman, Individually and as Personal Representative of the Estate of Margaret Hensley, Plaintiff, v. White Oak Estates, Inc., White Oak Management, Inc., and White Oak Manor, Inc., Defendant(s).	**AFFIDAVIT OF TERRY PUTMAN**

PERSONALLY appeared before me, the undersigned, who being duly sworn, hereby states and attests that the following is true and correct:

1. I am a citizen and resident of Spartanburg County, South Carolina.

2. My mother, Margaret Hensley, was admitted to White Oak Estates, a skilled nursing facility/nursing home, on or about August 29, 2017.

3. That on or about the time of my mother's admission and during her entire admission, I was a citizen and resident of Spartanburg County, South Carolina.

4. That admission to the facility was very stressful for both the family and for my mother. That further, my mother was transitioning from an inpatient admission to the hospital where she had been admitted for inpatient care. That it was during this hospitalization and right before admission to White Oak Estate that I was required to sign the admission documents for White Oak Estates where she was to transition for long-term care.

ELECTRONICALLY FILED - 2021 Mar 15 11:04 AM - SPARTANBURG - COMMON PLEAS - CASE#2020CP4203819

5. That at no point in time did any representative of White Oak Estates ever alert me to the alleged arbitration agreement or explain it to me.

6. That I was advised and led to believe I was required to sign the alleged arbitration agreement for Margaret Hensley's admission to White Oak Estates.

7. Margaret Hensley was not competent and was never aware that I had signed the arbitration agreement.

8. When I signed the alleged arbitration and admission agreement, no one from the facility explained the arbitration provisions to me.

9. That my brother, Kevin Hensley, who is also a statutory beneficiary, was unaware that I was signing the Arbitration Agreement.

10. That the Estate of Margaret Hensley has no assets or income to be able to pay for the arbitration costs as set forth in the agreement.

11. That personally, I do not have the financial ability to pay for the arbitration costs as set forth in the agreement.

12. Had I been aware of any alleged arbitration agreement and its effect, I would not have signed it.

Date: 03/15/2021

Terry Putman

Terry Putman

SWORN to and subscribed before me this
15th day of March, 2021

Amanda Weatherford
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 1-25-27

AMANDA V. WEATHERFORD NOTARY PUBLIC SOUTH CAROLINA

Josh Thompson

From: Knie, Grace Law Clerk (Brittany Biggs) <gknielc@sccourts.org>
Sent: Thursday, March 18, 2021 5:02 PM
To: mchristian@cclawfirm.com; Josh Thompson
Subject: 2020-CP-42-03818 AND 2020-CP-42-03819 - Terry Putman, et al vs. White Oak Estates, Inc., et al

Counsel,

Judge Knie has requested that each of you submit a proposed order regarding your positions within 10 days. Please email those to this email and please entitle them; "Proposed Order". Please copy them to each other as well.

Sincerely,

Brittany L. Biggs
Law Clerk to the Honorable Grace Gilchrist Knie
Seventh Judicial Circuit
180 Magnolia Street
Spartanburg, South Carolina 29306
Ph: (864) 596-4235
Fax: (864) 562-4234
gknielc@sccourts.org

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Josh Thompson

From: Josh Thompson
Sent: Friday, March 26, 2021 4:24 PM
To: Knie, Grace Law Clerk (Brittany Biggs); mchristian@cclawfirm.com
Cc: Jenna Bynum; Julie Wallace
Subject: RE: 2020-CP-42-03818 AND 2020-CP-42-03819 - Terry Putman, et al vs. White Oak Estates, Inc., et al
Attachments: Defendants' Proposed Order.docx

Ms. Biggs:

I hope you are doing well. Per Judge Knie's instruction, please see Defendants' proposed Order attached.

Thank you,

Josh

Joshua T. Thompson
101 W. St. John St., Ste. 300
Spartanburg, SC 29306
PO Box 6470
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BOULIER THOMPSON & BARNES,LLC
ATTORNEYS AT LAW

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STATE OF SOUTH CAROLINA)) COUNTY OF SPARTANBURG)	IN THE COURT OF COMMON PLEAS
Terry Putnam, Individually and as Personal Representative of the Estate Of Margaret Hensley, Plaintiff, v. White Oak Estates, Inc.; White Oak Management, Inc.; and White Oak Manor, Inc., Defendants.	**[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND COMPELLING ARBITRATION** C.A. Number: 2020-CP-42-03818 C.A. Number: 2020-CP-42-03819

This matter was before the Court on March 17, 2021 upon Defendants' Motion to Dismiss and Compel Arbitration. Counsel of record for all parties were present, including Matthew W. Christian for Plaintiff and Joshua T. Thompson for Defendants. Having reviewed the submissions by counsel and hearing all arguments advanced, the Court hereby GRANTS Defendants' Motion and ORDERS that this matter be dismissed and compelled to binding arbitration in accordance with the below findings.

FACTUAL BACKGROUND

On October 7, 2011, Margaret Hensley ("Ms. Hensley") executed a Durable Power of Attorney naming Plaintiff Terry Putnam ("Plaintiff") as her agent (the "POA"). The POA granted Plaintiff all lawfully delegated powers not specifically limited in the POA, including the powers to arbitrate; to provide a place of residence, health care, and custodial care; to employ health care personnel; and to arrange for hospitalizations and other care. Within the POA, Ms. Hensley expressly provided that all actions taken by Plaintiff pursuant to the POA "shall be binding on me, my estate and my personal representative."

In November 2012 and May 2014, Plaintiff exercised her POA powers to admit Ms.

Hensley to White Oak Estates for care. On each occasion, Plaintiff executed merged admission and arbitration agreements. These prior agreements were provided to the Court and demonstrate Plaintiff's familiarity with White Oak Estates and its admissions process as well as Plaintiff's willingness to agree to arbitration on terms substantially similar to those at issue in this case.

Pertinent to the present claims, Hensley was admitted to White Oak Estates on August 29, 2017 for short term rehab following a twelve-day hospitalization at Spartanburg Medical Center during which she underwent a surgical repair for a right femur fracture.

On December 24, 2017, five days prior to Ms. Hensley's admission to White Oak Estates and while Ms. Hensley was still securely hospitalized at Spartanburg Medical Center, Plaintiff executed a merged Resident Facility Admission Agreement, Arbitration Agreement, and Resident Representative Agreement (the "Merged Agreements") as part of the process for having Ms. Hensley admitted to White Oak Estates.

The Admission Agreement defines White Oak Estates as the "Facility" and Ms. Hensley as the "Resident." Within the Admission Agreement, Plaintiff, as Ms. Hensley's daughter and Power of Attorney, agreed that the Admission "Agreement, the Resident Representative Agreement, and Arbitration Agreement, and the admission documentation represent the entire Agreement and understanding between the parties…." Likewise, Plaintiff agreed that all claims between the parties were subject to arbitration pursuant to the Federal Arbitration Act (the "FAA") and was pointed to the Arbitration Agreement which was incorporated by reference. Further, Plaintiff acknowledged that Ms. Hensley's obligations under the Admission Agreement "shall be binding upon all parties hereto and upon their respective heirs, personal representatives, successors and assigns." Finally, Plaintiff agreed that she had the opportunity to read the Admission Agreement, ask questions about it, and have it explained to her.

Turning to the merged Arbitration Agreement, Plaintiff again executed this document as

Ms. Hensley's daughter and POA "for valuable consideration." Plaintiff agreed that the Arbitration Agreement would be pursuant to the FAA. The Arbitration Agreement reiterated that it "shall be considered" along and together with the Admission Agreement. Likewise, the Arbitration Agreement noted that all claims between Ms. Hensley, her heirs and beneficiaries, White Oak Estates, and all other White Oak entities would be subject to binding arbitration.

Next, Plaintiff agreed to the process for arbitration, including selection of arbitrators, discovery, and the arbitration hearing. Likewise, Plaintiff agreed that the Arbitration Agreement had been explained to her, that she the right to seek legal counsel before signing the Arbitration Agreement, that she had thirty days to opt out of the Arbitration Agreement on Ms. Hensley's behalf, and that she freely and voluntarily executed the Arbitration Agreement. Plaintiff also again agreed that the decision to arbitrate would be binding on Ms. Hensley and her heirs, beneficiaries, successors, and assigns.

Based on the merged Admission Agreement, Ms. Hensley was admitted to White Oak Estates and received skilled nursing care until her discharge on September 23, 2017.

On November 2, 2020, Plaintiff commenced actions 2020-CP-42-03818 and 2020-CP-42-03819, both alleging claims of negligence against all Defendants related to the care that Ms. Hensley received at White Oak Estates. Defendants simultaneously filed Answers and Motions to Compel Arbitration on February 19, 2021.

Because the Merged Agreements are valid and enforceable and Plaintiff's claims expressly fall within the scope of the arbitration provision at issue, the Court finds this matter should be dismissed and compelled to arbitration.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As an initial matter, this Court is mindful of the strong presumption in favor of the validity of arbitration agreements because of the policy favoring arbitration. O'Neil v. Hilton Head Hosp.,

115 F.3d 272, 273 (4th Cir. 1997) ("The FAA embodies a strong federal policy in favor of arbitration, and, accordingly, there is a strong presumption in favor of the validity of arbitration agreements."); Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) ("Furthermore, it is the policy of this state to favor arbitration of disputes."). For this reason, both Federal and South Carolina courts have held that any doubts over arbitrability should be resolved in favor of compelling arbitration. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 – 25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved 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."); Towles v. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved 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.").

Viewed through the lens of presumed enforceability outlined above, the merged Admission and Arbitration Agreements, by their terms and by law, are governed by the FAA, 9 U.S.C. §§ 1-16. See Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (skilled nursing facility admission agreements and residencies implicate interstate commerce, and thus are governed by the FAA).

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2. Because Plaintiff has not contested Defendants' legal arguments and affidavit testimony establishing interstate commerce, the Court considers only whether a written agreement to arbitrate exists. The Court

finds and concludes that Defendants have made this showing and rules in Defendants' favor for the reasons set forth herein.

I. Plaintiff's execution of the Merged Admission and Arbitration Agreements was supported by valid, lawful consideration and applies to the claims at issue.

Ms. Hensley executed an October 7, 2011 Durable Power of Attorney naming Plaintiff her agent which gave her the authority to enter into the Merged Agreements. Further, the POA specifically authorized Plaintiff to bind Ms. Hensley, her estate, and her personal representative.

Against this backdrop, White Oak Estates presented Plaintiff with merged Admission and Arbitration Agreements. Plaintiff expressly agreed within the Merged Agreements that they constituted the entirety of the agreement between the parties, were to be considered together, and were incorporated within each other. Even if this were not the case, the Merged Agreements would still be construed together because they relate to the same subject matter—Ms. Hensley's admission to and care at White Oak Estates. See, e.g., Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 232 S.E.2d 20 (1977) (Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated.); Plaza Dev. Serv. v. Joe Hardin Builder. Inc., 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988) (Even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties.)

Plaintiff argues that decisional law of this state requires that the Admission Agreement and Arbitration Agreement be viewed as separate documents because the Arbitration Agreement provides a thirty-day opt provision that is not referenced in the Admission Agreement. First, this is not accurate. The Admission Agreement section concerning the Arbitration Agreement clearly

recognizes the parties will participate in arbitration of claims subject to the opt out provision contained within the Arbitration Agreement. This harmonizes the reading of both Agreements, supporting the entirety of agreement clause. Second, this case is distinguishable from the cases cited by Plaintiff. Prior decisional opinions cited by Plaintiff have declined to find merger because the merger clauses did not expressly recognize the integration of the arbitration agreements. See, e.g., Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 355 – 356, 755 S.E.2d 450, 455 (finding the merger clause of the admission and arbitration agreements was ambiguous because it talked about the agreements as though they were to remain separate documents); Thompson v. Pruitt Corp., 416 S.C. 43, 53, 784 S.E.2d 679 (2016) (finding the merger clause of the admission agreement ambiguous because it did not incorporate the arbitration agreement by name). As set forth above, the Merged Agreements' entirety of agreement clause expressly notes that the Arbitration Agreement is part of the overall, singular agreement of the parties.

Having concluded that the Admission and Arbitration Agreement merge, this Court further concludes that proper consideration for the arbitration agreement was provided. Even for non-signatories, admission can serve as the direct benefit which supports arbitration where the admission and arbitration are governed by the same agreement as they are in these cases. See, e.g., Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 558, 813 S.E.2d 292, 299–300 (Ct. App. 2018) ("Restated, when a signatory seeks to enforce an arbitration agreement against a nonsignatory, the doctrine prevents the nonsignatory from averring he or she is not bound to the arbitration agreement when he or she receives a direct benefit from a contract that contains an arbitration clause.")

Beyond the offering of admission—and even if the Agreements did not merge, the Plaintiff expressly acknowledged in the arbitration agreement that "valuable consideration" was given for her agreement to bind Ms. Hensley, her heirs, and her beneficiaries to arbitration. The Court is

bound by the ordinary meaning of this clear term that the parties used. See S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) ("When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense.").

Even if the parties did not clearly recognize consideration being given, the Court would not have to strain to identify the consideration. This consideration included, but was not limited to, a quicker resolution of the claims; the ability to choose any individual to represent the resident/claimant at the arbitration (or to represent oneself), thereby avoiding attorneys' fees; relaxed standards for presentation of evidence; the ability to choose an arbitrator; and payment within ninety days of an arbitration award being made. See, e.g., AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344–45 (2011) ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute…. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.")

Plaintiff argues that if the Agreements did not merge, the consideration discussed in the prior paragraph would be illegal "additional" consideration pursuant to 42 U.S.C. § 1396r(c)(5)(A)(iii). The Court disagrees. This statute does not identify an arbitration provision as additional consideration. Furthermore, Plaintiff does not cite any case law supporting this notion.

To the contrary, other courts have rejected Plaintiff's interpretation of this statute. In Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 989 (Ala. 2004), the plaintiff argued that requiring nursing home admittees whose fees are paid by Medicare or Medicaid to relinquish their right to a jury trial was a form of additional consideration that violated 42 U.S.C. § 1396r(c)(5)(A)(iii). The court rejected the argument, finding "an arbitration agreement sets a forum for future disputes," and requiring a nursing home admittee to sign one is not tantamount to

"charging an additional fee or other consideration." Id. at 989. The court pointed out that the plaintiff's reasoning could arguably dispose of almost any term in the admission contract. Id. See also Sanford v. Castleton Health Care Center, LLC, 813 N.E.2d 411, 419 (Ind.App.2004) (finding that "other consideration" did not encompass an arbitration agreement); Owens v. National Health Corp., 263 S.W.3d. 876 (Tenn. 2007) (court rejected plaintiff's argument that waiver of jury trial through arbitration provision was "other consideration").

In exchange for this consideration, Plaintiff agreed that Ms. Hensley would pay for the services provided to her and that Ms. Hensley, her personal representative, her heirs, and her beneficiaries would engage in arbitration to settle any disputes. Plaintiff, as Ms. Hensley's lawfully empowered agent, freely and voluntarily accepted the offer by executing the Merged Agreements. The Arbitration Agreement, by its plain language, specifically said that binding arbitration would be required for all claims between Ms. Hensley, her heirs, her beneficiaries, White Oak Estates, White Oak Manor, Inc. and White Oak Management, Inc., those being the exact type of claims that Plaintiff now raises in the above-captioned actions.

This Court finds and concludes that just as any other competent adult entering a contract, Plaintiff, Ms. Hensley, her heirs, her successors, and her assigns are held to the merged Admission and Arbitration Agreements and must arbitrate their disputes with Defendants. See J.B. Colt Co. v. Britt, 129 S.C. 226, 123 S.E. 845, 847 (1924) (a person who enters a valid contract is, "of course, bound by the terms and conditions thereof"); Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("A person signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it."); Maw v. McAlister, 252 S.C. 280, 285, 166 S.E.2d 203, 205 (1969) ("The duty on the part of one who signs a written instrument to exercise reasonable care to protect himself requires that

he read the contract which he signs….").

II. Plaintiff has failed to prove that the Admission and Arbitration Agreements are unconscionable.

A party arguing that a contract is unconscionable bears the burden of proving "(1) she lacked a meaningful choice as to whether to arbitrate because the Agreement's provisions were one-sided, and (2) the terms were so oppressive no reasonable person would make them and no fair and honest person would accept them." Doe v. TCSC, LLC, 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020). "[C]ourts 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.

To establish lack of meaningful choice, Plaintiff submits a contradictory affidavit which states on one hand that she was never made aware of the arbitration agreement and on the other hand that she was "advised and led to believe" she was required to it. The Court finds and concludes that Plaintiff's argument that she did not know about the arbitration clause fails as a matter of fact and law.

As a matter of fact, within the August 2017 Admission Agreement, Plaintiff agreed that all claims between the parties were subject to arbitration pursuant to the Federal Arbitration Act and was pointed through conspicuous capitalized font to the Arbitration Agreement which was incorporated by reference. Further, Plaintiff agreed that she had the opportunity to read the Admission Agreement, ask questions about it, and have it explained to her. Likewise, within the Arbitration Agreement, Plaintiff acknowledged that said Agreement had been explained to her, that she had the right to seek legal counsel before signing it, that she had thirty days to opt out of it on Ms. Hensley's behalf, and that she freely and voluntarily executed it. Plaintiff was familiar

with what she was doing, given ample notice of what she was being asked to sign, and given the opportunity to reflect on her agreement to arbitrate and rescind it. Still, she executed the Merged Agreements and did not rescind her consent to binding arbitration.

As a matter of law, anyone who enters into a written contract has a duty to read the contract which she signs. Maw, 252 S.C. at 284-285, 166 S.E.2d at 204. Likewise, anyone who is capable of reading and understanding, but fails to read a contract before signing is bound by the terms thereof. Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms).

Next, though Plaintiff's affidavit states this was a stressful time, she does not explain how she lacked a choice or how she possibly was surprised by the arbitration agreement. Plaintiff admits that she signed the Merged Agreements while her mother was still hospitalized. In fact, she signed the Merged Agreements five days before her mother was discharged from the hospital and needed a long-term care placement. Plaintiff has failed to explain in any way what prevented her from shopping around, visiting facilities, and making the conscious and knowing choice she admitted to making in the Merged Agreements.

Likewise, Plaintiff cannot claim surprise at the terms. Plaintiff had previously admitted Ms. Hensley to White Oak in November 2012 and May 2014. Each time, Plaintiff executed merged admission and arbitration agreements. Though the wording of these agreements may have been revised over the years, the vast majority of the key terms which she now claims are unconscionable were present in the 2012 and 2014 agreements, including selection of three arbitrators who were

not all required to be lawyers, the arbitration process, and the non-prevailing party paying all costs.

Finally, Plaintiff cites to out-of-state case law for the argument that Plaintiff's alleged inability to pay for arbitration makes the Merged Agreements unconscionable. This Court is not aware of any such case law in this state. Instead, in South Carolina, a person who enters a valid contract is, "of course, bound by the terms and conditions thereof." J.B. Colt Co., 129 S.C. 226, 123 S.E. at 847.

Still, even if the Court were to consider the two out-of-state cases Plaintiff cites, Plaintiff still would fail to carry her burden necessary to invalidate the Merged Agreements. Those cases require Plaintiff to make an individualized and detailed showing that the expected cost of arbitrating is greater than litigating, that the arbitration costs are prohibitively expensive, and that she lacks a funding source such as her counsel's agreement in the fee agreement to forward costs. The Clark case cited by Plaintiff makes clear that "conclusory allegations" as to inability to pay is not good enough. "Rather, parties must show that based on their specific income/assets, they are unable to pay the likely costs of arbitration." Clark v. Renaissance W., LLC, 307 P.3d 77 (Ariz. App. 2013). Plaintiff's conclusory allegations in her affidavit in no way carry this burden.

The Court, therefore, finds and concludes that Plaintiff has failed to establish that the Merged Agreements are unconscionable.

III. Plaintiff's claims in both lawsuits are encompassed within the scope of the merged Admission and Arbitration Agreement.

Plaintiff next argues that the Merged Agreements do not encompass her wrongful death claims. This Court disagrees.

Ms. Hensley's POA authorized Plaintiff to bind Ms. Hensley, her Estate, and her personal representative. Plaintiff then exercised that authority to expressly bind Ms. Hensley and her heirs, her personal representatives, successors, assigns, and beneficiaries to the requirements of the

Merged Agreements. The Merged Agreements conspicuously state that "all claims" between Ms. Hensley, her personal representative, her heirs, her beneficiaries, White Oak Estates, White Oak Manor, Inc., and White Oak Management, Inc.–these parties forming the direct and third-party beneficiaries of the Merged Agreements–will be submitted to arbitration. Plaintiff's wrongful death action, -03818, is one such claim.

Besides the express authority provided in the POA, Plaintiff as Ms. Hensley's agent had the ability to obligate Ms. Hensley's wrongful death beneficiaries to arbitration because South Carolina's Wrongful Death Statute is a derivative action. See S.C. Code Ann. § 15-51-10 (The South Carolina Wrongful Death Act requires, as a condition of any suit, that the decedent herself, had she lived, could have "maintain[ed] an action and recover[ed] damages."); Estate of Stokes v. Pee Dee Family Physicians, LLP, 389 S.C. 343, 347 (2010) ("[O]ur law has remained steadfast to the principle of limiting the right of recovery under the wrongful death statute to those cases in which the party injured would have been entitled to recover if death had not ensued." (cataloguing cases)); Rish v. Seaboard Air Line Ry., 90 S.E. 704, 704-05 (S.C. 1916) ("The [Wrongful Death Act] gives a right of action where none existed before, and limited the right of recovery to those cases in which the party injured would have been entitled to recover if death had not ensued.")

Although the case law in South Carolina has not directly addressed the issue at hand, the court has not been hesitant to prohibit wrongful death actions in which the decedent had in some way barred herself from pursuing the underlying cause of action. In Price v. Richmond & D.R. Co., 33 S.C. 556, 12 S.E. 413 (1889), the court determined that a release executed by the decedent prior to his death prevented a wrongful death action brought by the decedent's wife. The Court's decision was premised upon the limiting language of the wrongful death statute. The Price Court held that if the defendant in some way deprived himself of the right to pursue a cause of action, "his administrator is, likewise, [also] barred of his right of action." Id. at 560, 12 S.E. at 413.

Furthermore, the court in Reed v. Northeastern R. Co., 37 S.C. 42, 16 S.E. 289 (1892) affirmed the Price holding and found that "[a]nything that would have defeated [the decedent's] recovery would defeat that in behalf of his family in case he failed to survive." Reed at 53, 16 S.E. at 291.

In Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988), the South Carolina District Court interpreted the Wrongful Death statute, and held that a survivor cannot bring an action under the wrongful death statute to recover for the same wrong sued upon earlier by the decedent, if the personal injury statute of limitations has expired, but the specific wrongful death limitations period has not expired. This establishes that wrongful death cause of action is wholly derivative. The District Court, sitting in diversity, examined the issue as the highest court of South Carolina would if confronted with the same situation. It then traced the history of wrongful death claims starting with Lord Campbell's Act. It further held that the same defenses that would have been available to use against the decedent, had he lived, were also available against those asserting the wrongful death claim.

Based on the legal nature of a wrongful death claim, the South Carolina Supreme Court has found that like here, where a decedent or her agent executes an arbitration agreement in connection with the decedent's admission to a nursing home, wrongful death actions can be subject to binding arbitration. Dean, 408 S.C. 371, 759 S.E.2d 727 at n. 3. District Courts in South Carolina interpreting Dean have found that statutory beneficiaries are subject to arbitration. See, e.g., THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, 2015 WL 1268185, at *3 (D.S.C. Mar. 19, 2015) ("Additionally, the South Carolina Supreme Court made clear in Dean that, under South Carolina law, an arbitral agreement is still indeed binding on a decedent's estate for a claim in wrongful death.")

IV. White Oak Management, Inc. and White Oak Manor, Inc. may enforce the Merged Agreements even though they are not signatories to the same.

Finally, the Court finds and concludes that Plaintiff is required to arbitrate her claims against non-signatories White Oak Management and White Oak Manor as a matter of contract and pursuant to the settled law of this State.

First, Plaintiff's freely and voluntarily contracted to arbitrate any claims against the two non-signatory Defendants within the Arbitration Agreement: "When reference is made to 'ALL' claims, 'all claims' is intended to include not only all claims between the Resident and the Facility, as well as claims between the Resident's heirs/beneficiaries, but also all other 'White Oak' entities, including specifically White Oak Manor, Inc. and White Oak Management, Inc." Therefore, Plaintiff agreed that "this Agreement also makes it such that no separate action or claims may be asserted against the Facility, or any other "White Oak" entities…"

Even if Plaintiff had not contractually obligated Ms. Hensley, her heirs, and her beneficiaries to pursue arbitration against White Oak Management and White Oak Manor, those entities still would be entitled to compel arbitration. Though White Oak Management and White Oak Manor are not signatories to the merged Agreements, Plaintiff alleges in both actions that these Defendants were involved in and responsible for Ms. Hensley's care provided at White Oak Estates and alleges causes of action against these Defendants based on the care provided to Ms. Hensley at White Oak Estates. Likewise, as evident through White Oak Management and White Oak Manor joining in the Motions to Dismiss and Compel Arbitration, White Oak Management and White Oak Manor agree to participate in binding arbitration as envisioned by the merged Admission and Arbitration Agreements. In such circumstances, South Carolina law recognizes that White Oak Management and White Oak Manor have the right to seek arbitration notwithstanding the fact that they are not a signatory to the Merged Agreements.

In S.C. Pub. Serv. Authority v. Great Western Coal, et al., the plaintiff contracted with Great Western Coal for the provision of coal. 312 S.C. 559, 437 S.E.2d 22 (Ct. App. 1993). The contract contained an arbitration clause. The plaintiff later brought suit against Great Western Coal, its president, and another employee, alleging that they had increased coal prices while lowering quality. Id. at 561, 437 S.E.2d at 23 – 24. Defendant president, a non-signatory to the contract, filed a motion to dismiss and compel arbitration. Id. at 561, 437 S.E.2d at 24. The trial judge denied defendant president's motion because he did not sign the contract in his individual capacity, and defendant president appealed. Id. at 563, 437 S.E.2d at 24 – 25.

The Court of Appeals reasoned that "a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint, or signatory parties in their individual capacity because this would nullify the rule requiring arbitration." Id. at 563, 437 S.E.2d at 24 - 25, citing Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990). The Court of Appeals further reasoned that "when the nonsignatory parties are willing to submit to arbitration, the case should be arbitrated." Id. The Court of Appeals therefore, concluded, that the defendant president was seeking arbitration and held that the trial judge erred in denying the same simply because the defendant president did not sign the contract. Id.

This Court finds that Great Western Coal is directly on point. Just like Great Western Coal's president, White Oak Management and White Oak Manor are not signatories to the Merged Agreements in question, but the claims against White Oak Management and White Oak Manor arise out of and relate to the relationship between Ms. Hensley and White Oak Estates. Also, like Great Western Coal's president, White Oak Management and White Oak Manor join in the Motions to Dismiss and Compel Arbitration and thus agree to submit to binding arbitration.

V. The Court Declines to Rule on Defendants' Request for Protection from Responding to Plaintiff's Written Discovery.

Defendants seek protection pursuant to Rule 26(c), SCRCP from being required to object and respond to Plaintiff's First Set of Interrogatories to Defendant White Oak Estates, Inc., First Requests for Production to White Oak Estates, Inc., First Set of Interrogatories to White Oak Management, Inc., First Requests for Production to White Oak Management, Inc., First Set of Interrogatories to White Oak Manor, Inc., and First Requests for Production to White Oak Manor, Inc. Because this Court dismisses this case, Defendants' request for protection is moot.

CONCLUSION

For the reasons set forth herein, Defendants' Motion to Dismiss and Compel Arbitration is hereby **GRANTED** and this matter is **DISMISSED.** Should Plaintiff opt to pursue this claim in arbitration, she is **COMPELLED** to do so by initiating her claim pursuant to the procedures set forth in the August 24, 2017 Arbitration Agreement.

IT IS SO ORDERED!

RECEIVED
Dec 14 2021
SC Court of Appeals

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.

December 14, 2021

Respectfully submitted,

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