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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

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

Terry Putman, 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.

FINAL BRIEF OF APPELLANTS

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CERTIFICATE OF COUNSEL

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

December 29, 2021

s/ Joshua T. Thompson

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STATEMENT OF ISSUES ON APPEAL

1. THE TRIAL COURT ERRED IN FAILING TO APPLY THE RIGOROUS STANDARDS REQUIRED IN FAVOR OF THE VALIDITY OF ARBITRATION AGREEMENTS.

2. THE TRIAL COURT ERRED IN FINDING THAT THE ADMISSION AGREEMENT AND ARBITRATION AGREEMENT DID NOT MERGE, BUT EVEN IF THEY DID NOT, VALUABLE CONSIDERATION SUPPORTS THE ARBITRATION AGREEMENT.

3. THE TRIAL COURT ERRED IN FINDING THAT THE ARBITRATION AGREEMENT IS UNENFORCEABLE BECAUSE IT IS UNCONSCIONABLE.

4. THE TRIAL COURT ERRED IN FINDING THAT THE ARBITRATION AGREEMENT DOES NOT APPLY TO THE WRONGFUL DEATH ACTION.

5. THE TRIAL COURT ERRED IN FINDING THAT THE ARBITRATION AGREEMENT DOES NOT APPLY TO DEFENDANTS WHITE OAK ESTATES, INC. AND WHITE OAK MANOR, INC.

STATEMENT OF THE CASE

On November 2, 2020, Terry Putman ("Ms. Putman"), Individually and as Personal Representative of the Estate of Margaret Hensley, brought these actions (consolidated for appeal) alleging wrongful death and survival claims against White Oak Estates, Inc., White Oak Management, Inc., and White Oak Manor, Inc. (R. p. 26 - 73). Defendants answered the complaints, alleging among other substantive defenses that Ms. Putman's claims were subject to binding arbitration. (R. p. 74 – 87).

On February 19, 2021, Defendants filed their Motion to Dismiss, Compel Arbitration, and For a Protective Order or, Alternatively, to Stay the Action Pending Arbitration as to both cases. (R. p. 88 – 135). The circuit court heard arguments on this motion on March 17, 2021, and thereafter requested the parties to submit draft orders. (R. p. 513 – 553; 557 – 558; 559 - 574).

On April 9, 2021, the circuit court issued its Order Regarding Defendants' Motion to Dismiss, Compel Arbitration, and For a Protective Order or, Alternatively, to Stay the Action Pending Arbitration. The circuit court denied Defendants' Motion to Dismiss and Compel Arbitration, and denied as moot Defendants' Motion for a Protective Order or Alternatively, to Stay the Action Pending Arbitration. (R. p. 1 – 25).

On April 19, 2021, Defendants filed their Motion to Alter or Amend. (R. p. 491 – 494). On May 28, 2021, the circuit court issued its Final Order Regarding Motion for Reconsideration, denying the same. (R. p. 26 – 28).

This appeal timely followed.

STANDARD OF REVIEW

Arbitrability determinations are subject to de novo review. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014), citing Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). Although a circuit court's factual findings will not be reversed if any evidence reasonably supports those factual findings, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." Id., citing Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79, 91 (2000).

FACTS

Margaret Hensley ("Ms. Hensley") granted her daughter Terry Putman a comprehensive Durable Power of Attorney ("POA") on October 7, 2011. (R. p. 151 – 163). There is no allegation that this POA is not valid and effective, or that any of its terms should not be enforced.

The POA granted broad powers to Ms. Putman, delegating "each and every power

that I may lawfully delegate, subject only to those limitations specifically set forth in this instrument." (R. p. 151). Article II (8) grants specific authority "to . . . arbitrate . . . all . . . rights to the payment of cash . . . and/or benefits to which I am now or may in the future become entitled." (R. p. 152). The POA further authorizes Ms. Putman to "institute, supervise, prosecute, defend, intervene in, abandon, compromise, arbitrate, settle, dismiss and appeal from any and all legal, equitable, judicial, or administrative hearings, actions, suits, proceedings, attachments, arrests, or distresses involving me in any way." (R. p. 153). Ms. Putman may also "grant releases to hospital staff, physicians, and other health care providers who act in reliance on instructions given by my Agent from all liability for damages suffered or to be suffered by me." (R. p. 159).

Article V of the POA granted extensive authority to "perform any acts and things and to execute and deliver any documents, instruments, affidavits, certificates, and paper necessary or appropriate to such exercise or exercises," including specifically to "sign . . . documents appropriate to effectuate the powers delegated herein." (R. p. 159).

The underlying negligence claims in this appeal relate to Ms. Hensley's admission to White Oak Estates in late August of 2017 for a short-term rehabilitative stay following surgical repair of a femur fracture. Five days prior to her physical transfer to White Oak Estates, while Ms. Hensley was safely hospitalized at Spartanburg Regional Medical Center, Ms. Putman executed the Arbitration Agreement, Resident and Facility Admission Agreement, and Resident Representative Agreement in her capacity as holder of the POA for Ms. Hensley. (R. p. 230 – 264). Ms. Putman had admitted her mother to White Oak Estates for care on at least three occasions since the POA was established in 2011. (R. p. 164 – 222; 230 – 264). Each time, Ms. Putman reviewed and signed the

Arbitration Agreement, Resident and Facility Admission Agreement, and Resident Representative Agreement. (R. p. 164 – 222; 230 – 264).

The Resident and Facility Admission Agreement ("Admission Agreement") defines White Oak Estates as the "Facility" and Ms. Hensley as the "Resident." (R. p. 235). Within the Admission Agreement, Ms. Putman, within the scope of her broad power under the POA, 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…." (R. p. 250). Likewise, Ms. Putman agreed that all claims between the parties were subject to arbitration pursuant to the Federal Arbitration Act (the "FAA") and was directed to the Arbitration Agreement, which was expressly merged and incorporated by reference. (R. p. 252 – 253). Further, Ms. Putman 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." (R. p. 253). Finally, Ms. Putman agreed that she had the opportunity to read the Admission Agreement, ask questions about it, and have it explained to her. (R. p. 251).

Turning to the merged Arbitration Agreement, Ms. Putman again executed this document as Ms. Hensley's POA "for valuable consideration." (R. p. 255, 259). She agreed that the Arbitration Agreement would be governed by the FAA. (R. p. 255). The Arbitration Agreement also expressly merged by its own language with the Admission Agreement, reiterating that it "shall be considered" along and together with the Admission Agreement (R. p. 258). 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. (R. p. 255). These terms were clear, express, and included several areas for Ms. Putman to initial within the document to express her understanding.

Next, Ms. Putman agreed to the process for arbitration, including selection of arbitrators, discovery, and the arbitration hearing. (R. p. 255 – 257). She also agreed that the Arbitration Agreement had been explained to her, that she had the right to seek legal counsel before signing the Arbitration Agreement, that she had thirty days to opt out of the Arbitration Agreement, and that she freely and voluntarily executed the Arbitration Agreement. (R. p. 257, 259). Ms. Putman also again agreed that the decision to arbitrate would be binding on Ms. Hensley and her heirs, beneficiaries, successors, and assigns. (R. p. 258 – 259).

Karen Baker, an employee of White Oak Estates, was authorized to and did execute the merged agreements on behalf of White Oak Estates. (R. p. 92).

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.

ARGUMENTS

1. THE TRIAL COURT ERRED IN FAILING TO APPLY THE RIGOROUS STANDARDS REQUIRED IN FAVOR OF THE VALIDITY OF ARBITRATION AGREEMENTS.

Federal and South Carolina law expressly favors arbitrating disputes. See 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."); Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014)(holding that courts may not refuse to compel

arbitration simply because a wrongful death claim is involved); Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) ("[i]t 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.").

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

209, 213 (2013), citing American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 94 (4th Cir. 1996).

The Federal Arbitration Act ("FAA") will preempt any state law that completely invalidates the parties' agreement to arbitrate. The basic purpose of the FAA is to ensure that arbitration will proceed in the event that a state law would have a preclusive effect on an otherwise valid arbitration agreement. Accordingly, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001); Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. Zabinski, 346 S.C. at 597, 553 S.E.2d at 118–119.

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

Further, the Supreme Court in Kindred Nursing Centers Ltd. Partnership v. Clark, 137 S. Ct. 1421, 1428-1429 (2017) expressly addressed the distinction between "contract formation" and "contract enforcement," rejecting the argument that the FAA applied to

the latter and not the former. The Court held that "[b]oth the FAA's text and our case law interpreting it say otherwise. The Act's key provision, once again, states that an arbitration agreement must ordinarily be treated as 'valid, irrevocable, and enforceable.' By its terms, then, the Act cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]' – that is, about what it takes to enter into them. Or said otherwise: A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreement once properly made. Precedent confirms that point. In [AT&T Mobility LLC v.] Concepcion, we noted the impermissibility of applying a contract defense like duress 'in a fashion that disfavors arbitration.' 563 U.S. at 341 . . . But the doctrine of duress, as we have elsewhere explained, involves 'unfair dealing at the contract formation stage.' [citations omitted] Our discussion of duress would have made no sense if the FAA, as the respondents contend, had nothing to say about contract formation." Id. at 1428.

The court failed to properly apply these interpretive mandates of the FAA, 9 U.S.C. § 2, et seq., in determining that the Arbitration Agreement was not enforceable.

2. THE TRIAL COURT ERRED IN FINDING THAT THE ADMISSION AGREEMENT AND ARBITRATION AGREEMENT DID NOT MERGE; BUT EVEN IF THEY DID NOT, VALUABLE CONSIDERATION SUPPORTS THE ARBITRATION AGREEMENT.

The Admission and Arbitration Agreements expressly merge. Ms. Putman expressly agreed within the Admission Agreement and the Arbitration Agreement that those agreements constituted the entirety of the agreement between the parties, were to be considered together, and were incorporated within each other. (R. p. Admission Agreement, p. 250, 252 – 253; 258). Even if this were not the case, the merged Admission

and Arbitration 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) (holding that 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.)

However, even if the Admission and Arbitration Agreements did not merge, the Arbitration Agreement stands as a separately enforceable agreement that meets all the elements of proper contract formation.

Ms. Hensley executed an October 7, 2011 Durable Power of Attorney naming Plaintiff her agent. Through the POA, Ms. Hensley gave her daughter Terry Putman the broadest lawful powers available to an agent, and specifically authorized her to agree to arbitration, provide places for residential and health care, employ health care personnel, and arrange for hospitalizations and similar care. (R. p. 151 – 152, 156 – 158). Likewise, Ms. Hensley specifically authorized Ms. Putman to bind Ms. Hensley, her estate, and her personal representative. (R. p. 162).

Against this backdrop, White Oak Estates presented Ms. Putman with the Admission and Arbitration Agreements, which offered Ms. Hensley inpatient nursing

care and related services. Even for non-signatories, admission can serve as the direct benefit that 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.")

Even beyond the offering of admission, the Admission and Arbitration Agreements expressly acknowledged that "valuable consideration" was given for the agreement to bind Ms. Hensley, her heirs, and her beneficiaries to arbitration. (R. p. 255). See South Carolina 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."). 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 (R. p. 255 – 257). 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.")

In exchange for this valuable consideration, Ms. Putman 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 (R. p. 236, 252 – 253; 255). Ms. Putman, as Ms. Hensley's lawfully empowered agent, freely and voluntarily accepted the offer by executing the Agreements, which expressly reminded her – and required her initials on such reminder - of the opportunity to engage counsel, her ability to ask questions, her ability to have the Agreements explained, and her ability to withdraw her agreement to arbitration within thirty days. (R. p. 251; 257, 259).

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. (R. p. 255 – 259), those being the exact type of claims now raised in the above-captioned actions. The Arbitration Agreement also provided a clear framework for arbitration, including the selection of arbitrators, discovery, and the arbitration hearing (R. p. 255 – 257). A duly authorized White Oak Estates employee executed the document on behalf of White Oak Estates (R. p. 91 – 92). Finally, though she had the option, Ms. Putman did not withdraw her agreement to arbitrate. (R. p. 130).

Just as any other competent adult entering a contract, Ms. Hensley, her heirs, her successors, and her assigns are held to the terms of the Admission and Arbitration Agreements (whether they are merged or not). 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….").

In summary, the Arbitration Agreement contains express consideration favorable to Ms. Putman and Ms. Hensley, including, but not limited to:

1. The ability to be represented by someone other than an attorney, thereby reducing litigation expenses;
2. The ability to have a speedy resolution of a claim, not encumbered by the formalities of a litigation forum;
3. The ability to present all evidence in an arbitration forum, not strictly limited by the rules of evidence;
4. The guarantee of payment within 90 days of an arbitration ruling, not limited by any appeals or other post-trial procedures to limit the enforcement of judgments, etc.; and,
5. The ability to recover all costs, fees, and expenses of the arbitration, (except any attorney's fees).

3. THE TRIAL COURT ERRED IN FINDING THAT THE ARBITRATION AGREEMENT IS UNENFORCEABLE BECAUSE IT IS UNCONSCIONABLE.

How could the circuit court find on the one hand that it the Arbitration Agreement

was not required to be signed, and on the other hand that it was an adhesion contract that was so oppressive that no reasonable person would accept its terms?

There is no evidence supporting a claim of unconscionability. The Arbitration Agreement is by the very legal definition cited by the circuit court NOT an adhesion contract. Signing the Arbitration Agreement was not required to gain admission for Margaret Hensley to White Oak Estates. The Arbitration Agreement contained an explicit opt-out clause – which Terry Putman expressly acknowledged with her initials. (R. p. 257 – 258). It foreclosed no particular type of recovery, it only specified a forum.

Terry Putman submitted an affidavit in the circuit court wherein she stated that "at no time did any representative of White Oak Estates ever alert me to the alleged arbitration agreement or explain it to me." (R. p. 302). She further swore, however, 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." (R. p. 302). These two statements are diametrically opposed, and cannot both be true. They are part of a self-serving series of statements that should not have any impact on the enforceability of the plain language of the Arbitration Agreement. Terry Putman does not claim she did not sign the Arbitration Agreement, only that she didn't read it.

The Arbitration Agreement itself demonstrates that not only did Terry Putman have a choice to sign it, it was not by its owns terms presented on a "take it or leave it" basis.

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). Additionally, "inequality of bargaining power alone will not invalidate an arbitration agreement." Id. The trial court cannot alter these considerations in the context of a contract for arbitration.

Further, Respondent had previously admitted Ms. Hensley to White Oak in November 2012 and May 2014. Each time, she executed merged admission and arbitration agreements (R. p. 164 – 222). Though the wording of these agreements may have been revised over the years, Ms. Putman was familiar with White Oak Estates, the White Oak Estates admission process, and the arbitration provisions contained within White Oak Estates admission documents when she was asked to execute the August 2017 Admission and Arbitration Agreements. Likewise, her past conduct demonstrated her willingness to agree to optional arbitration provisions on behalf of her mother.

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 to the Arbitration Agreement which was incorporated by reference. (R. p. 252 - 253). Further, she agreed that she had the opportunity to read the Admission Agreement, ask questions about it, and have it explained to her. (R. p. 251). Likewise, within the Arbitration Agreement, Ms. Putman agreed that the Arbitration 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. (R. p. 257, 259).

Further, to the extent that Ms. Putman claims inability to pay for arbitration as a ground supporting unconscionability, Ms. Putnam has cited no South Carolina case law that allows a party to a contract to avoid the contract because she cannot satisfy it. Regardless, the nonbinding cases cited by Ms. Putman make it clear that bald allegations of inability to pay are not enough to meet a party's burden of establishing inability to pay as a defense. Instead, specific evidence of income and assets must be provided, which has not been done. Likewise, the cases cited by Ms. Putman inquire as to whether counsel has agreed to advance costs as a factor in this consideration. Ms. Putman has made no showing that she is required to advance the costs under her fee agreement with her counsel.

Simply, there is no evidence supporting a claim of unconscionability. The Arbitration Agreement was not an adhesion contract, signing it was not required to gain admission for Margaret Hensley to White Oak Estates, it contained an opt-out clause that Respondent initialed in addition to signing the Arbitration Agreement, and it foreclosed no type of recovery; it only specified a forum. In Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (2001), the Court held that even an adhesion contract is not per se unconscionable, and that a person who can read is bound to read an agreement before signing it. It further held that the debtors in that case were not deprived of a remedy, but were simply required to seek their remedy through arbitration rather than litigation.

Public policy in no way prohibits the presentation, review, and signing of a document by a resident's lawfully designated attorney-in-fact. CMS rules expressly allow for pre-injury arbitration agreements as long as they are not a condition of admission to a nursing facility. See 42 U.S.C. § 483. Nothing in the Arbitration Agreement required Respondent to sign as a condition of admission. Further, the Supreme Court in Kindred held in no uncertain terms that attorneys-in-fact under a general durable power of attorney have the authority to bind the principal to pre-dispute arbitration agreements.

On a broader scale, arguments asking the Court of Appeals to find the Arbitration Agreement as a whole invalid have no place in this appeal of an Order denying a Motion to Compel Arbitration, and are more suited for an appeal granting such a motion. The arguments are speculative and are not based in facts developed in the record (because the parties have not participated in discovery).

In short, Ms. Hensley 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 Agreements and did not rescind her consent to binding arbitration. The Agreements, therefore, are not unconscionable and should be enforced by this Court.

4. THE TRIAL COURT ERRED IN FINDING THAT THE ARBITRATION AGREEMENT DOES NOT APPLY TO THE WRONGFUL DEATH ACTION.

Respondent had both the right and the power to bind a wrongful death claim to arbitration.

In Dean v. Heritage Healthcare of Ridgeway, LLC, the Supreme Court of South Carolina held that courts "may not refuse to compel arbitration simply because a wrongful

death claim is involved." 408 S.C. 371, 759 S.E.2d 727, 731 n.3 (2014); citing Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203-04 (2012). The Dean opinion is specifically relied upon in a later unpublished United States District Court opinion, THI of South Carolina at Magnolia Manor-Inman, LLC v. Gilbert, 2015 WL 1268185, wherein the District Court noted "the South Carolina Supreme Court made clear in Dean that, under South Carolina law, an arbitral agreement is still indeed binding on a decedent's estate for a claim in wrongful death." Id. at *3.

South Carolina's wrongful death statute is a derivative action that is able to be disposed of and/or restricted by the decedent or her attorney-in-fact during her lifetime.

Although case law in South Carolina has not directly addressed this issue, the court has not hesitated to prohibit wrongful death actions in which the decedent had in some way barred herself from pursuing the underlying cause of action. In sum, the decedent – or her lawful representative – can and do in fact control the any wrongful death claims prior to them potentially vesting in any heirs.

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, 37 S.C. 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 - interpreting the South Carolina wrongful death statute - 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, even if the specific wrongful death limitations period has not expired. This clearly establishes that a cause of action for wrongful death 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, has he lived, were also available against those asserting the wrongful death claim.

The South Carolina wrongful death statute contains plain language establishing a condition precedent to the right to bring a wrongful death claim. Therefore, a new statutory right is created by S.C. Code Ann. § 15–51–10 in the personal representative of the decedent. This statutory right of action can only be maintained if the decedent - had he lived - could have maintained such an action. If the decedent never had a cause of action, none accrues under the wrongful death statute. Scott v. Greenville Pharmacy, Inc., 212 S.C. 485, 48 S.E.2d 324, 326 (1948). Furthermore, anything that would have defeated the decedent's recovery had he survived the alleged wrongful injury, "such as contributory negligence, a valid release, or similar acts on his part," would defeat the right of recovery in behalf of his family in case of his death. Reed, 37 S.C. at 53, 16 S.E. at 291.

The Supreme Court in Estate of Stokes v. Pee Dee Family Physicians, LLP, 389 SC.

343, 699 S.E.2d 143 (2010), citing Judge Joseph F. Anderson's decision in Quattlebaum, expressly recognized that a wrongful death claim is derivative of an injured person's personal injury claim. Contrary to the circuit court's determination, this is the very nature of a derivative action. The decedent's actions control the availability of the wrongful death action to the statutory heirs.

It follows logically that Respondent's execution of the Arbitration Agreement as Margaret Hensley's attorney-in-fact defeated her ability as the personal representative to later disavow her actions, as she is attempting. Because the execution of the Arbitration Agreement lawfully bound Margaret Hensley to arbitrate actions arising from White Oak Estates' alleged negligence, it also controls the availability of the wrongful death action to her heirs.

Because Terry Putman signed the Arbitration Agreement in her legal capacity on behalf of Margaret Hensley - and not in her own capacity - she had every right to exercise her mother's option to bind her heirs to the decision to defer a wrongful death claim to arbitration. Courts across the country hold this premise true. Where wrongful death claims are not subject to arbitration agreements, it is generally because the person signing on behalf of the resident did not have authority to sign on the resident's behalf. Here, there is no challenge to Terry Putman's authority to sign the Arbitration Agreement on behalf of Margaret Hensley. Terry Putman had full authority to defer wrongful death claims to arbitration on behalf of Terry Putman, and did so. See Diversicare Leasing Corp. v. Hubbard, 189 So.3d 24 (Ala. 2015) (holding that "an arbitration agreement that binds the nursing-home resident also binds the resident's representative"), citing Entrekin v. Internal Medicine Associates of Dothan, P.A., 689 F.3d 1248, 1259 (11th Cir. 2012). The

court in Diversicare further held that personal representatives of estates of deceased nursing home residents who properly signed arbitration agreements on behalf of residents "were bound to arbitrate the wrongful-death claims" of the resident's estates. Id. at 28, 30; see also Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004) (holding that personal representatives of nursing home residents were bound by arbitration provisions contained in admission contracts, arbitration provision was not unconscionable, and not a contract of adhesion); Owens v. Coosa Valley Heath Care, Inc., 890 So.2d 983 (Ala. 2004) (holding that arbitration agreement bound both resident and representative); Estate of Eckstein ex rel. Luckey v. Life Care Centers of America, Inc., 623 F. Supp. 2d 1235 (E.D. Wash. 2009)(holding that claims for neglect, corporate negligence, and wrongful death were subject to arbitration based on arbitration agreement signed by resident's attorney-in-fact that was binding on the estate); Laizure v. Avante at Leesburg, Inc., 109 So.3d 752 (Fla. 2013) (arbitration agreement covered wrongful death claims, and estate and statutory heirs were bound by the arbitration agreement).

The trial court's decision ignores the clear language of the Arbitration Agreement and the practicalities of arbitration agreements in the long term care context. "[T]o hold otherwise would eviscerate a long term care provider's contractual rights when presented with a wrongful death claim of a resident, the very claim anticipated by the Agreement." Estate of Eckstein, 623 F. Supp. at 1239. See also Sanford v. Castleton Health Care Center, LLC, 813 N.E.2d 411, 420 (Ind. Ct. App. 2004) (holding the estate's wrongful death claim was subject to arbitration because "regardless of whether [the personal representative], was privy to the contract containing the arbitration clause, the Estate's survival and

wrongful death claims arose out of [Defendant's] alleged negligent treatment of [the resident]").

The wrongful death statute clearly derivative. A claim under it only arises if there is a wrongful act that would have been actionable by the decedent, if he had not died. Likewise, if a wrongdoer dies, a wrongful death action survives against the personal representative subject to actions taken by – or not taken by – the decedent during his lifetime.

The trial court holding – taken to its logical end - would mean that the personal representative of an estate is personally liable for a decedent's wrongdoing, and that he - along with the other heirs - must personally pay any resulting award. Such an outcome cannot be brooked, and such a ruling cannot stand and must be reversed.

Execution of a nursing home arbitration agreement by a party with the capacity to contract on behalf of the decedent binds the decedent's estate and statutory heirs in a subsequent wrongful death action arising from an alleged tort within the scope of an otherwise valid arbitration agreement.

The trial court's reliance on Boyle v. United States, 948 F. Supp. 2d 570 (D.S.C. 2012) is wholly misplaced. This case is cited only by name, and not citation, in the trial court order. Boyle does not appear to mention the issue of whether a wrongful death claim can be subject to arbitration. Nonetheless, the trial court found that Boyle stood for the premise that a wrongful death claim was separate from a survival claim for purposes of stacking damage caps under the South Carolina Non-Economic Awards Act of 2005. This holding has no relevance to the issue of whether a decedent can submit wrongful death claims to arbitration. And the fact remains that the wrongful death claim is patently

derivative – there would be no claim but for an injury to the decedent.

5. THE TRIAL COURT ERRED IN FINDING THAT THE ARBITRATION AGREEMENT DOES NOT APPLY TO DEFENDANTS WHITE OAK ESTATES, INC. AND WHITE OAK MANOR, INC.

The evidence of record in this case establishes an enforceable arbitration contract under the FAA.

A valid contract in South Carolina requires for its enforcement proof of an offer, acceptance of the offer, and consideration. Where an agreement is clear on its face and unambiguous, a court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement. See, e.g., Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia, 409 S.C. 568, 762 S.E.2d 696 (2014). There is no evidence in the record that Terry Putman was not authorized to act on behalf of Margaret Hensley, nor that she did not sign the Arbitration Agreement in her capacity as attorney-in-fact for Margaret Hensley. As noted above, she does swear under oath that she both did not know she signed an Arbitration Agreement AND that a White Oak Estates' representative told her she was required to sign an Arbitration Agreement.

The Arbitration Agreement provides that it will cover all claims arising out of Margaret Hensley's residency at the Facility. Paragraphs 1 and 2 of the Arbitration Agreement expressly provide that the Arbitration Agreement applies to claims against White Oak Manor, Inc. and White Oak Management, Inc. (R. p. 255).

The Arbitration Agreement intentionally created a direct – and not incidental or consequential – benefit to White Oak Manor and White Oak Management. The court in Pearson v. Hilton Head Hosp., 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012), relying on International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206

F.3d 411, 416-17 (4th Cir. 2000), held that "well-established common law principles dictate that in an appropriate case a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." These include principles such as incorporation by reference, assumption, agency, veil piercing/alter ego, and equitable estoppel. International Paper, Id. Further, "[i]t does not follow . . . that under the [FAA] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision." Id. at 416.

Pearson cited and relied upon the South Carolina District Court's opinion in Goer v. Jasco Indus., Inc., 395 F. Supp. 2d 308, 314 n.9 (D.S.C. 2005), which held that "equitable estoppel allows a non-signatory to compel arbitration . . . when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory." The court also held that "application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise, arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration is effectively thwarted." Id. at 295; see also, J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-321 (4th Cir. 1988).

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.

Looking to (1) the language of the Admission Agreement and Arbitration Agreement (which expressly incorporates claims against White Oak Manor and White Oak Management), (2) the claims Respondent has raised against White Oak Management, and (3) applying this law, it is abundantly clear that any claims against White Oak Manor and White Oak Management are substantially intertwined with Respondent's pending claims against White Oak Estates, the other signatory to the Arbitration Agreement.

In fact, in Respondent's Complaint, she has alleged that Margaret Hensley was a resident at White Oak Estates, and that the actions of White Oak Management, Inc. and

White Oak Manor, Inc. "directly affected resident care such as Margaret Hensley's," and that the parties were engaged in a "joint venture." (R. p. 53 – 54). Respondent thereafter refers to all three White Oak entities as simply "Defendants" within the remaining allegations. (R. p. 54 – 73).

Respondent's own allegations of the substantially interdependent and concerted alleged misconduct of White Oak Estates, White Oak Management, Inc., and White Oak Manor, Inc., through which Respondent alleges joint liability for those alleged wrongs, compels the construction of the Arbitration Agreement to be equally enforceable by White White Oak Manor and Oak Management. To hold otherwise would gut the established federal policy in favor of arbitration and result in inconsistent and unfair results of multiple proceedings in different forums, and a waste of judicial and party resources.

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

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

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

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

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

Ms. Putman cannot avoid the Admission and Arbitration Agreements' provisions by naming non-signatories. Likewise, she cannot rely on the relationship created between Ms. Hensley and White Oak Estates when the Agreements benefit her and repudiate those Agreements when they work to her alleged disadvantage. White Oak Management and White Oak Manor thus are entitled to seek enforcement of the Agreements, and the trial court erred in holding otherwise.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

December 23, 2021

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Dec 29 2021
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

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

Terry Putman, 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.

CERTIFICATE OF COUNSEL

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

December 29, 2021

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