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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES E. GIBBONS et al.,  
Plaintiffs and Respondents,  
v.  
SILVERADO SENIOR LIVING  
MANAGEMENT, INC.,  
Defendant and Appellant.

D076703

(Super. Ct. No.  
37-2019-00047592-CU-PO-CTL)

APPEAL from an order of the Superior Court of San Bernardino, County, Donna G. Garza, Judge and San Diego County, Kenneth J. Medel, Judge.<sup>1</sup> Reversed and remanded with directions.

Giovanniello Law Group and Alexander F. Giovanniello, Thomas C. Swann, Cat N. Bulaon for Defendant and Appellant.

Peck Law Group and Steven Charles Peck, Adam J. Peck, Spencer E. Peck for Plaintiffs and Respondents.

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<sup>1</sup> The petition to compel arbitration was heard in San Bernardino Superior Court, and Judge Garza's tentative ruling denying the petition became her final order. The case was later transferred to the San Diego Superior Court.

Appellant Silverado Senior Living Management, Inc. dba Silverado Senior Living—Encinitas (Silverado)<sup>2</sup> appeals from the trial court’s order denying its petition to compel arbitration and motion to stay Gayle Gibbons’s elder abuse and wrongful death lawsuit brought in her capacity as successor in interest to James Gibbons, her deceased spouse,<sup>3</sup> and in her own capacity. The court concluded Gayle signed an arbitration agreement as James’s representative; therefore, she retained a wrongful death claim in her individual capacity. It exercised its discretion under Code of Civil Procedure<sup>4</sup> section 1281.2, subdivision (c), to refuse to enforce the arbitration agreement, reasoning the existence of Gayle’s separate claim posed a risk of inconsistent judgments.

Silverado contends: (1) the arbitration agreement that Gayle signed as James’s representative was also binding on Gayle individually, thus barring her separate wrongful death claim; and (2) because the Federal Arbitration Act (FAA) governs the arbitration agreement, the trial court lacked discretion to stay arbitration of James’s and Gayle’s claims under section 1281.2, subdivision (c). We conclude the court erred by denying the petition as to James’s claims, which were governed by the arbitration agreement and the FAA; however, it did not err by denying the petition as to Gayle’s individual

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<sup>2</sup> The complaint names as codefendants Blossom Grove Management Ca, LLC dba Blossom Grove Alzheimer’s Special Care Center (Blossom) and Scripps Health dba Scripps Memorial Hospital—Encinitas (Scripps); however, they are not parties to this appeal.

<sup>3</sup> We refer to respondents by their first names to avoid confusion, and intend no disrespect.

<sup>4</sup> Undesignated statutory references are to the Code of Civil Procedure.

claim. Accordingly, we reverse the order and remand with directions set forth below.

## FACTUAL AND PROCEDURAL BACKGROUND

### *The Complaint*

In her capacity as James's successor in interest (§ 377.32) and on her own behalf, Gayle sued all defendants for elder abuse (Welf. & Inst. Code, § 15600 et seq.). She also alleged causes of action against Silverado and Blossom for wrongful death, and against Scripps and Doe defendants for wrongful death by neglect (§ 377.60). She alleged that James, who was over 65 years of age, "developed scabies, MRSA [Methicillin-resistant Staphylococcus Aureus], sepsis, pressure ulcers, and suffered extreme weight loss" while in the care and custody of defendants, including Silverado, which is an assisted-living or residential care facility.

Gayle further alleged that defendants "recklessly neglected [James] by breaching their duties of care owed to [him] in failing to provide [him] with the care and treatment to which he was entitled . . . failing to prevent the development of infections, failing to report his change of condition and providing timely care, failing to developing and implementing [*sic*] care plans, failing to treat the infections, failing to assist with personal hygiene resulting in skin breakdown to [James's] body, failing to provide staff with the knowledge, skills and competencies to care for residents with infection and skin breakdown, and failing to prevent [James] from experiencing pain and suffering." Gayle also alleged: "Defendants 'neglected' [James] as that term is defined in Welfare and Institutions Code, [section] 15610.57 in that Defendants themselves, as well as their employees, failed to exercise the degree of care that reasonable persons in a like position would exercise by

denying or withholding goods or services necessary to meet [his] basic needs.” James died in August 2016.

*The Petition to Compel Arbitration and Motion to Stay Proceedings*

Silverado in its petition to compel arbitration pointed out that James had designated Gayle as his attorney-in-fact. It claimed Gayle signed the arbitration agreement as James’s representative or agent, and the agreement applied to both James’s and Gayle’s causes of action.

The arbitration agreement provides that “any claim or dispute . . . arising out of the provision of services . . . including but not limited to . . . any action for injury or death arising from negligence, intentional tort and/or statutory causes of action (including but not limited to alleged violations of Elder Abuse . . .) will be determined by submission to arbitration as provided by [the FAA].” It states that “arbitration shall be conducted by one or more neutral arbitrators in accordance with the procedures set forth in the [FAA], Code of Civil Procedure [sic].” A separate provision of the agreement states it “shall be governed by and interpreted under the [FAA], 9 U.S.C. sections 1-16.” The agreement provides it “shall be binding on all parties, including their personal representatives, executors, administrators, successors, guardians, heirs, and assigns.” The agreement also states: “*Based on the resident’s mental capacity, the term resident may include responsible party, [power of attorney], guardian and/or conservator.*” (Hereafter the mental capacity provision; some capitalization omitted.)

Gayle opposed the petition, arguing: (1) she did not have legal authority to enter into a contract on James’s behalf; (2) Silverado presented no evidence that James authorized her to make decisions for his healthcare; (3) the arbitration agreement fails to comply with statutory requirements; and (4) the codefendants were not parties to the arbitration agreement.

The trial court denied Silverado’s petition, finding that Gayle had signed the arbitration agreement as James’s representative. The court concluded Gayle had a separate right to maintain her wrongful death cause of action in her individual capacity. Pointing out that Gayle did not allege medical malpractice under section 1295, it stayed arbitration, reasoning “there could be a possibility of inconsistent rulings” under section 1281.2.

## DISCUSSION

### I. *Gayle’s Wrongful Death Claim Is Not Arbitrable*

Silverado contends that as Gayle signed the arbitration agreement, “not only did [she] agree to be bound by [it] in her individual capacity, she expressly agreed that [it] would be governed by the FAA and require that all claims for [James’s] death, including those based on neglect as alleged in the complaint, will be arbitrated.” Silverado relies on the arbitration agreement’s mental capacity provision. Gayle argues that as she was not a party to the arbitration agreement, she was not required to arbitrate her wrongful death claim.

A party generally cannot be compelled to arbitrate a dispute that he or she has not agreed to resolve by arbitration. (*Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 142; *Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990 [“The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration”].) Whether an arbitration agreement is binding on a third party (e.g., a nonsignatory) is a question of law subject to de novo review. (*Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1512.)

“Unlike some jurisdictions wherein wrongful death actions are derivative, . . . section 377.60 ‘creates a *new cause of action* in favor of the

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