THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2019-CP-23-00473
Appellate Case No. 2019-001955

Estate of Patricia Royston, by and through
the appointed Personal Representative, Marianne McCoig,
Individually, and on behalf of the statutory beneficiaries, Respondent,

v.

Hunt Valley Holdings, LLC
a/k/a Fundamental Long Term Care Holdings, LLC;
Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC; and
THI of South Carolina at Magnolia Place at Greenville, LLC,
d/b/a Magnolia Place-Greenville, Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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Appellants[1] make the following points in reply to Plaintiff's responsive brief.

ARGUMENT IN REPLY

1. **According to Plaintiff, with respect to the Facility's supposed failure to meet its burden to prove the mutual assent required to form a valid contract, "the circuit court made two key factual findings: (1) 'There is no evidence the Arbitration Agreement was signed by Patricia Royston during the admission process and provided to [the Facility]'; and (2) Appellants 'acknowledge the copy [of the Arbitration Agreement] at issue was not signed by any Facility representative.'"[2] The first finding is incorrect, and the second is ultimately inconsequential.**

As explained in Appellants' principal brief, there is in fact evidence that Ms. Royston signed the Arbitration Agreement during the admission process and provided it to the Facility; indeed, the only reasonable conclusion capable of being drawn from the evidence is that, although the Facility has been unable to locate it in its files, Ms. Royston provided the *original* Arbitration Agreement bearing her signature to the Facility at the time of her admission and was provided a *copy* for her own records, which she then kept among her personal effects. (*See* Br. of Apps. pp. 5–8.) As also explained in Appellants' principal brief, and indeed as Plaintiff

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[1] Shorthand references already defined in Appellants' principal brief (e.g., the "Facility" is Defendant-Appellant THI of South Carolina at Magnolia Place at Greenville, LLC, d/b/a Magnolia Place-Greenville; the "Other Appellants" are Defendants-Appellants Hunt Valley Holdings, LLC, a/k/a Fundamental Long Term Care Holdings, LLC, Fundamental Clinical and Operational Services, LLC, and Fundamental Administrative Services, LLC; and "Appellants" are the Facility and the Other Appellants, collectively) are continued in this reply brief.

[2] (Br. of Resp. pp. 3–4.)

recognizes in general principle (though she denies its applicability in this instance),[3] the absence of the Facility's signature on the Arbitration Agreement does not preclude its assent thereto. (*See* Br. of Apps. pp. 8–10.)

2. **According to Plaintiff, "When asked by the circuit court whether the Facility's failure to retain the Arbitration Agreement could mean Ms. Royston intentionally chose not to deliver it, the Facility deemed the possibility a 'worthy point'[4] for which he could offer only inferences, not evidence, to rebut."[5] Plaintiff misapprehends the relationship between evidence and inferences: Where, as here, inferences are properly supported by direct evidence, such inferences amount to circumstantial evidence and are every bit as competent as direct evidence to prove any fact in issue.**

"Inferences drawn from physical facts . . . may be as strong as direct evidence. *Such inferences amount to circumstantial evidence* and circumstantial evidence, when sufficiently strong, is as competent as positive evidence to prove a fact." *McCready v. Atlantic Coast Line R. Co.*, 212 S.C. 449, 455, 48 S.E.2d 193, 196 (1948) (emphasis added); *see also St. Paul Fire & Marine Ins. Co. v. American Ins. Co.*, 251 S.C. 56, 59–60, 159 S.E.2d 921, 923 (1968) ("Any fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of

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[3] (Br. of Resp. p. 5 ("The Facility's appeal depends on the notion that a party can sometimes assent to a contract even without signing it. While that is true as a general statement of law, it does not apply here."); *see also id.* at p. 8 (acknowledging that "the Facility is correct [that] South Carolina allows a party to assent by means other than a signature . . .").)

[4] To be clear, the Facility's respectful reference to the court's question as a "worthy point" should not be confused for the Facility conceding the point.

the facts."); *Marks v. Industrial Life & Health Ins. Co.*, 212 S.C. 502, 505–06, 48 S.E.2d 445, 446–47 (1948) ("The attending circumstances along with the direct testimony may be taken into account by the jury in arriving at its decision as any fact in issue may be established by circumstantial evidence, if the circumstances, which must themselves be proven[,] lead to the conclusion with reasonable certainty. A well connected train of circumstances is as cogent of the existence of a fact as any array of direct evidence and may even outweigh opposing direct testimony. It is sufficient if there is evidence from which the fact can properly be inferred.").

3. *Dean v. Dean*, 229 S.C. 430, 93 S.E.2d 206 (1956), is distinguishable from the present case, and in any event, it does not account for the proposition, which Plaintiff herself acknowledges to be "true as a general statement of law,"[6] "that a party can sometimes assent to a contract even without signing it."[7]

Plaintiff cites *Dean* for the proposition that, "*when a contract demands all parties' signatures*, it is ineffective until all parties have signed."[8] But unlike in *Dean*, the contract at issue here (the Arbitration Agreement) does *not* "demand all parties' signatures." Plaintiff tries to analogize the instant case to *Dean* because the Arbitration Agreement has a blank for the Facility's signature. The contract at issue in *Dean*, however, did not merely have a blank for another party's signature; rather, it expressly "recited that [it] is executed by the parties in five counterparts, each of

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5 (Br. of Resp. p. 3.)
6 (Br. of Resp. p. 5.)
7 (*Id.*)

which shall be deemed an original." 229 S.C. at 433, 93 S.E.2d at 208. Because the contract was not in fact executed by each of the five intended parties to it, but only by four of them, the *Dean* Court concluded the parties did not intend the contract to be effective until it was signed by all parties. *Id.* at 210, 93 S.E.2d at 438 ("We conclude that the [contract at issue] was not effective because it was the *manifest intent* of all parties thereto that it would not become effective unless signed by all intended parties.") (emphasis added). As explained in Appellants' principal brief, such intent is not manifest here; indeed, the only intent that reasonably can be ascribed to the Arbitration Agreement is that the Facility assented to it. (*See* Br. of Apps. pp. 8–10.)

Moreover, *Dean* does not account for the proposition, which, again, Plaintiff herself acknowledges to be "true as a general statement of law,"[9] "that a party can sometimes assent to a contract even without signing it."[10] As explained in Appellants' principal brief, "It has long been a paradigm of South Carolina law that when a contract signed by one party only is accepted by the other party, it becomes binding upon both just as if it were signed by both." (Br. of Apps. p. 9 (quoting *Jaffe v. Gibbons*, 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct. App. 1986)).)

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8 (*Id.* at p. 7 (emphasis added).)

9 (Br. of Resp. p. 5.)

10 (*Id.*)

4. Plaintiff makes too much of the Facility not "holding" the Arbitration Agreement, and contrary to Plaintiff's assertion, the Facility did indeed "act on" (i.e., manifest its assent to) the Arbitration Agreement.

Citing *Peddler, Inc. v. Rikard*, 266 S.C. 28, 221 S.E.2d 115 (1975), Plaintiff contends, "without holding a copy of the Arbitration Agreement, the Facility cannot prove its assent." (Br. of Resp. p. 9.) Such a myopic focus on holding the Arbitration Agreement is why the Facility contends, as explained in its principal brief, that to conclude it did not assent to the Arbitration Agreement is absurd. (Br. of Apps. pp. 8–10.)

While it is true that *Peddler* speaks of holding a contract, it does not speak of holding the contract in terms of some rigid, mechanically applied test. Indeed, what it says is as follows:

> The rule stated in *Gladden v. Keistler*, 141 S.C. 524, 140 S.E. 161, is here applicable. We quote therefrom the following:
>
> 'It is not always necessary, in order to give validity to a contract, that it should be signed by both parties; it may be sufficient if it be signed by one party and accepted, held, and acted upon by the other. *See Bulwinkle v. Cramer*, 27 S.C. 376, 3 S.E. 776, 13 Am. St. Rep. 645. In 6 R.C.L. at page 641, it is said:
>
> 'But the fact that one of the parties has signed the contract does not require that the other party should do likewise. A written contract, not required to be in writing, is valid if one of the parties signs it and the other acquiesces therein. Acceptance of a contract by assenting to its terms, holding it and acting upon it, may be equivalent to a formal

> execution by one who did not sign it. . . . If a person accepts and adopts a written contract, even though it is not signed by him, he is deemed to have assented to its terms and conditions and to be bound by them.'

Peddler, 266 S.C. at 32, 221 S.E.2d at 117.

Respectfully, to view *Peddler* as narrowly as Plaintiff is to miss the forest for the trees. The above-quoted language in *Peddler* is aimed at answering a question of fact—and the question is *not* whether the party who did not sign the contract at issue held it or not, *but rather* whether they assented to the contact. And here, where the contract at issue is one that the Facility deliberately chose to prepare and present to Ms. Royston, where the Facility (even before obtaining the Arbitration Agreement from Plaintiff) took care to preserve its rights therein by filing its answer to Plaintiff's complaint expressly "subject to and without waiving" those rights, and where the Facility immediately acted to exercise those rights by moving to compel arbitration upon Plaintiff's production of the Arbitration Agreement, how can it seriously be questioned whether the Facility assented to the Arbitration Agreement?

5. Plaintiff offers no rebuttal regarding Issue/Argument I.B. in Appellants' principal brief.

Issue/Argument I.B. in Appellants' principal brief challenges the circuit court's finding that the Arbitration Agreement is not a valid and enforceable agreement because "[t]he parties on the Arbitration Agreement are not those parties

specifically listed in this lawsuit." (Br. of Apps. pp. 1, 10–14.) Plaintiff's response brief contains no rebuttal. (*See generally* Br. of Resp.)

6. The Arbitration Agreement does not omit, or fail to sufficiently state, any material term.

Referencing *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 438 (2009), Plaintiff argues that the Arbitration Agreement is invalid because it omits (or is "inscrutably vague"[11] with respect to) material terms regarding (a) the arbitrator selection process and (b) the rules governing arbitration proceedings. (*See* Br. of Resp. pp. 14–17.)

In *Grant*, an arbitration agreement *specifically required* a particular entity to serve as arbitrator and was silent as to any alternative, neither specifying an alternate arbitrator nor providing a mechanism to select an alternate. 383 S.C. at 128, 678 S.E.2d at 437. When the designated entity was no longer able to serve as arbitrator, a dispute arose. *Id.* Finding that the specification of the named arbitrator was a material term of the agreement and that it had been rendered ineffective, the *Grant* Court held arbitration was no longer required. *See Id.* at 128–132, 678 S.E.2d at 437–39 ("Where designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution, we believe that it is neither 'logistical' nor 'ancillary.'"). The Court also held that the default selection

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[11] (Br. of Resp. p. 13.)

mechanism in FAA § 5 was inapplicable *when the parties make a specific arbitrator an integral term*. *Id.* at 131, 678 S.E.2d at 438.[12]

Although *Grant* does require all material terms to exist within an arbitration agreement for a meeting of the minds to result, the terms that Plaintiff alleges to be absent or unduly vague are distinguishable from the material terms required under *Grant*.

The lack of a specified arbitrator does not constitute an omission of a material term. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 82, 749 S.E.2d 139, 147 (Ct. App. 2013) ("[T]he lack of a specified arbiter is not an omission of a material term."). While the *Grant* Court held that a named arbitrator is a material term *when one is specified within an agreement* and that FAA § 5 does not apply *when such a*

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[12] FAA § 5 provides as follows:

> If in the [arbitration] agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5.

specification exists, these holdings are inapplicable when, as here, the contract *does not specify* a particular arbitrator. *Id.*

With regard to arbitrator selection, the Arbitration Agreement states as follows: "The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court." (R. p. 228.) The only reasonable interpretation of this plain language is that either the parties can agree on an arbitrator or the court will decide.[13]

Plaintiff's contention about the supposed inscrutability of the so-called "panel" process (i.e., the language in the Arbitration Agreement about "[t]he parties . . . select[ing] an arbitrator from a panel having experience and knowledge of the health care industry") preventing implementation of any alternative arbitrator selection process[14] is without merit. First off, the Arbitration Agreement does not say that the

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[13] Beyond the alternative arbitrator selection process expressly provided for in the Arbitration Agreement, there is also the alternative provided by FAA § 5, which applies not only "if no method [of naming or appointing an arbitrator] [is] provided [in the arbitration agreement]" but also "if a method [is] provided and any party . . . fail[s] to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy . . . ." 9 U.S.C. § 5.

[14] (Br. of Resp. p. 17 n.8 ("Appellants may also argue the vagueness of the 'panel' is immaterial because both the Arbitration Agreement and the FAA provide an alternative mechanism for arbitrator selection. But, by its terms, this alternative mechanism may not be implemented unless the 'panel' process fails. The 'panel' process cannot fail (or even commence) because its parameters lack the clarity required to be attempted.") (internal citations omitted).)

"panel" process must first be tried and fail before any alternative can be implemented. It simply says, "*If the parties cannot reach a mutual decision on the selection of an arbitrator*, the *parties agree* that an arbitrator *shall be* selected by the Court." (R. p. 228 (emphasis added).) This language in no way conditions implementation of this alternative method of arbitrator selection on the parties having first tried the "panel" process and failed, or indeed on there being any particular reason at all why the parties cannot agree on an arbitrator.[15] Moreover, to construe the Arbitration Agreement as doing so would be absurd and contrary to the rules of contract interpretation. *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) ("An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided."); *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975) ("Where a construction of a contract makes it unusual or extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail.").

As for the procedural matters about which Plaintiff claims there is a lack of guidance, they do not rise to the level of material terms but rather are mere "ancillary

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[15] FAA § 5 has no such condition either. By its plain language, it applies "if for *any other reason* there shall be a lapse in the naming of an arbitrator . . . or in filling a vacancy . . . ." (emphasis added). 9 U.S.C. § 5.

logistical concerns." *York*, 406 S.C. at 83, 749 S.E.2d at 147 (explaining that matters like discovery rules, cost allocations, or arbitration initiation procedures are not material terms but rather "'ancillary logistical' ones" that are "not required within an arbitration agreement") (citing *Grant*, 383 S.C. at 131–32, 678 S.E.2d at 439).

Moreover, and in any event, the Arbitration Agreement expressly states that arbitration shall be as provided by the South Carolina ADR Rules,[16] which rules are expressly geared to "secur[ing] the just, speedy, inexpensive and collaborative resolution in every action to which they apply" [17] and provide the parties and the arbitrator ample tools to accomplish the same. *See, e.g.*, Rule 11, SCADR (Duties of the Parties, Representatives and Attorneys – Arbitration); Rule 12, SCADR (Non-Binding[18] Arbitration Hearing and Award); Rule 13, SCADR (Authority and Duties of Arbitrators).

The Arbitration Agreement does not lack any material term or suffer from any fatal ambiguity. Provided they meet their mutual obligations of good faith and fair

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16 (R. p. 228.)

17 Rule 1, SCADR.

18 To be clear, parties may agree to apply the South Carolina ADR Rules in *binding* arbitration. *See* Rule 12(a), SCADR ("Arbitrations selected by the parties under these rules are deemed non-binding arbitrations *unless otherwise expressly agreed by the parties*.") (emphasis added). Here, of course, the parties expressly agreed that arbitration would be under the South Carolina ADR Rules and that the proceedings would be binding. (R. p. 228.)

dealing,[19] which obligations include, the Facility submits, the obligation to refrain from asserting disingenuous or absurd interpretations of the contract in an effort to undermine it, there is no good reason why the parties cannot arbitrate the instant dispute in accordance with the Arbitration Agreement.

In addition to clearly stating the parties' mutual and concurrent promises to arbitrate, the Arbitration Agreement sets out the scope of the disputes that are subject to arbitration, how the arbitrator is to either be agreed upon or alternatively selected, the applicability of both the South Carolina ADR Rules and the FAA, and makes clear that the arbitrator's decision is binding and enforceable in a court of competent jurisdiction. (*See* R. p. 228.) And to require more just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

7. The Arbitration Agreement is not unconscionable.

The issue of unconscionability presents a two-part test. Unconscionably requires *both* (1) an absence of meaningful choice on the part of one party due to one-sided contract provisions *and* (2) terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Simpson*

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[19] There is, of course, an implied covenant of good faith and fair dealing in every contract. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995).

v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). Neither of these is present here.

The first part of the test (absence of meaningful choice) is undermined by the express acknowledgement in the Arbitration Agreement itself that the "Resident/Representative is not required to use the . . . Facility for Resident's healthcare needs and . . . there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident." (R. p. 228.) Moreover, the Arbitration Agreement was *not a precondition of admission.* (*See* Br. of Resp. p. 11 (noting "that agreeing to the Arbitration Agreement '[was] not a precondition to admission.'").) In other words, *it did not have to be agreed to* for Ms. Royston to be admitted to the Facility, but she did agree to it, and by virtue of her signature upon it, is legally presumed to have read it, understood it, and agreed to its terms. *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.").

As for the second part of the test (unreasonably oppressive terms), the Arbitration Agreement simply binds the parties (both sides) to submit to arbitration. Not only is this not oppressive, "both state and federal policy favor arbitration of disputes." *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668. And there is nothing about the Arbitration Agreement that suggests it is not geared towards achieving an unbiased

decision by a neutral decision-maker. *Id.* at 25, 644 S.E.2d at 668 ("In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.").

Regarding Plaintiff's contention about the supposed incongruity between the arbitration process and the discovery needs in nursing home malpractice cases, first off, it amounts to a wholesale attack on the enforceability of arbitration agreements in the nursing home malpractice context, which violates the FAA. *See Concepcion*, 563 U.S. at 339 (instructing that arbitration agreements must be placed on equal footing with other contracts and that, while a court may set aside arbitration agreements by state-law defenses that govern the validity, revocability, and enforceability of contracts generally, it may not do so "by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue").

In any event, Plaintiff's concerns are unfounded. She herself recognizes that the Arbitration Agreement calls for arbitration to be conducted under the South Carolina ADR Rules, that the South Carolina ADR Rules are required ("shall") to be "construed to secure the just, speedy, inexpensive and collaborative resolution" of disputes, and that "an arbitration proceeding amounting to a trial by ambush" would not be consistent with the South Carolina ADR Rules. (Br. of Resp. p. 21; *see also* Rule 1, SCADR.) Accordingly, by her own logic (and indeed all logic), there is no

reason for concern. What the Arbitration Agreement calls for is arbitration to be conducted consistent with the South Carolina ADR Rules, the very same rules that Plaintiff acknowledges are geared toward "secur[ing] the just, speedy, inexpensive and collaborative resolution" of disputes, and do not allow for "an arbitration proceeding amounting to a trial by ambush."

Further still, both the South Carolina ADR Rules (*see* Rule 12) and the FAA itself (*see* § 7[20]) provide all the tools necessary for the proceedings, including

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[20] FAA § 7 provides:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7.

discovery therein, to be conducted in a way that affords Plaintiff a fair and meaningful opportunity to present her case in arbitration, with no more limitation thereon than that which is inherent in the arbitration process generally as an alternative to litigation—an alternative, which, again, "both state and federal policy favor . . . ." *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668.

8. The Arbitration Agreement applies with equal force to the wrongful death claim.

To be clear, conceptually, Plaintiff's argument here is completely separate and independent from any other challenge to the enforceability of the Arbitration Agreement. Her argument is to the effect that an arbitration agreement is unenforceable with respect to a claim of wrongful death even if it is in all other respects a valid and enforceable arbitration agreement under South Carolina's general contact law. The only way this could be true (i.e., legally correct) is if the claim of wrongful death (i.e., the substantive right of action) belongs to the wrongful death beneficiaries themselves. If this were the case, then general principles of contract law would indeed apply to prevent wrongful death beneficiaries from having to arbitrate "their" claims if they themselves had not agreed to do so. A wrongful death claim, however, does not belong to the wrongful death beneficiaries. It belongs to the decedent's personal representative, and a specific rule prohibiting enforcement of otherwise valid agreements to arbitrate wrongful death claims would violate the FAA's requirement that arbitration agreements be placed on equal footing with other

contracts,[21] as indeed our Supreme Court has already recognized in *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 389, 759 S.E. 727, 737 n.3 (2014) ("[C]ourts *may not* refuse to compel arbitration simply because a wrongful death claim is involved.") (emphasis added).

"The right of action for wrongful death is purely statutory and did not exist at common law . . . ." *Glenn v. E. I. DuPont Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970). A wrongful death claim must be a claim that, had the decedent lived, they could have maintained themselves. S.C. Code Ann. § 15-51-10 ("Whenever the death of a person shall be caused by the wrongful act, neglect or default of another *and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof*, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.") (emphasis added); *see also Maxey v. Sauls*, 242 S.C. 247, 250, 130 S.E.2d 570, 572 (1963) ("[T]he right to maintain the [wrongful death] action is based upon the condition that 'the act, neglect or default' must be 'such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damage in respect thereof.' In other words, '*if the deceased never had a cause of action, none accrues under the wrongful death statute.*'") (discussing prior statutory language that

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[21] *See Concepcion*, 563 U.S. at 339.

is identical to that in present § 15-51-10) (quoting *Scott v. Greenville Pharmacy*, 212 S.C. 485, 489, 48 S.E. 324, 326 (1948) (emphasis added). Accordingly, a claim of wrongful death is derivative in nature, in that it derives from (and does not arise without) a cause of action arising in favor of the *decedent*. *See Id.*; *see also* 26 S.C. Jur. Limitation of Actions § 32 ("A wrongful death action is derivative in nature . . . ."); *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 942 (D.S.C. 1988) ("If the decedent never had a cause of action, none accrues under the wrongful death statute. Furthermore, anything that would have defeated the decedent's recovery had he survived the accident, 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. It follows logically that the decedent's failure to file a timely claim . . . is an act, or omission, on his part which should defeat the right of recovery of his personal representative.") (internal citations and quotation marks omitted); *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010) ("*Quattlebaum* was correctly decided and adheres to the principle that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived.'").

"[T]he substantive right to bring . . . a wrongful death action . . . is determined by the Probate Code." *Fisher on behalf of estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 240, 811 S.E.2d 739, 742 (2018); *see also id.* at 242, 811 S.E.2d at 743

("The Probate Code defines who may act on behalf of the estate of a deceased person. The Probate Code, therefore, is the substantive law by which the identity of the *'real party in interest'* is determined for all civil actions *brought on behalf of the estate of a deceased person.*") (emphasis added). "Under the Probate Code . . . *wrongful death actions must be brought by the personal representative* . . . ." *Id.* (emphasis added); *see also* S.C. Code Ann. § 15-51-20 ("Every [wrongful death] action shall be brought by or in the name of the executor or administrator of [the] person [whose death was wrongfully caused].");[22] *Glenn*, 254 S.C. at 134, 174 S.E.2d at 158 ("If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed by the Probate Court, it should be dismissed.").

Even though it is for their "benefit," a wrongful death claim does not belong to the wrongful death beneficiaries themselves. It is a claim that is brought on behalf of the estate of the deceased person. The substantive right to bring the claim belongs to decedent's personal representative, who must bring the claim and is the real party in

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[22] As explained by the *Fisher* Court, "Under the Probate Code . . . the terms 'executor' and 'administrator' do not have separate meaning, but are included within the defined term 'personal representative.'" 422 S.C. at 240, 811 S.E.2d at 742 (citing S.C. Code Ann. § 62-1-201(33) (defining "Personal representative" to "include[] executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.")). "Therefore, wrongful death actions must be brought by the personal representative, despite the language 'shall be brought by . . . the executor or administrator' that still appears in section 15-51-20." *Id.*

interest under South Carolina law. And consistent with Judge Anderson's "correct" analysis in *Quattlebaum* (which explains that anything that would have defeated the decedent's recovery had he survived, such as, for instance, a valid release, will apply to the wrongful death claim), it follows logically that a valid arbitration agreement must also apply to the wrongful death claim.

CONCLUSION

For the foregoing reasons, as well as those already set forth in their principal brief, Appellants ask this Honorable Court to reverse the circuit court and compel Plaintiff's claims against the Facility to arbitration (or, alternatively, to remand the case to the circuit court with instructions that it do so) and to stay this action as to the Other Appellants (or, alternatively, remand the case to the circuit court with instructions that it either do so or conduct any further proceedings necessary to decide the Motions to Stay on the merits), and, assuming, *arguendo*, out of an abundance of caution, that a threat of undue prejudice to Appellants is posed by the extraneous language in the circuit court's order denying the Facility's motion to compel arbitration, regardless of whether the denial of the Facility's motion is reversed on appeal, to reverse the circuit court in respect of this language or otherwise render such language immaterial going forward.

[Signature on next page]

Respectfully submitted,

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Dated: 9/3/20

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2019-CP-23-00473
Appellate Case No. 2019-001955

Estate of Patricia Royston, by and through
the appointed Personal Representative, Marianne McCoig,
Individually, and on behalf of the statutory beneficiaries, Respondent,

v.

Hunt Valley Holdings, LLC
a/k/a Fundamental Long Term Care Holdings, LLC;
Fundamental Clinical and Operational Services, LLC;
Fundamental Administrative Services, LLC; and
THI of South Carolina at Magnolia Place at Greenville, LLC,
d/b/a Magnolia Place-Greenville, Appellants.

APPELLANTS' CERTIFICATION FOR FINAL REPLY BRIEF

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I, Russell G. Hines, do hereby certify that the Final Reply Brief of Appellants complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

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