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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKEMS COUNTY
Court of Common Pleas

G.D. Morgan, Jr. Circuit Court Judge

Appellate Case No. 2023-000033

Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley, …….. Appellant,

v.

Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC …… Respondents.

APPELLANT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court erred in finding a binding arbitration contract when the record shows Ms. Galloway had no authority to sign the Admission Agreement on her mother's (Ms. Cooley's) behalf.

2. Whether Respondents waived any right to pursue arbitration by garnering nearly eight months' worth of litigation-only discovery benefits and by failing to act on a power-of-attorney document that had been in their possession for nearly two years.

3. Whether the Admission Agreement's onerous damage limitations, liability waivers, and other one-sided terms render the purported contract unconscionable.

4. Whether the circuit court erred in finding the Admission Agreement's arbitration provision binds Ms. Cooley's uconsenting beneficiaries identified by statute to recover under South Carolina's distinct, independent wrongful death claim.

5. Whether the Respondent Corporate Entities may enforce a purported arbitration contract to which they are not parties and that specifically limits its scope to disputes between its parties.

STATEMENT OF THE CASE

Appellant Deonda Weldon, in her individual capacity and in her role as Personal Representative for the Estate of her mother Earline Cooley, initiated this civil action by filing a Summons and Complaint in the Pickens County Court of Common Pleas on October 13, 2021. (R. pp. 27-73). The suit alleged medical, ordinary, and corporate negligence claims against Respondents Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square ("the Facility"), Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC. (R. pp. 74-89). Respondents filed a joint answer on December 21, 2021, and the parties began discovery. See e.g. (R. pp. 167-68). After several months of merits discovery, the Facility and Dominion Senior Living, LLC filed a Rule 12(b)(1), (2), (3), and (6), SCRCP, motion to compel arbitration on June 9, 2022. (R. pp. 306-08). The same motion cited Rule 26(c), SCRCP and requested a protective order exempting these parties from existing and future discovery obligations. Id.

Appellant responded on October 18, 20022, with a memorandum in opposition, affidavits from Ms. Weldon and her sister Debra Galloway, and a number of other exhibits. (R. pp. 428-65). The Facility and Dominion Senior Living, LLC filed a supporting memorandum one day later. (R. pp. 372-97). The Honorable G. D. Morgan Jr. held oral arguments for the motions on October 20, 2022. (R. pp. 90-166). Judge Morgan entered a Form 4 order granting the motion on October 26, 2022, ruling in the movants favor on five points and instructing their attorney to draft a proposed formal order for review. (R. pp. 1-3). Judge Morgan's final order, entered on January 3, 2023, was captioned as an "Order Granting Defendants' Motion to Compel Arbitration and Dismissing Cases," and ordered Appellant's lawsuit "be dismissed." (R. pp. 4); 25 (granting motion and ruling that "this matter is **DISMISSED**") (emphasis in original). Appellant filed and served a timely notice of appeal on January 10, 2023. (R. p. 744).

STATEMENT OF THE FACTS

Decedent Earline Cooley's health had grown worrisome in February 2019. She was suffering from diabetes and related neuropathy along with dementia often leading to anxiety and depression. (R. p. 34 ¶ 9). With few options available in Pickens County for residential care, Ms. Cooley's declining health created a stressful time for her three daughters Deonda Weldon, Robin Elliott, and Debra Galloway. (R. p. 469 ¶ 9). Their mother's situation required the selection of a qualified facility to meet Ms. Cooley's growing needs and the appointment of a representative to perform the legal tasks Ms. Cooley's mental and physical infirmities prevented her from doing for herself.

Ms. Cooley had made her intentions known for a legal representative in a Durable Power of Attorney she executed in 2006. Ms. Cooley appointed Ms. Weldon as her sole "agent." (R. p. 345). It was only if Ms. Weldon was "unable or unwilling or unavailable to serve" that Ms. Cooley

intended for anyone else to make legal decisions for her. If that contingency was proved, Ms. Cooley appointed Ms. Elliott as her "substitute or successor" agent who would then be empowered to step in and exercise the same authority Ms. Weldon had. Id. Ms. Cooley also addressed the possibility that at some point Ms. Weldon and Ms. Elliott would *both* prove "unable or unwilling or unavailable to serve" as her agent. If, and only if, that contingency proved true, Ms. Galloway would be empowered as Ms. Cooley's second substitute or successor agent. Id.

The family chose to move Ms. Cooley to the Facility, an assisted living center in Clemson, South Carolina, that represented itself as possessing the necessary funding and personnel to meet Ms. Cooley's needs. (R. pp. 29-30, 34 ¶¶ 3, 8). On February 14, 2019, a Facility representative presented a "Dominion Senior Living Resident Admission Agreement" ("Admission Agreement") to Ms. Galloway. According to Ms. Galloway's sworn statement, the Facility could have presented the Admission Agreement to either of her two sisters as neither had indicated she was unwilling or unable to serve as Ms. Cooley's agent. (R. pp. 468-69 ¶¶ 2, 10). In fact, Ms. Weldon's affidavit acknowledges Ms. Cooley had made it her responsibility to consider documents like the Admission Agreement and both she and Ms. Elliott were available and willing to carry out their duties as agents in February 2019. (R. pp. 466-67 ¶¶ 2, 4). Ms. Weldon would not have executed the Admission Agreement as the Facility presented it because of its worrisome terms. (R. p. 466 ¶ 3). The Admission Agreement included "Agreement to Arbitrate" and "Limitations of Liability" provisions designed to dramatically alter the procedure and substance of any effort to recover for harms Ms. Cooley might suffer at the Facility. (R. pp. 320-21 ¶¶ 13, 15). Despite these circumstances, the Facility presented the Admission Agreement to Ms. Galloway and she signed. (R. pp. 328).

Ms. Cooley became a Facility resident on March 8, 2019, but did not receive the care or services she needed. Over the next year, Ms. Cooley suffered a series of increasingly severe and preventable falls at the Facility. She fell in her room, the bathroom, the hallway, and the dining room. (R. pp. 35-37 ¶¶ 14-32). Appellant alleges the Facility knew Ms. Cooley had a high risk of falls but did little to prevent them. (R. p. 34 ¶¶ 10-11). The Facility did not even create a care plan for Ms. Cooley for the first eight months that she lived there. (R. p. 34 ¶ 12). Ms. Cooley's physical therapist noted how unsteady she had become and her need for assistance in movements. (R. p. 36 ¶ 23). Yet, the Facility did not make any adjustments—no modifications to her room, no effort to assist her as she moved from one location to the other. (R. pp. 36-37 ¶¶ 24, 31). As the falls began piling up, so did Ms. Cooley's injuries. What started out as bruising (R. p. 35 ¶ 15) became a knock on the head and then "pain all over" her body. (R. pp. 35-37 ¶¶ 17, 32). Following a March 9, 2020 fall, an ambulance took Ms. Cooley to the emergency room. (R. p. 37 ¶¶ 32-33). Doctors diagnosed her with a urinary tract infection and a fractured femoral head requiring surgery. (R. p. 37 ¶ 33). The surgery resulted in additional complications (hypoxia and thrombocytopenia) from which Ms. Cooley did not recover. (R. pp. 37-38 ¶¶ 33-35).

Appellant filed this action on October 13, 2021, seeking personal injury and wrongful death damages from the Facility for medical and ordinary negligence. Appellant also alleged the neglect that led to Ms. Cooley's death was part of a bigger problem at the Facility. The Complaint's corporate negligence claim focused on the constellation of legal entities responsible for the Facility's operations including Respondents Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC and Dominion Group, LLC (collectively, "Corporate Entities"). (R. pp. 43-44 ¶¶ 46-49). The Corporate Entities controlled the Facility's finances and how funds are allocated to the provision of services to residents. (R. pp. 29-34 ¶¶ 3-7). Appellant

alleges the Corporate Entities systematically starved the Facility of the funds needed to meet residents' needs and pocketed the money as profits. Id. As a result, the Facility lacked the number of qualified and trained staff members needed to assist Ms. Cooley as she continued to fall. (R. pp. 40-43 ¶ 40).

The circuit court dismissed Appellant's actions, finding all of her claims must be arbitrated pursuant to the Admission Agreement's "Agreement to Arbitrate" provision. (R. pp. 4-26). Appellant argues the Admission Agreement is not a binding arbitration contract because Ms. Galloway lacked authority to execute it on Ms. Cooley's behalf. (R. pp. 428-65). Appellant also argues Respondents waived the right to pursue arbitration and that the purported arbitration provision is unconscionable, inapplicable to Appellant's wrongful death claim, and unenforceable by the Corporate Entities. Id.

STANDARD OF REVIEW

Appellate courts apply a *de novo* review to a circuit court's ruling on which individuals or entities are bound to a purported arbitration contract. Wilson v. Willis, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) (citing Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) and Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012)). While the Federal Arbitration Act ("FAA") imposes a presumption favoring arbitration, the presumption does not apply to the "identity of the parties who may be bound to such an agreement." Id. at 337-38, 827 S.E.2d at 173. In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory. Id.

ARGUMENT

1. The Circuit Court Erred in Finding the Facility Proved the Formation of a Valid Arbitration Contract.

South Carolina's nursing home arbitration jurisprudence shows that a court's primary task is to determine whether there is a valid arbitration contract and, specifically, to ascertain whether the individual who signed the proposed contract for a nursing home resident had the legal authority to act on the resident's behalf. Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).[1] The authority question was a "strong point of contention" here. (R. p. 105 lines 9-10). Yet, the circuit court did not address it until the order's penultimate page, without any citations, and in just three paragraphs. (R. p. 24). Even then, the circuit court failed to properly analyze the power of attorney document the Facility claims granted Ms. Galloway authority. Since the record shows the Facility did not meet its burden to prove a valid arbitration contract, the circuit court's dismissal of Appellant's claims should be reversed.

Mutual assent is an essential requirement of any contract. Laser Supply & Services, Inc. v. Orchard Park Assoc., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009.) Yet, the circuit court concluded the Admission Agreement (and its arbitration provision) were valid and binding

[1] The circuit court erred in viewing this task through "the lens of presumed enforceability." (R. p. 8). The federal and state pro-arbitration policies to which the circuit court refers are limited to arbitrability matters (i.e. the scope of arbitrable issues) not at issue here. Wilson, 426 S.C. at 337, 827 S.E.2d at 173. The South Carolina Supreme Court specifically refuses to presume the enforceability of a proposed arbitration agreement and instructs courts to subject it to the same formation requirements as any other contract. Id. at 337-38, 827 S.E.2d at 174 (citing Global Pac., LLC v. Kirkpatrick, 88 N.E.3d 431, 435 (Ohio Ct. App. 2017) ("a presumption *against* arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement . . .") (emphasis in original).

against Ms. Cooley and her estate even though Ms. Cooley never signed or otherwise assented to its terms. The circuit court found Ms. Cooley had delegated authority to execute the Admission Agreement to Ms. Galloway via her Durable Power of Attorney and, therefore, Ms. Galloway's signature on the document was sufficient to create a binding contract. (R. p. 24). Thus, the circuit court's task was to interpret the Durable Power of Attorney to determine whether Ms. Galloway had the authority the Facility claimed.

Powers of attorney must be construed using general contract interpretation rules. Arredondo v. SNH SE Ashley River Tenant, LLC, 433 S.C. 69, 75, 856 S.E.2d 550, 553-54 (2021) (citing Stott v. White Oak Manor, Inc., 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019)). Chief among those rules is a court's duty to read a power of attorney to effectuate its principal's intent as expressed through the unambiguous language she chose. Id. Here, Ms. Cooley unambiguously identified a single "Agent" to exercise authority on her behalf in all matters governed by the Durable Power of Attorney. (R. p. 345) (appointing Ms. Weldon "to serve as my agent ("Agent") and to exercise the powers and discretions set forth below"). No one else was entitled to act for Ms. Cooley unless Ms. Weldon was "unable," "unwilling," or "unavailable to serve or to continue to serve." Id. If this qualification was met, Ms. Cooley unambiguously selected another of her daughters (Ms. Elliott) to serve as "substitute or successor Agent." Id. In the event of Ms. Weldon's unavailability, Ms. Cooley intended for no one other than Ms. Elliott to act on her behalf. It was only if Ms. Elliott was also "unable," "unwilling," or "unavailable to serve or to continue to serve" that Ms. Cooley intended to empower her third daughter Ms. Galloway to serve as her second "substitute or successor agent." Id.

The circuit court did not properly analyze this language or follow Ms. Cooley's wishes when it found the Admission Agreement was properly formed. Instead, it deduced Ms. Galloway

had legal authority solely from the fact that she was available when the Admission Agreement was presented for signature. (R. p. 24) ("the Court finds and concludes that Ms. Galloway was an available agent under the POA and had the appropriate authority to execute the Admission Agreement . . ."). This was an error of law. Ms. Galloway's potential authority under the Durable Power of Attorney was tied not to her availability but rather the inability, unwillingness, and unavailability of her two sisters (Ms. Weldon and Ms. Elliott). In other words, per the Durable Power of Attorney's plain language, Ms. Cooley did not expand Ms. Galloway's potential authority to instances where she was available but instead strictly limited it to instances where Ms. Weldon and Ms. Elliott were unavailable. Since the circuit court did not properly apply South Carolina contract interpretation rules in interpreting the Durable Power of Attorney, it erred in finding Ms. Galloway had legal authority to act for Ms. Cooley and in concluding the purported arbitration contract was valid.

Beyond the circuit court's misreading of the Durable Power of Attorney, the Facility also failed to meet its burden to prove Ms. Galloway's purported authority. As the party seeking arbitration, it was the Facility's burden to prove a valid contract. Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assur. Co., 867 F.3d 449, 456 (4th Cir. 2017); Fici v. Koon, 372 S.C. 341, 346, 642 S.E.2d 602, 604 (2007) ("The burden of proof is on the party seeking to enforce the contract"). Since the Admission Agreement's validity turns on Ms. Galloway's purported authority, it was the Facility's duty to prove the circumstances specified in the Durable Power of Attorney were met to empower Ms. Galloway to act as second substitute agent. See Hodge, 422 S.C. at 565, 813 S.E.2d at 304 (quoting McCall v. Finley, 294 S.C. 1, 6, 362 S.E.2d 26, 29 (Ct. App. 1987) (imposing burden of proof on agency proponent and stating proof of agency "must be clearly established by the facts")); Frasier v. Palmetto Homes of Florence, Inc., 323 S.C.

240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996) (finding defendants bore burden of establishing all required elements to prove an agency relationship).

The only evidence the Facility has ever offered to claim Ms. Weldon and Ms. Elliott were "unable," "unwilling," or "unavailable" to act as Ms. Cooley's agent was an emergency contact form listing out-of-town addresses for these two sisters. (R. pp. 105-06). The Facility never explained how Ms. Weldon or Ms. Elliott's addresses affected their ability or willingness to sign a document like the Admission Agreement. More importantly, an extensive amount of evidence shows Ms. Weldon and Ms. Elliott were available. For example, Ms. Weldon's availability to serve as agent is supported by the fact that she is listed as Ms. Cooley's "Financially Responsible Party" in the Admission Agreement. (R. p. 309). That position meant the Facility would be looking to Ms. Weldon to advise Ms. Cooley of any changes in rent or other fees. (R. p. 314 ¶ 5). That role also purportedly made Ms. Weldon jointly and severally liable for all financial obligations Ms. Cooley had to the Facility. (R. p. 322 ¶ 17). It strains credulity for the Facility to argue an individual taking on all the monetary burden of Ms. Cooley's admission was somehow not available to consider signing the contract that would lead to the admission.

The family's sworn statements only further undermine the Facility's position. Ms. Galloway's affidavit states that neither Ms. Weldon nor Ms. Elliott ever claimed she was unwilling or unable to serve as Ms. Cooley's agent. (R. p. 469 ¶ 10). Ms. Weldon was just as direct in stating that considering any contract that would subject Ms. Cooley to arbitration was her responsibility under the Durable Power of Attorney, and not Ms. Galloway's. (R. p. 466 ¶¶ 1-2). Ms. Weldon also disavowed the notion that Ms. Elliott would have declined her role as first substitute agent. (R. p. 467 ¶ 4) ("there was no reason that [Ms. Elliott] was unwilling or unable to review the Admission Agreement for execution").

Finally, the Facility has suggested it did not know the Cooley family dynamics and Ms. Galloway's signature is itself sufficient evidence of her authority. (R. p. 106). But, that argument does not account for the Durable Power of Attorney's plain language. The Durable Power of Attorney did provide a safe harbor for third parties like the Facility to know whether authority had transferred from Ms. Cooley's agent to a substitute agent:

> Any party dealing with any person named as Alternate Agent hereunder may rely on as conclusively correct an affidavit or certificate under penalties of perjury of such Alternate Agent that those persons named as prior Agents are no longer serving.

(R. p. 353 ¶ 4). The Facility has not pointed to any affidavit or statement (sworn under penalty of perjury) in which Ms. Galloway certified that both Ms. Weldon and Ms. Elliott had both vacated their positions as agents of higher priority than Ms. Galloway. In fact, the only sworn statements are those recounted above, and they show Ms. Weldon and Ms. Elliott *were* available and willing to serve. The Facility cannot claim Ms. Galloway had authority under the Durable Power of Attorney while also ignoring that same document's designated procedure for determining whether she had authority.

In sum, the circuit court erred in its ruling on the threshold issue in this case. Appellant's claims could not be dismissed and arbitration could not be ordered without the Facility proving the formation of a valid arbitration contract. The only contract the Facility offered to meet this burden was not signed by Ms. Cooley or anyone with authority to act on her behalf. The circuit court erred as a matter of law in finding Ms. Galloway's availability gave her authority when Ms. Cooley plainly intended to empower Ms. Weldon and Ms. Elliott instead. Similarly, the Facility did not meet its burden of proof to show Ms. Weldon and Ms. Elliott were "unable," "unwilling," or "unavailable" to act as Ms. Cooley's agent when the documentary and testimony evidence shows they were both available and willing. As a result, the purported arbitration contract fails for

lack of mutual assent, and the Court need not address any of the remaining issues to reverse the circuit court's ruling.

2. The Circuit Court Erred in Finding Respondents' Inexcusable Delay and Discovery Activities did not Waive their Right to Pursue Arbitration.

South Carolina contract law provides that a contractual right may be waived. Waiver applies to any "voluntary and intentional abandonment or relinquishment of a known right." Parker v. Parker, 313 S.C. 482, 443 S.E.2d 388, 391 (1994) (citing Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 342-44, 415 S.E.2d 384, 387 (1992)). A contract right can be waived expressly, but, more often, waiver is implied from a party's conduct. Parker, 313 S.C. at 487, 443 S.E.2d at 391. Implied waiver arises when a party pursues "[a]cts that are inconsistent with the continued assertion of a right." Covil Corp. v. Penn. Nat'l Mut. Cas. Ins. Co., 436 S.C. 85, 870 S.E.2d 191 (Ct. App. 2022) (quoting Provident Life & Acc. Ins. Co. v. Driver, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994)); see also Hyload, Inc. v. Pre-Engineered Prods., Inc., 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992). Proving waiver focuses exclusively on the conduct of the waiving party. There is no requirement under South Carolina law to show the party asserting waiver has been misled or suffered any prejudice as a result of the belated assertion of a contractual right. Janasik, 307 S.C. at 344, 415 S.E.2d at 388 (citing Am. Jur. 2d *Estoppel and Waiver* § 154, 158). Waiver applies with equal force and in the same manner for the right to arbitration as it does for any other contractual right. Hyload, 308 S.C. at 280, 471 S.E.2d at 624; see also Morgan v. Sundance, Inc., 142 S.Ct. 1708 (2022) (barring arbitration-specific waiver rules).

The circuit court erroneously overlooked or discounted the Facility's substantial litigation conduct before it switched gears and began its pursuit of arbitration. Rather than immediately seek arbitration when this legal action began, Respondents' first response to Appellant's Complaint

(filed October 13, 2021) was an answer with discovery requests attached two months later (December 21, 2021). Contrary to how they are portrayed in the circuit court order (R. p. 12), these discovery requests were not aimed at arbitration-related issues. Not a single one of Respondents' 27 interrogatories sought information bearing on its arbitration pursuit. Similarly, only one of the 27 requests for production sent that same day made any reference to arbitration. At the same time Respondents were seeking and receiving information through discovery, they were also refusing to answer Appellant's basic discovery requests. Respondents' discovery responses were grossly inadequate in that they failed to identify the employees who cared for Ms. Cooley at the Facility and failed to provide any of the basic information needed to investigate the staffing and budgetary concerns Appellant believes contributed to Ms. Cooley's injuries. (R. pp. 303-05). Respondents refused to provide training reports, timesheets, budget projections, and other readily on hand documents that would show the actual caregiver to resident ratio in the Facility. Id. Respondents' aim was to get upfront what the rules of procedure allow litigants to discover, stall Appellant's attempt to do the same, and then move for arbitration to avoid a trial.

That goal is further evidenced by Respondents' actions on January 4, 2022, when they used the circuit court's subpoena power seeking Ms. Cooley's records from at least four different entities. (R. pp. 508-26). A subpoena is a discovery device that is almost always permitted in litigation and almost never allowed in arbitration. 9 U.S.C. § 7 (allowing subpoenas in arbitration only when issued by arbitration panel and only for appearances at the arbitration hearing); Comsat Corp. v. Nat'l Sci. Found., 190 F.3d 269, 278 (4th Cir. 1999) (finding no authority for subpoena "for pre-hearing discovery, absent a showing of special need or hardship"). Respondents would have no mechanism for subpoenaing Ms. Cooley's medical records in arbitration and would likely never see them in the course of an arbitration proceeding.

The discovery portion of this litigation played out for months before Respondents sought arbitration. Appellant filed a motion to compel on March 22, 2022, since Respondents was not providing basic information and was not responding to Appellant counsel's attempts to resolve the discovery dispute. The parties got so far as to begin scheduling depositions in early May 2022. But, having received the discovery it requested from Appellant and having been given months to utilize the court's subpoena power, Respondents switched course and finally sought arbitration in a motion filed on June 9, 2022. This motion was filed almost eight months after the litigation began. Respondents' course of conduct over that eight months was all inconsistent with the assertion of a right to arbitration, and the circuit court erred in finding no waiver in this case.

The circuit court's error was based in part on its conclusion that more is required to prove waiver. (R. pp. 13-15). It is true that, in the past, South Carolina courts have held that a party may waive any right it had to pursue arbitration if it first chooses to litigate in a way that would render a shift to arbitration *prejudicial to its opponent*. Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 513, 788 S.E.2d 216, 218 (2016); Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 388, 759 S.E.2d 727, 736 (2014). In that era, South Carolina's waiver analysis considered three elements including (1) whether a significant length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 127, 647 S.E.2d 249, 251-52 (Ct. App. 2007).

However, the prejudice requirement is no longer part of the waiver analysis in light of recent precedent. South Carolina's appellate courts long ago recognized a split of authority in federal courts over whether arbitration waiver requires proof of prejudice to the non-waiving party.

Rich v. Walsh, 357 S.C. 64, 69-71, 590 S.E.2d 506, 508-10 (Ct. App. 2003). Even South Carolina cases have taken inconsistent positions on a possible prejudice requirement. Id. at 71, 590 S.E.2d at 509-10 (comparing Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 338 S.E.2d 631 (1985) with Hyload, 308 S.C. at 280, 417 S.E.2d at 624). The cases requiring proof of prejudice derived that requirement from the same basic sources. E.g. Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003) (citing Sentry Eng'g); Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999) (same)). Sentry Engineering, the typical starting point for a prejudice requirement under South Carolina law, grounded its ruling in a single Second Circuit opinion. 287 S.C. at 351, 338 S.E.2d at 634 (citing Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968)). Although there is no prejudice requirement for any other form of contractual right, Carcich inferred one for arbitration waivers in light of the federal policy favoring arbitration. 389 F.2d at 696.

Just last year, the U.S. Supreme Court unanimously overruled Carcich. Morgan, 142 S. Ct. at 1713-14. Morgan described Carcich as a lynchpin for the mistaken notion that the traditional pro-arbitration policy compels or permits courts to adopt rules that apply only to arbitration contracts. Id. at 1713. Pro-arbitration policy was designed only to remedy historic judicial antipathy to arbitration; it has never permitted rules or requirements that make an arbitration agreement more enforceable than any other type of contract. Id. at 1713-14. Therefore, Morgan held, arbitration waiver does not require proof of prejudice under federal law because prejudice is not required to waive any other contractual right. Id. at 1713 (disapproving any "bespoke rule of waiver for arbitration").

In light of Morgan, courts may not demand proof of prejudice to show an arbitration waiver unless the governing law also demands prejudice for waiver of other contractual rights.[2] That means there can be no prejudice requirement for arbitration waiver under South Carolina law. Like the U.S. Supreme Court in Morgan, the South Carolina Supreme Court also recently held that the state policy favoring arbitration does not permit arbitration specific rules. Palmetto Constr. Group, LLC v. Restoration Specialists, LLC, 432 S.C. 633, 636, 856 S.E.2d 150, 152 (2021) ("Our courts' statements that the law 'favors' arbitration was never intended to elevate a contractual right of arbitration above the procedural rules of the court other contract provisions"). Plus, Carcich, the case on which Sentry Engineering and progeny relied to impose a prejudice requirement, is no longer good law. Morgan, 142 S. Ct. at 1713-14. Finally, South Carolina courts have explicitly held that proof of prejudice is generally not required for waiver of contract rights. Janasik, 307 S.C. at 344, 415 S.E.2d at 388.

Even if a prejudice requirement was part of South Carolina law, it would be easily met here. South Carolina's appellate courts have found waiver under similar circumstances, including in a nursing home case. Johnson, 416 S.C. at 513, 788 S.E.2d at 218; Rhodes, 374 S.C. at 127, 647 S.E.2d at 251-52; Evans, 352 S.C. at 551, 575 S.E.2d at 77.[3] These cases recognized prejudice similar to what Appellant has suffered as a result of Respondents' delay in pursuing arbitration.

[2] See Herrera v. Manna 2nd Ave. LLC, Case No. 1:20-cv-11026-GHW, 2022 WL 2819072 (S.D.N.Y. July 18, 2022) (finding that Morgan "suggests that courts should toss out special rules for considering waivers of the right to arbitration, and instead use the same test for waiver as would be used in any other contract dispute").

[3] See also In re Estate of Cortez, 245 P.3d 892, 896 (Ariz. App. 2010) (finding nursing home waived right to assert arbitration where it failed to assert arbitration in its initial pleading and waited nearly a year before filing motion to compel arbitration); Orlanis v. Oakwood Terrace Skilled Nursing & Rehab. Ctr., 971 So.2d 811, 812 (Fla. App. 2007) (finding nursing home waived right to assert arbitration where it engaged in discovery by serving interrogatories, requests for production, and "notices to produce to non-parties").

For example, in Evans, this Court made two important observations about how a party's approach to discovery before seeking arbitration can prejudice its opponent. First, prejudice is likely if the party now seeking arbitration has gained through discovery information unavailable in arbitration. Evans, 352 S.C. at 551, 575 S.E.2d at 77 (holding that defendant "availed itself of discovery tools unavailable in arbitration, thereby prejudicing [plaintiff] by obtaining information from her it might not have been able to otherwise obtain"). Federal cases applying the FAA also consider the advantage gained through information available solely through litigation as substantial evidence of prejudice. Baja, Inc. v. Auto. Testing & Dev. Serv., Inc., Civil Action No. 8:13-cv-02057-GRA, 2014 WL 2719261, at * 9 (D.S.C. June 16, 2014) (finding defendant waived right to assert arbitration in part because it engaged in discovery to which it would not be entitled under the applicable arbitration rules). Respondents obtained information through its medical records subpoenas that prejudice Appellant because Respondents largely ignored Appellant's discovery requests and access to documents would be far more limited in arbitration.

Second, Appellant was prejudiced because Respondents' eight-month delay caused her to expend substantial resources in in pursuing discovery Respondent had no intention of fully answering. Evans shows Respondents had an obligation in how it addressed the receipt of discovery requests if it intended to seek arbitration. Rather than ignoring Appellant's request and follow-up letter, Respondents "bore the onus to halt discovery by seeking the court's protection" while the circuit court evaluated its arbitration request. Evans, 352 S.C. at 551, 575 S.E.2d at 77 (citing Rule 26(c)(1), SCRCP)). Finally, the circuit court excused Respondents' delay in seeking arbitration by suggesting they acted "swiftly to protect [their] interests" after they received Ms. Cooley's Durable Power of Attorney "for the first time." (R. p. 16). But, that assertion does not accurately state the record. The Facility had the Durable Power of Attorney in its possession since

June 2020 when Appellant's counsel made a pre-litigation medical records request. (R. pp. 488-507); see also (R. pp. 116-17) (Respondents' counsel admitting he cannot dispute the fact that [the Durable Power of Attorney] was in somebody's hands at the facility as part of that medical records request").

Thus, from the moment the summons and complaint was served on Respondents, they had in their possession the only document on which they now rely in seeking arbitration. There is no reasonable explanation for Respondents' delay other than a desire to take advantage of discovery before seeking the advantages of arbitration. The waiver doctrine is designed to prevent exactly that course of conduct.

3. The Circuit Court Erred in Finding the Disputed Arbitration Provision was not Unconscionable.

The Admission Agreement's arbitration and dispute resolution provisions buried their one-sided damage limitation and liability waivers deep within a thirty-plus page document and then made Ms. Cooley's admission contingent on accepting their grossly unfair terms. These provisions bear all the hallmarks of procedural and substantive unconscionability, and the circuit court erred by allowing the Facility to enforce them.

Under South Carolina law, unconscionability is "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007) (quoting Carolina Care Plan, Inc. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). The "absence of meaningful choice" element "speaks to the fundamental fairness of the bargaining process." Simpson, 3873 S.C. at 25, 664 S.E.2d at 669. The key factors on this element include (1) the nature of the injuries suffered by the plaintiff; (2) whether the plaintiff is a

substantial business concern; (3) the relative disparity in the parties' bargaining power; (4) the parties' relative sophistication; (5) whether there is an element of surprise in the inclusion of the challenged clause; and (6) the conspicuousness of the arbitration clause. Id. (citing Carlson v. Gen. Motors Corp., 883 F.2d 287, 293 (4th Cir. 1989)).

Identifying a document as an adhesion contract is a useful starting point for analyzing these substantive factors. Simpson, 373 S.C. at 27, 644 S.E.2d at 669. Here, the evidence shows the Admission Agreement is an adhesion contract. An adhesion contract has two defining characteristics: (1) it is presented in a standardized form; and (2) it is presented by a party with greater bargaining power to a party with lesser power on a "take-it-or-leave-it" basis—i.e. without that party's ability to negotiate terms. Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). The Admission Agreement is a standard form contract as the same document is presented to every potential new resident with the individual's name simply handwritten in to a prepopulated blank in the opening paragraph. (R. p. 309). The evidence further shows this form contract was effectively non-negotiable. As Ms. Galloway explained, the Admission Agreement was part of a stack of documents presented to her near the time of Ms. Cooley's admission and she was unaware it contained an arbitration provision. (R. p. 469 ¶¶ 4-5). The Admission Agreement was presented on a take-it-or-leave-it basis with no opportunity for Ms. Galloway to negotiate its terms. (R. p. 469 ¶ 11). Ms. Galloway believed she must sign the document exactly as presented or Ms. Cooley would not get the care she needed. Id.

The Simpson factors also show the fundamental unfairness of the bargaining process. The first factor favors Appellant because Ms. Cooley's injuries were personal and substantial. Respondents' alleged negligence caused a series of falls, leading to bruises, broken bones and

other substantial personal injuries prior to Ms. Cooley's death. (R. pp. 35, 37 ¶¶ 15, 33). The other factors also favor Appellant. Ms. Galloway was not a substantial business concern. She was acting only as Ms. Cooley's daughter with the aim of obtaining the care she urgently needed. In contrast, Respondents are sophisticated business entities evidenced in many ways including the complex organization structure they have built to manage the Facility's operations. (R. p. 44 ¶ 48). The disparity in bargaining power is considerable. Appellants operate nursing homes in multiple states with annual expenses and revenues totaling millions of dollars. Id. Ms. Cooley, on the other hand, was an elderly woman in poor health in need of daily care. Finally, the key language of the Admission Agreement was not conspicuous relative to any of the other admission paperwork the Facility presented to Ms. Galloway. It was printed on the twelfth page of a thirty-plus page document. The arbitration provision did not require an additional signature or initial and was not referenced elsewhere in the Admission Agreement. Plus, the lack of conspicuousness and surprise elements relate not only to how prominently an arbitration provision is featured in a contract but also consider whether the way in which the arbitration provision is drafted imposes substantive limitations that would not be immediately apparent to an unsophisticated person. E.g. Simpson, 373 S.C. at 27-28, 644 S.E.2d at 670 (finding arbitration provision "inconspicuous . . . in light of its consequences" including the deprivation of statutory remedies).

The Admission Agreement's arbitration and dispute resolution provisions also contain oppressive terms. The arbitration provision bars recovery of punitive damages. (R. p. 320 ¶ 13). The closely-related "Limitations on Liability" provision purports to impose express limits on economic damages ("net" damages only) and non-economic damages ($ 250,000). This same provision further restricts Appellant's potential recovery by reversing South Carolina's collateral source rule. (R. p. 321 ¶ 15). While the Facility may argue these limitations apply with equal force

to its claims against Ms. Cooley, that ignores the types of legal actions these parties are likely to pursue against one another. A non-economic damages cap and altered collateral source rule are not mutual limitations in effect because there is no instance where a commercial entity like the Facility could sustain non-economic loss from some tort by Ms. Cooley. The most likely legal claim a residential services provider could have against its resident would be some small dispute over rent. Not only would such a claim be unaffected by the Admission Agreement's damages cap, it would be excluded from the arbitration requirement as well. (R. p. 320 ¶ 13) (limiting arbitration to claims valued in excess of $ 15,000). Thus, while these provisions are facially mutual, they still support a finding of unconscionability because their effect is decidedly non-mutual. Huskins v. Mungo Homes, LLC, ___ S.E.2d ___, 2023 WL 2071173, at * 6 (Ct. App. 2022) (finding arbitration contract's timing provision oppressive because, while it "purports to apply equally to both sides, as a practical matter, it would disproportionally affect" one rather than the other).

The Admission Agreement also goes to great lengths to limit what the Facility can be sued for. Buried in paragraph 8(D), the Admission Agreement asks every resident to waive claims for "all risks related to or arising from living in" the Facility. The Facility also attempts to indemnify itself from any liability to Ms. Cooley from injuries she suffered at the hands of other residents, even if the offending resident was negligently supervised by the Facility's personnel. (Admission Agreement ¶ 8(E)). Both individually and as a collective, these unfair and one-sided terms are substantively unconscionable because no reasonable party in the Facility's position would offer them and no reasonable resident/family member in Ms. Galloway's shoes would be expected to accept them.

In sum, the Admission Agreement's arbitration and dispute resolution provisions cannot stand under South Carolina law because they seek to avoid accountability for injuries to vulnerable

adults caused by the Facility specifically charged with providing residential services to them. These provisions are so pervasive that they cannot be severed, and the only proper remedy is to invalidate the dispute resolution provisions in full. See Simpson, 373 S.C. at 34, 673 S.E.2d at 673 (quoting Booker v. Robert Half Int'l Inc., 413 F.3d 77, 84-85 (D.C. Cir. 2005)); see also Alexander v. Anthony Intern., LP, 341 F.3d 256, 271 (3d Cir. 2003) (concluding court "cannot give effect to an agreement to arbitrate afflicted by so much fundamental and pervasive unfairness") (refusing to sever unconscionable contract terms based on "cumulative effect of a number of oppressive and one-sided provisions contained within the entire [arbitration] clause").

4. The Non-Facility Corporate Entities May not Enforce the Arbitration Contract Because it is Limited to Claims Between its Narrowly-Defined Parties.

Respondents Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC and Dominion Group, LLC ("Corporate Entities") are entities involved with the Facility's operations (R. pp. 30-34 ¶¶ 4-7) but they are not parties to the Admission Agreement. Since South Carolina law presumes a contract's duties and benefits are exclusive to its parties, the circuit court erred in determining Appellant's claims meet the limited circumstances when a non-party may enforce contract provisions. To grant these entities enforcement rights, the Admission Agreement would have to unambiguously extend its benefits to them and unambiguously subject to arbitration Appellant's claims against these entities. Since the Admission Agreement's language does not meet these requirements, the circuit court's ruling should be reversed.

What separates contractual duties from their statutory or tort-based counterparts is that they are imposed only on parties that affirmatively manifest assent to them. Accordingly, South Carolina law presumes contracts may only be enforced by their parties. Touchberry v. City of Florence, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988). This presumption may be overcome

only if the contract's language unambiguously extends its benefits to third parties. Thompson, 416 S.C. at 57, 784 S.E.2d at 687. Here, the Admission Agreement does not extend to third persons. (R. p. 320 ¶ 13) ("The Parties desire to resolve disputes between them . . .") (emphasis added). The very next sentence expressly limits the scope of arbitrable claims to its narrowly defined "parties." Id. ("any claim or dispute . . . amongst the Parties . . . shall be determined by arbitration").

"Parties" is also a defined term in the Admission Agreement and it is limited to the Facility, Ms. Cooley as "Resident," and Ms. Weldon as "Financial Responsible Party" and "Resident Representative (R. p. 309). The Admission Agreement never purports to make the Corporate Entities a "party," and the Admission Agreement unambiguously limits its scope to the contract's "parties." Only the "Parties" agree that any alleged arbitrable claims involve interstate commerce and the arbitration provision's damages provision only apply to "any Party." (R. p. 320 ¶ 13). By choosing to define "party" so narrowly and then to affirmatively limit the contract's scope to "party" disputes, the Facility unambiguously excluded the Corporate Entities from enforcing the Admission Agreement' s arbitration provision.

The circuit court also suggested Appellant is equitably estopped from opposing the Corporate Entities' attempts to compel arbitration. (R. p. 18). Citing the Corporate Entities' corporate bonds with the Facility, the circuit court concluded Appellant's claims against the Corporate Entities are "intertwined" with and "interdependent" on her claims against the Facility. (R. p. 19). However, while some courts allow nonsignatories to bind a signatory to a contract with an arbitration provision using equitable estoppel, this principle has a very limited application governed by a very strict legal standard. Pearson, 400 S.C. at 293, 733 S.E.2d at 601-02.

Largely developed by federal courts in the Eleventh Circuit, most courts apply the "intertwined claims" test. Pearson, 400 S.C. at 289, 295, 733 S.E.2d at 601, 604 (quoting Sunkist

v. Sunkist, 10 F.3d 753 (11th Cir. 1993) and MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999)); see also Brantley v. Republic Mortg. Ins. Co., 424 F.3d 392, 396 (4th Cir. 2005) (applying "intertwined claims" test and affirming denial of arbitration of claims related to South Carolina mortgage). This test is meant as a high bar to equitable estoppel because it allows a party outside a contract to enforce its terms. See Wachovia Bank, Nat'l Ass'n v. Schmidt, 445 F.3d 762, 771 (4th Cir. 2006) (finding "fact that a signatory receives benefits from a contract" is "insufficient, in and of itself, to estop it from asserting that a nonsignatory is not entitled to invoke the contract's arbitration clause"). Thus, equitable estoppel only applies in this context in two circumstances. First, a signatory may be equitably estopped from opposing arbitration with a nonsignatory when the signatory's claims against that nonsignatory "must rely on the terms of" the contract containing the arbitration provision. Pearson, 400 S.C. at 295, 733 S.E.2d at 604 (quoting Goer v. Jasco Indus., Inc., 395 F. Supp. 2d 308, 314 n. 9 (D.S.C. 2005) (additional citations omitted)). Second, equitable estoppel may apply when the signatory alleges "substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." Id.

Neither of these circumstances are present here. The first only applies if Appellant's claims against the Corporate Entities "make[] reference to" or "presume[] the existence of" the Admission Agreement. Brantley, 424 F.3d at 396 (quoting MS Dealer, 177 F.3d at 947). It is not enough that claims against the nonsignatory relate to the same underlying incident as the claims against a signatory, they must also rely on the terms of the contract containing an arbitration provision. Weber v. Lewis, Civil Action No. 4:18-cv-00239-RBH, 2018 WL 5885511, at * 3 (D.S.C. Nov. 9, 2018); see also Hill v. G.E. Power Sys., Inc., 254 Fed. Appx. 426, 431-32 (5th Cir. 2007)

(finding no basis for equitable estoppel "unless the plaintiff relies on the agreement to establish its cause of action").

This Court reached a similar conclusion in Weaver v. Brookdale Senior Living, Inc. by holding that the equitable estoppel theory governing signatory-nonsignatory arbitration claims "is not implicated simply because a claim relates to or would not have arisen 'but for' a[n] [arbitration] contract's existence." 431 S.C. 223, 230-31, 847 S.E.2d 268, 272 (Ct. App. 2020) (quoting Wilson, 426 S.C. at 343, 827 S.E.2d at 176). Weaver ultimately concluded that, when a nursing home resident alleges poor care led to injury or death, the resulting legal claims "rely on general tort duties" and not any provision of contracts the resident entered at her admission. 431 S.C. at 232, 847 S.E.2d at 273. Here, Appellant's corporate negligence-based claims make no reference to the Admission Agreement and the Corporate Entities' duty to provide proper funding and staffing arise from their control of the Facility, not any contractual obligation.

The second circumstance described in Pearson is also absent in this case. This test is only met when a nonsignatory alleges "concerted misconduct" by a nonsignatory and signatory. E.g. Griggs v. Evans, 43 A.3d 1081, 1094 (Md. App. 2012) (applying equitable estoppel where plaintiff alleged civil conspiracy). Appellant would have to plead some form of conspiracy or "collusion" among the Corporate Entities and the Facility to support equitable estoppel. Brantley, 424 F.3d at 396. But, Appellant's complaint alleges distinct corporate negligence-based claims against the Corporate Entities arising from an independent duty owed directly from those entities to Ms. Cooley. South Carolina Supreme Court precedent further rejects the notion Appellant's claims against the Facility and the Corporate Entities are "intertwined" because, while nursing negligence and corporate negligence in the nursing home setting may relate to the same resident's injuries, "a

finding of one does not necessarily preclude the other." Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015) (citations omitted).

Morrow shows how claims for negligent care by a nursing home are distinct from claims against the home's corporate relatives for corporate negligence. The Corporate Entities' alleged "understaffing" and "underfunding" of the Facility are the basis for Appellant's corporate negligence claims. (R. p. 44 ¶¶ 46-49). In Morrow, the South Carolina Supreme Court recognized both the viability and distinctiveness of a nursing home corporate negligence claim. Like Ms. Hensley, the nursing home resident in Morrow suffered severe injuries that could have been prevented by a more robust, better trained nursing home staff and by a more diligent approach by the few staff members who were present when the injury occurred. 412 S.C. at 536, 773 S.E.2d at 145. For the errors of the nursing assistants who were with the resident when he fell, there was a negligence claim against the facility. Id. at 538, 773 S.E.2d at 146. Additionally, for the understaffing that contributed to the injuries, the plaintiff could purse a corporate negligence claim against the separate entities (like the Corporate Entities) influenced the nursing home's operations by controlling its budget. Id.

Morrow shows a negligence cause of action against the Facility and a corporate negligence cause of action against the Corporate Entities are not the same claim. Id. at 539, 773 S.E.2d at 146 (recognizing corporate negligence is grounded in "independent, albeit interconnected, duties owed by corporate entity to nursing home resident"); see also Manor Care, Inc. v. Douglas, 763 S.E.2d 73, 90-91 (W. Va. 2014) (finding corporate negligence claim based on "failure to allocate a proper budget" to nursing home leading to understaffing was distinct from claim based on negligent resident care decisions). Plus, corporate negligence is distinct from the Corporate Entities' vicarious liability for torts of the Facility's employees under the doctrine of respondeat superior.

Id. at 538, 773 S.E.2d at 146 (citing Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contract Physicians*, 47 S.C. L. Rev. 431 (1996) ("the theory of vicarious liability is different than the theory of direct corporate liability")). In fact, Respondent's claims against the Facility and the Corporate Entities must be distinct because corporate negligence can only be performed by the latter entities and never by the Facility itself. Morrow, 412 at 538, 773 S.E.2d at 146 (holding that vicarious liability and direct corporate liability are distinct because "a finding of one does not necessarily preclude a finding of another").[4]

Ultimately, for either test, equitable estoppel cannot apply unless there is a substantial connection between Appellant's specific claim against the Corporate Entities and the operative terms of Ms. Cooley's purported arbitration contract with the Facility. South Carolina's federal district court holds that the "essential question" is "whether Plaintiffs would have an independent right to recover against the non-signatory Defendants even if the contract containing the arbitration clause were void." Goer, 395 F. Supp. 2d at 315. Proving Appellant's corporate negligence-based claims depends on the Admission Agreement is "always the *sine qua non* of an appropriate situation for applying equitable estoppel." Id. (quoting In re Humana Inc. Managed Care Litig., 285 F.3d 971, 976 (11th Cir. 2002) (rev'd on other grounds, PacifiCare Health Sys. v. Book, 538 U.S. 401 (2003)). The circuit court did not and could not make this showing. The corporate negligence-based claims against the Corporate Entities and the nursing negligence claims against the Facility were not dependent on the Admission Agreement but are instead grounded in distinct common law duties. See Weaver, 431 S.C. at 232, 847 S.E.2d at 273.

[4] See also McWilliams et al., 47 S.C. L. Rev. at 463 (stating that the failure in a medical facility's duty to create and enforce safety rules "can be employed either cumulatively *or as a substitute*" for a claim against a negligent medical provider) (emphasis added).

Finally, the circuit court incorrectly concluded the Corporate Entities are granted the right to compel arbitration by a rule this Court adopted in South Carolina Public Service Authority v. Great Western Coal, 312 S.C. 559, 437 S.E.2d 22 (Ct. App. 1993). (Order at 15-16). Culled from an out-of-circuit federal court opinion, the rule is designed to prevent an arbitration contract's party from wholly avoiding arbitration by naming a non-party and proceeding in litigation rather than arbitration. Great W. Coal, 312 S.C. at 563, 437 S.E.2d at 25 (citing Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990) ("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")).

But the Arnold rule has a crucial limit that makes it inapplicable here. The Arnold court only allowed a nonsignatory to force arbitration because language in the arbitration contract "indicates that the parties' basic intent was to provide a single arbitral forum to resolve all disputes arising" from their transaction ***even if those disputes involved non-parties***. 920 F.2d at 1282. Thus, the parties knew going into the transaction that they may be required to arbitrate with non-parties and each party's signature on the arbitration contract was express assent to that expansive view of the individuals who may force arbitration. When the arbitration contract does not extend its scope to non-parties, the Arnold rule does not apply. See e.g., McCarthy v. Azure, 22 F.3d 351, 357 (1st Cir. 1994) (finding the Arnold principle should not apply when "the arbitration clause fails to indicate the corporate signatory's intention to protect employees through arbitration"). This limitation on the rule assures that the contract parties' intent is upheld. Westmoreland v. Sadoux, 299 F.3d 462, 466 (5th Cir. 2002) ("an agent or employee of a signatory cannot invoke an arbitration clause unless the parties intended to bring them into the arbitral tent").

Since the Facility chose to limit the Admission Agreement's arbitration provision to disputes between its parties, this purported contract does not indicate its parties intended to permit non-party enforcement. To grant the Corporate Entities enforcement rights, the circuit court had to effectively rewrite the Admission Agreement's arbitration provision to expand its scope. In so doing, the circuit court violated a long-standing contract interpretation rule. Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) (quoting MailSource, LLC v. M.A. Bailey & Assoc., 356 S.C. 363, 369, 588 S.E.2d 635, 639 (Ct. App. 2003) (rejecting party's interpretation that would require disputed contract to be rewritten because that is "a service the courts of South Carolina do not perform").

The circuit court's use of the Great Western Coal/Arnold rule has one final flaw. The rule holds that a party cannot avoid arbitration altogether by naming a non-party to an arbitration contract. That is not what Appellant has done here. Appellant named the Corporate Entities as defendants not in an effort to avoid arbitration with the Facility but because, the Corporate Entities' conduct substantially contributed to the losses Ms. Cooley and her statutory beneficiaries sustained. Appellant opposes arbitration with the Facility because, as discussed above, the Admission Agreement's arbitration provision cited by the Facility is invalid. Even if the Court were to reject that argument and compel arbitration of the Appellant-Facility dispute, the Corporate Entities should not be permitted to ride the Facility's coattails to compel arbitration of the claims against them. Arbitration always remains a matter of contract and the Corporate Entities have no colorable argument that they have an arbitration contract with Appellant.[5]

[5] Thus, in the event the Court were to compel Appellant's claims against the Facility's to arbitration, Appellant's claims against the Corporate Entities should continue in litigation. The U.S. Supreme Court acknowledges the need for parallel dispute resolution processes where one defendant may claim the benefit of an arbitration contract and another may not. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 20 (1983).

5. Ms. Galloway's Purported Consent to Arbitration Does Not Extend to Wrongful Death Claim.

The circuit court erroneously ruled the Admission Agreement's arbitration provision covered Appellant's wrongful death claim. That ruling improperly assumes Ms. Cooley had the power to waive the right to a jury trial on a claim that did not exist when the Arbitration Agreement was presented, would never belong to her, would not accrue for years, and covered injuries suffered exclusively by other people. No South Carolina authority supports these propositions. In fact, even if Ms. Cooley could agree to arbitrate her own claims, the history and structure of South Carolina's wrongful death and survival statutes show wrongful death is a distinct, independent claim she could not force to arbitration because it belongs to beneficiaries who never agreed to forego a jury trial.

a. South Carolina Law does not Allow a Nursing Home Arbitration Contract to be Enforced Against Unconsenting Non-Parties.

None of Ms. Cooley's wrongful death beneficiaries were parties to the Admission Agreement and none assented to its terms. Thus, the Admission Agreement may not be cited to dismiss the wrongful death claim without overcoming the presumption that a contract may be enforced only by its parties. Touchberry, 295 S.C. at 48-49, 367 S.E.2d at 150. A South Carolina contract may be enforced against a non-party only with proof of (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; or (5) estoppel. Wilson, 426 S.C. at 338, 827 S.E.2d at 174 (citing Malloy v. Thompson, 409 S.C. 57, 561-62, 762 S.E.2d 690, 692 (2014)). Since the Facility did not offer evidence to prove any of these theories, the Admission Agreement's arbitration provision does not apply to the wrongful death claim.

b. South Carolina Courts Define Wrongful Death as a Distinct, Independent Claim that is Not Dependent on Claims Held by a Decedent at her Death.

Unable to show Ms. Cooley's family members are parties or non-parties with enforcement power, the Facility can only argue the wrongful death claim actually belongs to Ms. Cooley's estate rather than the statutorily designated beneficiaries. However, this argument incorrectly lumps together the wrongful death claim and the survival of tort claims Ms. Cooley had against the Facility/Corporate Entities at the time of her death. The history and development of South Carolina's wrongful death claim and survival statute show wrongful death is something entirely different than tort claims surviving a person's death for the benefit of her estate. South Carolina courts have long recognized these are two very different theories of liability with distinct origins, purposes, and results. Even in more modern cases, their distinct nature is evidenced in how the claims are litigated and how juries resolve them.

The differences begin with the statutes themselves. The wrongful death statute, originally known as Lord Campbell's Act, is now codified beginning at S.C. Code Ann. § 15-51-10 and it creates a cause of action for tortious conduct causing death. A wrongful death claim covers losses and awards damages exclusively to statutorily-defined beneficiaries consisting of the decedent's children, parents, or heirs. S.C. Code Ann. § 15-51-20. Damages are paid to these beneficiaries because a wrongful death claim is directed at their losses suffered as a result of the decedent's absence. Scott v. Porter, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (citing F. P. Hubbard & R. L. Felix, The South Carolina Law of Torts 610 (2d ed 1997) (holding that wrongful death damages consist of (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use and comfort of the decedent's society, experience, knowledge, and judgment).

In contrast, the legislature positioned the survival statute in a completely different code chapter. Both wrongful death and survival relate to "civil remedies and procedures" (Title 15) but, while wrongful death is a distinct claim warranting its own designation (Chapter 51), the survival statute is classified within an existing chapter (Chapter 5) identifying the proper "parties" for pursuing legal claims. A plaintiff may cite the survival statute to support a suit for any number of legal claims. When that claim is based on the decedent's personal injury, the available damages include "medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." Scott, 340 S.C. at 170, 530 S.E.2d at 395 (citing Gowan v. Thomas, 237 S.C. 223, 225, 116 S.E.2d 761, 762 (1960)). Thus, while courts and parties often refer to a "survival claim," this term is a misnomer because the survival statute does not create a claim, it only corrects a misguided common-law rule that assumed a person's existing legal claims died with her. Bemis v. Waters, 170 S.C. 432, 170 S.E. 475, 476 (1933) (holding that survival statute exists as a "correct[ion]" to common-law rule); see also Johnson v. Baptist Three Rivers Hosp., 984 S.W.2d 593, 596 (Tenn. 1999) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 127, at 945 (5th ed. 1984) (noting error of common-law rule was that it made it "cheaper for the defendant to kill the plaintiff than to injure him")). The statutory scheme alone shows wrongful death and survival are distinct claims accruing at different times and governed by different statutes of limitation. S.C. Code Ann. § 15-3-560(6) (measuring three-year limitations period for wrongful death claims from date of death).

The statutes' history also shows their distinctiveness and independence. In Grainger v. Greenville, S. & A. Railway Co., the South Carolina Supreme Court traced the divergent tracks wrongful death and survival claims have taken over their development. 101 S.C. 399, 85 S.E. 968 (1915). In that case, the trial court had dismissed a survival action because the decedent's

administrator (equivalent to the modern "personal representative") had previously recovered on a wrongful death claim. Id. at 968. The wrongful death statute in place then was nearly identical to current section 15-51-10 and it provided a claim "in favor of the beneficiaries" but nothing for "the deceased or his estate." Id. at 969. When the legislature recognized this abnormality, it responded by creating the predecessor to the modern survival statute. Id. (citing 1912 Code section 3693). Grainger held this legislative history conclusively established wrongful death and survival claims are distinct and independent. Id.; Complete Auto Transit, Inc. v. Bass, 229 S.C. 607, 611, 93 S.E.2d 912, 914 (1956) (reading Grainger to hold "judgment in an action for wrongful death did not bar a subsequent action for pain and suffering of the decedent"). The claims are distinct because "[t]he beneficiaries, the cause of action, the measure of damages, are all different." Grainger, 85 S.E. at 969.

Building on Grainger and other similar cases, Bass further highlighted the claims' distinctiveness by holding judgment in a wrongful death claim does not have claim preclusive effect on survival claims. 229 S.C. at 611-12, 93 S.E.2d at 914; see also Gleaton v. Southern Ry. Co., 212 S.C. 186, 192, 46 S.E.2d 879 (1948) ("verdict and judgment for defendant in an action under the survival statute will not estop the personal representative of the deceased in an action under Lord Campbell's Act subsequently tried"). Bass also addressed a reason why wrongful death claims are often erroneously perceived as dependent on survival claims. In both, the decedent's personal representative is the named plaintiff. 229 S.C. at 612, 93 S.E.2d at 914. But this fact alone is not determinative because, when asserting wrongful death and survival claims, a personal representative "function[s] under two separate and distinct trusteeships having no relationship to each other beyond the fact that their origin is referable to the death of the same person." Id. In other words, while it is the personal representative's name in the caption for a wrongful death

claim, "it is clear . . . the real parties to the action were the beneficiaries." Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539, 541 (1928) (finding personal representative "only in the capacity of a trustee in bringing [wrongful death] suit for the real parties in interest").

In light of the history and structure of wrongful death and survival claims, a number of other reported opinions have rejected the notion that the former is dependent on the latter. As early as 1907, the South Carolina Supreme Court recognized a wrongful death action is not the survival of an action which the deceased had in his lifetime, but is a "new cause of action." Osteen v. Sothern Ry., Carolina Division, 76 S.C. 368, 57 S.E. 196, 200 (1907). Claussen held that a wrongful death claim is "not a continuation" of any claim the decedent had before her death. 145 S.E. at 540. A wrongful death claim is "independent" of claims the decedent had during her life and "wholly different" than any other claim available at her death. Wellman v. Bethea, 243 F. 222 (E.D.S.C. 1917); In re Mayo's Estate, 60 S.C. 401, 38 S.E. 634, 638 (1901). Wrongful death and survival claims are "separable and distinct." Keel v. Seaboard Air Line Ry., 122 S.C. 17, 114 S.E. 761, 762 (1922); see also Wilson v. Massengill, 124 F.2d 666, 669 (6th Cir. 1942) (describing South Carolina's wrongful death and survival claims as "separate and distinct"). In sum, Appellants err in asking the Court to find wrongful death is dependent on survival claims because "[t]he object, scope, and measure of damages" is different for the two claims. In re Mayo's Estate, 38 S.E. at 638; see also 28 S.C. Jur. Wrongful Death § 5 (describing two claims at the tortious death of a person and, crucially, that "***the wrongful death action and the survival action involve different, independent claims***.") (emphasis added).

These distinctions remain valid even in more modern cases. This Court continues to recognize the wrongful death statute created a new cause of action that did not exist at common law, accrues only at the decedent's death, and which is subject to its own statute of limitation.

Weaver v. Lentz, 348 S.C. 672, 678, 561 S.E.2d 360, 363 (Ct. App. 2002). Accordingly, wrongful death actions and survival claims consider the losses related to a person's death from completely different perspectives. Boyle v. U.S., 948 F. Supp. 2d 577, 580 (D.S.C. 2012); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) ("In a wrongful death case, the issue of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death"). Their distinctiveness is even plainer in practice. Since they compensate different groups for different losses, wrongful death and survival claims can result in dramatically different verdicts. For example, in Scott, the jury awarded $ 600,000 in actual damages on a medical malpractice claim alleged under the survival statute and $ 1.5 million in punitive damages for the same claim. 340 S.C. at 162, 530 S.E.2d at 391. On a wrongful death claim in the same action, the jury awarded $ 1.5 million in actual damages and $ 2 million in punitive damages. Id. Since these two claims addressed such different losses by different people, the disparate awards were not inconsistent, and this Court affirmed the verdict in its entirety. Id. at 169-71, 530 S.E.2d at 394-96; see also Welch, 342 S.C. at 303-05, 536 S.E.2d at 420-21 (affirming verdict of less than $29,000 for survival claim and $ 3 million for wrongful death claim).

In sum, extensive South Carolina precedent rejects the circuit court's finding that wrongful death claims are dependent on claims a person holds at the time of her death. In multiple cases dating back over a hundred years, South Carolina's appellate courts have held wrongful death claims are "distinct," "independent," "separate," "wholly different," and "not a continuation" of claims a decedent could have filed during her lifetime. These cases, along with the history and structure of the relevant statutes, show Ms. Cooley could not bind her wrongful death beneficiaries to arbitration. Accordingly, any language in her durable power of attorney or the Admission Agreement purporting to bind the beneficiaries is invalid because it asserts power Ms. Cooley

never had. Those beneficiaries are the "real parties" to the wrongful death claim and they did not sign the Arbitration Agreement or otherwise consent to waive their right to a jury trial.

c. None of the South Carolina Authority the Circuit Court Cited Supports Arbitration in this Case.

The circuit court mistakenly relied on a few South Carolina and federal district court rulings as support for the notion that wrongful death is a derivative claim and a nursing home resident can agree to arbitrate this claim even though it benefits different people for their own particularized damages. None of the authorities the circuit court cited support that conclusion and none squarely address the question now before the Court. Instead, it is the precedent cited above that is most helpful for showing the true nature of a wrongful death claim in South Carolina law.

The circuit court suggested the South Carolina Supreme Court addressed the arbitrability of wrongful death claims in Dean. (R. p. 21). However, Dean addressed a very different issue related to forum selection clauses and a contractually-designated arbitral forum no longer willing to arbitrate the legal claims in question. Id. at 382, 759 S.E.2d at 733 (finding "outcome of this appeal turns" on effect of arbitral forum provision). Plus, Dean did not even compel arbitration in the case before it. The Supreme Court rejected a few reasons cited for invalidating a nursing home arbitration contract but remanded the matter to the circuit court to address two others. Id. at 387, 759 S.E.2d at 736.

The circuit court misread one of Dean's footnotes. Id. at 378 n. 3, 759 S.E.2d at 731 n. 3 ("We note that courts may not refuse to compel arbitration simply because a wrongful death claim is involved"). This footnote addressed an overly broad pronouncement in the appealed order suggesting wrongful death claims are categorically excluded from arbitration. Id. (citing circuit court order statement stating that "wrongful death actions are not something that's arbitrated"). That type of rule would violate the FAA's equal-treatment principle. Id. (citing Marmet Health

Care Ctr., Inc. v. Brown, 565 U.S. 530, 532-33 (2012)); see also Kindred, 137 S. Ct. at 1426. However, that is not what is at issue here. A wrongful death claim may be arbitrable in instances where the statutory beneficiaries agree to do so. Appellant simply argues an individual's consent to arbitrate may not be grafted into a wrongful death claim that pays different people for different losses. Dean does not reject that argument or even consider it.

Moreover, refusing to compel arbitration for a wrongful death claim under these circumstances fully consistent with the equal-treatment principle. Several other courts have held that rejecting arbitration for wrongful death claims in similar cases does not violate Marmet or any other Supreme Court precedent on the equal-treatment principle.[6] Refusing to compel arbitration here does not mean wrongful death claims can never be arbitrated. Instead, as other courts have recognized, it simply means the nursing home failed to get consent for arbitration from the proper people. Finally, reading Dean's footnote to have any bearing on the parties' dispute does not adequately account for either side's arguments on the key issue. As discussed below, the interaction of wrongful death and survival claims for arbitrability purposes requires a careful analysis of statutory language and history as well as case law interpreting the two claims. Dean had no reason to undertake this analysis and has nothing to offer the Court in resolving this appeal.

The circuit court also referenced one unreported federal district court order which cited the Dean footnote. (Order at 18) (citing THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, Civil Action No. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015)). The soundness of

[6] See Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 360 (Ill. 2012) (unlike Marmet, Illinois was not applying a categorical anti-arbitration rule but was rather applying "common law principles governing all contracts"); Vickers v. Canal Pointe Nursing Home & Rehab Ctr., 2016 Ohio 3244, 2016 WL 3080329 (Ohio App. June 1, 2016) (finding that Ohio Supreme Court precedent preventing arbitration of wrongful death claims did not create categorical ban Marmet bars because it applied generally applicable contract law rule against enforcing contract against person who had not assented).

Gilbert's reasoning and the continued viability of its conclusions are questionable. The district court ordered arbitration but did not feel the need to squarely address the issue raised here because the court concluded the plaintiff "ha[d] not brought a wrongful death action . . . for the benefit of individual heirs." Id. at * 3. The court's meaning is unclear, but the court was mistaken if it was implying the proceeds of a wrongful death claim do not flow to individuals identified as statutory beneficiaries. S.C. Code Ann. § 15-51-40; see also Claussen, 145 S.E. at 541 (finding beneficiaries are the "real parties" to a wrongful death claim). Additionally, Gilbert was never more than persuasive authority and is likely now bad law. Gilbert applied equitable estoppel and third-party beneficiary theories to compel arbitration, but this court has since rejected those theories multiple times in nursing home cases. 2015 WL 1268185, at * 2; see also Hodge, 422 S.C. at 556-58, 574-75, 813 S.E.2d at 299-300, 308; Thompson, 416 S.C. at 57-62, 784 S.E.2d at 687-89.

Finally, the circuit court reasoned that, since section 15-51-10 permits wrongful death claims only when the decedent would have had a claim if she survived, South Carolina law intends to give an individual control over a wrongful death claim which includes the right to determine the method by which it will be resolved. (Order at 17-18) (citing Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988)); see also Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E.2d 143 (2010) (citing Quattlebaum). But, Quattlebaum (and Stokes) did not address arbitration at all. Instead, they simply held that if an individual allows the statute of limitations on a personal injury claim to lapse during her life, then a wrongful death claim may not be used after her death to "revive" the stale claim. Stokes, 389 S.C. at 349, 699 S.E.2d at 146.

The statute of limitations is not at issue here and Quattlebaum/Stokes have never been cited as justification for binding non-parties to an arbitration contract. Plus, the legal provisions holding

that an individual may prevent a wrongful death claim by ignoring or settling a personal injury suit during her life do not mean the individual may control the manner in which the wrongful death claim will be resolved *should she choose to leave it intact*. Several courts have made this distinction explicitly. Oklahoma, like South Carolina, bars a wrongful death suit if the decedent ended a personal injury claim during her lifetime based on the same wrongdoing. Boler v. Sec. Health Care, LLC, 336 P.3d 468, 477 (Okla. 2014). Even so, Boler refused to apply a nursing home resident's arbitration contract to a wrongful death claim because doing so would violate contract principles on mutual assent. Id. at 471 and n. 5.

Pennsylvania also bars wrongful death claims if the decedent allowed her personal injury claim to lapse. Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 657 (Pa. Super. 2013). Yet, just like Oklahoma, Pennsylvania does not extrapolate from that rule the notion that an individual can bind her wrongful death beneficiaries to arbitration. Pisano, 77 A.3d at 657, 662 (refusing to find wrongful death beneficiaries lost jury trial right "where they did not waive it of their own accord"). Thus, Quattlebaum/Stokes and their interpretation of section 15-51-10 do not require arbitration in this case. Had Ms. Cooley settled her claims against the Facility before her death, Ms. Galloway could not bring a wrongful death claim on behalf of the statutory beneficiaries. But it does not follow that Ms. Cooley had the ability to direct the wrongful death claim to arbitration. Since Ms. Cooley had a viable dispute with the Facility when she died, a proposed arbitration of the wrongful death claim must consider whether the wrongful death beneficiaries agreed to waive a jury trial.

In short, none of the South Carolina authority the circuit court cited support arbitration in this case. The cases in the previous section are more apt precedent showing South Carolina recognizes wrongful death is a distinct, independent, and non-derivative legal claim.

d. Many Other Jurisdictions Have Refused to Compel Arbitration of Wrongful Death Claims Based on a Decedent's Arbitration Contract.

In light of the historical and structural differences between South Carolina's wrongful death and survival statutes, as well as substantial case law defining and treating the resulting claims distinctly, the Court should reverse the circuit court's attempt to use Ms. Cooley's purported assent to the Admission Agreement to force arbitration on a wrongful death claim. At least a dozen other jurisdictions have rejected that argument.[7] Four different state supreme courts have done so over just the last dozen years. While some jurisdictions have taken a contrary view[8], South Carolina's statutory language and case law discussed above are more in line with the states that refuse to compel arbitration under similar circumstances. In the aggregate, to the extent the Court looks beyond South Carolina law, persuasive authority does not support the circuit court's order.

The en banc Missouri Supreme Court addressed a similar case in Lawrence v. Beverly Manor. There, an elderly woman was admitted to a nursing home with the assistance of her daughter. 273 S.W.3d at 526. During the admission process, the daughter signed an arbitration contract on her mother's behalf pursuant to a power of attorney that had been in place for several

[7] FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191, 209-10, 213 (Md. App. 2016); Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490, 494 and n. 1 (Pa. 2016) (citing Pisano, 77 A.3d at 660); Boler v. Sec. Health Care, LLC, 336 P.3d 468, 477 (Okla. 2014); Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., 316 P.3d 607, 614 (Ariz. Ct. App. 2014); Daniels v. Sunrise Sr. Living, Inc., 212 Cal. App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); Carter v. SSC Odin Operating Co, LLC, 976 N.E.2d 344, 355-58 (Ill. 2012); Ping v. Beverly Enters., Inc., 376 S.W.3d 581 (Ky. 2012); Woodall v. Avalon Care Center-Federal Way, LLC, 231 P.3d 1252 (Wash. App. 2010); Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009); Bybee v. Abdulla, 189 P.3d 40 (Utah 2008); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007); Chapman v. Cardiac Pacemakers, Inc., 673 P.2d 385 (Idaho 1983); see also Strickholm v. Evangelical Lutheran Good Samaritan Soc'y, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

[8] E.g. Laizure v. Avante at Leesburg, Inc., 109 So.3d 752 (Fla. 2013); In re Labatt Food Serv., L.P., 279 S.W.3d 640 (Tex. 2009); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004); Ballard v. Southwest Detroit Hosp., 327 N.W.2d 370 (Mich. App. 1982).

years. Id. Similar to the Admission Agreement, the contract in Lawrence purported to bind both the mother and "all persons whose claim is derived through or on behalf" of the mother including family members, legal representatives, and heirs. Id. Shortly after admission, the nursing home's staff members allegedly dropped the mother and caused fatal injuries. Id. Just like this case, the family filed wrongful death and other legal claims, the nursing home cited the contract in an effort to compel arbitration, and the trial court denied the motion. Id. at 526-27.

The Missouri Supreme Court affirmed, finding wrongful death is not derived from any claim the mother may have had at or before her death. Id. at 529. All of the key components cited in Lawrence to show a wrongful death is not derivative are also present under South Carolina law. Lawrence started by reviewing the wrongful death statute's language. Id. at 527 (quoting Mo. Rev. Stat. § 537.080). Missouri's statute is substantially similar to its South Carolina counterpart with both creating a claim for torts causing fatal injuries and both indicating a wrongful death claim arises if the decedent would have been able to pursue a claim had she survived. Id.; see also S.C. Code Ann. § 15-51-10. Missouri courts interpreted that language to create a new cause of action that is distinct from survival claims and not a transmitted right from a decedent to her family members. Lawrence, 273 S.W.3d at 527. South Carolina precedent makes these same points. Weaver, 348 S.C. at 678, 561 S.E.2d at 363 ("[t]he wrongful death statute . . . created a new cause of action"); Claussen, 145 S.E. at 540 (wrongful death is "not a continuation" of an existing claim); Keel, 114 S.E. at 762 (wrongful death and survival claims are "separable and distinct"). Considering both the statutory language and precedent, Lawrence concluded a wrongful death claim is "separate and distinct." 273 S.W.3d at 528. Its holding was buttressed by the fact that Missouri wrongful death claims compensate different people for different losses. Id. at 528-29. The South Carolina Supreme Court has cited the same factors to highlight a wrongful death claim's

independence. Scott, 340 S.C. at 168-70, 530 S.E.2d at 394-95 (listing available damages in wrongful death and survival claims); In re Mayo's Estate, 38 S.E. at 638 (finding "object, scope, and measure of damages" in wrongful death claims is "wholly different").

Lawrence followed and was soon joined by a number of other states in rejecting the notion that a nursing home resident could contract away a jury trial on a wrongful death claim compensating her family members or heirs for their unique damages. These cases often point to a common set of factors to show a wrongful death claim is not dependent on the decedent's claims. First, a wrongful death claim is likely separate when wrongful death and survival are expressly distinguished in the statutes. Pisano, 77 A.3d at 656 (reading statutes to mean "two separate and distinct causes of action arise from a single injury" resulting in death); see also Woodall v. Avalon Care Center-Federal Way, LLC, 231 P.3d 1252 (Wash. App. 2010) (describing wrongful death and survival as "conceptually different"). Second, the two claims should be viewed as separate when they are brought by different people to compensate different individuals for different losses. In Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., an Arizona appellate cited the different claimants, different beneficiaries, and different damages as definitive proof a wrongful death statute "confers and original and distinct claim" and is neither "derived from nor is it a continuation of claims which formally existed in a decedent." 316 P.3d 607, 613 (Ariz. Ct. App. 2014); see also FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191, 203 (Md. App. 2016) (holding that survival and wrongful death claims are distinct because they are "by different persons, the damages go into different channels, and are recovered upon different grounds"); Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 599 (Ky. 2012) (concluding wrongful death is independent claim in part because it belongs to the beneficiaries and is "meant to compensate them for their own pecuniary loss").

Third, many of these opinions find wrongful death to be a distinct claim because it accrues at a different time than a survival claim. In Carter v. SSC Odin Operating Co, LLC, the Illinois Supreme Court concluded wrongful death is independent because it "does not accrue until death" while the state's survival statute "simply allows a representative . . . to maintain those . . . actions that had already accrued." 976 N.E.2d 344, 354 (Ill. 2012); see also Boler, 336 P.3d at 477; Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007) (employee could not agree to arbitrate wrongful death claims "because he held no right to those claims; they accrued independently to his beneficiaries for the injuries they personally suffered"). In other words, a wrongful death claim does not accrue or, as one court put it, "vest" in the statutory beneficiaries until the decedent's death. Strickholm v. Evangelical Lutheran Good Samaritan Soc'y, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

Finally, these cases show the error in the circuit court's interpretation of a "derivative" claim. The Admission Agreement purports to extend to Ms. Cooley's "legal representatives, heirs, estates, successors, and assigns." (Admission Agreement ¶ 20(G)). The circuit court concluded wrongful death is sufficiently derivative because S.C. Code Ann. § 15-51-10 permits a wrongful death claim only if the decedent could have brought a claim for the same harm before she died. Many of the cases from other states cited above found wrongful death was not a derivative claim despite statutes like section 15-51-10. Boler, 336 P.3d at 472-77; Carter, 976 N.E.2d at 358-59; Woodall, 231 P.3d at 1259 ("characterizing the wrongful death claims as 'derivative' does not support the proposition that the heirs must arbitrate their claims for wrongful death"). By arguing that a statute like section 15-51-10 was enough to force a wrongful death claim to arbitration, Carter found a party was "overstat[ing] the significance of the derivative nature of a wrongful-death action" especially where, here as in Carter, there is extensive case law and structural

differences demonstrating wrongful death is an independent claim. Similarly, Boler held that while a statute like 15-51-10 might make wrongful death "partially derivative" in a limited sense, it would still be improper to compel arbitration since wrongful death accrues separately and compensates statutory beneficiaries directly for their personal losses. 336 P. 3d at 472, 477 (finding a resident's signature could not compel arbitration on wrongful death claim unless that claim was "wholly derivative"); see also Pisano, 77 A.3d at 659-60 (providing detailed discussion of definition for "derivative" and rejecting arbitration because while wrongful death claims are inherently "derivative of the decedent's injuries," they "are not derivative of decedent's rights").

In sum, persuasive authority does not support the circuit court's finding that South Carolina's wrongful death claim is "derivative" such that a nursing home resident's agreement to arbitrate applies to a wrongful death claim. A dozen states have considered statutes similar to section 15-51-10 and found wrongful death is a distinct, independent claim.

CONCLUSION

Based on the arguments above, Appellant respectfully requests the Court reverse the circuit court order dismissing Appellant's claims and compelling arbitration. Respondents failed to meet their basic burden of proof to show a valid arbitration contract because neither Ms. Cooley nor anyone with authority to act on her behalf signed the Admission Agreement or otherwise assented to arbitrate claims against the Facility. The Admission Agreement's purported arbitration provision is also invalid because it is procedurally and substantively unconscionable. Plus, Respondents' eight month delay in seeking arbitration and substantial litigation-related activity waived any perceived right to pursue arbitration. Alternatively, there are several parties and claims to which any arbitration right cannot apply. The Corporate Entities cannot compel arbitration because they are not parties to any purported arbitration contract with Ms. Cooley. Similarly, the

Facility cannot force Appellant to arbitrate the wrongful death claim because it did not belong to Ms. Cooley, and her purported assent to the Admission Agreement could not bind it to arbitration. Accordingly, the circuit court's order should be reversed in full, and Appellant should be permitted to continue her claims through litigation.

Respectfully submitted,

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