THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court Of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Appellate Case No. 2012-213352

Case No: 2012-CP-46-2692

Paul Sullivan as Personal Representative of the
Estate of Pauline C. Cook, ...Respondent,

v.

Park Pointe Village, Inc., a wholly owned subsidiary of
ACTS Retirement-Life Communities, Inc., Neva Lattimer,
and Marvin Lawrence, ... Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

Respondent Paul Sullivan, as Personal Representative of the Estate of Pauline C. Cook (hereinafter "Sullivan"), exhaustively cites *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993), for the proposition that the circuit court's determination - that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, does not preempt state law absent evidence the Resident Contract has a nexus to interstate commerce - should be affirmed. As Sullivan is aware, however, *Timms* has been expressly overruled by the South Carolina Supreme Court as standing in stark and irreconcilable contrast with more recent, binding precedent from the Supreme Court of the United States on this precise question. In light of the inescapable conclusion that the Resident Contract at issue in these proceedings satisfies the "aggregate effects" test, the holding of the circuit court to the contrary must be reversed and remanded for an order compelling arbitration and staying the civil action.

I. THE RESIDENT CONTRACT INVOLVES INTERSTATE COMMERCE AND TRIGGERS APPLICATION OF THE FEDERAL ARBITRATION ACT.

The *Timms* Court refused to compel arbitration because, in its view, the contract between a nursing home and its resident lacked a sufficient nexus to interstate commerce to trigger application of the FAA, which is the identical conclusion the circuit court below felt obligated to reach in light of what it viewed as binding state authority on this issue. The basis of the decision in *Timms* seems to be that while certain factors demonstrated the nursing home's involvement in interstate commerce and "could evidence . . . involvement in interstate commerce . . ., their relationship to the agreement [between the parties] is insufficient to form the basis of the contract between the parties." *Id.*, 310 S.C. at 473, 427 S.E.2d at 644. The circuit court found *Timms* "to be

controlling" and was guided by what it viewed as the purely local reach of the "provision of living accommodations" provided pursuant to the Resident Contract. (Order, p. 3)

In *Cape Romain Contractors, Inc. v. Wando E., LLC*, 747 S.E.2d 461, 2013 S.C. LEXIS 203 (2013), the trial court, like the court in this case, refused to enforce an arbitration agreement between the parties that "did not sufficiently impact interstate commerce." *Id.* at *1. Like Sullivan, Cape Romain opposed compulsory arbitration based, in part, on its assertion that the arbitration clause was not enforceable pursuant to the FAA because "the transaction did not impact interstate commerce." *Id.* at *3. Finding that the underlying construction project fell within Congress's commerce power, the supreme court rejected Cape Romain's argument and reversed the trial court's order declining to enforce the arbitration provision. The same result necessarily follows here.

Noting the wide reach of Congress's commerce power, the *Cape Romain* Court joined with the majority of courts and noted that "Congress has authority to regulate (1) 'the use of the *channels* of interstate commerce, (2) 'the *instrumentalities* of interstate commerce, or persons or things in interstate commerce . . .' and (3) 'those activities having a *substantial relation* to interstate commerce.'" *Cape Romain*, 2013 LEXIS 203 at * 6[1] (quoting *United States v. Gould*, 568 F.3d 459, 470 (4th Cir. 2009) (additional citation omitted) (emphasis in the original)). Rejecting the trial court's unduly narrow analysis of whether the contract on its face bore a "substantial relation to interstate

[1] Going further, "[c]hannels of commerce are 'the interstate transportation routes through which persons and goods move.'" *Id.* at *6-7 (citing *United States v. Ballinger*, 395 F.3d 1218, 1225 (11th Cir. 2005) (quoting *United States v. Morrison*, 529 U.S. 598, 613 n.5 (2000) (channels of interstate commerce include highways, railroads, navigable waterways, airspace, telecommunications networks and even national securities markets)). "Instrumentalities of interstate commerce, by contrast, are the people and things themselves moving in commerce . . . ." *Id.* (quoting *Ballinger*, 395 F.3d at 1226 (identifying automobiles, airplanes, boats, shipment of goods, pagers, telephones and mobile phones as instrumentalities of interstate commerce).

commerce" - and based upon the repudiation of this *Timms*[2] analysis - the court clarified that the proper approach "involves consideration of all three broad categories of activity within the purview of Congress's commerce power -- use of the channels of interstate commerce; regulation of persons, things or instrumentalities in interstate commerce; and regulation of activities having a substantial relation to interstate commerce." *Cape Romain*, 2013 S.C. LEXIS 203 at * 7-8 (citing *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)).

A. The "Instrumentalities of Interstate Commerce" Factor Weighs In Favor Of Enforcing The Parties' Agreement To Arbitrate.

Any one factor, standing alone, is sufficient to warrant the conclusion that arbitration is appropriate and that the agreement to arbitrate should be enforced. In *Cape Romain*, the "instrumentalities of interstate commerce" factor weighed in favor of a finding of interstate commerce where materials used in construction were manufactured or fabricated outside of South Carolina and transported to this State. 2013 S.C. LEXIS 203 at *9-10 (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594-95, 553 S.E.2d 110, 117-18 (2001) (use of out-of-state materials, contractors and investors implicates interstate commerce); *Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (use of labor, supplies, and materials from out-of-state sources indicates interstate commerce); *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (finding consultation with out-of-state technicians is an indicator of interstate commerce)). The same result follows here.

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[2] *See* 2013 S.C. LEXIS 203 at * 8 n. 5 ("We overrule *Timms* to the extent it determined the FAA did not apply because the contract *on its face* failed to demonstrate that the parties contemplated an interstate transaction.") (emphasis in the original) (citations omitted).

As noted, the Resident Contract demonstrates a sufficient nexus between interstate commerce and the arbitration provision therein to trigger application of the FAA. As the circuit court expressly acknowledged, it is beyond argument[3] that the provision of assisted living, nursing care, and security services pursuant to the Resident Contract necessarily involves goods, personnel, telecommunications, wire transfers, and additional items that move in interstate commerce. (October 18, 2012 Hr'g Trans., p. 15, lines 15-17)

The circuit court's acknowledgement on this score is consistent with modern precedent. *See, e.g., Rainbow Health Care Ctr., Inc. v. Crutcher*, 2008 U.S. Dist. LEXIS 6705 (N.D. Okla. 2008) (nursing home admission agreements, when examined in the aggregate, evidence interstate commerce due to the nature of the goods and services nursing homes provide); *Owens v. Coosa Valley Health Care, Inc.*, 890 So.2d 983, 988 (Ala. 2004) (the transaction underlying a nursing home admission agreement is "unquestionably economic in nature," and, pursuant to the aggregate effects test, affects interstate commerce sufficiently to warrant FAA preemption). Further, Sullivan himself implicates interstate commerce when he pleads that Park Pointe Village is a "wholly owned subsidiary" and "alter ego" of an out-of-state parent. (Amd. Compl., ¶2) In light of these provisions, there is no question that the FAA governs the arbitration provision of

[3] Indeed, at oral argument of Appellants' motion, the circuit court acknowledged "obviously care facilities like [Park Pointe Village] get employees from out of state, equipment or medicine or food shipped from Charlotte or whatever . . . ." (October 18, 2012 Hr'g Trans. p. 15, lines 15-17; Order p. 3 ("Here, the subject matter of the Resident Contract is the provision of living accommodations, described as a 'Residential Unit,' 'together with the facilities, services and medical care' otherwise specified in the contract.") While the circuit court expressly acknowledged that the provision of services contemplated by the Resident Contract necessarily involves interstate commerce, he nevertheless refused to apply the correct standard with regard to application of the FAA. (Order p. 3) ("Based upon the record presented, I find the case of *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) to be controlling.")

the Resident Contract and that the circuit court erred in declining to grant Appellants' motion to compel arbitration.

B. The "Regulation of Activities Having A Substantial Relation To Interstate Commerce" Factor Weighs In Favor Of Enforcing The Parties' Agreement To Arbitrate.

The *Cape Romain* Court further found the activities implicated by the marine construction project issue in that case were sufficient, standing alone, to trigger application of the FAA. 2013 S.C. LEXIS 203 at * 11-12 (quoting *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003) ("Congress's Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.' Only that general practice need bear on interstate commerce in a substantial way."). After examining the "commercial aspects" of construction contract "in the aggreage", the court had absolutely no difficulty concluding the trial court erred in finding the FAA did not apply.

Again, the same conclusion necessarily follows in this case given the types of services contemplated by the Resident Contract. The Resident Contract obligated Park Pointe Village to provide Sullivan's Decedent with a residential unit, security services, telephone and cable access, and medical care, which is undoubtedly one of the most highly regulated activities in the United States. *See, e.g.,* The Patient Protection and Affordable Care Act of 2010. Going further, the Resident Contract obligated Sullivan's Decedent to enroll in and pay for Medicare coverage, as well as Medicare supplemental insurance. (Ex. A to Amd. Mot., p. 13, § 6.7) Even the circuit court acknowledged that the provision of assisted living, medical, and security services "involve commerce".

(October 18, 2012 Hr'g Trans., p. 15, lines 15-17) It merely felt constrained by *Timms* to refrain from applying the broad standard for "involving commerce" followed in later cases and that militates here in favor of reversal.

C. This Court Should Reverse The Trial Court And Compel Arbitration As Provided For By The Arbitration Agreement Contained In The Resident Contract.

After concluding the contract at issue involved interstate commerce, the second prong of the court's analysis in *Cape Romain* involved the decision of whether arbitration should be compelled. Beginning with the "strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration," the court had little difficulty concluding the trial court erred in denying the motion to compel arbitration. 2013 S.C. LEXIS 203 at *13 (quoting *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012); *Am. Ex. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (June 20, 2013) ("[C]ourts must 'rigorously enforce' arbitration agreements according to their terms, including terms that 'specify *with whom* the parties choose to arbitrate their disputes,' and 'the rules under which that arbitration will be conducted.'") (additional citations and quotations omitted).

As reflected in Section 21 of the Resident Contract, Cook and Park Pointe anticipated and agreed that ***any*** dispute arising out of their contract would be subject to arbitration. (Ex. A to Amd. Mot., p. 36) ("***Any controversy, dispute or disagreement*** arising out of or relating to this Contract, or concerning any rights arising under this Contract or a breach of this Contract, shall be settled by voluntary arbitration.") (Emphasis added) This arbitration agreement extends to disputes arising out of Park Pointe's provision of security services - an issue at the heart of Sullivan's claims against

Appellants - pursuant to Section 5.13 of the Resident Contract. (Ex. A to Amd. Mot., p. 8-9, §§ 5.12, 5.13) ("Company will, as part of the services included in the Monthly Rate, provide certain security services at the Retirement Community in accordance with Company's prevailing policy. . . .") Sullivan does not dispute the existence of the arbitration provision or challenge it as vague or ambiguous, and this was not an issue before the circuit court. As such, the arbitration provision "should be enforced in accordance with [its] unambiguous terms." *Cape Romain*, 2013 S.C. LEXIS 203 at *14 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (noting that the "preeminent concern" in construing arbitration agreements is to protect the contractual rights of the parties, which requires courts to enforce "rigorously" those terms upon which private parties have agreed)).

II. THE CIRCUIT COURT ERRED IN APPLYING THE SOUTH CAROLINA UNIFORM ARBITRATION ACT TO INVALIDATE THE ARBITRATION PROVISION OF THE RESIDENT CONTRACT.

In the second section of his Initial Brief, Sullivan urges affirmance on three grounds. First, he asserts the circuit court correctly applied admittedly "heightened requirements" within the South Carolina Uniform Arbitration Act because Appellants allegedly failed to establish the necessary link between the Resident Contract and interstate commerce.[4] (Initial Br. of Resp't., p. 16) For the reasons previously stated, this argument fails and runs afoul of clear authority restricting the states' ability to single out "arbitration provisions for suspect status." *Doctor's Assocs., Inc. v. Casaratto*, 517

[4] For the additional reasons set out in the first section of this brief, Appellants again submit that the circuit court erred in its conclusion that nothing in the Resident Contract "involves commerce" under the *Timms* analysis. Indeed, it is plainly evident from the face of that document, without the need to resort to additional extrinsic evidence, that the economic activity contemplated by the Resident Contract presents a "general practice . . . subject to federal control." *Citizens Bank*, 539 U.S. at 56-57 (internal quotations and citations omitted).

U.S. 681, 687 (1996) (internal quotations omitted). Second, Sullivan asserts, incorrectly, that the choice of law provision[5] within the Resident Contract and failure to specifically reference the FAA necessarily mandates application of the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq.* (2012), ("SCUAA"). Finally, Sullivan once again ignores binding authority to the contrary to assert that his tort-based claims are not subject to binding arbitration.

It could not be more plain that the reach of the FAA is expansive and that the Act applies in this case. "Congress's Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if *in the aggregate* the economic activity in question would present a general practice . . . subject to federal control." *The Citizens Bank v. Alafabco*, 539 U.S. 52, 56-57 (2003); *see also Episcopal Housing Corp.*, 269 S.C. at 636, 239 S.E.2d at 649 ("The Federal Arbitration Act was enacted pursuant to the commerce clause, thereby superseding the South Carolina common law."). Thus, Sullivan's argument that *Timms* is controlling or that the choice of law provision within the Resident Contract compels application of the SCUAA misses the mark. Instead, the correct analysis must begin with a discussion of whether the provision of goods, services, and medical care pursuant to the Resident Contract, in the aggregate, affects interstate commerce. Clearly, for all of the reasons set forth in Appellants' briefing on this issue, the answer to this question is yes.

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[5] Specifically, Sullivan and the circuit court rely upon an overbroad mis-reading of Section 23.9 of the Resident Contract referencing application of South Carolina law. A plain reading of the literal language used in that section makes clear that South Carolina law is only to be used for purposes of interpreting language in the agreement and not for invalidating portions of the contract. The circuit court's expansive reading of the provision - that it applies to all matters pertaining to the contract - is inconsistent with both the plain language and the intent of the parties, both of which are entitled to a presumption of enforcement.

Sullivan's argument that the arbitration provision within the Resident Contract fails because it does not specifically mention the FAA is similarly infirm. Indeed, he cites no authority to support that proposition. Instead, all that is required is that "there is a written provision for arbitration in the contract." *Episcopal Housing Corp.*, 269 S.C. at 637, 239 S.E.2d at 650 (citing 9 U.S.C. § 2 ("A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). Sullivan cites no authority for the proposition that inclusion of a choice of law provision mandates application of state law even where the contract contains a valid and enforceable arbitration clause. *See Landers v. Federal Deposit Insurance Corp.*, 402 S.C. 100, 104, 739 S.E.2d 209, 210 (2013) (enforcing arbitration provision that provided for "binding arbitration" of claims and controversies "[e]xcept [for] matters contemplated" by a separate section of the agreement addressing applicable law and choice of forum consideration). Instead, the choice of law provision exists to assist in resolving any potential dispute as to the validity and enforcement of the Resident Contract: it does not and cannot negate the viability of the arbitration provision standing alone.

Appellants concede that the Resident Contract "does not comply with the SCUAA" inasmuch as it is not necessary that it do so given the clear nexus between the Resident Contract and interstate commerce. (*Cf.* Initial Br. of Resp't., p. 17) As noted in Appellant's Initial Brief, a court may set aside arbitration agreements by state-law defenses that govern the validity, revocability, and enforceability of contracts generally,

but not "by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742 (2011). That is precisely what Sullivan, aided by the court below, has attempted to do with regard to the arbitration provision of the Resident Contract. While Sullivan and the circuit court attempted to avoid arbitration by noting the distinguishing and unique facts of this case and the purported impact of arbitration on Sullivan's ability to pursue personal causes of action[6] in the underlying proceeding, these tactics cannot be used to subvert the intent of the parties in entering into an otherwise valid arbitration provision. (Oct. 18 Hr'g Trans., pp. 12-14)

The circuit court in this instance clearly held the arbitration provision of the Resident Contract to heightened drafting requirements that are not applicable to contracts generally. (November 7, 2012 Order, p. 4) (Observing there was "[n]o mention of the arbitration provision . . . anywhere else in the document. In particular, the requisite notice that the agreement is subject to arbitration pursuant to the SCAA [sic] is not displayed on the front page of the document as required by statute.") These requirements simply were not applicable, and Appellants urge this Court to find the statutory provisions are preempted to the extent they were used impermissibly to target and invalidate contractual provisions addressing arbitration.

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[6] Sullivan erroneously argues that S.C. Code Ann. § 15-48-10(b)(4) bars mandatory arbitration of "[a]ny claim arising out of personal injury, based on contractor tort, or to any insured or beneficiary under any insurance policy or annuity contract." First, Sullivan has not been plead a "personal" cause of action. More importantly, given that the arbitration agreement at issue triggers application of the FAA, it is invalid as a matter of law. *See Marmet Health Care*, 132 S. Ct. 1201 (2012) (state's categorical prohibition against pre-dispute agreements to arbitrate personal injury or wrongful death claims against nursing homes held contrary to the terms and coverage of the FAA).

III. RESPONDENT HAS NOT RAISED ANY VALID ALTERNATIVE SUSTAINING GROUNDS TO SUPPORT THE ERRONEOUS JUDGMENT BELOW.

A. Outrageous Conduct.

Sullivan relies on *Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705 (2007), to support his assertion that his Decedent could not have contemplated she was agreeing to arbitrate claims relating to the alleged failure by Park Pointe Village and its employees to provide adequate security and what he describes as the outrageous conduct of a former employee of Park Pointe Village. (Initial Br. of Resp't., p. 18-19) This argument is nonsensical when viewed through the prism of the Resident Contract and more recent South Carolina authority.

In addition to providing a residence, assisted living services, and other amenities, Park Pointe Village was contractually bound to provide Sullivan's Decedent with "security services." (Ex. A to Amd. Mot., p. 9) To that end, she could contact Park Pointe Village personnel for 24-hour emergency response services. (*Id.*, p. 8) (Section 5.12 Response System) Sullivan's allegations against Appellants are, in fact, grounded on the allegation that Park Pointe Village and its employees assumed and breached a duty to provide security to his Decedent and other Park Pointe Village residents. (Amd. Compl., ¶¶ 32-34) It would be inconsistent and unjust to permit Sullivan to rely upon the Resident Contract to suit his ends while at the same time repudiating the arbitration provision. *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 295, 733 S.E.2d 597, 604 (Ct. App. 2012).

In more recent precedent, the South Carolina Supreme Court has observed that "[a]lthough the intention of parties is relevant, as a matter of policy, arbitration agreements are liberally construed in favor of arbitrability." *Landers v. Federal Deposit Insurance Company*, 402 S.C. 100, 108-09, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 94 (4th Cir. 1996)). The presumption in favor of arbitration is strengthened where, as here, the arbitration provision is broadly written. *Id.*, 402 S.C. at 109, 739 S.E.3d at 213 (citation omitted). A clause calling for arbitration of "all disputes 'arising out of or relating to' the contract is construed broadly." *Landers*, 402 S.C. 100 at 109, 739 S.E.2d at 214 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 298 (1967) (labeling as "broad" a clause that required arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement.")). Thus, "the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." *Id.* (citing *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988); *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119).

Section 21.1 of the Resident Contract contains the arbitration provision at issue. (Ex. A to Amd. Mot. to Dismiss, p. 36) Like the broadly worded provision in *Landers*, the subject provision calls for arbitration of "***[a]ny*** controversy, dispute or disagreement arising out of or relating to this Contract, or concerning ***any*** rights arising under this Contract or a breach of this Contract. . . ." (*Id.*) (Emphasis added) Clearly, the provision of security services, as well as the alleged breach of duty arising from the failure to

provide adequate security services, constitutes a "significant relationship" between the asserted claims and the contract in which the arbitration clause is contained. *Landers*, 402 S.C. at 109, 739 S.E.2d at 214 (citations omitted). Here, the gravamen of Sullivan's Amended Complaint centers on the failure to provide adequate security to his Decedent. Because they bear a "significant relationship" between the asserted claims and the Resident Contract, arbitration is appropriate. The Court should reject Sullivan's assertion security-related conduct can serve as an alternative sustaining ground to support the trial court's erroneous order denying the motion to compel arbitration.

B. Privity of Contract.

While admitting there is a dearth of South Carolina authority on point, Sullivan nevertheless argues his Decedent's statutory beneficiaries should not be bound to the arbitration provision inasmuch as they were not signatories to the Resident Contract. (Resp't's Initial Br., pp. 22-23) This argument fails because it is inconsistent with the terms and provisions of the Resident Contract itself and because South Carolina authority acknowledges that a party may be bound to an arbitration provision even when he did not sign it.

In *Cape Romain*, the South Carolina Supreme Court expressly noted a property owner that was not a party to the underlying lawsuit or a signatory to the construction contract at issue could be joined as a party to the arbitration proceeding when the non-signatory is "substantially involved in a common question of law or fact [and] whose presence is required if complete relief is to be accorded in arbitration." 2013 S.C. LEXIS

203 at *17-18. Moreover, the Resident Contract itself provides that the contract, including the agreement to arbitrate ***any*** claim arising thereunder, "shall be binding upon, and inure to, the benefit of the Company and Resident, and their respective successors, permitted assigns and ***personal representatives***." (Ex. A to Amd. Mot. to Dismiss, p. 38)

Relying on extraterritorial and distinguishable authority, Sullivan nevertheless asserts that the beneficiaries of his Decedent's estate cannot be viewed as bound to the arbitration provision because they did not sign it or assent to it. The first, *Sennett v. National Healthcare Corp.*, 272 S.W.3d 237 (Mo. Ct. App. 2008), is distinguishable on the basis that there is no mention of any clause wherein the nursing resident agreed that the contractual terms would bind her heirs, successors, and personal representatives. The second two, *Noland Health Services, Inc. v. Wright*, 971 So.2d 681 (Ala. 2007), and *Finney v. National Healthcare Corp.*, 193 S.W.3d 393 (Mo. App. 2006), are distinguishable because the signatories to the contracts at issue in those cases did not sign in a legally representative capacity and, therefore, were not viewed by the courts as binding the residents or their heirs.

The South Carolina Supreme Court has recognized the derivative nature of wrongful death claims pursuant to the Wrongful Death Act, S.C. Code Ann. § 15-51-10, *et seq. See, e.g., Estate of Stokes v. Pee Dee Family Physicians*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010) ("We affirm today that a claim under the Wrongful Death Act lies in the decedent's estate only when the decedent's estate possesses the right of recovery at his death."); *Farmer v. Monsanto Corp.*, 353 S.C. 553, 558, 579 S.E.2d 325, 328 n.2 (2003) ("In a wrongful death action, the representative plaintiff's capacity is derived from

the decedent's . . . .). Thus, the law of South Carolina[7] is clear that anything that would have defeated the decedent's recovery had she survived, such as a valid release, would defeat the right of recovery on behalf of her family in a wrongful death action.

It necessarily follows that in signing the arbitration provision of the Resident Contract, as well as the "binding effects" clause therein, Sullivan's Decedent agreed that her heirs, successors, and personal representative would be bound by the arbitration provision. It also comports with South Carolina authority supporting the proposition that where the contract is clear and unambiguous, parties who are "substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration." *Cape Romain*, 2013 S.C. LEXIS 203 at *18 (citations and quotations omitted). Perhaps of equal importance is the fact that enforcement of the arbitration provision does not deny Sullivan's Decedent's heirs of a remedy. Indeed, enforcement of the arbitration agreement simply means that pursuit of those remedies will occur in a different forum. Accordingly, the fact that Sullivan and the other statutory beneficiaries to his Decedent's Estate are non-signatories to the Resident Contract is of no moment and should not be viewed as an alternative sustaining ground.

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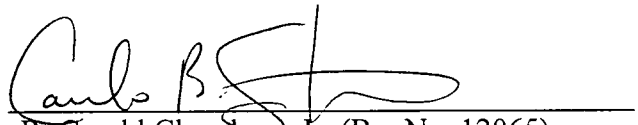
[7] A number of states have concluded that a valid arbitration agreement is equally enforceable against the decedent's beneficiaries in a wrongful death claim as it would have been against the decedent herself. *See, e.g.*, *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 646-647 (Tex. 2009) ("In this case, we consider whether the arbitration provision in an agreement between a decedent and his employer requires the employee's wrongful death beneficiaries to arbitrate their wrongful death claims against the employer event though they did not sign the agreement. We hold that it does."); *Cleveland v. Mann*, 942 So.2d 108, 118-119 (Miss. 2006) (holding non-signatory beneficiaries were bound by decedent's arbitration agreement pursuant to Mississippi Wrongful Death Act, Miss. Code Ann. § 11-7-3 (Rev. 2004)); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So.2d 661, 665 (Ala. 2004) (holding representative asserting Alabama Wrongful Death Act claim pursuant to § 6-5-410 (Ala. Code 1975) was bound by an arbitration agreement); *Ballard v. Sw. Detroit Hosp.*, 327 N.W.2d 370, 372 (Mich. App. 1982) (holding a beneficiary asserting wrongful death action pursuant to M.C.L. § 600.2922(1) (M.S.A. § 27A.2922(1)) was bound by an arbitration agreement because the claim was a derivative cause of action under Michigan law).

CONCLUSION

For the reasons stated herein, Appellants submit they are entitled to an order reversing the judgment of the circuit court denying the motion to compel arbitration pursuant to the Federal Arbitration Act.

TURNER, PADGET, GRAHAM & LANEY, P.A.

September 30, 2013 By: 

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PROOF OF SERVICE

I certify this 30th day of September 2013 that I have served a copy of the INITIAL REPLY BRIEF OF APPELLANTS upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

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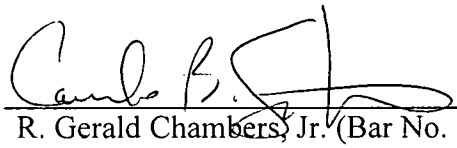
By: 

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September 30, 2013

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Paul Sullivan as Personal Representative of the Estate of Pauline C. Cook v. Park Pointe Village, Inc., Neva Lattimer, and Marvin Lawrence
Appellate Case No.: 2012-213352
File No.: 80.1497

Dear Ms. Kitchings:

Enclosed please find the originals and one copy each of the Initial Reply Brief of Appellants and Proof of Service regarding the above-referenced matter. Please file the original documents and return clocked copies to me via our office courier. Thank you for your assistance with this matter, and please contact me if you have any questions.

With kind regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.

Carmelo B. Sammataro

CBS/tj
Enclosures
cc: Richard A. Harpootlian, Esquire
Graham L. Newman, Esquire
M. David Scott, Esquire
(w/enc.)