THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
William C. McMaster, III, Circuit Court Judge

Appellate Case No. 2025-002264
Case No. 2025-CP-23-01757
Case No. 2025-CP-23-01759

Kimberly Haag, Individually and as Personal Representative of the Estate of Raymond Zeigler,……. Respondent,

v.

Carlyle Senior Care of Fountain Inn, LLC; Carlyle Senior Care Management Company, Inc.; New Day Health Ventures, LLC; LARK of Fountain Inn, LLC; Fountain Inn Healthcare, LLC d/b/a Fountain Inn Post Acute; Providence Group, Inc.; Providence Administrative Consulting Services, Inc.; PACS Group, Inc.; PACS Holdings, LLC; and 501 Gulliver Property, LLC,…… Appellants.

INITIAL BRIEF

OF THE APPELLANTS:
FOUNTAIN INN HEALTHCARE, LLC D/B/A FOUNTAIN INN POST ACUTE; PROVIDENCE GROUP, INC.; PROVIDENCE ADMINISTRATIVE CONSULTING SERVICES, INC.; PACS GROUP, INC.; PACS HOLDINGS, LLC; AND 501 GULLIVER PROPERTY, LLC

[SIGNATURE ON FOLLOWING PAGE]

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February 6, 2026
Charleston, South Carolina

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INTRODUCTION

The Appellants appeal the trial court's denial of a motion to compel arbitration raised in two separate medical malpractice civil actions, which are both alleged to arise from Mr. Raymond Zeigler's ("Mr. Zeigler") care and treatment at a skilled nursing facility in Greenville, South Carolina ("Facility"). Respectfully, the trial court's orders erroneously deny the Appellants' Motions to Dismiss, Stay Litigation and Compel Arbitration (collectively "Motion to Compel Arbitration"). Instead, the trial court should have granted the Appellants' Motion to Compel Arbitration pursuant to the Federal Arbitration Act.

Kimberly Haag, the personal representative of Mr. Zeigler's estate, executed the Arbitration Agreement during Mr. Zeigler's admission to the Facility. Years before his admission, Mr. Zeigler executed a General Durable Power of Attorney ("POA"), which designated and authorized Kimberly Haag to act as his Attorney-in-Fact. The POA was signed by Mr. Zeigler, two witnesses, and a notary public. It was recorded in the Greenville County Register of Deeds within days of its execution.

The Arbitration Agreement executed by Kimberly Haag on behalf of and for Mr. Zeigler clearly and unmistakably contains a delegation clause, which delegates any questions of applicability and enforceability to an arbitrator pursuant to the Federal Arbitration Act. The delegation clause is valid under state common law contract principles because a valid offer, acceptance, and consideration exist to support it. Any remaining arguments raised by Respondent in opposition to the Motion to Compel Arbitration did not specifically and exclusively challenge the delegation clause or involved questions of the Arbitration Agreement's applicability or enforceability, which was otherwise delegated to the arbitrator.

Notwithstanding the existence of an Arbitration Agreement containing a valid delegation clause, the trial court's additional ruling permitting jurisdictional discovery as to the issue of arbitration inherently presents reversible error. In light of the trial court permitting jurisdictional discovery on the issue of arbitration, the trial court should have, in the alternative, declined to grant or deny the Motion to Compel Arbitration until considering the jurisdictional discovery. Moreover, in accordance with the Federal Arbitration Act, the trial court should have continued the Appellants' Motion Compel Arbitration to a date after the expiration of jurisdictional discovery and an additional opportunity for the Parties to be heard. The denial of a motion to compel arbitration becomes the law of the case and any subsequent motion to compel arbitration as permitted by the trial court's order is limited to that extent.

ISSUES PRESENTED

I. Did the trial court err in denying the Appellants' Motion to Compel Arbitration?

A. Did the trial court err by ruling that the delegation clause within the Arbitration Agreement was not valid under general state contract principles and that the remaining arguments raised by the Respondent were not otherwise delegated to an arbitrator by the Parties?

i. Whether the Arbitration Agreement is one governed by the FAA involving interstate commerce?

ii. Whether the delegation clause within the Arbitration Agreement is valid according to state law contract principles?

iii. Whether the delegation clause clearly and unmistakenly delegates the remaining underlying arguments raised by Respondent to an arbitrator?

B. Without waiver to the above, even assuming one of the arguments raised by Respondent was properly before the trial court and not otherwise delegated to an arbitrator, whether the trial court nonetheless erred by ruling that specific argument warranted the denial of the Appellants' Motion to Compel Arbitration?

C. Did the trial court err, as a matter of law, by denying the motion to compel arbitration but at the same time ordering that Appellants "reset" or refile a motion to compel arbitration upon completion of jurisdictional discovery, instead of continuing the pending motion to a date not before the close of jurisdictional discovery and in doing so, allowing the Appellants an opportunity to proceed to a trial on the issue of arbitration pursuant to 9 U.S.C. § 4?

i. Whether the denial of a motion to compel arbitration becomes the law of the case?

ii. Whether the denial of a motion to compel arbitration before the Parties and the trial court had the opportunity to conduct a "full inquiry" into the issue of arbitration is erroneous as a matter of law?

STATEMENT OF THE CASE

I. Introduction

This is the appeal of the trial court's orders denying the Appellants' Motion to Dismiss, Stay Litigation and Proceedings, and Compel Arbitration and their subsequently filed Motion to Reconsider, which they raised in two separate civil actions. (Orders Den. Mot. Compel; Orders Den. Mot. Recons.; R. ___.) Although this appeal involves two civil actions, those civil actions are only distinguishable to the extent that the first alleges a cause of action for wrongful death ("WD") and the second alleges a cause of action for survival ("SA"). (Pl. SA Compl. ¶ 26; Pl. WD Compl. ¶ 26; R. ___.) Both actions are predicated on the same underlying claim of medical malpractice. (Pl. SA Compl.; Pl. WD Compl.; R. ___.) Specifically, Respondent alleges Appellants breached the applicable standard of care during the time Raymond Zeigler ("Mr. Zeigler") was admitted and resided at a facility located at 501 Gulliver Street, Fountain Inn, SC 29644 ("Facility"). (*Id.*; R. ___.)

II. Background Facts

On May 8, 2018, Mr. Zeigler executed a General Durable Power of Attorney ("POA") wherein he appointed his daughter, Kimberly Haag, as his true and lawful attorney-in-fact with the express agency authority to act on his behalf. (Def. Mot. Dismiss Pl. WD Compl., Ex. C; R. ___.) The POA was executed by Mr. Zeigler, signed by two witnesses, and notarized. (*Id*. at 24-25; R. ___.) It was recorded in the Greenville County Register of Deeds on May 10, 2018. (*Id*. at 1; R. ___.) The POA expressly grants Kimberly Haag the authority to "arbitrate" disputes on behalf of Mr. Zeigler:

> My Attorney-in-Fact may institute, supervise, prosecute, defend, intervene in, abandon, compromise, adjust, arbitrate, settle, dismiss, and appeal from any and all legal, equitable, judicial, or administrative hearings, actions, suits, or proceedings involving me

> in any way. This authority includes, but is not limited to, claims by or against me arising out of property damage or personal injury suffered by or caused by me or under circumstances such that the resulting loss may be imposed on me. My Attorney-in-Fact may otherwise engage in litigation involving me, my property, or my legal interests, including any property, interest, or person for which or whom I have or may have any responsibility.

(*Id*. at 7; R. ___.) Additionally, the POA expressly grants Kimberly Haag the power to execute agreements pertaining to medical or general care that Mr. Zeigler required.

> **Section 4.19 Caregiver Agreements**
> My Attorney-in-Fact may enter into, execute, modify, alter, or amend any contract or agreement (for example, a Caregiver Agreement or Personal Services Contract) pertaining to my medical, personal, or general care that I may require at my residence, assisted living facility, nursing facility, or in another's residence on my behalf . . .

(*Id*. at 13; R. ___.) Lastly, the POA expressly granted Kimberly Haag the authority to exercise any and all general powers to the extent permissible under South Carolina law, such as the execution of an Arbitration Agreement:

> **Section 7.09 Interpretation**
> This General Durable Power of Attorney is a general power of attorney and should be interpreted as granting my Attorney-in-Fact all general powers permitted under South Carolina law. The description of specific powers is not intended to, nor does it, limit or restrict any of the general powers granted to my Attorney-in-Fact.

(*Id*. at 21; R. ___.) On December 22, 2022, Mr. Zeigler was admitted to the Facility. (Pl. SA Compl. ¶ 12; Pl. WD Compl. ¶ 12; R. ___.) During the admission process, Respondent, Kimberly Haag on behalf of Mr. Zeigler, and in her capacity as Legal Representative and Power of Attorney, executed an Admission Agreement with Appellant Carlyle Senior Care of Fountain Inn, LLC, for Zeigler's residency. (Def. Mem. Supp. Mot. Compel, p.2; Co-Def. Mot. Compel, Ex. B; R. ___.) She also executed a Mediation and Binding Arbitration Agreement ("Arbitration Agreement") on behalf of Mr. Zeigler and with the express agency authority of Mr. Zeigler. (Def.

Mem. Supp. Mot. Compel, p.2; Def. Mot. Compel, Ex. A; R. ___.) The Arbitration Agreement applies the Federal Arbitration Act, 9 U.S.C § 1, *et seq.,* and the Parties specifically agreed the agreement involved interstate commerce. (Def. Mot. Compel, Ex. A, pp. 1-3; R. ___.)

> **(3) Involvement of Interstate Commerce:** The Facility expressly represents and provides notice to the Resident that the Facility must and will engage in interstate commerce in the course of its relationship with Resident. The Resident is aware of this fact, acknowledges this fact, and explicitly expects that interstate commerce will be involved in the course of the relationship between the Parties. The Resident agrees that (s)he could specifically seek residency at a different facility if Resident expected and/or desired to reside in a facility that did not and would not engage in interstate commerce in the course of the relationship between the Parties, which includes, but is not limited to, the provision of care to the Resident. Therefore, it is the express intent and expectation of the Parties that the care provided by the Facility to the Resident will and does involve, implicate, and affect interstate commerce.
>
> The Parties expressly acknowledge and agree that the relationship between the Parties, which includes, but is not limited to, the provision of care, products, and services to the Resident by and through the Facility, necessarily will, and in fact does, necessitate transaction(s) involving and affecting interstate commerce by needing and in fact utilizing people, information and tangible materials that originate out of state and that must be and in fact are transported across state lines to the Facility. . .

(*Id.* at pp. 2-3; *R.* ___.) The Arbitration Agreement includes a delegation clause delegating all matters, including any questions of applicability and/or enforceability, to an arbitrator. (*Id*. at 2; R. ___.)

> **(a) <u>Intent of the Parties</u>.** The Parties expressly intend that all matters be resolved by arbitration, including, but not limited to, resolving any questions regarding the applicability and/or enforceability of this Agreement as well as resolving all Claims, existing presently or in the future, between the parties without regard for whether such Claims are presently known or unknown.

(*Id*.; R. ___.) While the Arbitration Agreement provided the Parties with the option of choosing a specific arbitrator for any underlying dispute, the Parties did not exercise this option.

(*Id*. at 3; R. ___.) By not exercising that option, the Parties were effectively permitted to choose any arbitrator proposed in the Arbitration Agreement or as permitted by the FAA. (Pl. Mem. Opp. Mot. Compel, p.8; Def. Mot. Compel, Ex. A, p. 3; R. ___.)

The Arbitration Agreement was signed and executed by Kimberly Haag, on behalf of and with the express agency authority of Mr. Zeigler. (Def. Mot. Dismiss, Ex. A, p. 1, 5; R. ___.) It was also signed and executed by an authorized representative of the Facility, Carlyle Senior Care. (*Id*. at 5; R. ___.) The Arbitration Agreement defined "Facility" as the following:

> **"Facility"** refers to the Facility identified above, and includes the Facility's employees, agents, subcontractors, and parent and affiliated companies (including, but not limited to, Cooke Management Company, Inc.) and their employees and agents.

(*Id*. at 1; R. ___.) Additionally, the Arbitration Agreement, *inter alia*, expressly contemplated and recognized the potential assignment, succession, or purchase of the Facility and expressly provided that the Arbitration Agreement would be binding on and inure to the benefit of such future interest holders:

> This Agreement shall be binding upon and inure to the benefit of the Parties hereto, their respective heirs, personal representatives, successors, purchasers and assigns.

(*Id*. at 5; R. ___.) At the time the Arbitration Agreement was executed, the Appellant Carlyle Senior Care of Fountain Inn, LLC operated the Facility and Appellants Carlyle Senior Care Management Company, Inc.; New Day Health Ventures, LLC; and LARK of Fountain Inn, LLC owned and/or managed the Facility (hereinafter collectively, "Prior Entity Appellants"). (Pl. SA Compl. ¶ 11; Pl. WD Compl. ¶ 11; R. ___.)

However, on March 14, 2023, Appellant Carlyle Senior Care of Fountain Inn, LLC and Appellant Fountain Inn Healthcare, LLC executed a "Management and Operations Transfer Agreement" ("Transfer Agreement"). (Def. Mem. Supp. Mot. Dismiss, Stay, Compel, pp. 2-3;

Def. Mot. Compel, Ex. B; R. ___.) The Transfer Agreement transferred certain management and operations interests in the facility and the rights and obligations of, *inter alia*, any and all "resident agreements." (*Id*.; R. ___.) With that said, on and after March 14, 2023, the Appellants Fountain Inn Healthcare, LLC; Providence Group, Inc.; Providence Administrative Consulting Services, Inc.; PACS Group, Inc.; PACS Holdings, LLC; and 501 Gulliver Property, LLC owned, managed, operated, or were otherwise in some way involved with the Facility (hereinafter "Current Entity Appellants"). (*See Id*. at 5; R. ___.)

III. Procedural Posture

Respondent filed the two underlying civil actions on March 18, 2025. (Pl. SA Compl.; Pl. WD Compl.; R. ___.) The Current Entity Appellants and Prior Entity Appellants (collectively "Appellants") separately filed Motions to Compel Arbitration in each civil action in May 2025 (collectively "Motion to Compel Arbitration"). (Def. SA&WD Mot.'s Compel; Co-Def. SA&WD Mot.'s Compel; R. ___.) The Appellants requested that the trial court grant Appellants' Motion to Compel Arbitration as a primary request for relief. (Def. SA&WD Mem. Supp. Mot. Compel, p.2; Def. SA&WD Mem. Supp. Mot. Compel, p.2; R. ___.) However, the Appellants alternatively and secondarily requested that the trial court grant the Parties jurisdictional discovery into the issue of arbitration and another opportunity to be heard on the underlying Motion to Compel Arbitration in the circumstance that the trial court was not inclined to grant the motion. (6/14/2023 Hr'g Tr., 38:3-11, 42:1-4; R. __.) Each of the motions were supported by memoranda of law by Appellants and Respondents. (Def. SA&WD Mem. Supp. Mot.'s Compel; Co-Def. SA&WD Mem. Supp. Mot.'s Compel; Pl. SA&WD Mem. Opp. Mot.'s Compel; R. ___.) The trial court heard the Appellants' Motion to Compel Arbitration on September 19, 2025. (Orders Den. Mot. Compel; R. ___.)

On September 22, 2025, the trial court issued Form-4 Orders in each civil action denying the Appellants' Motions to Compel Arbitration but permitted the Parties to engage in thirty (30) days of limited jurisdictional discovery and otherwise ordered the following:

> After careful consideration of the arguments of the parties and the material filed, Defendants' Motion to Dismiss, Stay Litigation, and Compel Arbitration is DENIED. The parties shall have 30 days to engage in jurisdictional discovery. At the conclusion of those 30 days, this matter may be reset if deemed appropriate.
>
> It is so Ordered.

(*Id.*; R. ___.) The Appellants filed Motions to Reconsider the trial court's September 22, 2025, Form-4 Order, for which all Parties filed supporting or opposing memoranda of law. (Def. Mot. Recons.; Co-Def. Mot. Recons.; Pl. Mem. Opp. Mot. Recons.; R. ___.) On October 24, 2025, the trial court granted in part and denied in part the Appellants' Motions to Reconsider. (Orders Den. Mot. Recons.; R. ___.) However, the trial court's original September 22, 2025 ruling that denied the Appellants' Motions to Compel Arbitration remained unamended and unaltered:

> Defendants' Motions to Reconsider were filed with this Court on October 2 and October 9, 2025. After careful consideration of the filings of counsel, the Motions to Reconsider are GRANTED in part and DENIED in part.
>
> In the Court's Order dated September 22, 2025, the Court used the term "reset." This term was meant to reflect the Court's intent to allow Defendants to refile their Motion to Compel Arbitration at the conclusion of jurisdictional discovery for a hearing on the merits.
>
> Further, the parties shall have an additional 45 days from the date of this Order to continue engaging in jurisdictional discovery.
>
> It is so Ordered.

(*Id.*; R. ___.) On November 7, 2026, the Current Entity Appellants filed a Notice of Appeal of the trial court's September 22, 2025 orders denying the Appellants' Motions to Dismiss, Stay, and Compel Arbitration and the trial court's October 24, 2025 orders denying the Appellants'

Motions to Reconsider in both civil actions. (11/07/25 Notices of Appeal; R. ___.) The Prior Entity Appellants filed a Notices of Appeal on November 12, 2026, for both trial court orders in each of the underlying civil actions. (11/12/25 Notices of Appeal; R. ___.) On November 12, 2025, the four (4) notices of appeal were consolidated for this Court's consideration. (See S.C. Ct. App. 11/12/25 Multiple Notices Letter; R. ___.)

STANDARD OF REVIEW

The Federal Arbitration Act ("FAA") provides that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Under the Federal Arbitration Act "[t]here is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. This policy…requires courts to enforce the bargain of the parties to arbitrate." *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) (internal citations omitted) (finding it was error for the lower court to refuse to compel arbitration).

A circuit court's determination of whether a claim is subject to arbitration is reviewed *de novo* on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes *de novo* review of the determination of whether an arbitration agreement is enforceable against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). "Under *de novo* review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id*. Issues of law, however, are reviewed without any particular deference to the circuit court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016).

LAW AND ANALYSIS

The FAA applies in state or federal court to any arbitration agreement involving interstate commerce, unless the parties contract otherwise. *Munoz v. Green Tree Fin. Corp*., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). "A party seeking to compel arbitration under the FAA must establish that (1) there is a valid agreement and (2) the claims fall within the scope of the agreement." *Wilson*, 426 S.C. at 326, 336, 827 S.E.2d at 173. As detailed below, the FAA applies to the Arbitration Agreement. The Arbitration Agreement clearly and unmistakably contains a delegation clause, which is validly formed under general state contract principles, and the delegation clause requires that an arbitrator decide any possible remaining issues, such as the Arbitration Agreement's scope and enforceability.

I. The Arbitration Agreement is Governed by the FAA because it Involves Interstate Commerce and the Parties Expressly Agreed the FAA Applies

The FAA applies to the Arbitration Agreement because the Parties agreed that the FAA governed the Arbitration Agreement and otherwise expressly and correctly agreed that the Arbitration Agreement involved interstate commerce. "Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz*, at 538, 542 S.E.2d at 363.

At the top of the first page, in bold, capital, and underlined letters, the Arbitration Agreement sets forth that it was "made pursuant to the Federal Arbitration Act (9 U.S.C. § 1 *et seq*.). The Arbitration Agreement expressly sets forth the following

> **(3) Involvement of Interstate Commerce:** The Facility expressly represents and provides notice to the Resident that the Facility must and will engage in interstate commerce in the course of its relationship with Resident. The Resident is aware of this fact, acknowledges this fact, and explicitly expects that interstate

> commerce will be involved in the course of the relationship between the Parties. The Resident agrees that (s)he could specifically seek residency at a different facility if Resident expected and/or desired to reside in a facility that did not and would not engage in interstate commerce in the course of the relationship between the Parties, which includes, but is not limited to, the provision of care to the Resident. Therefore, it is the express intent and expectation of the Parties that the care provided by the Facility to the Resident will and does involve, implicate, and affect interstate commerce.

Accordingly, Respondent expressly agreed that the Arbitration Agreement executed in connection with Mr. Zeigler's admission and residency at the Facility involved interstate commerce, which triggers the application of the FAA. South Carolina has expressly recognized Arbitration Agreements that are signed in connection with the admission of a resident at a skilled nursing facility are contracts involving interstate commerce and subject to the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (arbitration agreements executed in connection with the admission of a resident at a skilled nursing facility implicate interstate commerce and thus, are governed by the FAA).

The Arbitration Agreement was executed for the admission of Mr. Zeigler at the Facility in conjunction with the Admission Agreement. The Facility is a skilled nursing facility and contracts executed in connection to the Facility and its residents involve interstate commerce. The operation of the Facility involves billing health insurance companies, engaging out of state vendors for services, purchasing supplies, and other activities that implicate interstate commerce. Therefore, the FAA applies to the Arbitration Agreement, which mandates compelling the above-captioned action to arbitration.

II. The Delegation Clause Contained in the Arbitration Agreement is Valid and Binds the Respondent to Arbitrate all Underlying Claims as Alleged against Each and Every Appellant

The trial court should have compelled the dispute to arbitration because the delegation clause within the Arbitration Agreement is valid and otherwise clearly and unmistakenly delegates any remaining, possible issues such as applicability and enforceability to an arbitrator. "Due to the strong South Carolina and federal policy favoring arbitration, arbitration agreements are presumed valid." *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 876 (Ct. App. 2020). The United States Supreme Court has held that parties may delegate the issue of arbitrability and "courts must respect the parties' decision as embodied in the contract" – particularly where, as here, the delegation clause is clear and unmistakable. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 65, 139 S. Ct. 524, 528 (2019).

"The FAA presumes parties intend that the court, rather than an arbitrator, will decide 'gateway' issues related to arbitration, including whether the arbitration agreement is valid and enforceable and whether it covers the parties' dispute." *TCSC, LLC*, at 608, 846 S.E.2d at 877. "The parties may, of course, delegate these gateway issues to an arbitrator as long as there is 'clear and unmistakable' evidence of such delegation." *Id*. If such a delegation occurs, the court retains the right and duty to determine if the delegation is valid and enforceable "as long as the party resisting arbitration has made a direct and discrete challenge to the validity and enforceability of the delegation clause[.]" *Id*.; *see also Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 700, 869 S.E.2d 859, 864 (Ct. App. 2022) ("as long as the parties' agreement delegates the arbitrability question to an arbitrator by clear and unmistakable evidence, a court may not override the contract").

Here, the trial court erred in denying the Appellants' motion to compel arbitration because the Arbitration Agreement contains a valid delegation clause and any and all remaining arguments in opposition to compelling arbitration should have been delegated to an arbitrator. The Arbitration Agreement clearly and unmistakably delegates any issues of the applicability and enforcement of the agreement exclusively to an arbitrator:

> **(a) Intent of the Parties.** The Parties expressly intend that all matters be resolved by arbitration, including, but not limited to, resolving *any questions regarding the applicability and/or enforceability of this Agreement* as well as resolving all Claims, existing presently or in the future, between the parties without regard for whether such Claims are presently known or unknown.

An "agreement to arbitrate a gateway issue" such as the issues of applicability and enforceability through a delegation clause like the one in the Parties' arbitration agreement is "simply an additional, antecedent agreement," and "the FAA operates on this additional arbitration agreement just as it does any other." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70, 130 S. Ct. 2772, 2777-78 (2010). With that said, when the presence of a delegation clause is raised, as it was here, the only question before the trial court is whether the delegation clause is valid.

Here, the trial court erred by not compelling the underlying dispute because the delegation clause was valid and any other issue challenging the arbitration agreement as a whole should have been left to an arbitrator. The delegation clause within the Arbitration Agreement is valid because it was formed by an offer, acceptance, and consideration. "An arbitration agreement, of course, is a contract." *Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 311, 914 S.E.2d 139, 142 (2025). A party seeking to compel arbitration must demonstrate the existence of a valid contract to arbitrate by establishing three elements. *Id*. In South Carolina, "[t]he necessary elements of a contract are an offer, acceptance, and valuable consideration." *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 581 S.E.2d 161 (2003).

A. The Delegation Clause, Included in the Arbitration Agreement, was Supported by a Valid Offer and Valid Consideration

A valid offer and valid consideration exist. An "offer" is the manifestation by one party of their willingness to enter a bargain, made so as to justify another person in understanding that his assent to that bargain is invited. Restatement (Second) of Contracts § 24. The offer identifies its subject, i.e. the bargained-for-exchange, and also creates a power of acceptance in the offeree. Restatement (Second) of Contracts § 29. Finally, "valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. A forbearance to exercise a legal right is valuable consideration." *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (internal citations omitted).

Here, a valid offer exists. The Arbitration Agreement was signed by a "Duly Designated Facility Representative" and agent of Carlyle Senior Care. The signature on the Arbitration Agreement of Appellant Carlyle Senior Care manifests a willingness to bind itself to the terms of the Arbitration Agreement. Next, consideration exists. The mutual agreement to arbitrate is valid consideration. *Lampo*, 445 S.C. at 313, 914 S.E.2d at 144. Therefore, a valid offer and valid consideration exist.

B. The Delegation Clause, Included in the Arbitration Agreement, was Supported by a Valid Acceptance

"Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 369, 593 S.E.2d 170, 173 (Ct. App. 2004). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d

132, 134 (2003). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Id*.

Here, Respondent admitted there was a valid acceptance of the Arbitration Agreement. (Pl. Mem. Opp. SA&WD Mot. Compel pp. 16-17; R. ___.) The Arbitration Agreement was signed on behalf of Mr. Zeigler by his agent and Attorney-in-Fact, Kimberly Haag pursuant to a general durable power of attorney executed and recorded before his admission to the Facility. The Respondent admits "[t]he agreement is not between Kimberly Haag individually and the Facility, only in her capacity as Power of Attorney for her father [Mr. Zeigler]." (*Id*.; R. ___.) The Respondent stated the following in her opposition to Appellants' Motions to Reconsider:

> In the present case, the facts are essentially uncontested. Defendants presented no affidavit of facts to contest anything other than the Arbitration Agreement and Power of Attorney. No one is contesting whether or not a power of attorney existed at the time that the Arbitration Agreement was signed.

(Pl. Mem. Opp. SA&WD Mot. Recons. p. 3; R. ___.) Accordingly, the issue as to whether Kimberly Haag was authorized to sign the Arbitration Agreement as an agent of Mr. Zeigler does not appear to be contested by the Respondent and is not an issue properly before the Court for its review.

Notwithstanding or in waiver of the above, on May 8, 2018, Mr. Zeigler executed a General Durable Power of Attorney ("POA") wherein he appointed his daughter, the Personal Representative Kimberly Haag, as his true and lawful attorney-in-fact with the authority to act in all ways on his behalf. The POA was notarized by a South Carolina notary and was signed by two witnesses. The POA was subsequently recorded in the Greenville County Register of Deeds on May 10, 2018. The POA states the following

> **Section 4.19 Caregiver Agreements**
> My Attorney-in-Fact *may enter into, execute, modify, alter, or amend any contract or agreement* (for example, a Caregiver Agreement or Personal Services Contract) *pertaining to my medical, personal, or general care that I may require at my residence, assisted living facility, nursing facility, or in another's residence on my behalf . . .*

(Def. Mot. Dismiss Pl. WD Compl., Ex. C; R. ___.) (emphasis added). Additionally, the POA expressly grants Kimberly Haag the authority to "arbitrate" disputes on behalf of Mr. Zeigler:

> My Attorney-in-Fact may institute, supervise, prosecute, defend, intervene in, *abandon, compromise, adjust, arbitrate, settle,* dismiss, and appeal from any and all legal, equitable, judicial, or administrative hearings, actions, suits, or proceedings involving me in any way. This authority includes, but is not limited to, claims by or against me arising out of property damage or personal injury suffered by or caused by me or under circumstances such that the resulting loss may be imposed on me. My Attorney-in-Fact may otherwise engage in litigation involving me, my property, or my legal interests, including any property, interest, or person for which or whom I have or may have any responsibility.

(*Id.*; R. ___.) (emphasis added). Kimberly Haag's power to enter into the Arbitration Agreement was expressly authorized by the POA. As a result, Kimberly Haag's execution of the Arbitration Agreement on behalf of Mr. Zeigler constituted a valid acceptance and created a valid and binding contract between Mr. Zeigler and the Facility.

C. A Valid Delegation Clause within the Arbitration Agreement Exists and any Remaining Issues were Clearly and Unmistakably Delegated to an Arbitrator and/or Challenged the Arbitration Agreement Instead of the Delegation Clause

Here, the Court should reverse the trial court's order denying Appellants' Motion to Compel Arbitration because a valid delegation clause within the Arbitration Agreement exists, which is clear and unmistakable. Specifically, the delegation clause is supported by a valid offer and consideration, and the Respondent admitted that Kimberly Haag signed the Arbitration

Agreement as a legal representative with the requisite agency authority to bind Mr. Zeigler. (Pl. Mem. Opp. SA&WD Mot. Compel pp. 16-17; R. ___.)

The delegation clause contained in the Arbitration Agreement leaves all other arguments raised by Respondent in opposition to arbitration to an arbitrator, including the applicability and enforceability of the Arbitration Agreement. When a delegation clause exists, the Court only "retains the right and duty to determine whether the delegation is valid and enforceable as long as the party resisting arbitration has made a direct and discrete challenge to the validity and enforceability of the delegation clause specifically, rather than the arbitration agreement as a whole." *TCSC, LLC*, at 608, 846 S.E.2d at 877 (emphasis added).

First, Respondent argued the Arbitration Agreement was not executed in accordance with certain federal regulations; this argument, even considered true, which it is not, improperly challenges the Arbitration Agreement as a whole and does not separately and exclusively challenge the delegation clause. *See id*. at 609, 846 S.E.2d at 877 (unless a party challenges the "delegation clause itself (rather than the arbitration agreement generally), a court must treat the delegation clause as valid . . . leaving any challenge to the validity of the Agreement as a whole for the arbitrator").

Second, Respondent opposed arbitration on the basis that the Parties did not expressly select from the list of arbitrators included in the agreement; however, this argument does not challenge the isolated delegation clause and thus, is properly left to an arbitrator pursuant to *Prima Paint*. *See id.*

Third, trial court's order erred to the extent that it denied the Motions to Compel Arbitration on the basis that the Current Entity Appellants cannot enforce the Arbitration Agreement because the Arbitration Agreement was executed before they became involved with the Facility by virtue

of the Transfer Agreement; the Respondent argued the Arbitration Agreement is not applicable to these Appellants, and the rights of the Prior Entity Appellants under the Arbitration Agreement were not otherwise assumed by them. Despite the fact that Respondent's Complaint expressly alleges that the Current Entity Appellants "assumed the ownership" and "became successors in interest of the facility,"[1] this argument nevertheless questions the applicability and enforceability of the Arbitration Agreement, which was specifically delegated to the arbitrator. Additionally, it is a challenge to the Arbitration Agreement as a whole and does not exclusively challenge the delegation clause. South Carolina Courts have consistently left this specific argument to an arbitrator. *See, e.g, Sanders*, 440 S.C. 377, 380, 892 S.E.2d 112, 113 (2023) ("*Prima Paint* requires the arbitrator to decide whether [p]etitioners retained the right to compel arbitration after assignment.").

Fourth, the trial court's order erred to the extent that it denied the Motions to COmepl Arbitration on the basis that the Arbitration Agreement is not enforceable as to the wrongful death claims, which Respondent erroneously alleged are distinct claims that do not apply or fall within the scope of the Arbitration Agreement. Respondent specifically argued the "scope of the agreement does not include the statutory beneficiaries' claims."[2] In doing so, Respondent seems to agree this argument is one of applicability and enforceability, which was delegated to an arbitrator. Additionally, this argument is one that challenges the Arbitration Agreement as a whole instead of the delegation clause specifically. *Rent-A-Ctr.*, 561 U.S. at 72, 130 S. Ct. at 2779 (unless [respondent] challenged the delegation provision specifically, we must treat it as valid . . . leaving any specific challenge to the validity of the Agreement as a whole for the arbitrator.").

[1] (Pl. SA Compl. ¶ 11; Pl. WD Compl. ¶ 11; R. ___.)
[2] (Pl. Mem. Opp. Mot. Compel, p. 17; R. ___.)

III. Notwithstanding and Without Waiver to the Above, Should the Court Decide to Rule on Any of those Remaining Arguments, the Trial Court's Order Should Still be Reversed

A. The Trial Court's Order is Erroneous because the Regulations Cited by Respondent Specifically do not Invalidate Arbitration Agreements

In agreement with the expressed intent of § 483.70(n)'s drafters, the Eighth Circuit Court of Appeals specifically held that 42 C.F.R. § 483.70(n) "does not invalidate or render unenforceable any arbitration agreement." *See Northport Health Servs. of Arkansas, LLC v. U.S. Dep't of Health & Hum. Servs*., 14 F.4th 856, 868 (8th Cir. 2021) (citing 84 Fed. Reg. at 34,718-32 ("This final rule does not purport to regulate the enforcement of any arbitration agreement . . . CMS does not have the power to annul valid contracts . . . This rule in no way would prohibit two willing and informed parties from entering voluntarily into an arbitration agreement."). Instead, 42 C.F.R. § 483.70(n) "establishes the conditions for receipt of federal funding through the Medicare and Medicaid programs" and is only enforced "through a combination of administrative remedies, including denial of payment and civil monetary penalties." *Id*. (citing 42 C.F.R. § 488.406; 84 Fed. Reg. at 34,733).

In *Northport*, the Eight Circuit Court of Appeals affirmed the district court's holding that 42 C.F.R. § 483.70(n) was enforceable and not in conflict with the FAA because it did not single out arbitration agreements governed by the FAA. *Id*. at 867. In that case, a group of skilled nursing facilities challenged 42 C.F.R § 483.70(n) on the basis that the Centers for Medicare & Medicaid Services ("CMS") exceeded their rulemaking authority. *See id*. at 863-64. In holding that § 483.70(n) was valid and enforceable, the court of appeals reasoned the rule did not single out arbitration agreements because in the rulemaking process, CMS specifically provided that it could not be used to annul valid contracts or regulate the enforcement of an arbitration agreement. *Id*. at 868. The Eighth Circuit Court of Appeals therefore held that § 483.70(n) "does not, *in words or*

effect, render arbitration agreements entered into in violation thereof invalid or unenforceable." *Id*. at 869 (emphasis added).

"So, for example, if [skilled nursing] facility entered into an arbitration agreement with a resident without complying with [§ 483.70(n)] by requiring the resident to sign as a condition of admission to the facility, . . . the arbitration agreement would nonetheless be enforceable, absent a showing of 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Id*. at 868 (citing 9 U.S.C. § 2; 42 C.F.R 483.70(n)(1); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 1745 (2011)).

Even assuming, *in arguendo*, the issue of § 483.70(n) was not delegated by the Parties to an arbitrator, the trial court additionally erred in finding that the § 483.70(n) was capable of invalidating the Arbitration Agreement. Moreover, the FAA prohibits an arbitration agreement from being invalidated by defenses that "only apply to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740. Similar to the court in *Northport*, the court here should find that § 483(n) does not, in words or effect, render the Arbitration Agreement unenforceable. Respectfully, the trial court's order is erroneous to the extent that it ruled the Arbitration Agreement was invalidated by § 483.70(n) because that application of § 483.70(n) would apply only to and single out arbitration, which is improper and impermissible according to the plain language of the FAA.

B. The Trial Court's Order is Erroneous because the Selection of an Arbitrator was Never Agreed on and is Therefore not a Material Term

The trial court's order is erroneous to the extent it ruled that the Arbitration Agreement is unenforceable because the Parties did not explicitly agree to an Arbitrator and was otherwise not an integral term. "[A]rbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law." *Grant v. Magnolia*

Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) (citing *Munoz*, at 538, 542 S.E.2d at 364). "The parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate." *Id*. (internal citation omitted). "In order to have a valid and *enforceable contract*, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract." *Id*. (internal citation omitted) (emphasis added).[3]

Similar to the issue here, the South Carolina Court of Appeals in *York* held that "the lack of a specified arbiter is not an omission of a material term" and affirmed compelling arbitration. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 82, 749 S.E.2d 139, 146-67 (Ct. App. 2013). In that case, the arbitration agreement did not specify an arbitrator or how an arbitrator is chosen. *Id*. The Court reasoned that the FAA specifically provides a method of the selection of an arbitrator when an arbitrator is not specifically agreed to in the agreement itself. *Id*. (citing 9 U.S.C. § 5).

The Court distinguished the facts of that case from the facts of *Grant v. Magnolia Manor-Greenwood, Inc.* because *Grant* involved an arbitration agreement wherein the parties specifically agreed to one arbitrator who no longer was able to facilitate the arbitration at issue in that case. *Id*. The court further reasoned the parties in *York* never agreed to a specific arbitrator and the term was omitted from the arbitration agreement at issue. *Id*. Therefore, the Court, in affirming the trial court's decision to compel arbitration, held that an arbitration agreement did not lack a meeting of the minds because the failure of the parties to select an arbitrator in an arbitration agreement does not constitute a lack of an integral term. *See id*. at 97, 749 S.E.2d at 153.

In *Grant*, the Supreme Court of South Carolina held the selection of an arbitrator is only an integral term to an arbitration agreement in the narrow circumstance that the parties specifically and exclusively agree to one arbitrator who can no longer arbitrate the facts of an underlying

[3] Enforceability was expressly delegated to the arbitrator.

dispute. 383 S.C. at 131-32, 678 S.E.2d at 438-39. In that case, a nursing home and an admitted resident expressly agreed in an arbitration agreement that one (1) arbitrator would arbitrate any underlying dispute. *Id*. at 128, 678 S.E.2d at 437. Approximately, one month after the execution of that agreement, the one (1) arbitrator the parties specifically agreed to use amended its rules to prohibit it from arbitrating healthcare claims. *Id*. The Court reasoned that "[o]nly if the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern will the failure of the chosen forum preclude arbitration." *Id*. at 131-32, 678 S.E.2d at 438-39 (internal citations omitted). In other words, the Court reasoned that the selection of an arbitrator is only integral to the agreement when "a specifically designated arbitrator becomes unavailable," which renders 9 U.S.C. § 5 inapplicable. *Id*.

Here, the trial court erred in denying Appellants' motions to compel arbitration because the Arbitration Agreement does not require the parties to arbitrate an underlying claim before a specific arbitrator who is now unavailable. In the present case, the Parties did not specifically agree to any arbitrator proposed in the Arbitration Agreement. Similar to the arbitration agreement used that warranted compelling arbitration in *York*, the Arbitration Agreement here did not lack any meeting of the minds or integral term. The Arbitration Agreement does not include a provision where the parties agreed to a specific arbitrator. Moreover, the exception set forth in *Grant* does not apply in this case because the Parties here never expressly agreed to one specific arbitrator, nor did they agree to one specific arbitrator who is now unavailable.

While the Arbitration Agreement may have proposed arbitrators for the Parties' mutual agreement, no party to the agreement wrote in or otherwise indicated a specific arbitrator to arbitrate an underlying dispute, and any such agreement is effectively omitted from the Arbitration Agreement. The Arbitration Agreement does not otherwise indicate or suggest in any way that a

specific arbitrator is required for any underlying dispute. Accordingly, the failure of the parties to agree to any proposed arbitrator cannot constitute the lack of an integral term. Instead, 9 U.S.C. § 5 operates to designate the process by which the parties select a particular arbitrator for the underlying dispute. Therefore, even if the Court were to rule on this issue delegated to an arbitrator, it should find that the Arbitration Agreement does not lack meeting of the minds because the Arbitration Agreement did not specifically require one (1) arbitrator who is now unavailable and does not lack any integral term or meeting of the minds.

C. All the Appellants Have the Right to Bind Respondent to Arbitration and Enforce the Arbitration Agreement

The trial court erred to the extent that it ruled that the Arbitration Agreement does not apply to the Current Entity Appellants because their interests and involvement in the Facility did not arise until after the Arbitration Agreement's execution. "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation [that] would cover the asserted dispute." *Bennett v. ACS Primary Care Physicians-Se. P.C.*, 444 S.C. 458, 480, 908 S.E.2d 110, 121 (Ct. App. 2024). "[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Zabinski*, at 597, 553 S.E.2d at 118. "[C]ourts must rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes." *Cape Romain Contractors, Inc.*, 405 S.C. at 125, 747 S.E.2d at 466 (internal citations omitted) (emphasis added by court).

At the outset, the Arbitration Agreement specifically states that "[t]his Agreement shall be binding upon and inure to the benefit of the Parties hereto, their respective heirs, personal representatives, *successors*, *purchasers*, and assigns." (Def. Mot. Compel, Ex. A, p. 5; R. ___.)

Next, the Respondent's Complaints specifically allege and admit that the Current Entity Appellants "*purchased*" and "became *successors* in interest of the Facility." (Pl. SA Compl. ¶ 11; Pl. WD Compl. ¶ 11; R. ___.) (emphasis added). Taking Paragraph 11 of the Respondent's pleadings as true and applying it to the plain language of the Arbitration Agreement, there should be no dispute as to the Current Entity Appellants' right to enforce the Arbitration Agreement.

Nevertheless, on March 14, 2023, the Transfer Agreement transferred certain management and operations interests in the facility from Appellant Carlyle Senior Care of Fountain Inn, LLC to Appellant Fountain Inn Healthcare, LLC. With that said, and even if the Court reaches this delegated issue of enforceability, the Arbitration Agreement is nevertheless enforceable by all the Appellants who are successors, purchasers, assigns, and affiliates as expressly included in the Arbitration Agreement.

Here, all the Parties to this appeal have the right and benefit of enforcing the Arbitration Agreement. The Facility is a signatory to the Arbitration Agreement, which expressly defines Facility as "the Facility identified above [Carlyle Senior Care] and includes the Facility's employees, agents, subcontractors, and parent and affiliated companies . . . and their employees and agents." Additionally, the Arbitration Agreement specifically states that "[t]his Agreement shall be binding upon and inure to the benefit of the Parties hereto, their respective heirs, personal representatives, successors, purchasers, and assigns."

Accordingly, the terms of the Arbitration Agreement, as read, understood, and signed by the Respondent, is "binding upon and inure[s] to the benefit of" every single Appellant in this action. The Prior Entity Appellants are capable of enforcing the Arbitration Agreement. The signatory to the Arbitration Agreement is Appellant Carlyle Senior Care. The remaining Prior

Entity Appellants are Carlyle Senior Care of Fountain Inn, LLC's "employees, agents, . . . and parent and affiliated companies" as defined and expressly included in the Arbitration Agreement.

The Current Entity Appellants are capable of enforcing the Arbitration Agreement, in conjunction with those other Appellants, because they too were expressly included in the Arbitration Agreement. The Current Entity Appellants are "purchasers" "successors" and "assigns" of signatory Carlyle Senior Care's interest in the Facility. Appellant Fountain Inn Healthcare, LLC purchased, was assigned, and otherwise succeeded the interest of Carlyle Senior Care of Fountain Inn, LLC as of the date of the Transfer Agreement's execution. In other words, for purposes of any disputes pertaining to the Arbitration Agreement and occurring on or after the date of the Transfer Agreement's execution, March 14, 2023, Respondent agreed the Arbitration Agreement "shall be binding upon and inure to the benefit of" the Current Entity Appellants. Therefore, should the Court even reach this delegated question of enforceability, it should nevertheless find that the Arbitration Agreement is enforceable by all Appellants because the Arbitration Agreement's terms expressly include them all and "courts must rigorously enforce . . . terms that specify *with whom* the parties choose to arbitrate their disputes." *Cape Romain Contractors, Inc.*, at 125, 747 S.E.2d at 466 (emphasis added by Court).[4]

[4] To the extent that the Court may find that any party does not fall within the express language of the Arbitration Agreement, such party is otherwise able to enforce the Arbitration Agreement through general common law principals for contract enforcement. *See GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 437 (2020) (The United States Supreme Court has "recognized that arbitration agreements may be enforced by nonsignatories through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, and estoppel.")

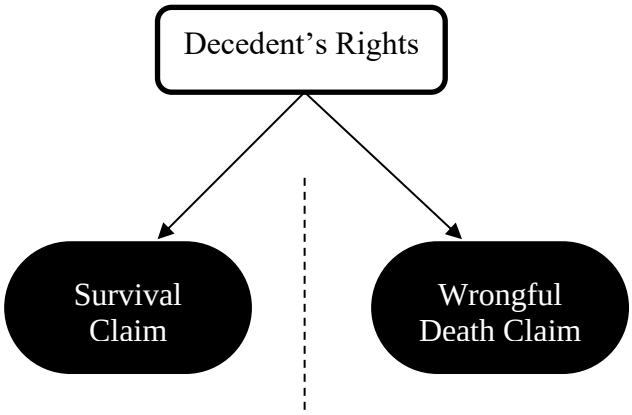
D. The Trial Court's Order Erred in Ruling as to the Applicability of the Arbitration Agreement to the Respondent's Wrongful Death Cause of Action, which was otherwise Delegated to an Arbitrator

At the outset, it is important to note that the issue of whether the Arbitration Agreement is enforceable against a claimant in a wrongful death cause of action was delegated to Arbitrator by the express terms of the Arbitration Agreement. Notwithstanding and without waiver to the delegation clause, even if the Court were to consider this issue it should find that the trial court's order erred to the extent that it denied arbitration on that basis.

The wrongful death statute, S.C. Code Ann. § 15-51-10, creates a cause of action for certain beneficiaries only if and to the extent that the decedent could have maintained an action for the injuries had he or she lived. The statute provides that a defendant "who would have been liable, if death had not ensued, shall be liable" in damages for the death, but only if the defendant's wrongful act or neglect was such that it "would, if death had not ensued, have entitled the party injured to maintain an action and recover damages…" *Id*.; *See also Farmer v. Monsanto Corp*., 353 S.C. 553, 558, 579 S.E.2d 325, 328 (2003) (holding "[i]n a wrongful death action, the representative plaintiff's capacity is derived from the decedent's"). In South Carolina, a wrongful death action does not exist independently of the decedent's rights; rather, it is derivative of the decedent's own cause of action.

South Carolina courts have consistently interpreted this language to mean that the right of a decedent's statutory beneficiaries to recover in wrongful death is entirely contingent upon and equivalent to the decedent's right to recover for the same wrongful act. *See Est. of Stokes ex rel. Spell v. Pee Dee Fam. Physicians, L.L.P.*, 389 S.C. 343, 347, 699 S.E.2d 143, 145 (2010) (holding that a wrongful death action lies only in "those cases in which the party injured would have been entitled to recover if death had not ensued"). This Court recently described the principle:

"[a]lthough a wrongful death claim is for the benefit of the decedent's family, South Carolina treats this claim as **derivative** of the decedent's own personal claim during his lifetime." *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 667, 869 S.E.2d 819, 851 (Ct. App. 2021), *aff'd sub nom. Jolly v. Fisher Controls Int'l, LLC*, 443 S.C. 511, 905 S.E.2d 380 (2024) (emphasis added).



An agreement to arbitrate claims is just as binding on the decedent, and those individuals standing in the shoes of the decedent, as is any other contract. By Kimberly Haag signing the arbitration agreement on Mr. Zeigler's behalf, Mr. Zeigler did not forfeit his future claim, but he did agree to bring that claim in a specific forum.

Respondent agreed that any covered claim would be resolved in the arbitral forum rather than in a civil suit. Because Mr. Zeigler promised to arbitrate his claims and could not, were he alive, maintain a civil action for his injuries, then, under South Carolina's wrongful death statute and the law interpreting the same, his personal representative cannot bring the same action. *See* S.C. Code Ann. § 15-51-10; *see also Est. of Stokes ex rel. Spell v. Pee Dee Fam. Physicians, L.L.P.*, 389 S.C. 343, 348, 699 S.E.2d 143, 146 (2010) (holding "[t]he right to bring a wrongful death claim is thus conditioned upon the decedent's right to maintain a claim or action."). Here, the condition precedent to a wrongful death suit, i.e. that the Decedent "could have maintained an

action for the injury had [he] survived," is absent because Decedent previously agreed to bring these claims in arbitration. Stated differently, Decedent's agreement to arbitrate gives rise to a defense for Appellants because the action filed by Respondent is not one that "the deceased…could have maintained." *Id.* at 347 (internal citations omitted).

Expanding on the derivative principle, South Carolina law is clear that wrongful death claims belong to the personal representative of the estate, not the beneficiaries individually. *See* S.C. Code Ann. § 15-51-20 and *Fisher on behalf of estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 240, 811 S.E.2d 739, 742 (2018) (concluding that only a personal representative has standing to sue for wrongful death). Kimberly Haag brought suit individually and as personal representative of the estate of Mr. Zeigler. In bringing that wrongful death claim, she acts on behalf of potential wrongful death beneficiaries, but she still brought the action "as Personal Representative of the Estate." As such, she is bound by the prior acts of Mr. Zeigler, including the execution of the Arbitration Agreement that she took part in as Mr. Zeigler's Attorney-in-Fact with express agency authority.

The Personal Representative, standing in Decedent's shoes, cannot selectively avoid the Arbitration Agreement entered by Decedent when that Agreement bound Decedent himself. Because the only person entitled to bring an action for wrongful death under South Carolina law is the personal representative of the decedent's estate, they are bound by decedent's prior agreements just like the decedent would be, were they alive. *See* S.C. Code Ann. § 15-51-20 and *Fisher*, 422 S.C. at 240, 811 S.E.2d at 742. Therefore, even if this issue was not delegated to an arbitrator, *in arguendo*, the trial court erred to the extent that it ruled the Arbitration Agreement did not apply to both the Respondent's survival and wrongful death action.

IV. The Trial Court Erred by Denying the Appellants' Motion to Compel Arbitration Before the Close of Jurisdictional Discovery on the Issue of Arbitration and a Trial on the Merits

In the underlying Motions to Compel Arbitration, Appellants alternatively requested the trial court to permit the Parties to conduct jurisdictional discovery on the issue of arbitration and continue the hearing to a date after the end of jurisdictional discovery for a trial on the issue of arbitration.[5] Instead, the trial court erroneously denied Appellants' Motion to Compel Arbitration and permitted jurisdictional discovery and the opportunity for Appellants to refile their Motion to Dismiss, Stay Litigation and Discovery, and Compel Arbitration at a later date. In other words, the trial court denied the Appellants' motion to compel arbitration before making a "full inquiry" into the issue of arbitration. *See Dean v. Heritage Healthcare of Ridgeway, LLC,* 408 S.C. 371, 388, 759 S.E.2d 727, 736 (2014) (requiring that the court make a full inquiry into the process of contractual formation prior to determining arbitrability).

Moreover, the unappealed denial of a motion to compel arbitration becomes the law of the case and without exercising a right to appeal such an order, any specific issues raised in the unappealed motion would be unreviewable in a subsequently raised, new motion. *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571, 776 S.E.2d 397, 403 (Ct. App. 2015) (affirming an out-of-state court's dismissal of a subsequently filed motion to compel arbitration, which was based on the

[5] When a party opposing arbitration on the basis that the arbitration agreement is invalid, the non-moving party cannot make a "full inquiry" into the issue before any hearing on a motion to compel arbitration without the trial court's order allowing limited discovery as to the validity of the arbitration agreement. Without an order, the non-moving party risks losing her right to arbitration on the basis of waiver. *See Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999) ("There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case."); *see also, e.g., Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 381, 892 S.E.2d 112, 114 (2023) ("The circuit court ordered . . . [Defendant] would waive its right to arbitration by responding to discovery.").

conclusion that "this court's opinion in *Flexon I* [regarding the issue of arbitration raised in a previous motion] was the law of the case.").

The Federal Arbitration Act provides "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition" the court for an order enforcing the arbitration agreement. 9 U.S.C. § 4. Furthermore, "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." *Id*. The Fourth Circuit has explained that, when the party resisting arbitration challenges "the existence of an agreement to arbitrate," the court should initially apply a standard "akin to . . . summary judgment." *Chorley Enters., Inc. v. Dickey's Barbecue Rests., Inc.*, 807 F.3d 553, 564 (4th Cir. 2015).

The party opposing arbitration thus "may not rest upon the mere allegations or denials of her pleading but must instead, by affidavit or other evidentiary showing, set out specific facts." *Roach v. Navient Sols., Inc.*, 165 F. Supp. 3d 343, 348 (D. Md. 2015); *see Tinder v. Pinkerton Sec.*, 305 F.3d 728, 735 (7th Cir. 2002) (similar). "If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary." *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003). The Fourth Circuit Court of Appeals has set forth that, when a motion to compel arbitration "presents unresolved questions of material fact, the FAA 'call[s] for an expeditious and summary hearing' to resolve those questions." *Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707, 713 (4th Cir. 2015) (internal citations omitted) (alteration in original).

In the present case, the trial court erred by denying the Appellants' Motion to Compel Arbitration instead of continuing it for a hearing or trial on the merits after the close of jurisdictional discovery as to the issue of arbitration. Appellants requested the trial court grant jurisdictional discovery in order to conduct a full inquiry into the arguments raised by the

Respondent in order to protect themselves from any risk to waiving their right to arbitration. Despite granting Appellants' request for jurisdictional discovery, the trial court erroneously denied the Motions to Compel Arbitration and required the Appellants to file new motions to compel arbitration after jurisdictional discovery ended. In doing so, the trial court's denial of the motion to compel arbitration ruled on the merits of arbitration and generally established the law of the case as to the issue of arbitration. Moreover, a subsequent motion to compel arbitration involving the same arguments made in the underlying motion would be barred by the law of the case doctrine.

Additionally, the trial court's decision to grant jurisdictional discovery into the issue of arbitration but at the same time deny the pending motions to compel arbitration is in conflict with the express language of the FAA. *See Dillon*, 787 F.3d at 713 ("the one thing the district court may never do is find a material dispute of fact does exist" and then deny the motion without holding "any trial to resolve that dispute of fact."). The trial court's ruling to grant jurisdictional discovery is inherently based on the fact that there is a genuine dispute of fact or that the Appellants had not had the opportunity to make a "full inquiry" into the Respondent's arguments opposing arbitration. Therefore, to the extent the Court is not inclined to reverse the trial court's order on the basis that the motions to compel should have been granted, Appellants respectfully request that the Court reverse the trial court's order on the basis that the trial court's decision to grant or deny the underlying motions to compel arbitration should have been continued to a date after the close of jurisdictional discovery.

CONCLUSION

For these reasons, Appellants respectfully request that the decision of the circuit court be reversed, and that an order be entered compelling arbitration of all Respondent's claims in the underlying actions in accordance with the valid delegation clause contained in the Arbitration Agreement and the FAA. In the alternative, the Appellants respectfully request that the decision of the circuit court be reversed, and that an order be entered requiring the trial court to proceed to a trial as to the issue of arbitration pursuant to 9 U.S.C. § 4.

Respectfully submitted this 6th day of February, 2026.

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