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SC Court of Appeals

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

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

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.

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COUNTERSTATEMENT OF THE ISSUES ON APPEAL

1. Whether the circuit court correctly addressed Daughter's challenges to the Arbitration Agreement's formation rather than interpreting its delegation clause to transfer those issues to an arbitrator.
2. Whether a purported arbitration contract's exclusive arbitral forum provision is a material and integral term the failure of which dooms the entire purported contract.
3. Whether the Providence Appellants formed an arbitration contract with Daughter as assignees of a contract containing an express anti-assignment provision.
4. Whether Appellants' violation of federal regulations designed to protect nursing home residents renders the purported Arbitration Agreement illegal.
5. Whether the circuit court erred in finding the Arbitration Agreement binds Mr. Zeigler's uconsenting beneficiaries identified by statute to recover under South Carolina's distinct, independent wrongful death claim.
6. Whether Appellants may challenge an interlocutory discovery order and the sufficiency of the circuit court's evidentiary hearing on their motions to compel arbitration.

STATEMENT OF THE CASE

Kimberly Haag ("Daughter"), appointed as personal representative of the Estate of her father Raymond Zeigler, filed two civil actions in the Greenville County Court of Common Pleas on March 18, 2025. (R. p. 15 ¶ 1). The Complaints alleged negligence-based claims against ten total defendants. Daughter's first action (Civil Action No. 2025CP2301757) was based on the survival statute for losses Mr. Zeigler suffered before his death, and the second (Civil Action No. 2025CP2301759) was filed under South Carolina's wrongful death statute for damages suffered by his statutory beneficiaries.

One of those Defendants, Appellant Carlyle Senior Care of Fountain Inn, LLC ("Old Owner") was the direct entity operating the skilled nursing facility at which Mr. Zeigler was a

resident when the alleged misconduct began.¹ Also named as Defendants were several entities with which Old Owner claims a legal connection—Appellants Carlyle Senior Care Management Company, Inc., New Day Health Ventures, LLC, and LARK of Fountain Inn, LLC. These four entities, which have pled and proceeded together in this appeal, will be collectively referred to as the “Carlyle Appellants.” The Facility came under new leadership in March 2023, most directly in the form of Appellant Fountain Inn Healthcare, LLC (“New Owner”). Entities with which New Owner claims a legal connection—Appellants Providence Group, Inc., Providence Administrative Consulting Services, Inc., PACS Group, Inc., PACS Holdings, LLC, and 501 Gulliver Property, LLC were also named as defendants. New Owner and these 5 entities will be collectively referred to as the “Providence Appellants.”

The Providence Appellants responded to the Complaints with a motion to dismiss, stay litigation and discovery, and to compel arbitration on May 9, 2025. (R. pp. 166-68). The Carlyle Appellants answered and filed a separate motion to compel arbitration five days later (May 14, 2025). (R. pp. 53-118, 310-15). Daughter filed an opposition memo and supporting affidavit on September 17, 2025. (R. pp. 482-519). Circuit Court Judge William C. McMaster, III held a hearing on September 19, 2025, and entered a Form 4 order on September 22, 2025, denying Appellants’ motions and allowing the parties 30 days to engage in jurisdictional discovery (R. pp. 1-6).

The Carlyle Appellants and Providence Appellants each filed motions to reconsider on October 2, 2025 (R. pp. 1412-31), which were substantively denied on October 24, 2025. (R. pp. 7-13). The circuit court’s Form 4 order clarified that the court intended to permit Appellants to

¹ That location, known as “Carlyle Senior Care of Fountain Inn” when Mr. Zeigler was admitted and renamed as “Fountain Inn Post-Acute” following a change in ownership, will be referred to as “Facility” below.

refile their motions at the end of the jurisdictional discovery period. (R. pp. 8, 11). The Providence Appellants filed a Notice of Appeal on November 7, 2025, and the Carlyle Appellants followed with their own notice on November 12, 2025. (R. pp. 1486-1517)

STATEMENT OF THE FACTS

This case alleges Mr. Zeigler's untimely death was caused by a series of preventable falls, infections, and other products of individual and institutional neglect while he was a Facility resident in 2023. (R. pp. 22-25 ¶¶ 12-25). Mr. Zeigler was first admitted to the Facility on March 3, 2022 for long-term care. (R. p. 521 ¶ 3). Over the following several months, Mr. Zeigler was transferred to the hospital multiple times and later returned to the Facility. (R. p. 522 ¶ 4). On one such occasion (December 22, 2022), Daughter was presented with a stack of documents to sign on Mr. Zeigler's behalf in connection with his readmission. (R. p. 522 ¶ 5). A Facility employee simply placed the stack in front of Daughter with the signature blocks highlighted in yellow. Daughter was given no explanation of the documents' terms but was told they all must be signed before Mr. Zeigler could get the care he needed. (R. pp. 522 ¶¶ 5-7).

Among the documents was an "Admission Agreement," a form contract of adhesion offered by Old Owner. The Admission Agreement included an explicit anti-assignment provision. (R. p. 420) ("no party to the Agreement may assign his/her rights or responsibilities under the Agreement"). On its final page, the Admission Agreement stated that the "Agreement" referred to throughout the document "includes all documents signed by the Resident at the time of admission." (R. p. 421). The stack also included a five-page document titled "Mediation and Binding Arbitration Agreement" ("Arbitration Agreement") signed by Daughter that same day on a line labeled "Resident's Responsible Party." (R. p. 453). The Arbitration Agreement included a provision stating that any arbitration proceedings "shall be administered by" either an entity known

as “Carolina Dispute Settlement Services,” the National Arbitration Forum,” or a “mutually agreeable” alternative entity so long as it was identified in writing when the Arbitration Agreement was signed. (R. p. 451). No selection was made among the exclusive arbitrator options presented. Id.

The incidents alleged in Daughter’s complaint began with Mr. Zeigler’s serious fall on February 3, 2023, and continued until his death on June 7, 2023. (R. p. 851). During that same time period, the Facility underwent a leadership transition. On March 13, 2023, Old Owner and New Owner entered a “Management and Operations Transfer Agreement” (“Transfer Agreement”) through which New Owner undertook “operational and financial responsibilities” for the Facility. (R. p. 244). Transfer Agreement section 15 called for New Owner to assume various Facility-related contracts but also acknowledged “certain of the Assumed Contracts may not, by their terms, be assignable” and “none of such non-assignable Assumed Contracts shall be deemed assigned to or assumed by New [Owner]” unless consent to assignment was obtained. (R. p. 266).

For the reasons discussed below, the circuit court correctly refused to compel arbitration because the Arbitration Agreement was never a properly formed contract between Daughter/Mr. Zeigler and any of the Appellants.

STANDARD OF REVIEW

Appellate courts apply a *de novo* review to a circuit court’s finding on whether a nonsignatory is bound to an arbitration contract. Wilson v. Willis, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) (citing Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) and Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012)). However, under a *de novo* review, the circuit court’s factual findings will not be reversed so long as “any evidence reasonably supports those findings.” Wilson, 426 S.C. at 335, 827 S.E.2d

at 172. “There is . . . no public policy—federal or state—‘favoring’ arbitration.” Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021); see also Lampo v. Amedisys Holding, Inc., 445 S.C. 305, 317, 914 S.E.2d 139, 146 (2025) (“remind[ing] our litigants and lower courts that we dispensed with this incorrect notion” of a pro-arbitration policy in Palmetto Construction Group) In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory. Wilson, 426 S.C. at 335, 827 S.E.2d at 172.

ARGUMENT

1. The Arbitration Agreement’s delegation clause did not prevent the circuit court from addressing Daughter’s contract formation arguments.

The Providence Appellants begin their brief challenging the circuit court ruling’s structure rather than its substance. While Daughter contests the very notion that she or Mr. Zeigler ever formed an arbitration contract with any Appellant, the Providence Appellants point to a provision of the contested Arbitration Agreement to conclude Daughter can only make that argument to an arbitrator. (Providence App. Br. at 13-20). Appellants insist U.S. Supreme Court precedent demands such a curious result. Id.; Carlyle App. Br. at 17-18. But, Appellants misread that precedent and overlook an important recent holding from the South Carolina Supreme Court. What these cases actually show is what common sense dictates: a party challenging the very existence of an arbitration contract cannot have her right to litigate that dispute removed by a provision within the same dubious contract.

Arbitration, the shift of a legal dispute from a judicial to less formal setting, arises by contractual agreement. When an initial challenge is posed to that agreement, questions arise as to whether a court or arbitrator is the proper decision maker to resolve it. The general rule is that these are matters for a court to address. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553

S.E.2d 110, 118 (2001); Doctor's Assocs., Inc. v. Alemayehu, 934 F.3d 245, 250-51 (2d Cir. 2019). However, courts recognize parties may alter this general rule in their contract. Using a so-called “delegation clause,” parties may confer to arbitration not just the substantive aspects of their business duties but also certain disputes regarding the contract embodying those duties. Doe v. TCSC, LLC, 430 S.C. 602, 607, 846 S.E.2d 874, 876 (Ct. App. 2020). Here, Appellants point to an Arbitration Agreement provision purporting to require arbitration for “any questions regarding the applicability and/or enforceability of this Agreement.” (Providence App. Br. at 14; Carlyle App. Br. at 18) (quoting Arb. Agr. at 2 § II(a)). Appellants then argue a combination of that contract language and U.S. Supreme Court precedent means the circuit court was required to simply grant their motions and leave all of Daughter’s Arbitration Agreement challenges to an arbitrator. Id. (citing Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 68 (2010); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)).

Appellants misread the precedent as the Supreme Court has never held or hinted that a delegation clause could force arbitration on the type of challenges Daughter raises here. Prima Paint interpreted the Federal Arbitration Act’s (“FAA”) rules governing a hearing on a party’s request to send litigation to arbitration. 9 U.S.C. § 4. Section 4 calls for a trial court to order arbitration “upon being satisfied that the making of the agreement for arbitration . . . is not in issue.” By limiting the judicial role to considering the making of “the agreement for arbitration,” Prima Paint concluded the FAA did not allow courts to address challenges to the validity of the larger agreement (or “container contract”) in which an arbitration provision may be located. 388 U.S. at 403-04. Thus, what has become known as the Prima Paint doctrine is a “severability rule,” requiring courts to separate challenges to the validity of an arbitration provision from those targeting the validity of the container contract more broadly. Buckeye Check Cashing, Inc. v.

Cardegna, 546 U.S. 440, 444 (2006). Courts address only the first category. Rent-A-Center expanded on the Prima Paint doctrine by applying it to an arbitration contract containing a delegation provision—meaning that discrete challenges to a delegation clause may be decided by a court but a challenge to the validity of the arbitration agreement more broadly must be resolved by an arbitrator. Rent-A-Center, 561 U.S. at 72.

That is where Appellants leave the analysis. Citing Prima Paint and Rent-A-Center, they go through Daughter’s challenges to the Arbitration Agreement argument-by-argument, labeling each one as a challenge to the container contract rather than the delegation clause specifically, and concluding each must be decided by an arbitrator. (Providence App. Br. at 17-19). In so doing, Appellants miss a crucial piece of the analytical framework. The Prima Paint doctrine has never covered every type of arbitration challenge a party like Daughter could raise. Johnson v. Continental Fin. Co., LLC, 131 F.4th 169, 177 (4th Cir. 2025) (noting Prima Paint did not “address[] contract formation”). Prima Paint only addressed challenges to a contract’s “validity” which is “different from the issue whether any agreement between the parties was ever concluded.” Rent-A-Center, 561 U.S. at 70 n. 2; Buckeye Check Cashing, Inc., 546 U.S. at 444 n. 1 (“validity” is different than “the issue of whether any agreement” was ever formed).

Thus, as South Carolina appellate courts have recognized, Appellants’ approach omits a crucial third type of arbitration challenge. In addition to challenges to the validity of a delegation clause and challenges to the validity of its container contract, there are also challenges to the *formation* of any contract between the proposed parties. The South Carolina Supreme Court recently made this important distinction after reviewing Prima Paint and its progeny. Sanders v. Savannah Hwy. Auto. Co., 440 S.C. 377, 892 S.E.2d 112 (2023) (citing In re Morgan Stanley & Co., 293 S.W.3d 182, 187 (Tex. 2009) (recognizing “a third discrete category to the Prima Paint

analysis . . . a challenge to whether any agreement was ever concluded”). So, when placed in its proper context, the Prima Paint severability rule targets issues related to a contract’s “validity,” not contract formation challenges.

Sanders is unequivocal in holding that contract formation challenges must always be resolved by a court—regardless of the text of a delegation provision. 440 S.C. at 388, 892 S.E.2d at 118 (“the court is always the proper body to determine whether the parties agreed to arbitrate in the first instance” and “[i]t is clear courts must determine issues of contract formation”). Accordingly, Appellants’ entire delegation clause argument stems from a misinterpretation of the Prima Paint doctrine. The distinction between contract-wide and delegation clause-specific challenges simply does not apply to Daughter’s arguments that she never formed an agreement to arbitrate with Appellants. See Will-Drill Resources, Inc. v. Samson Resources Co., 352 F.3d 211, 218 (5th Cir. 2003) (“the separability doctrine [from Prima Paint] rests on the assumption that there is an underlying agreement”).

To rule otherwise would create statutory, contract law, and equitable problems. A fundamental arbitration principle holds that a party cannot be forced to arbitration for any matter that she has not contractually agreed to do so. A properly formed contract is a *sine qua non* for arbitration on any issue which means a formation dispute simply cannot be delegated to an arbitrator. The FAA and rudimentary contract law principles will not allow it. Berkeley Cnty. Sch. Dist. v. Hub Int’l Ltd., 944 F.3d 225, 234 n. 9 (4th Cir. 2019) (delegation clause cannot be read to “undermine [9 U.S.C § 4] and preclude a court from deciding that a party never made an agreement to arbitrate *any* issue” (emphasis in original); Doctor’s Assocs., 934 F.3d at 251 (“An agreement that has not been properly formed is not merely an unenforceable contract; it is not a contract at all. And if it is not a contract, it cannot serve as the basis for compelling arbitration.”)). As several

courts have held, directing a case to arbitration without addressing whether the arbitration contract was even properly formed “put[s] the cart before the horse.” Johnson, 131 F.4th at 175; Nat’l Union Fire Ins. Co. v. Stucco Sys., LLC, 289 F. Suppl. 3d 457, 466 (S.D.N.Y. 2018). In short, no matter how far Appellants claim the delegation clause reaches, it does not extend to any challenge Daughter makes to the Arbitration Agreement’s formation. K.F.C. v. Snap Inc., 29 F.4th 835, 837 (7th Cir. 2022) (“the breadth of a delegation is irrelevant if the parties did not enter into a contract.”).

“Formation” and “validity” challenges differ in their impact. “Formation challenges render the whole contract unenforceable” while a validity challenge “requires courts to discern which parts [of] the agreement are invalid.” Johnson, 131 F.4th at 176. For example, a party challenges “formation” not “validity” when contesting the authenticity of a signature on the purported arbitration agreement or the legal authority/mental capacity of the signor. Buckeye Check Cashing, Inc., 546 U.S. at 444 n. 1; Sanders, 440 S.C. at 388, 892 S.E.2d at 117 (citing Sandvik AB v. Advent Int’l Corp., 220 F.3d 99, 107 (3d Cir. 2000)). All of Daughter’s arguments against the Arbitration Agreement are contract “formation” challenges rather than the “validity” challenges covered by the Prima Paint severability rule. Daughter argues the failed exclusive arbitral forum provision is a material term rendering the Arbitration Agreement illusory. Whether a document purporting to be an arbitration agreement is actually an illusory contract is a “formation” question. Johnson, 131 F.4th at 173 (“it was for the court, not the arbitrator, to determine whether the contract was illusory”). Daughter then argues she never formed an agreement to arbitrate with New Owner, the assignee of management and control over the facility in the 2023 transfer. This too is a formation issue—i.e. challenging whether Daughter and New Owner ever had a contract. I.S. Joseph Co., Inc. v. Mich. Sugar Co., 803 F.2d 396, 400 (8th Cir. 1986) (citing Am. Safety Equip.

Corp. v. J.P. Maguire & Co., 391 F.2d 821, 828-29 (2d Cir. 1968) (finding a court, “not the arbitrator, must determine whether an assignee of an arbitration clause can enforce the agreement against one of the original parties”); Elzinga & Voklers, Inc. v. LSSC Corp., 838 F. Supp. 1306, 1310 (N.D. Ind. 1993) (finding validity of assignment of contract containing arbitration provision “goes to the existence of a contract to arbitrate and therefore must be determined by the court”).

Daughter’s third challenge asserts that she never had a contract with several appellants who were not signatories to the Arbitration Agreement. Courts routinely label questions about non-signatory rights to be matters of contract formation. RUAG Ammotec GmbH v. Arch on Firearms, Inc., 538 P.3d 428, 433 (Nev. 2023) (“Where a nonsignatory is involved in a motion to compel arbitration under a contract, there is a question as to the very existence of an agreement involving the nonsignatory”); Jody James Farms, JV v. Altman Group, Inc., 547 S.W.3d 624, 628 (Tex. 2018) (“Determining whether a claim involving a non-signatory must be arbitrated is a gateway matter for the trial court, not the arbitrator”); Schoenfeld v. Mercedes-Benz USA, LLC, 532 F. Supp. 3d 506, 510 (S.D. Ohio 2021). Finally, Daughter contests the Arbitration Agreement as illegal because it was presented and executed in violation of federal law. Whether a contract is illegal is also recognized as a “formation” question. Riverwalk Apartments, L.P. v. RTM Gen. Contractors, Inc., 779 So.2d 537, 538 (Fla. App. 2d Dist. 2000) (“A party who alleges and offers colorable evidence that a contract containing an arbitration clause is illegal cannot be compelled to arbitrate the threshold issue of the existence of the agreement to arbitrate; only a court can make that determination”).

In sum, the circuit court was correct to address each of Daughter’s challenges to the Arbitration Agreement rather than sending them to arbitration. Daughter points to several legal principles showing an arbitration contract between Appellants and her never actually existed. The

U.S. and South Carolina Supreme Court both recognize contract formation disputes like the ones Daughter raised cannot be compelled to arbitration regardless of any delegation provision in the purported arbitration contract.

2. The Arbitration Agreement lacked the required “meeting of the minds” to form a contract.

An attempted agreement does not amount to a legally formed contract in the absence of operable terms on essential components of the proposed transaction. Who will serve as arbitrator and the basic way in which arbitration proceedings take place are essential components of a purported arbitration contract. Since the Arbitration Agreement’s provision on these essential components fail, no arbitration contract was ever formed here.

South Carolina common law holds that any contract must have a “meeting of the minds between the parties with regard to all essential and material terms of the agreement.” Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). The “meeting of the minds” requirement is not a mere interpretative principle but rather an essential component for contract formation. Id. (discussing “[t]his ‘meeting of the minds’ required to *make a contract* . . .”) (emphasis added). What constitutes an “essential” or “material” term can vary based on a contract’s subject matter, but the South Carolina Supreme Court has ruled that, in the arbitration contract context, a “choice of forum” provision can rise to that level. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435, 438 (2009) (quoting Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1220 (11th Cir. 2000)). That is true because designating a specific arbitrator can have “wide-ranging substantive implications” on everything from who will be making decisions to what standards will be applied in the decision making process. Grant, 383 S.C. at 132, 678 S.E.2d at 439 (quoting Singleton v. Grade A Market, Inc., 607 F. Supp. 2d 333, 339 (D. Conn. 2009)). When a choice of forum term is material and its provisions fail, so does the purported contract as a whole.

Grant, 383 S.C. at 132, 678 S.E.2d at 439 (affirming circuit court’s denial of motion to compel arbitration).

Five years after Grant, the Court returned to the issue to explain what constitutes an essential, material, and “integral” choice of forum provision in an attempted nursing home arbitration contract. Dean v. Heritage Healthcare of Ridgeway, 408 S.C. 371, 383, 759 S.E.2d 727 (2014). After surveying cases from other jurisdictions, Dean adopted the majority rule holding that a choice of forum provision requiring arbitration be “administered by” a designated entity is an integral term while a provision merely requiring arbitration occur “in accordance with” a certain entity’s rules is not. 408 S.C. at 384, 759 S.E.2d at 734.

Using the Grant and Dean analysis, the Arbitration Agreement choice of forum provision is an essential, material, and integral term. (R. p. 171). It uses mandatory language, stating that arbitration “shall” go before the designated entities. Id. It also does far more than adopt those entities’ procedural rules. Using the precise language discussed in Grant and Dean, this provision requires arbitration be “administered by” the designated entities. Id. Moreover, as in Grant, this integral choice of forum provision fails because the designated entities are unavailable. The National Arbitration Forum (“NAF”) is unavailable because, after being sued by its home state’s attorney general for consumer fraud, NAF agreed to stop administering any form of consumer arbitration. Miller v. GGNCS Atlanta, LLC, 746 S.E.2d 680, 683 (Ga. App. 2013). Disputes arising from nursing home negligence falls squarely within the NAF ban on “consumer” arbitration. Id. at 683 n. 5.²

² The other designated arbitrator, “Carolina Dispute Settlement Services,” is equally unavailable as that entity no longer appears to exist. The website listed for it (notrials.com) now redirects to a page for the “North Carolina Center for Mediation,” an entity that trains mediators but does not conduct arbitration proceedings.

Accordingly, the circuit court correctly denied Appellants' motion to compel arbitration based on the failure of the Arbitration Agreement's essential choice of forum term. Dean, 408 S.C. at 382, 759 S.E.2d at 733 (quoting Meskill v. GGNSC Stillwater Greeley, LLC, 862 F. Supp. 2d 966, 975 (D. Minn. 2012) (noting that, when exclusive forum is unavailable, "it is as though an essential term of the agreement has failed"). Appellants make two flawed arguments to avoid this outcome. First, they attempt to distinguish Grant on the facts, arguing the Arbitration Agreement is more like cases where arbitrator selection was not deemed an integral term. (Carlyle App. Br. at 16) (citing York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013); (Providence App. Br. at 22) (citing York). However, York was different because the plaintiff there challenged only what the arbitration contract did not say. 406 S.C. at 82, 749 S.E.2d at 147. This Court simply found that an arbitration agreement silent on arbitrator selection is still a properly formed contract. Id. Grant, the Court concluded, "held that a named arbitrator is a material term *when one is specified within an agreement.*" York, 406 S.C. at 82, 749 S.E.2d at 147 (emphasis in original). Since section II(b) identifies two (unavailable) entities that "shall . . . administer[]" proceedings, the Arbitration Agreement is governed by Grant rather than York.

Second, Appellants tout the FAA's gap-filling arbitrator selection provision, arguing a court can name an arbitrator to address Daughter's claims. (Providence App. Br. at 24) (citing 9 U.S.C. § 5). This, too, is foreclosed by precedent. FAA Section 5 is directed at addressing a "lapse" in the arbitrator selection process and is "inapplicable to cases where the specifically designated arbitrator becomes unavailable." Grant, 383 S.C. at 130-31, 678 S.E.2d at 438 (citing In re Salomon Inc. Shareholders' Derivative Litig., 68 F.3d 554, 561 (2d Cir. 1995)). Grant found "great merit" in this interpretation and limitation on Section 5. Grant, 383 S.C. at 131, 678 S.E.2d at 438. While that section applies when the purported contract is silent on arbitrator selection, it may not

be used to “circumvent the parties designation of an exclusive arbitral forum.” Id. (quoting In re Salomon Inc., 68 F.3d at 561). Grant made the analysis even a step easier by concluding that, whenever the choice of forum provision is an integral contract term, Section 5 does not apply. Grant, 383 S.C. at 131-32, 678 S.E.2d at 439; see also Khan v. Dell Inc., 669 F.3d 350, 354 (3d Cir. 2012) (finding court will “decline to appoint a substitute arbitrator, as provided in the FAA” if “the choice of forum is an integral part of the agreement to arbitrate”).

In sum, the circuit court properly denied Appellants’ motion to compel arbitration based on the failure of the Arbitration Agreement’s choice of forum provision. Under the principles laid out in Grant and the test confirmed in Dean, that provision was an essential and integral term because it required arbitration to be “administered by” specified arbitration entities.³ With those entities unavailable, a viable arbitration contract was never made.

3. Daughter formed no arbitration contract with the Providence Appellants.

The Providence Appellants, which had nothing to do with the Facility when the purported Arbitration Agreement was presented to Daughter, argue they still somehow formed an arbitration contract that governs Daughter’s claims. When management of the Facility transferred to New Owner, the Providence Appellants contend, the right to compel arbitration transferred with it—and even extended to the remaining Providence Appellants. But, that argument is not even consistent with the operative contract language, and it finds no support in South Carolina law.⁴

³ This provision suffers from at least one other fatal flaw. It calls for the dispute resolution process to begin with the resident submitting a written request with a copy “sent to the Facility at the address set forth below.” (R. p. 171). The lines provided to identify the address for sending requests to the Facility are blank. Id. at 4.

⁴ Whether Daughter ever had an arbitration agreement with the Providence Appellants is a contract formation question that remains a matter for judicial determination notwithstanding the Arbitration Agreement’s delegation clause. Sanders does not indicate otherwise as it held only that a delegation clause may apply to questions of whether an assignor’s enforcement right continues

The Providence Appellants’ claim to enforcement authority is based in the law of assignments. (Providence App. Br. at 26) (arguing they all may enforce Arbitration Agreement because Fountain Inn Healthcare, LLC “purchased, was assigned, and otherwise succeeded the interest of” Facility’s previous owner). In legal terms, an assignment involves a “transfer of control of the thing assigned from the assignor to the assignee.” Moore v. Weinberg, 373 S.C. 209, 219, 644 S.E.2d 740 (Ct. App. 2007) (citing Donahue v. Multimedia, Inc., 362 S.C. 331, 338, 608 S.E.2d 162, 165 (Ct. App. 2005)). The existence of a valid assignment is based on “manifestation of the assignor’s intention to transfer” the right in question, which means assignments are largely governed by contract law. Moore, 373 S.C. at 219-20, 644 S.E.2d at 745 (quoting Restatement (Second) of Contracts § 317(1) (1981)). Generally, a right acquired by contract may be assigned by a party to a third person, but the right to assign may be removed by the contract itself. Restatement (Second) of Contracts § 317(2) (“A contractual right can be assigned unless assignment is validly precluded by contract”); Dobyns v. S.C. Dep’t of Parks, Recreation & Tourism, 317 S.C. 353, 358, 454 S.E.2d 347, 350 (Ct. App. 1995) (enforcing anti-assignment clause).

That is precisely what happened here. The Providence Appellants claim a valid assignment of rights under the Arbitration Agreement through the transfer of control over the Facility—a transfer governed by the Transfer Agreement entered between Old Owner and New Owner in March 2023. However, the pertinent contracts preclude assignment. The “Admission Agreement” presented to Daughter on December 22, 2022, contains an express anti-assignment provision making certain that “no party to the Agreement may assign his/her rights or responsibilities under

post-assignment. 440 S.C. at 388-89, 892 S.E.2d at 118 (distinguishing between “contract formation” and contract “continued existence” arguments).

the Agreement.” (R. p. 348). The term “Agreement” is defined broadly to include “all documents signed by the Resident at the time of admission . . .” (R. p. 349); see also Klutts Resort Realty, Inc. v. Down’Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977) (presuming documents should be interpreted together if executed “at the same time, by the same parties, for the same purpose, and in the course of the same transaction”). The Arbitration Agreement was one such document presented to and signed by Daughter on December 22, 2022. (R. p. 169). Thus, the anti-assignment provision applies in equal force to Old Owner’s purported right to compel arbitration as to any other right created in the Admission Agreement.

The Transfer Agreement expressly acknowledges the reality of the anti-assignment provision. Section 15 governs “Assignment and Assumption of Contracts and Leases.” (R. pp. 196-97). The Providence Appellants summarily claim the Transfer Agreement shows they assumed all Facility resident agreements and are, therefore, the rightful assignee of arbitration rights. (Providence App. Br. at 8). Yet, within Section 15, New Owner (the entity to whom the Facility’s management was being transferred) acknowledged “certain of the Assumed Contracts may not, by their terms, be assignable; and, accordingly, ***none of such non-assignable Assumed Contracts shall be deemed assigned or to be assumed by*** [New Owner] unless and until the same shall become so assignable or consent to assignment is obtained.” (R. p. 196) (emphasis added). The Providence Appellants point to no evidence of any consent to assignment and, therefore, the Transfer Agreement did not effectuate an assignment of any purported right to arbitration.

Finally, there is an inherent tension in the arguments made by the two sets of Appellants. The absence of an assignment means the Providence Appellants never formed an arbitration agreement with Daughter. But, if the assignment were valid and the Providence Appellants garnered arbitration rights, that would necessarily mean the Carlyle Appellants could not have

them too. The very nature of an assignment would not permit this sort of double dipping. When a valid assignment is formed, “the assignor’s right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.” Moore, 373 S.C. at 219-20, 644 S.E.2d at 745 (quoting Restatement (Second) of Contracts § 317(1)). In other words, if the Providence Appellants gained arbitration rights by assignment, then the Carlyle Appellants necessarily lost them at that very same moment.

In sum, even if the purported Arbitration Agreement was not doomed by the failure of an essential, integral, and material term, the Providence Appellants never formed an arbitration contract agreement with Daughter as the right to compel arbitration could not be assigned to them.

4. The purported Arbitration Agreement is illegal.

Additionally, the Arbitration Agreement was never a viable contract because of its substantive illegality. By federal regulation, the U.S. Centers for Medicare and Medicaid Services (“CMS”) imposes substantive limitations on the use of binding arbitration agreements in the nursing home setting. 42 C.F.R. § 483.70(m). Since these regulatory requirements were violated in several respects when the Arbitration Agreement was presented to Daughter, that document never formed a viable contract.

The regulation’s requirements break down into three main categories. There is certain language an arbitration contract must contain. 42 C.F.R. § 483.70(m)(3) (requiring provision granting resident 30-day period to rescind the agreement). There are provisions an arbitration provision categorically may not include. 42 C.F.R. § 483.70(m)(5) (barring provisions which would discourage a resident or her family from reporting the home’s misconduct to authorities). Finally, there are requirements on what a nursing home representative must tell the resident when an arbitration contract is presented for signature. 42 C.F.R. § 483.70(m)(2)(i) (requiring certain

baseline explanation of arbitration agreement's terms and effect). All of these provisions are designed for resident protection. As part of its State Operations Manual, CMS publishes a voluminous "Guidance to Surveyors for Long Term Care Facilities" (hereafter "CMS Guidance")⁵ explaining the origin and purpose of each regulation. Section 483.70(m)'s requirements arose out of "[c]oncerns . . . about the fairness and transparency related to both the means by which [arbitration] agreements are created and the fairness of the arbitration processes themselves." CMS Guidance at 713. Given the medical needs of a potential resident, the time pressures of moving the potential resident from a hospital to a more long-term location, and the resulting stress for the resident's family, "asking individuals to commit to binding arbitration in these situations may not represent the best option in terms of advancing the health care of residents." Id.

The circuit court was presented evidence that the regulation was not followed here. First, while 42 C.F.R. § 483.70(m)(1) bars a nursing home from making a resident's admission contingent on the resident agreeing to arbitrate, that is exactly what Daughter says happened here. (R. p. 522 ¶ 7) ("I was advised and led to believe that I was required to sign all the documents presented to me, including the alleged arbitration agreement for my father to be re-admitted to" the Facility). Second, 42 C.F.R. § 483.70(m)(2)(1) requires a nursing home to ensure an arbitration agreement is "explained to the resident and his or her representative in a form and manner that he or she understands, including in a language the resident and his or her representative understands." Daughter never received an explanation of the Arbitration Agreement's key terms (e.g. its revocation provision) and was not even given a copy of key documents. (R. p. 522 ¶¶ 8-9). Precisely as CMS worried, this meant Daughter "did not fully understand all of the documents but

⁵ See (R. p. 497) (quoting CMS Guidance at 712), available at <https://www.cms.gov/medicare/provider-enrollment-and-certification/guidanceforlawsandregulations/downloads/appendix-pp-state-operations-manual.pdf>

signed out of the urgency” to have Mr. Zeigler admitted to the Facility. (R. p. 522 ¶ 7). Appellants do not offer an affidavit from a Facility representative or any substantive evidence to challenge Daughter’s affidavit.

All Appellants offer instead is the suggestion that these regulatory violations do not matter here because the regulation is about federal funding standards, not the protection of residents’ contract rights. (Carlyle App. Br. at 12-13) (citing Northport Health Servs. of Ark., LLC v. U.S. Dep’t of Health & Hum. Servs., 14 F.4th 856 (8th Cir. 2021)); (Providence App. Br. at 20) (citing Northport). However, the CMS Guidance document shows otherwise. The concerns about an overstressed elderly person’s family signing a poorly-explained, overly complicated document purporting to waive their loved one’s constitutional rights are directly implicated here. Plus, Appellants fail to mention more recent precedent distinguishing Northport. See Hickory Heights Health & Rehab, LLC v. Watson, 707 S.W.3d 499 (Ark. App. 2025) (noting § 483.70(m) violation and affirming denial of motion to compel arbitration notwithstanding Northport).⁶

5. Daughter’s purported consent to arbitration does not extend to the wrongful death claim.

Moreover, there was no contract formed to arbitrate the wrongful death claim that belonged to Mr. Zeigler’s statutory beneficiaries. To find otherwise would improperly assume Mr. Zeigler had the power to waive the right to a jury trial on a claim that did not exist when the Arbitration Agreement was presented, would never belong to him, would not accrue for years, and covered injuries suffered exclusively by other people. No South Carolina authority supports these propositions. In fact, even if Mr. Zeigler could agree to arbitrate his own claims, the history and

⁶ Further review of Hickory Heights was rejected by both the Arkansas and U.S. Supreme Courts. 711 S.W.3d 793 (Mem) (Ark. June 5, 2025); ___ S.Ct. ___, 2026 WL 79896 (Mem) (Jan. 12, 2026).

structure of South Carolina's wrongful death and survival statutes show wrongful death is a distinct, independent claim he could not force to arbitration because it belongs to beneficiaries who never agreed to forego a jury trial.

a. South Carolina law does not allow a nursing home arbitration contract to be enforced against unconsenting non-parties.

Mr. Zeigler's wrongful death beneficiaries were not parties to the Admission Agreement and did not assent to its terms. Thus, the Admission Agreement may not be cited to dismiss the wrongful death claim without overcoming the presumption that a contract may be enforced only by its parties. Touchberry, 295 S.C. at 48-49, 367 S.E.2d at 150. A South Carolina contract may be enforced against a non-party only with proof of (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; or (5) estoppel. Wilson, 426 S.C. at 338, 827 S.E.2d at 174 (citing Malloy v. Thompson, 409 S.C. 57, 561-62, 762 S.E.2d 690, 692 (2014)). Since Appellants did not offer evidence to prove any of these theories, the Arbitration Agreement does not apply to the wrongful death claim.

b. South Carolina courts define wrongful death as a distinct, independent claim that is not dependent on claims held by a decedent at his death.

Unable to show Mr. Zeigler's beneficiaries are parties or non-parties with enforcement power, Appellants can only argue the wrongful death claim actually belongs to Mr. Zeigler's estate rather than the statutorily designated beneficiaries. However, this argument incorrectly lumps together the wrongful death claim and the survival of tort claims Mr. Zeigler had against the Facility at the time of his death. The history and development of South Carolina's wrongful death claim and survival statute show wrongful death is something entirely different than tort claims surviving a person's death for the benefit of her estate. South Carolina courts have long recognized these are two very different theories of liability with distinct origins, purposes, and results. Even

in more modern cases, their distinct nature is evidenced in how the claims are litigated and how juries resolve them.

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

In contrast, the legislature positioned the survival statute in a completely different code chapter. Both wrongful death and survival relate to "civil remedies and procedures" (Title 15) but, while wrongful death is a distinct claim warranting its own designation (Chapter 51), the survival statute is classified within an existing chapter (Chapter 5) identifying the proper "parties" for pursuing legal claims. A plaintiff may cite the survival statute to support a suit for any number of legal claims. When that claim is based on the decedent's personal injury, the available damages include "medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." Scott, 340 S.C. at 170, 530 S.E.2d at 395 (citing Gowan v. Thomas, 237 S.C. 223, 225, 116 S.E.2d 761, 762 (1960)). Thus, while courts and parties often refer to a "survival claim," this term is a misnomer because the survival statute does not create a claim, it only corrects a misguided

common-law rule that assumed a person's existing legal claims died with her. Bemis v. Waters, 170 S.C. 432, 170 S.E. 475, 476 (1933) (holding that survival statute exists as a “correct[ion]” to common-law rule); see also Johnson v. Baptist Three Rivers Hosp., 984 S.W.2d 593, 596 (Tenn. 1999) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 127, at 945 (5th ed. 1984) (noting error of common-law rule was that it made it “cheaper for the defendant to kill the plaintiff than to injure him”)). The statutory scheme alone shows wrongful death and survival are distinct claims accruing at different times and governed by different statutes of limitation. S.C. Code Ann. § 15-3-560(6) (measuring three-year limitations period for wrongful death claims from date of death).

The statutes' history also shows their distinctiveness and independence. In Grainger v. Greenville, S. & A. Railway Co., the South Carolina Supreme Court traced the divergent tracks wrongful death and survival claims have taken over their development. 101 S.C. 399, 85 S.E. 968 (1915). In that case, the trial court had dismissed a survival action because the decedent's administrator (equivalent to the modern “personal representative”) had previously recovered on a wrongful death claim. Id. at 968. The wrongful death statute in place then was nearly identical to current section 15-51-10 and it provided a claim “in favor of the beneficiaries” but nothing for “the deceased or his estate.” Id. at 969. When the legislature recognized this abnormality, it responded by creating the predecessor to the modern survival statute. Id. (citing 1912 Code section 3693). Grainger held this legislative history conclusively established wrongful death and survival claims are distinct and independent. Id.; Complete Auto Transit, Inc. v. Bass, 229 S.C. 607, 611, 93 S.E.2d 912, 914 (1956) (reading Grainger to hold “judgment in an action for wrongful death did not bar a subsequent action for pain and suffering of the decedent”). The claims are distinct because “[t]he

beneficiaries, the cause of action, the measure of damages, are all different.” Grainger, 85 S.E. at 969.

Building on Grainger and other similar cases, Bass further highlighted the claims’ distinctiveness by holding judgment in a wrongful death claim does not have claim preclusive effect on survival claims. 229 S.C. at 611-12, 93 S.E.2d at 914; see also Gleaton v. Southern Ry. Co., 212 S.C. 186, 192, 46 S.E.2d 879 (1948) (“verdict and judgment for defendant in an action under the survival statute will not estop the personal representative of the deceased in an action under Lord Campbell’s Act subsequently tried”). Bass also addressed a reason why wrongful death claims are often erroneously perceived as dependent on survival claims. In both, the decedent’s personal representative is the named plaintiff. 229 S.C. at 612, 93 S.E.2d at 914. But this fact alone is not determinative because, when asserting wrongful death and survival claims, a personal representative “function[s] under two separate and distinct trusteeships having no relationship to each other beyond the fact that their origin is referable to the death of the same person.” Id. In other words, while it is the personal representative’s name in the caption for a wrongful death claim, “it is clear . . . the real parties to the action were the beneficiaries.” Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539, 541 (1928) (finding personal representative “only in the capacity of a trustee in bringing [wrongful death] suit for the real parties in interest”).

In light of the history and structure of wrongful death and survival claims, a number of other reported opinions have rejected the notion that the former is dependent on the latter. As early as 1907, the South Carolina Supreme Court recognized a wrongful death action is not the survival of an action which the deceased had in his lifetime, but is a “new cause of action.” Osteen v. Sothern Ry., Carolina Division, 76 S.C. 368, 57 S.E. 196, 200 (1907). Claussen held that a wrongful death claim is “not a continuation” of any claim the decedent had before her death. 145

S.E. at 540. A wrongful death claim is “independent” of claims the decedent had during her life and “wholly different” than any other claim available at her death. Wellman v. Bethea, 243 F. 222 (E.D.S.C. 1917); In re Mayo’s Estate, 60 S.C. 401, 38 S.E. 634, 638 (1901). Wrongful death and survival claims are “separable and distinct.” Keel v. Seaboard Air Line Ry., 122 S.C. 17, 114 S.E. 761, 762 (1922); see also Wilson v. Massengill, 124 F.2d 666, 669 (6th Cir. 1942) (describing South Carolina’s wrongful death and survival claims as “separate and distinct”). In sum, Appellants err in asking the Court to find wrongful death is dependent on survival claims because “[t]he object, scope, and measure of damages” is different for the two claims. In re Mayo’s Estate, 38 S.E. at 638; see also 28 S.C. Jur. Wrongful Death § 5 (describing two claims at the tortious death of a person and, crucially, that “*the wrongful death action and the survival action involve different, independent claims.*”) (emphasis added).

These distinctions remain valid even in more modern cases. This Court continues to recognize the wrongful death statute created a new cause of action that did not exist at common law, accrues only at the decedent’s death, and which is subject to its own statute of limitation. Weaver v. Lentz, 348 S.C. 672, 678, 561 S.E.2d 360, 363 (Ct. App. 2002). Accordingly, wrongful death actions and survival claims consider the losses related to a person’s death from completely different perspectives. Boyle v. U.S., 948 F. Supp. 2d 577, 580 (D.S.C. 2012); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (“In a wrongful death case, the issue of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death”). Their distinctiveness is even plainer in practice. Since they compensate different groups for different losses, wrongful death and survival claims can result in dramatically different verdicts. For example, in Scott, the jury awarded \$ 600,000 in actual damages on a medical malpractice claim alleged under the survival statute and \$ 1.5 million in

punitive damages for the same claim. 340 S.C. at 162, 530 S.E.2d at 391. On a wrongful death claim in the same action, the jury awarded \$ 1.5 million in actual damages and \$ 2 million in punitive damages. Id. Since these two claims addressed such different losses by different people, the disparate awards were not inconsistent, and this Court affirmed the verdict in its entirety. Id. at 169-71, 530 S.E.2d at 394-96; see also Welch, 342 S.C. at 303-05, 536 S.E.2d at 420-21 (affirming verdict of less than \$29,000 for survival claim and \$ 3 million for wrongful death claim).

In sum, extensive South Carolina precedent rejects the notion that wrongful death claims are dependent on claims a person holds at the time of his death. In multiple cases dating back over a hundred years, South Carolina's appellate courts have held wrongful death claims are "distinct," "independent," "separate," "wholly different," and "not a continuation" of claims a decedent could have filed during her lifetime. These cases, along with the history and structure of the relevant statutes, show Mr. Zeigler could not bind his wrongful death beneficiaries to arbitration. Accordingly, any language in the Arbitration Agreement purporting to bind the beneficiaries is invalid because it asserts power Mr. Zeigler never had. Those beneficiaries are the "real parties" to the wrongful death claim, and they did not sign the Arbitration Agreement or otherwise consent to waive their right to a jury trial.

c. None of the South Carolina authority on which appellants rely supports arbitration in this case.

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

The Carlyle Appellants suggest the South Carolina Supreme Court addressed the arbitrability of wrongful death claims in Dean. (Carlyle Br. at 16). However, Dean addressed a very different issue related to forum selection clauses and a contractually-designated arbitral forum no longer willing to arbitrate the legal claims in question. Id. at 382, 759 S.E.2d at 733 (finding “outcome of this appeal turns” on effect of arbitral forum provision). Plus, Dean did not even compel arbitration in the case before it. The Supreme Court rejected a few reasons cited for invalidating a nursing home arbitration contract but remanded the matter to the circuit court to address two others. Id. at 387, 759 S.E.2d at 736.

The Carlyle Appellants misread one of Dean’s footnotes. Id. at 378 n. 3, 759 S.E.2d at 731 n. 3 (“We note that courts may not refuse to compel arbitration simply because a wrongful death claim is involved”). This footnote addressed an overly broad pronouncement in the appealed order suggesting wrongful death claims are categorically excluded from arbitration. Id. (citing circuit court order statement stating that “wrongful death actions are not something that’s arbitrated”). That type of rule would violate the FAA’s equal-treatment principle. Id. (citing Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532-33 (2012)); see also Kindred, 137 S. Ct. at 1426. However, that is not what is at issue here. A wrongful death claim may be arbitrable in instances where the statutory beneficiaries agree to do so. Daughter simply argues an individual’s consent to arbitrate may not be grafted into a wrongful death claim that pays different people for different losses. Dean does not reject that argument or even consider it.

Moreover, refusing to compel arbitration for a wrongful death claim under these circumstances fully consistent with the equal-treatment principle. Several other courts have held that rejecting arbitration for wrongful death claims in similar cases does not violate Marmet or any

other Supreme Court precedent on the equal-treatment principle.⁷ Refusing to compel arbitration here does not mean wrongful death claims can never be arbitrated. Instead, as other courts have recognized, it simply means the nursing home failed to get consent for arbitration from the proper people. Finally, reading Dean's footnote to have any bearing on the parties' dispute does not adequately account for either side's arguments on the key issue. As discussed below, the interaction of wrongful death and survival claims for arbitrability purposes requires a careful analysis of statutory language and history as well as case law interpreting the two claims. Dean had no reason to undertake this analysis and has nothing to offer the Court in resolving this appeal.

Finally, the Providence Appellants reason that, since section 15-51-10 permits wrongful death claims only when the decedent would have had a claim if she survived, South Carolina law intends to give an individual control over a wrongful death claim which includes the right to determine the method by which it will be resolved. (Providence App. Br. at 27-29) (citing Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E.2d 143 (2010)). But Stokes did not address arbitration at all. Instead, it simply held that if an individual allows the statute of limitations on a personal injury claim to lapse during her life, then a wrongful death claim may not be used after her death to "revive" the stale claim. Stokes, 389 S.C. at 349, 699 S.E.2d at 146.

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

⁷ See Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 360 (Ill. 2012) (unlike Marmet, Illinois was not applying a categorical anti-arbitration rule but was rather applying "common law principles governing all contracts"); Vickers v. Canal Pointe Nursing Home & Rehab Ctr., 2016 Ohio 3244, 2016 WL 3080329 (Ohio App. June 1, 2016) (finding that Ohio Supreme Court precedent preventing arbitration of wrongful death claims did not create categorical ban Marmet bars because it applied generally applicable contract law rule against enforcing contract against person who had not assented).

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

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

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

d. Many other jurisdictions have refused to compel arbitration of wrongful death claims based on a decedent's arbitration contract.

In light of the historical and structural differences between South Carolina's wrongful death and survival statutes, as well as substantial case law defining and treating the resulting claims distinctly, the Court should reject Appellants' attempt to use Mr. Zeigler's purported assent to the Arbitration Agreement to force arbitration on a wrongful death claim. At least a dozen other jurisdictions have rejected that argument.⁸ Four different state supreme courts have done so over just the last fifteen years. While some jurisdictions have taken a contrary view⁹, South Carolina's statutory language and case law discussed above are more in line with the states that refuse to compel arbitration under similar circumstances. In the aggregate, to the extent the Court looks beyond South Carolina law, persuasive authority does not support the circuit court's order.

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

⁸ FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191, 209-10, 213 (Md. App. 2016); Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490, 494 and n. 1 (Pa. 2016) (citing Pisano, 77 A.3d at 660); Boler v. Sec. Health Care, LLC, 336 P.3d 468, 477 (Okla. 2014); Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., 316 P.3d 607, 614 (Ariz. Ct. App. 2014); Daniels v. Sunrise Sr. Living, Inc., 212 Cal. App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); Carter v. SSC Odin Operating Co, LLC, 976 N.E.2d 344, 355-58 (Ill. 2012); Ping v. Beverly Enters., Inc., 376 S.W.3d 581 (Ky. 2012); Woodall v. Avalon Care Center-Federal Way, LLC, 231 P.3d 1252 (Wash. App. 2010); Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009); Bybee v. Abdulla, 189 P.3d 40 (Utah 2008); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007); Chapman v. Cardiac Pacemakers, Inc., 673 P.2d 385 (Idaho 1983); see also Strickholm v. Evangelical Lutheran Good Samaritan Soc'y, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

⁹ E.g. Laizure v. Avante at Leesburg, Inc., 109 So.3d 752 (Fla. 2013); In re Labatt Food Serv., L.P., 279 S.W.3d 640 (Tex. 2009); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004); Ballard v. Southwest Detroit Hosp., 327 N.W.2d 370 (Mich. App. 1982).

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

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

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

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

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

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

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

In sum, persuasive authority does not support Appellants’ argument that South Carolina’s wrongful death claim is “derivative” such that a nursing home resident’s agreement to arbitrate applies to a wrongful death claim. A dozen states have considered statutes similar to section 15-51-10 and found wrongful death is a distinct, independent claim.

6. Appellants’ challenge to the circuit court’s discovery ruling is not immediately appealable.

Finally, Appellants make somewhat confusing arguments regarding the circuit court’s ruling on jurisdictional discovery. At points, they seem to argue ordering jurisdictional discovery while a motion to compel arbitration was pending is improper, while at others they assert that the real issue here was that the hearing on their substantive arbitration motion was insufficiently robust.

Neither argument finds support in South Carolina law. For one thing, discovery orders are almost always interlocutory and not appropriate for immediate appellate review. Grosshuesch v. Cramer, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008); Rule 201(a), SCACR (limiting appeals to a final judgments and appealable orders). Moreover, this Court has rejected on multiple occasions a nursing home’s appellate claim that the key to proving a properly-formed arbitration contract

would have been available if they had just performed more discovery before filing their motion. Solesbee v. Fundamental Clinical & Operational Servs., LLC, 426 S.C. 638, 650-51, 885 S.E.2d 144 (Ct. App. 2023); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 579, 813 S.E.2d 292, 311 (Ct. App. 2018).

Plus, Appellants never explain what jurisdictional discovery was supposed to reveal on the contract formation failures outlined above or why they did not seek this information before filing their motions to compel arbitration. Neither the procedural rules nor their opponent's conduct prevented Appellants from serving discovery requests. In fact, Appellants had the right to serve written discovery requests and to notice depositions from the moment Daughter filed her Complaints with the Greenville County Clerk of Court. Rule 30(a)(1), SCRCP (permitting depositions "[a]fter commencement of an action"); Rule 33(a), SCRCP (same for serving interrogatories); Rule 34(b), SCRCP (same for serving requests for production); see also Rule 3(a), SCRCP (stating that a civil action is "commenced" when the complaint is filed if later served within the statute of limitations). The rules specifically provide that a party need not seek a court's permission before serving discovery requests. Rule 33(a), SCRCP; Rule 34(b), SCRCP. The bottom line is that Appellants chose to move forward on motions to compel arbitration with what they now seem to say was insufficient evidence to prove the formation of an arbitration contract. Appellants were driving the bus when it came to when the arbitration issue came before the circuit court, and they should have performed whatever discovery they deemed necessary before filing their motions.

Appellants' suggestion that the circuit court's hearing on their motions was insufficiently robust is also in error. (Providence App. Br. at 31); (Carlyle App. Br. at 19) (citing 9 U.S.C. § 4). Appellants got everything to which the FAA entitled them at the circuit court. FAA Section 4

requires a trial court determine whether “the making of the agreement for arbitration or the failure to comply therewith is . . . in issue.” That determination is made using a “summary judgment-like standard.” Burch v. P.J. Cheese, Inc., 861 F.3d 1338, 1346 (11th Cir. 2017). It is only if there are genuine questions of material fact that the trial court is required to go on to Section 4’s requirement to “proceed summarily to the trial.” Appellants’ briefs do not identify the supposed genuine disputes of material fact that they think should have led to a trial on the arbitration issue.

Yet, even if those disputes did exist, the resulting “trial” would be limited. Section 4’s use of “proceed summarily” language demands speed “so that the parties can get on with the merits of their dispute in the right forum.” Berkeley Cnty. Sch. Dist. v. Hub Int’l Ltd., 944 F.3d 225 (4th Cir. 2019) (quoting Howard v. Ferrellgas Partners, L.P., 748 F.3d 975, 978 (10th Cir. 2014) (Gorsuch, J.)). That means the FAA Section 4 “trial” is really just an “expeditious and summary hearing.” Dillon v. BMO Harris Bank, N.A., 787 F.3d 707, 716 (4th Cir. 2015); see also Housing Auth. of the City of Columbia v. Cornerstone Housing, LLC, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003) (quoting Jackson Mills, Inc. v. BT Capital Corp., 312 S.C. 400, 404, 440 S.E.2d 877, 879 (1994) (“The determination of whether an arbitration agreement exists is ‘a matter to be forthwith and summarily tried by the Court’”). As many courts have recognized, this “trial” will look far less like a traditional trial and far more like a typical evidentiary hearing. See e.g. Moffett v. Life Care Ctrs. of Am., 219 P.3d 1068, 1079 (Colo. 2009) (“expedited evidentiary hearing”); St. Fleur v. WPI Cable Systems/Mutron, 879 N.E.2d 27, 32 (Mass. 2008); Haynes v. Kuder, 591 A.2d 1286, 1290 (D.C. 1991).

Appellants were afforded an evidentiary hearing on their motions. The Providence Appellants presented the circuit court with a 22-page memorandum and five exhibits in support of their motion. (R. pp. 1210-32). The exhibits included not just the Arbitration Agreement and

Transfer Agreement but also a CMS form documenting deficiencies at the Facility (R. pp. 1299-1307) and consumer information from Medicare.gov on the quality of nursing care the Facility provided (R. pp. 1308-10). Appellants had a fair opportunity to present whatever pertinent information they thought the circuit court should review to address their motions.

Thus, there is no merit to the procedural components of Appellants' arguments on appeal. Their challenge to the jurisdictional discovery order is improper because discovery orders are interlocutory, and Appellants had permission under the rules of civil procedure to conduct the discovery of their choosing before filing their motions to compel arbitration. Once they chose to file those motions, Appellants received what the FAA demands. The circuit court conducted a hearing to determine whether an arbitration agreement was made, and Appellants had an opportunity to present evidence to support their arguments.

CONCLUSION

Based on the arguments above, Daughter respectfully requests the Court affirm the circuit court's orders denying Appellants' motions to compel arbitration. The circuit court was correct to address the merits of Daughter's contract formation challenges rather than citing the Arbitration Agreement's delegation clause to transfer them to an arbitrator. The delegation clause can have no effect if housed in a contract that was never properly formed. The circuit court also correctly ruled no arbitration contract was formed here. The Arbitration Agreement's material terms fail, it was formed in an illegal manner, and the Providence Appellants are not its parties by name or assignment. Moreover, there is no arbitration contract between any appellant and Mr. Zeigler's statutory beneficiaries, the owners of the wrongful death claim. Accordingly, the circuit court's order should be affirmed.

Respectfully submitted,

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