

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. No.: 2023-CP-42-04152 &
	)	2023-CP-42-04153
	)	
Varesa Goodman, Individually and as	)	
Personal Representative of the Estate	)	
of Dennis Edwards,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
THI of South Carolina at Spartanburg,	)	
LLC d/b/a Magnolia Manor-	)	
Spartanburg, Fundamental	)	
Administrative Services, LLC,	)	
Fundamental Clinical and Operational	)	
Services, LLC, THI of Baltimore, Inc.,	)	
THI of South Carolina, LLC, Hunt	)	
Valley Holdings, LLC, and Rusty	)	
Flathmann,	)	
	)	
Defendant(s).	)	

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SC Court of Appeals

This matter came before the Court on Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg's (hereinafter "Facility") Motion to Compel Arbitration and Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, THI of Baltimore, Inc., THI of South Carolina, LLC, Hunt Valley Holdings, LLC, and Rusty Flathmann's Motions to Stay. Present for the Defendants was Matthew Riddle of Clement Rivers, LLP and Matthew W. Christian of Christian & Christian, LLC. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda with attached exhibits, and as for reasons more fully set forth below, the Court hereby denies the Defendants' Motions.

BACKGROUND

This matter arises out of two civil actions – the survival action and a wrongful death action. Both actions involve allegations of nursing home negligence and corporate negligence resulting in the death of Dennis Edwards (hereinafter “Decedent”). Varesa Goodman (hereinafter “Daughter”) was Decedent’s daughter and serves as Personal Representative of Decedent’s Estate. Plaintiff alleges that Decedent was admitted to Facility after being hospitalized for a brain surgery. Dennis Edwards was at significant risk of falls and at risk for pressure injuries/bedsores. Complaint, pp. 8-9. Due to weakness and partial paralysis, Decedent was at risk for falling off of the bed and required two-person assistance with bed mobility. Complaint, pp. 8-9. Additionally, Decedent was provided a protective helmet to wear on his head. Complaint, pp. 8.

On May 25, 2020, only one staff member was providing care to Decedent, and as a result, that individual rolled Decedent off the bed and onto the floor where he struck his head, as his protective helmet was also not in place. Complaint, p. 9. Decedent was emergently transported to the hospital where it was found that he also had multiple pressure injuries/bedsores, including a sacral pressure ulcer that was necrotic and infected. In addition to these injuries, Plaintiff alleges that Decedent suffered from significant nutritional compromise and weight loss, poor hygiene care, overmedication/chemical restraint, and poor tracheostomy care. Complaint, p. 10. As a result of his injuries, Decedent suffered until his death on July 28, 2020.

In addition to the clinical neglect, Plaintiff alleges corporate negligence by the Defendants including, but not limited to, underfunding the facility, understaffing the facility, having employees engage in fraudulent charting, and having nurses conduct out-

of-scope assessments. As a result of these facts, Plaintiff has alleged corporate negligence, as well as clinical negligence, which Plaintiff alleges was directly caused the parent, management, and affiliated companies of the facility, all of which owned, controlled, directed, managed, and affected resident care at the facility.

Plaintiff filed the Notice of Intent to File Suit on May 15, 2023. The parties engaged in the mandatory pre-suit mediation which was unsuccessful. Daughter then timely filed the Summons and Complaint on October 26, 2023, and served the Defendants with same, as well as Interrogatories and Requests for Production no later than January 2024. Plaintiff then requested Discovery from the Defendants, and Defendants refused to provide same. As a result, Plaintiff filed a Motion to Compel Discovery on July 12, 2024. On that same date, Defendants finally decided to file a Motion to Compel Arbitration and Motions to Stay on July 12, 2024, some eight months after the Summons and Complaint was filed. Plaintiff contends that the arbitration agreement is unenforceable under state contract law and this Court agrees for the various reasons set forth herein below.

Legal Analysis and Conclusions

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that “where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application

to arbitrate. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013). Defendants cannot meet the burden.

Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) (“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”). The courts, not arbitrators, are charged with deciding certain “gateway matters” including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008). The arbitration agreement at issue in this particular case is not valid to begin with because there existed no authority for anyone to sign the Arbitration Agreement on behalf of Decedent and was not signed by the Decedent. Therefore, the inquiry should go no further. However, even if the Court finds that the parties had a valid arbitration agreement, the agreement applies only to the Survival Action and only to the “facility” Defendant.

I. Daughter Had No Authority to Sign the Arbitration Agreement for Decedent

Because Decedent did not sign the Arbitration Agreement, Daughter was required to have the authority to execute the Arbitration Agreement for the Arbitration Agreement to be enforceable. Daughter had no such authority. It is undisputed that there existed no power of attorney, guardianship, conservatorship, or any other authority to execute the Arbitration Agreement on behalf of Decedent.

Therefore, Daughter did not have any actual authority when signing the Arbitration Agreement. As a result, the Defendants argue that Daughter had apparent and inherit authority to bind Decedent under the Arbitration Agreement and should be estopped from denying the validity of the Arbitration Agreement.

II. Daughter Had No Apparent and Inherit Authority to Bind Decedent Under the Arbitration Agreement and Decedent's Estate is Not Estopped from Denying the Validity of the Arbitration Agreement.

Defendants contend that Decedent had implied or inherent authority to act on behalf of Decedent and should be estopped from denying the existence of the Arbitration Agreement. Defendants' arguments are not in keeping with the holdings of South Carolina Courts. The legal consequences of an agent's actions can only be attributed to the principle when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 598 S.E.2d 717, 359 S.C. 635, 642 (Ct. App. 2004). Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations". Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649, S.E.2d 488, 491 (2007). Apparent authority exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that a person of ordinary prudence, reasonably familiar with business usages and custom is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption. Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 399 S.E.2d 430 (Ct. App. 1990), *rev'd on other grounds*.

South Carolina law requires that to prove apparent authority, the Defendants must show "... (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a

change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance, Company, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists.

The Defendants have presented no evidence that Decedent represented, implicitly, or explicitly, to the Defendants that Daughter had the authority to enter into the Arbitration Agreement on his behalf. The Affidavit presented by Plaintiff reflects that Decedent was not present when Daughter signed the Arbitration Agreement. No evidence was presented that Decedent was ever aware that Daughter signed the Arbitration Agreement and never authorized Daughter to sign such contracts or agreements.

It should be further noted that at no point in time did Defendants ever request Decedent to sign the Arbitration Agreement personally. It should also be noted that the Arbitration Agreement does not reflect any authority which Defendants contend Daughter would have had to execute the agreement.

As the South Carolina Court of Appeals noted in Hodge v. UniHealth Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018) where it discussed a Maryland case, Dickerson v. Longoria, 95 A.2d 721, 743, 414 Md. 419 (2010), and specifically stated that " "This limited range of acts performed on the [decedent]'s behalf

suggest, at most, [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that.” *Id.* As further noted by the South Carolina Court of Appeals in Hodge, the Dickerson Court, and The Supreme Court of Nebraska which was quoted in Hodge, “...a son who had authority to sign health care documents on behalf of his mother did not have authority to sign an arbitration agreement on her behalf.” Hodge citing Dickerson and Koricic v. Beverly Enterprises-Nebraska, Inc., 773 N.W.2d 145, 149-52 (Neb. 2009). More importantly, the Hodge court relied upon the Court of Appeals’ decision in Thompson v. Pruitt Corp., 784 S.E.2d, 679, 416 S.C. 43, 55 (Ct. App. 2016), *cert. denied*, S.C. Sup. Ct. Order dated Dec. 2, 2016, where the Thompson court determined “**The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal’s right of access to the courts and to a jury trial.**” Hodge quoting Thompson at 55, 784 S.E. 2d at 686, emphasis added.

Daughter made no representation that she had any authority to bind Decedent. Moreover, as noted in Hodge, when the arbitration agreement is separate from the admission agreement, as in the present case, the facility cannot show that it changed its position for the worse as required to prove apparent agency. Therefore, Defendants cannot argue that any apparent authority/agency existed for the Daughter to sign the Arbitration Agreement on Decedent’s behalf. The present case is very similar to Coleman v. Mariner Health Care, Inc., 755 S.E.2d 450 (S.C. 2014); Hodge v. UniHealth Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018); and Thompson v. Pruitt Corp., 784 S.E.2d, 679, 416 S.C. 43, 55 (Ct. App. 2016); Solesbee v. Fundamental

Clinical and Operational Services, LLC, 426 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023).

In all of these cases, either the South Carolina Supreme Court or the South Carolina Court of Appeals found arbitration agreements to be unenforceable where a family member signed an arbitration agreement near the time of admission to a skilled nursing facility for the Decedent that did not have any actual authority to do such. In all four cases, the Court found that no implied authority and that no estoppel applied. As the Court noted in Thompson and in Hodge, there was no evidence that the resident being admitted to the nursing home took any action to create an agency relationship for Son. See Thompson v. Pruitt Corp., 784 S.E.2d, 679, 416 S.C. 43, 55 (Ct. App. 2016) and Hodge v. UniHealth Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018). The present case is nearly identical to Hodge and Thompson.

Further, applying the requirements in Hodge, there is no equitable estoppel in the present case. First, the Admissions Agreement and Arbitration Agreement did not merge. Many of the factors identified in Coleman, Hodge, Thompson, and Solesbee which demonstrate that the Arbitration Agreement and Admission Agreement did not merge exist with regard to the present situation. To further illustrate no merger, a number of factors exist including the fact that the Admission Agreement was required for admission, but the Arbitration Agreement was not required by admission by Defendants according to Defendants' own brief and argument. Further, the Admission Agreement was to be administered under state and federal law while the Arbitration Agreement was to be construed only according to federal law. Also, the Admission Agreement could be terminated at any time with written notice but the Arbitration Agreement provided that it could not be terminated and would "remain in effect for all care rendered at the facility

and shall survive any termination or breach of this agreement or the Admission Agreement.” The Admission Agreement also contained a severability provision, was assignable by the facility, had the right to be modified by the facility and contained a superseding clause representing that the Admission Agreement contained the entire agreement and superseded all other agreements. Therefore, there is significant evidence that there was no merger of the Admission Agreement and Arbitration Agreement.

Furthermore, as the Hodge Court noted, the Plaintiff is not suing under the Arbitration Agreement or attempting to invoke the Arbitration Agreement itself. In fact, Plaintiff has filed no action alleging a breach of contract under the Admission Agreement. Therefore, Plaintiff is not seeking to invoke benefit of either of the contracts executed by Daughter. See Wilson v. Willis, No. 27879, 2019 S.C. LEXIS 27. As the Wilson Court noted, a non-signatory should be compelled to arbitrate a claim only if it seeks through the claim to derive a direct benefit from the contract containing the arbitration provision. Id. at 344. The Wilson Court also noted that it is important to distinguish direct benefits from indirect benefits because when the benefits to a signatory are merely indirect, an arbitration agreement cannot be enforced. Id. at 343. The Wilson Court explicitly found that the mere fact that a claim would not exist “but for” the contract, does not invoke the theory of estoppel. Further, as the Wilson Court noted, “Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly. See Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 71 A.3d 849, 852 (N.J. 2013) (Observing equitable estoppel should be used sparingly to compel arbitration and noting it

‘is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration’); 28Am. Jur. 2d Estoppel and Waiver §29 (2011) (stating equitable estoppel should be used with restraint and only in exceptional circumstance).” Id. at 345. Therefore, because Plaintiff is not seeking benefits directly flowing from the Agreement, and further, because the Arbitration Agreement and Admission Agreement did not merge, the Defendants cannot maintain that the Plaintiff should be equitably estopped from denying the existence of the Arbitration Agreement. Further, as Plaintiff argues, this same argument for the same arbitration agreement has been rejected on a magnitude of occasions with the same Defendants by the South Carolina Court of Appeals and South Carolina Supreme Court in numerous unpublished and published decisions. Defendants set forth no basis why this case and this agreement is any different.

III. The Arbitration Agreement is not enforceable because it does not identify the proper parties to the agreement and there was no meeting of the minds.

The Arbitration Agreement is unenforceable because it lacks mutual assent and meeting of the minds. Contract formation demands the mutual assent of the proposed parties. Eden v. Laurel Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978)(citing Kitchens v. Lee, 221 S.C. 59, 59, S.E.2d 67 (1952)).

It is a basic tenet of contract law that a contract must contain a meeting of the minds in order for a valid contract to exist and be enforceable. The Arbitration Agreement has blanks requiring the Facility to identify both the resident and the name of the facility to set forth the defined parties to the agreement. The Arbitration Agreement does not identify the proper name for the facility to the agreement.

Identifying the proper parties to a contract are essential terms to the contract. The Defendants have the burden to prove who the parties were in the contract within the four

corners of the agreement. “Vagueness of expression, indefiniteness, and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract.” Reed v. Boykin, 282 S.C. 614, 327 S.E.2d 68 (S.C. App., 1984). Put simply, the language within the four corners of this Arbitration Agreement do not identify “THI of South Carolina as Spartanburg, LLC” or “Magnolia Manor Spartanburg” as a party to this agreement. “MMS” is not a facility or legal entity and is not a defined term. Therefore, the agreement is impossible to enforce because there is no mutual assent or meeting of the minds as no actual facility is identified.

The document must be construed against the Defendants as the drafting entities. Nowhere does the document identify that Dennis Edwards was entering into an Arbitration Agreement with Magnolia Manor-Spartanburg.

IV. The Arbitration Agreement is unenforceable because Defendants failed to follow regulatory requirements to enforce a valid arbitration agreement in a skilled nursing facility claim.

Federal regulations governing the operation of nursing homes have specific requirements for the creation and execution of arbitration agreements to residents and/or their families by the facility. 42 C.F.R. §483.70(n). The regulations and Guidance to Surveyors require that the facilities be able to prove the following:

- (1) That the terms and conditions of the arbitration agreement are clearly explained to the resident and/or his/her representative;
- (2) It is explained to the resident and his/her representative that the arbitration agreement is voluntary and not required for admission to the facility;
- (3) The facility must explain the arbitration agreement to the resident and resident’s representative in a manner and form which they understand, and

the facility “must ensure there is evidence that the resident or their representative has acknowledged understanding of the agreement;”

- (4) Further, when a signature is used to acknowledge understanding, additional evidence is needed to establish that the resident or their representative understood what was being signed;
- (5) If the resident is cognitively impaired, such should be taken into account in determining whether or not the resident is able to understand the contents of the agreement;
- (6) The facility is required to distinguish the arbitration agreement from the admission agreement, especially if the arbitration agreement is contained within the admission agreement and allow the resident or their representative to decline the arbitration agreement without declining the admission agreement;
- (7) It must be clearly explained to the resident or resident’s representative that there is thirty (30) days to withdraw or terminate the agreement should they change their mind;
- (8) The facility must explain to the resident or their representative how the resident or their representative may withdraw from or terminate the arbitration agreement within the thirty (30) days should they desire to do so; and
- (9) The facility may not require, force, or pressure the resident or his/her representative to sign the binding arbitration agreement.

42 C.F.R. §483.70(n).

Aside from the plain language of the Arbitration Agreement, Defendants offer no evidence to rebut Daughter's Affidavit that the agreement was not explained to her in the terms required as described above. In fact, the Guidance to Surveyors established by the Federal Government for the interpretation of these regulations specifically states:

“In some cases, the binding arbitration agreement may specify that the resident or his/her representative acknowledges understanding by signing the document. When a signature is used to acknowledge understanding, additional evidence may be needed to establish that, in fact, the resident or their representative understood what he or she was signing. It may not be sufficient that the resident or their representative signed the document.”

State Operations Manual, Appendix PP – Guidance to Surveyors for Long-Term Care Facilities, Guidance Section 483.70(n)(1)(2)(i)(ii)(3)-(5). Defendants were required to meet these regulations in order for there to be a binding arbitration agreement. Any arbitration agreement that violates federal law or legal requirements is an invalid contract. An illegal contract is unenforceable. Berkebile v. Outen, 426 S.E.2d 760, 762 n. 2 (1993). “The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.” Id. As a result, the Arbitration Agreement is unenforceable.

V. The Arbitration Agreement is Unenforceable as to the Wrongful Death Claim and the Statutory Beneficiaries.

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement by its own terms is an agreement between “MMS (‘Facility’) its agents, employees and servants, and Dear Sir or Madam, (‘Resident’) or Varesa Goodman (‘Resident’s Durable Power of Attorney for Health

Care’/’Resident’s Legal Guardian’/’Resident’s Responsible Party’ hereafter collectively ‘Representative’). Therefore, any purported agreement to arbitrate any claims was (by the terms of the contract which was drafted by the Defendants) only on behalf of the Facility and Resident or Resident’s Representative.

While at some point during Decedent’s admission to the facility, he might have had the authority to bind himself and his claims to arbitration but was never given the chance. However, even if the agreement purported to include the statutory beneficiaries, Daughter did not have the legal authority to bind Decedent’s statutory beneficiaries who are not a parties/signatories to the Arbitration Agreement. The signatory to the agreement is Daughter on behalf of Decedent and Facility. Daughter was only asked to sign the agreement on behalf of Decedent and was not even aware of the Arbitration Agreement. No other parties are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries’ claims.

While Defendants would like to contend that the agreement covers statutory beneficiaries’ claims, which it does not, the problem with this contention is that Decedent/Daughter had no authority to waive the statutory beneficiaries’ claims. While dealing with a separate arbitration issue in a nursing home case and finding the arbitration agreement to be unenforceable, the Court of Appeals in Hodge recognized the separateness of the statutory beneficiaries/estate’s claims from those of the resident. In discussing the Maryland court’s case of Dickerson, the Court noted that the nursing home was attempting “to use equitable estoppel against [the patient’s] estate based on actions that [daughter] took *in her individual capacity*. The fact that [daughter] is *now the Personal Representative for [the patient’s] [e]state* is of no moment; we will not hold

this circumstance against [the patient's] [e]state. Simply put, [the patient's] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] [e]state, or by [daughter] in *her capacity as Personal Representative* of [the patient's] [e]state....” Hodge quoting Dickerson v. Longoria, 995 A.2d. 721, 743 (Md. 2010). As recognized in this discussion, actions taken by Daughter in her *individual capacity* will not be held against the estate and as the Court noted, the estate may well have other beneficiaries or creditors.

Defendants insist that Daughter had the power to waive the right to a jury trial on a claim that did not exist when the Arbitration Agreement was presented but never belonged to her and covered injuries suffered exclusively by other people. Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019), provides the specific times when a contract may be enforced against a non-party and the Defendants would have the burden of proving each of the elements of one of those instances where such a contract may be enforced against a non-party. Defendants cannot prove these elements existed with regards to this specific case.

The statutory beneficiaries’ claim is much more akin to the claims of the non-signatory Plaintiffs in Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019), where the South Carolina Supreme Court held the non-signatories could not be bound by the arbitration agreement. Much like the non-signatories in Wilson, the statutory beneficiaries in the instant case are not attempting to exploit or receive a direct benefit from the agreement and were not even aware of the existence of the arbitration provision. Defendants confuse the benefit Decedent received from admission and attempt to argue

the statutory beneficiaries received a benefit personally from the admission. That argument is without merit.

As the Wilson Court notes, “Equitable estoppel is ultimately a theory designed to prevent injustice, and it should be used sparingly. See Hirsch v. Amper Fin. Servs., LLC, 71 A.3d 849, 852 (N.J. 2013)(observing equitable estoppel should be used sparingly to compel arbitration and noting ‘it is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration’); 28 Am.Jr.2d Estoppel and Waiver §29 (2011)(stating equitable estoppel should be used with restraint and only in exceptional circumstances).”

Further confirming the separateness of each statutory beneficiary’s claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, United States District Court for the District of South Carolina, Beaufort Division (2009). In Boyle, the Court concluded that the wrongful death beneficiaries’ claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. Further, at least one other South Carolina court judge has come to the same conclusion. These analyses confirm that the wrongful death claimants have separate and distinct claims apart from that of the survival action. As such, the Daughter and Decedent were incapable of waiving the statutory beneficiaries’ right to a trial by jury.

Many other states have come to this same conclusion, Daniels v. Sunrise Senior Living, Inc., 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2013)

(Wrongful Death claims not bound to arbitration), Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by arbitration agreement.) The only signatures to the Arbitration Agreement were the Daughter for Decedent (Resident) and Facility. Therefore, the only parties executing this Agreement were the Daughter purportedly on behalf of Decedent and Facility. Facility would contend that this agreement is binding on the non-signatory statutory beneficiaries simply because the Arbitration Agreement says so.

However, as the Supreme Court of Kentucky said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises, Inc.:

[A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third-party are appropriately subjected the contract's arbitration provisions, at least where the tort and contract are significantly intertwined. See, In re Weekley Homes, L.P., 180 S.W. 3d 127 (Tex. 2005) (negligent repair claim by homeowner's daughter against contractor was subject to repair contract's arbitration clause because daughter, although a non-party, was direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contract-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however, it is

something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed.2d 491 (2002) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit”, Citation and internal quotation marks omitted.) Since Beverly’s theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a “third party beneficiary” of the arbitration agreement, we reject it out of hand.

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (KY 2012).

Likewise, Facility’s mentioning of “successors, assigns, heirs, personal representatives, guardians or any other persons deriving their claims through or on behalf of Resident”, as being bound by the Arbitration Agreement does not make it so. It is no more than an *ipse elixir* which Defendants expect this Court to embrace. The law simply does not permit a party to cut off the rights of a non-signatory to an agreement who receives no benefit thereunder.

The wrongful death claims are separate claims apart from the Decedent’s claims.

According to South Carolina’s Wrongful Death Act:

“Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages.”

South Carolina Code Annotated §15-51-10 (1977)

The wrongful death beneficiaries are as follows:

“Every such action shall be for the benefit of the wife, or husband and child or children of the person whose

death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused.”

South Carolina Code Annotated §15-51-20 (Supp. 2001)

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of the Decedent, society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989).

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of Decedent’s society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989). Damages are paid to these beneficiaries because a wrongful death claim is directed at their losses suffered as a result of Dennis Edwards’ 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)). In contrast, the legislature positions the survival statute in a completely different code chapter. The wrongful death claim 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.

The wrongful death claim is a separate claim than the claims a decedent might bring on his own behalf under the survival statute. In Bennett v. Spartanburg Railway

Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated “necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions.” Id. at 31. See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court’s ruling noting that survival claims are independent of wrongful death claims), Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

In Grainger v. Greenville S&A Railway Co., the South Carolina Supreme Court traced the divergent tracks that wrongful death and survival claims have taken over their development. Grainger v. Greenville S&A Railway Co., 101 S.C. 399, 85 S.E. 968 (1915). In that case, the trial court had dismissed the survival action because the decedent’s administrator (equivalent to the modern “Personal Representative”) had previously recovered on a wrongful death claim. Id. at 968. When the legislature recognized this abnormality, it responded by creating the predecessor to the modern survival statute. Id. citing 1912 Code §3693. Grainger held this legislative history conclusively established wrongful death and survival actions are distinct and independent. Id. The claims are distinct because “the beneficiaries, the cause of action, the measure of damages, are all different.” Grainger 85 S.E. at 969. Our courts have further held that judgement in a wrongful death claim does not have preclusive effect on survival claims. 229 S.C. at 611-12 93 S.E.2d at 914. Further, the law is clear that in wrongful death claims, the personal representative “functions under two separate and distinct trusteeships”. Id. In other words, while it is the personal representative’s name

in the caption for the 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).

Further, as early as 1907, our 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. Southern Ry., Carolina Division, 76 S.C. 368, 57 S.E. 196, 200 (1907). Claussen held 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). Our court continues to recognize the distinctiveness of the two actions and that the wrongful death statute created a new cause of action that did not exist at common law and only accrues at the decedent’s death as the wrongful death claim is subject to its own statute of limitations. Weaver v. Lentz, 348 S.C. 672, 678, 561 S.E.2d 360, 363 (Ct. App. 2002).

It is true that our Supreme Court reaffirmed that a claim under the Wrongful Death Act lies in the decedent’s estate only when the decedent possessed the right of recovery at his death. Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E. 2d 143 (2010). This rule, however, does not dictate the conclusion that a wrongful death claim is wholly derivative of the decedent’s claim. Instead, the rule provides that if the defendant has a defense that would completely bar the decedent’s claim had the decedent survived, then the wrongful death beneficiaries may not bring a claim under the statute. For instance, in Stokes, the statute of limitations had run on the decedent’s claim, and the wrongful death beneficiaries were accordingly totally barred from pursuing their claims under the statute. The Supreme Court cited the following from

United States District Court case of Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988): “anything that would have *defeated the decedent’s recovery* had he survived the accident, (such as contributory negligence, a valid release, or similar acts on his part.” (Emphasis added). The Court held Quattlebaum was correctly decided and adheres to the principle that that a decedent’s estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived.” Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 143, 146, 699 S.E.2d (S.C. 2010) at 146.

Facility has never asserted that the claims here are completely barred or that Decedent’s recovery has been “defeated” by operation of law, such as by the running of the statute of limitations or the execution of a release. Instead, what Facility asserts is that Decedent may not bring a claim in court but must pursue his remedies in arbitration. Thus, neither Stokes nor the wrongful death statute operate to cut off the statutory beneficiaries’ rights, even if the claims had been subject to arbitration. See also Carter v. SSC Odin Operating Co., LLC, 2012 IL 113204, ¶57, 976 N.E.2d 344, 359 (IL 2012) (noting the defendants overstated the significance of the derivative nature of a wrongful death action, and stating “Although a wrongful-death action is dependent upon the decedent’s entitlement to maintain an action for his or her injury, had death not ensued, neither the Wrongful Death Act nor this court’s case law suggests that this limitation on the cause of action provides a basis for dispensing with basic principles of contract law in deciding who is bound by an arbitration agreement”). Additionally, the legal provisions holding 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 she choose to leave it intact.

The Pennsylvania Superior Court recently in Pisano v. Extended Homes, Inc., operating under the fictitious name Belaire Health 84 Rehabilitation Center, 2013 PA Super 232, 77 A.3d 651, 662 (PA 2013) affirmed the trial court decision that the nursing home arbitration agreement did not apply to the statutory beneficiaries' wrongful death claim. The Court noted the wrongful death and survival actions are not derivative of each other but are flowing from the same underlining tortious conduct. Like the South Carolina statute, Pennsylvania's wrongful death statute provides that the right of action exists only for the benefit of the spouse, children, parents, or parents of the deceased. Id. at 656. The Pennsylvania Court further held that since the wrongful death claim is independent of the survival action and because the wrongful death statute does not characterize the wrongful death claim as that of a third-party beneficiary, that the trial court properly refused to compel arbitration to the non-signatory wrongful death beneficiaries who were not parties to the arbitration agreement.

Likewise, in Bybee v. Abdulla, M.D., 189. P.3d 40, 2008 UT 35 (Utah, 2008), the Supreme Court of Utah held that an agreement to arbitrate that was signed by the decedent cannot extend to the statutory beneficiaries of a wrongful death claim. The Utah Supreme Court noted that certain defenses from the decedent's personal injury action may be raised against the heirs of a wrongful death action such as comparative negligence and statutes of limitations as key common characteristics. However, as the Supreme Court of Utah noted, both of these defenses go to the viability of the underlying personal injury action. The Court further stated that "by contract, an agreement to bind

heirs to arbitrate disputes does not implicate the viability of underlying claims.” Id. at 47, citing Horwich v. Superior Court, 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P. 2d 927, 935 (1999). The Utah Supreme Court went on to note that “we have never intended to suggest, however, that because Decedent is the master of his claim, he may by contract expose his unwilling heirs to any imaginable defense.” Bybee v. Abdulla, M.D. at 46. The Utah Supreme Court further held that the defenses against the decedent’s claim which are less likely to be found enforceable against the heirs’ claims in a wrongful death action “are contract provisions that purport to affect the rights of heirs that do not affect the existence of the decedent’s personal injury claim during his lifetime. The arbitration agreement...falls squarely within this category and is, therefore, unenforceable against the heir.” Id. at 47.

The Court of Appeals in Washington in Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 231 P. 3d 1252 (Wash. App. Div. 1 2010) held that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit.” Id. quoting Satomi Owners Association v. Satomi. LLC, 167 Wash. 2d 781, 225 P.3d 213 (2009). The Washington Court of Appeals further noted that the wrongful death claims asserted in that case were not on behalf of the estate just as South Carolina’s wrongful death claims are not on behalf of the estate. The Washington Court of Appeals further discussed the Supreme Court of Ohio’s ruling in Peters v. Columbus Steel Casting Co., 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), wherein the Supreme Court of Ohio held that the wrongful death claim of a spouse who was Administrator of her husband’s estate was not subject to the Decedent’s arbitration agreement. The Washington Court of Appeals in discussing Peters,

stated “In sum, the decedent’s agreement was an agreement ‘to arbitrate his claims against the company,’ and thus the provision in the agreement binding the decedent’s heirs applied to a survival action. But the decedent could not ‘restrict his beneficiaries to arbitration of their wrongful death claims because he held no right to those claims.” Woodall v. Avalon Care Center - Federal Way, LLC at 929. In the Washington Court of Appeals’ analysis, the Court concluded that the wrongful death beneficiaries could not be bound to the arbitration agreement which they did not sign.

Because the statutory beneficiaries have separate and independent claims and were not covered by the scope of this agreement or parties to this agreement, the Arbitration Agreement drafted by Facility cannot reach the claims of the wrongful death statutory beneficiaries.

CONCLUSION

Based upon the forgoing reasons, Defendant THI of South Carolina at Spartanburg, LLC d/b/a magnolia Manor-Spartanburg’s’ Motion to Stay or Dismiss Action and Compel Arbitration and Stay State Court Proceedings and Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, THI of Baltimore, Inc., THI of South Carolina, LLC, Hunt Valley Holdings, LLC, and Rusty Flathmann’s Motions to Stay are hereby denied.

IT IS SO ORDERED.

The Honorable J. Derham Cole
Seventh Judicial Circuit

Date: _____, 2025
Spartanburg, South Carolina



Spartanburg Common Pleas

Case Caption: Varesa Goodman , plaintiff, et al VS Thi Of South Carolina At
Spartanburg Llc , defendant, et al

Case Number: 2023CP4204152

Type: Order/Other

IT IS SO ORDERED!

s/J. Derham Cole 2053