

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2017-002241

RECEIVED  
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SC Court of Appeals

Stephanie Walker Weaver,.....Respondent,

v.

Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston, Terri Robinson,  
John Does, and Richard Roe Corporations, .....Defendants,

Of whom Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston, and  
Terri Robinson are the .....Appellants.

RESPONDENT’S MOTION TO DISMISS ISSUE I (AND ITS SUBPARTS) OF  
APPELLANTS’ INITIAL BRIEF AS UNAPPEALABLE

Pursuant to Rules 201(a),<sup>1</sup> and 240, SCACR, Respondent Stephanie Walker Weaver (“Weaver”) moves this Court for an order dismissing Issue I (and its subparts) from Appellants’ Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston, and Terri Robinson (“Appellants”) Initial Brief because it is not immediately appealable.<sup>2</sup>

**FACTUAL AND PROCEDURAL BACKGROUND**

Weaver’s grandmother, Bonnie S. Walker, died by alligator attack while a resident at Appellants’ assisted living facility. (Exh. 1, Cmplt.). Mrs. Walker, who had a history of wandering

<sup>1</sup> “Appeal may be taken, as provided by law, from any final judgment, appealable order or decision.” Rule 201(a), SCACR.

<sup>2</sup> Weaver contemporaneously files a motion to stay all appellate deadlines pending the Court’s ruling on this motion.

and sleep-walking, disappeared from the facility around 12:15 am on July 27, 2016. *Id.* at ¶¶ 21, 23. Approximately 7 hours later, when Appellants discovered she was missing, they notified the family of her disappearance. *Id.* at ¶¶ 24-25. Weaver came to the facility with other family members to look for her grandmother. *Id.* at ¶¶ 26-27. Weaver walked to a retention pond on the facility property and found her grandmother's dead body dismembered by an alligator attack and lying in the pond. *Id.* at ¶ 29.

Appellants settled the survival and wrongful death claims of Mrs. Walker's Estate. (Exh. 2, Mot. to Compel). Weaver filed this action for her separate, individual injuries suffered as a result of finding her dead, dismembered grandmother. On June 19, 2017, she filed a complaint asserting causes of action for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress/outrage. (Exh.1, Cmpl.). On July 19, 2017, Appellants filed a motion to dismiss or, in the alternative, to compel arbitration based on Mrs. Walker's residency agreement. (Exh. 2).

In the motion to dismiss, Appellants argued that (1) the wrongful death case was the exclusive remedy such that Weaver could not recover for her individual injuries, (2) any duties owed by Appellants were owed to Mrs. Walker and not to Weaver, (3) Weaver could not establish negligent infliction of emotional distress because she allegedly was not in close proximity to the attack and did not contemporaneously perceive it, and (4) Weaver could not establish intentional infliction of emotional distress because Appellants did not direct any conduct towards her. (Exh. 2, Mot.; Exh. 3 Memo. in Supp. of Mot.). The motion to dismiss does not discuss any provisions of the Residency Agreement.

After a hearing, the lower court denied the motions to dismiss and compel arbitration in a single order. (Exh. 4, Order). Appellants filed a Notice of Appeal. Appellants' Initial Brief

includes the unappealable, interlocutory issue of whether the lower court should have denied the motion to dismiss.

## ARGUMENT

Appellants ask this Court to consider an unappealable issue. (Br. of App. pp. 11-13). In response, Weaver files this motion to dismiss. The denial of a motion to dismiss is unappealable, and the Court should dismiss that issue and order Appellants to file an amended initial brief removing that issue, its subparts, and all other portions of the brief related to it.

“[T]he denial of a motion to dismiss is not directly appealable.” *Levi v. N. Anderson Cnty. EMS*, 409 S.C. 374, 381-82, 762 S.E.2d 44, 48 (Ct. App. 2014) (internal quotation marks omitted) (“Courts cannot review a decision that has not been made. . . . the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings.” (internal quotation marks and citations omitted)).

This Court may exercise its discretion to review interlocutory orders on appeal with an appealable issue.<sup>3</sup> However, it frequently refuses to do so. *See Smith v. Tiffany*, 419 S.C. 548, 552 n.1, 799 S.E.2d 479, 481 n.1 (2017) (declining to address the appeal of a discovery order with an appeal of an order granting summary judgment because “the issue lacks a sufficient nexus or companionship to justify this Court’s exercise of immediate appellate review” (internal quotation marks omitted)); *Watson v. Underwood*, 407 S.C. 443, 457-60, 756 S.E.2d 155, 163-64 (Ct. App. 2014) (choosing not to hear an appeal of an order denying a petition to terminate a trust with an appeal of an order granting partial summary judgment because the court has declined to consider an interlocutory appeal when it “found the issue to be novel and relating to the sufficiency of the

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<sup>3</sup> Appellants do not cite to or discuss S.C. Code Ann. § 14-3-330 as a basis for the immediate appealability of the denial of the motion to dismiss.

allegations”); *Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 371, 628 S.E.2d 902, 918 (Ct. App. 2006) (refusing to entertain an appeal from the denial of summary judgment with an appeal of an order dismissing causes of action because the order on summary judgment “is not conducive to appellate review”); *Brown v. Cnty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005) (refusing to accept an appeal from the denial of a motion to dismiss with an appeal of the denial of a preliminary injunction because the issues “lack a sufficient nexus or companionship to justify this Court’s exercise of immediate appellate review”); *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998) (electing “not to entertain” the interlocutory appeal of an order granting a motion to amend a complaint); *Flavor-Inn v. NNCNB Nat’l Bank*, 309 S.C. 508, 514, 424 S.E.2d 534, 537 (Ct. App. 1992) (refusing to address the denial of a motion to strike defenses with other appealable issues because the denial is “not immediately appealable” and the appellant “has shown no reason why this general rule should not be followed here”).

For the reasons stated below, the Court should grant Weaver’s motion to dismiss Appellants’ Issue I and its subparts as unappealable.

**I. The Motions to Dismiss and Compel Arbitration are Not Companion Issues**

The issues in the motion to dismiss and motion to compel arbitration are completely unrelated with no overlapping factual or legal analysis. They are not companion issues as to which this Court has previously entertained an unappealable issue with an appealable issue. Two cases illustrate this principle.

In *Brown v. County of Berkeley*, the plaintiff appealed the lower court’s denial of a preliminary injunction and the defendants cross-appealed the denial of their motion to dismiss. 366 S.C. at 357, 622 S.E.2d at 535. The Supreme Court refused to accept the denial of the motion to

dismiss as a companion issue to the denial of the preliminary injunction. *Id.* at 362 n.5, 622 S.E.2d at 538 n.5. “[T]he two issues argued on appeal (the denial of a preliminary injunction preventing a special audit and the denial of a motion to dismiss claims for defamation, defamation *per se*, and intentional infliction of emotional distress) lack a sufficient nexus or companionship to justify this Court’s exercise of immediate appellate review.” *Id.*

The same result is warranted in this case. The issues of the denial of a motion to compel arbitration and the denial of a motion to dismiss claims for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress lack a sufficient nexus or companionship to justify this Court’s exercise of immediate appellate review. *See Smith v. Tiffany*, 419 S.C. 548, 552 n.1, 799 S.E.2d 479, 481 n.1 (2017) (refusing to address the appeal of a discovery order with an appeal of an order granting summary judgment because “the issue ‘lack[s] a sufficient nexus or companionship to justify this Court’s exercise of immediate appellate review’” (quoting *Brown*, 366 S.C. at 362 n.5, 622 S.E.2d at 538 n.5)). There are no companion issues that are closely connected. Whether the arbitration provision is enforceable against a non-signatory is wholly unrelated to whether Weaver’s individual claims are subsumed by Mrs. Walker’s Estate’s survival and wrongful death claims and whether Weaver’s complaint pled sufficient allegations for each cause of action. There is no common law applicable to the motion to dismiss and motion to compel arbitration. There are no common facts analyzed under the motion to dismiss and motion to compel arbitration.

Appellants’ only argument on this point is that, somehow, both motions involve the Residency Agreement that contains the arbitration provision. (Initial Br. of App. pp. 12-13). This is a legal and factual stretch that is not supported by Appellants’ prior arguments in this case. Appellants, when addressing the motion to dismiss, do not reference the Residency Agreement.

(Exhs. 2 & 3). Rather, they discuss only the duties alleged in the Complaint, which also does not allege a duty owed to Weaver by virtue of the Residency Agreement. The Complaint and Weaver's memorandum in opposition to the motion to dismiss do not discuss the Residency Agreement. (Exhs. 1 & 5, Memo. in Opp.). The lower court's order does not discuss the Residency Agreement in its ruling on the motion to dismiss. (Order pp. 1-2). The motion to dismiss has nothing to do with the Residency Agreement. The Court should reject Appellants' effort to relate the two solely for the purpose of attempting the appeal of an unappealable issue.

In another case, *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002), the lower court granted the defendant's motions to dismiss and for summary judgment, and denied the plaintiff's motion for summary judgment as to one claim. *Id.* at 325, 574 S.E.2d at 505. The Court recognized "the denial of a motion for summary judgment is not immediately appealable" but "the courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when those appeals are companion to issues that are reviewable." *Id.* at 338, 574 S.E.2d at 511. Because the lower court's decision to grant summary judgment "encompassed the claim" that was the subject of the decision to deny summary judgment, the issues were "so closely connected" to make review appropriate. *Id.* at 338-39, 574 S.E.2d at 511-12.

This case is easily distinguishable from *Pitts* because there are no companion issues that are closely connected. The lower court's decision to deny the motion to compel does not encompass the claims that are the subject of the motion to dismiss, and Appellants make no such argument. Review of the unappealable decision to deny the motion to dismiss is not appropriate for interlocutory review with the motion to compel arbitration.

**II. The Lower Court's Ruling on the Motion to Dismiss is Not Conducive to Appellate Review**

The lower court's ruling on the motion to dismiss substantively consists of two sentences. It ruled "After review of the Plaintiff's Complaint and hearing the arguments of counsel, I find that Plaintiff has sufficiently plead each cause of action as stated therein, and therefore, I deny Defendants' Motion to Dismiss." (Exh. 4 p. 2). There is no discussion of or ruling on the particular arguments Appellants make in Issue I (and its subparts) of their Initial Brief. Appellants chose not to file a Rule 59(e) motion.

This is similar to *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006). Queen's Grant appealed from an order dismissing causes of action, and the respondent cross-appealed from the denial of a motion for summary judgment. *Id.* at 349, 628 S.E.2d at 906. This Court chose not to entertain an appeal of the interlocutory order denying a motion for summary judgment because "the purposeful decision of the circuit court to avoid any consideration of the motion dictates restraint." *Id.* at 371, 628 S.E.2d at 918. The lower court's order stated in one paragraph that it "realized the case can probably be tried upon a submission of the record to me without testimony, so I see no need to grant summary judgment when it will be almost as simple to hear the case on the merits." *Id.* at 371-72, 628 S.E.2d at 918-19. This Court stated such an order "was not conducive to appellate review", reasoning that the "order clearly was not intended to be a final ruling on any of the issues [the respondent] raises." *Id.* at 371, 373, 628 S.E.2d at 918-19.

The same result is warranted in this case. The lower court's ruling on the motion to dismiss is not conducive to appellate review because it simply states Weaver sufficiently pled each cause of action. Such a ruling is not a meaningful platform for appellate review of the arguments

Appellants make in Issue I and its subparts. The Court should find the order on the motion to dismiss is not conducive to appellate review and decline to address the interlocutory order.

**III. Review of the Interlocutory Order Denying a Motion to Dismiss Does Not Avoid Unnecessary Litigation or Narrow the Issues**

The Court's consideration of whether review of an interlocutory order may avoid unnecessary litigation or narrow the issues favors neither party in this case and, therefore, does not support exercising discretion to review an unappealable order.

Appellants' argument on this point assumes this Court will rule in its favor on all or one of the multiple arguments it makes as to the denial of its motion to dismiss. If the Court rules against Appellants on its arguments, the parties will have engaged in unnecessary appellate litigation to end up in the same position. Appellate litigation may last for years if a party seeks a writ of certiorari of this Court's decision. A review of the motion to dismiss does not avoid unnecessary litigation. Rather, it would create unnecessary appellate litigation of an unappealable issue.

Further a resolution of the motion to dismiss requires weighing of the facts which is inappropriate for appellate review of an unappealable, interlocutory order. This demonstrates that further development of the facts on remand may change the outcome of a ruling on these claims, also making this issue ineligible for review on appeal. *See Pelfrey v. Bank of Greer*, 270 S.C. 691, 695-96, 244 S.E.2d 315, 317 (1978) ("refrain[ing] from considering the appeal from [the denial of] these additional motions to strike. These motions involve factual matters and can best be determined at trial in the light of the facts developed.").

For example, Appellants argue Weaver's negligent infliction of emotional distress claim fails because she was not in close proximity to and did not contemporaneously perceive the alligator attack. (Br. of App. p. 20). However, Weaver pled she "was in close proximity to where her grandmother's body was discovered and contemporaneously perceived and was herself injured

by discovering her grandmother's dismembered body floating in the retention pond." (Exh. 1 ¶¶ 39, 47). A resolution of this issue involves factual matters that may still be developed and application of the law to those facts.

Appellants also argue they did not direct any conduct towards Weaver to support a claim for intentional infliction of emotional distress. However, Weaver pled "Defendants notified her family of the disappearance" before looking for Mrs. Walker, "informed" the family when they arrived that Mrs. Walker had not been located, and then the family looked for her. (Exh. 1, Cmplt. ¶¶ 25-27). These allegations show the issue of conduct directed at Weaver is not one to be decided as a matter of law but after consideration of the evidence.

Appellants have not shown the entertaining an interlocutory order will avoid unnecessary litigation in this case and their arguments ask this Court to analyze and weigh the allegations of the Complaint which is inappropriate given that the lower court did not even engage in such an analysis. An appellate review of an interlocutory order denying a motion to dismiss will not avoid, but instead may create, unnecessary litigation.

### **CONCLUSION**

For the reasons stated herein, Weaver requests this Court find Appellants' Issue I and its subparts are not immediately appealable and order Appellants to file an amended Initial Brief removing Issue I, its subparts, and all other portions of the brief related to it, with Respondent's Initial Brief and Designation of Matter due thirty (30) days after service of Appellants' amended brief.

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**EXHIBIT 1**

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HBP may be served via their registered agent for service of process, Corporation Service Company, 1703 Laurel Street, Columbia, SC 29201.

4. At all material times, Defendants Brookdale and HBP established, owned, operated, managed, and/or controlled Brookdale Charleston, an assisted living facility or community residential care facility.

5. At all material times, Defendant Terri Robinson was the licensed Administrator of Brookdale Charleston and directed, controlled and exercised general administrative charge of Brookdale Charleston.

6. Upon information and belief, Defendant Robinson is a citizen and resident of Charleston County, South Carolina.

7. Whenever in this Complaint it is alleged that Defendants Brookdale or HBP did any act or failed to do any act, it is meant that the officers, agents, or employees of the defendants respectively performed, participated in, or failed to perform such acts while in the course and scope of their employment or agency relationship.

8. Brookdale and HBP are directly liable by virtue of their own conduct for the wrongful acts detailed herein. Brookdale and HBP are also vicariously or indirectly liable and responsible for the wrongful conduct detailed herein under one or more of the following alternative legal theories:

9. *Alter Ego*: At all times material to this lawsuit, Brookdale and HBP were *alter egos* of one another. Brookdale and HBP conducted the business of these entities, including the facility, as if they were one by commingling them on an interchangeable basis or confusing separate properties, records, or control. Furthermore, the facility was a subsidiary, affiliate, and/or alter ego of Brookdale and HBP. The management and operations of the facility were so assimilated within

Brookdale and HBP that Brookdale Charleston was simply a name through which Brookdale and HBP conducted their business. Brookdale and HBP dominated and controlled the operations of the facility, and any assertions by Brookdale and HBP that each was a separate corporate enterprise with an independent and separate existence is a sham and part of a scheme to perpetrate fraud, promote injustice, and evade existing legal and fiduciary obligations.

10. **Agency:** At all times material to this lawsuit, Brookdale and HBP acted as agents for one another and each ratified or authorized the acts or omissions of the other.

11. **Amalgamation of Interests:** Brookdale and HBP each remain liable for the acts and omissions of the other because Brookdale and HBP are and have been operating as an amalgamation of interests creating a blurred corporate identity through an integrated enterprise and/or joint venture in the establishment, operation, management, and control of the facility. Brookdale and HBP shared a common purpose in establishing, operating, managing, and controlling the facility and combined their property and labor in the facility for the purpose of making a profit and to blur the legal distinction between the entities and their activities.

12. Defendant John Does and Defendant Richard Roe Corporations are individuals and businesses unknown to the Plaintiff at this time that took part in the reckless and negligent acts and/or omissions of the named defendants. Plaintiff intends to name as additional defendants in this lawsuit each corporation, partnership, other entity, and/or individual that, either directly or in concert with others, took part in the negligent acts and/or omissions of the named defendants.

13. Plaintiff also intends to name as defendants any other corporation, partnership, other entity, and/or individual who is or was an *alter ego* of the Defendants, or who is a joint venture with the Defendants, that participated in the establishment, ownership, operation, management or control of the facility.

14. Defendants are jointly and severally liable as to all damages alleged herein because their negligent, grossly negligent, reckless and wanton acts and/or omissions are a direct and proximate cause of the Plaintiff's damages and injuries.

15. The facts and circumstances alleged herein and giving rise to Plaintiff's injuries and damages occurred in Charleston County, South Carolina and jurisdiction and venue are proper in this judicial circuit pursuant to South Carolina Code Ann. § 15-7-30(B).

### **FACTUAL ALLEGATIONS**

16. Plaintiff reasserts and realleges the allegations in the above paragraphs as if stated herein verbatim.

17. Plaintiff is the granddaughter of Bonnie S. Walker.

18. From June 4, 2016 through her death on July 27, 2016, Bonnie S. Walker (hereinafter "Bonnie Walker") was a resident of Brookdale Charleston, an assisted living/community residential care facility located at 2030 Charlie Hall Boulevard in Charleston, South Carolina.

19. Brookdale Charleston held itself out to the public, including the family of Bonnie Walker, as an assisted living/community residential care facility with the personnel and expertise necessary to ensure the safety of residents admitted to Brookdale Charleston, including Bonnie Walker.

20. Defendants had a duty to operate and manage Brookdale Charleston with due care to adequately and appropriately monitor and supervise residents, including Bonnie Walker.

21. At all material times, Defendants knew or should have known that due to her physical and mental condition, as well as a known history of wandering and sleep-walking,

Bonnie Walker required monitoring and supervision to minimize wandering and prevent elopement from the facility.

22. Notwithstanding this knowledge, Defendants failed to exercise due care in monitoring, supervising, and otherwise providing services required to keep Bonnie Walker safe.

23. On July 27, 2016, at around 12:15 a.m., Bonnie Walker eloped from Brookdale Charleston.

24. Defendants did not discover that she was missing from the facility until around 7:15 a.m., at which point Bonnie Walker had been out of the custody, supervision, and control of Defendants for at least 7 hours.

25. Prior to conducting an appropriate search and taking other measures to locate Bonnie Walker, Defendants notified her family of the disappearance.

26. Plaintiff and other family members traveled to Brookdale Charleston and were informed that Defendants still had not located Bonnie Walker.

27. As Defendants had not yet located her grandmother, Plaintiff began searching the property, walking to the rear of the facility towards a retention pond.

28. Upon information and belief, the retention pond and immediately surrounding area were under the control of Defendants.

29. As she walked closer to the pond, Plaintiff was shocked and horrified to find the remains of her grandmother's body floating in the pond where it had been dismembered by an alligator.

30. Defendants knew or should have known that:

- a. Bonnie Walker was at risk for wandering and elopement from the facility;

- b. Residents, including Bonnie Walker, who eloped from the facility were likely to wander in and around the retention pond;
- c. Alligators were present in and around the retention pond;
- d. The retention pond presented a hazardous and dangerous condition to residents, including Bonnie Walker;
- e. Due to her diminished capacity, of which the Defendants were aware, Bonnie Walker could not appreciate the risks posed by the retention pond, including the dangers posed by the presence of alligators;
- f. Family members notified that Bonnie Walker was missing, including Plaintiff, would actively search for her on the property; and
- g. The search conducted by family members, including Plaintiff, would likely include the retention pond area.

31. As a result of Bonnie Walker's exposure to the hazards of the retention pond, known by the Defendants to be an area where alligators were located, Bonnie Walker suffered a variety of injuries, including but not limited to, dismemberment, and her horrific death.

32. The reckless, negligent, wrongful and intentional acts of Defendants alleged herein caused Plaintiff to suffer and continue to suffer, severe personal and emotional distress and injury, which includes but is not limited to: anxiety, worry, disturbance of sleep resulting in extreme fatigue, loss of quiet enjoyment of normal daily activities, irritability, feelings of dread and fear, feelings of reduced self-worth, shame, isolation and humiliation, impairment of interpersonal relationships, impaired ability to concentrate, and impaired ability to enjoy life.

**FIRST CAUSE OF ACTION**  
**(Negligence)**

33. Plaintiff reasserts and realleges the allegations in the above paragraphs as if stated herein verbatim.

34. Defendants had a duty to use reasonable care in the operation of Brookdale Charleston, and in accordance with all laws, statutes, regulations, ordinances, industry standards, customs, and practices regarding the ownership and operation of such a facility.

35. Defendants' duties included the duty to monitor and supervise their residents and to conduct timely and diligent searches for residents known to be missing or known to have eloped.

36. Defendants were negligent, grossly negligent, careless, willful, wanton, and reckless and breached their duties by failing to maintain property subject to their control in a reasonably safe condition, failing to correct dangerous conditions of which Defendants were aware or should have been aware of in the exercise of reasonable care, and failing to warn Plaintiff of dangerous conditions.

37. Defendants were negligent, grossly negligent, careless, willful, wanton, and reckless and breached their duties by operating Brookdale Charleston in a manner which resulted in the elopement of Bonnie Walker.

38. Defendants were further negligent, grossly negligent, careless, willful, wanton, and reckless and breached their duties by failing to conduct an adequate and timely search for Bonnie Walker; failing to warn Plaintiff of the hazards associated with the retention pond and circumstances foreseeably created if Bonnie Walker had entered the pond known to be inhabited by alligators, and otherwise failing to act to prevent the horrific discovery by Plaintiff of Bonnie Walker's dismembered remains in the retention pond.

39. Plaintiff was in close proximity to where her grandmother's body was discovered and contemporaneously perceived and was herself injured by discovering her grandmother's dismembered body floating in the retention pond behind the facility.

40. Defendants' negligence, gross negligence, and recklessness, as set forth above, proximately caused physical injuries and the death of Bonnie Walker, and Defendants knew or should have reasonably foreseen that its negligent, gross negligent, and reckless conduct would cause harm to Bonnie Walker's family members, including Plaintiff.

41. As a direct and proximate cause of Defendants' negligent, grossly negligent, careless, willful, wanton, and reckless conduct and breach of the duties owed to Plaintiff and Bonnie Walker, Plaintiff suffered damages in the form of physical injury and harm, past and future medical expenses, past and future physical and mental pain and suffering, mental, emotional, and psychological damage, severe emotional distress, and loss of enjoyment of life.

42. As a further legal and proximate result of Defendants' conduct, Plaintiff has suffered economic damages in an amount to be awarded according to proof.

43. As a result, Plaintiff is entitled to an award of actual and punitive damages against all Defendants in such amounts as to be determined by a jury.

**SECOND CAUSE OF ACTION**  
**(Negligent Infliction of Emotional Distress)**

44. Plaintiff reasserts and realleges the allegations in the above paragraphs as if stated herein verbatim.

45. Defendants' negligence, gross negligence, and recklessness, as set forth above, proximately caused serious physical injuries and the death of Bonnie Walker, and Defendants

knew or should have reasonably foreseen that their negligent, gross negligent, and reckless conduct would cause harm to Bonnie Walker's family members, including Plaintiff.

46. Plaintiff was the granddaughter of Bonnie Walker and maintained a close relationship with her grandmother until the time of her death.

47. Plaintiff was in close proximity to where her grandmother's body was discovered and contemporaneously perceived and was herself injured by discovering her grandmother's dismembered body floating in the retention pond.

48. As a direct and proximate cause of Defendants' negligent, grossly negligent, careless, willful, wanton, and reckless conduct, Plaintiff suffered and will continue to suffer severe emotional distress that no reasonable person should be expected to experience.

49. As a direct and proximate cause of Defendants' negligent, grossly negligent, careless, willful, wanton, and reckless conduct and breach of the duties owed to Plaintiff and Bonnie Walker, Plaintiff suffered physical injury and harm, past and future medical expenses, past and future physical and mental pain and suffering, mental, emotional, and psychological damage, and loss of enjoyment of life.

50. As a further legal and proximate result of Defendants' conduct, Plaintiff has suffered economic damages in an amount to be awarded according to proof.

51. As a result, Plaintiff is entitled to an award of actual and punitive damages against all Defendants in such amounts as to be determined by a jury.

**THIRD CAUSE OF ACTION**  
**(Intentional Infliction of Emotional Distress / Outrage)**

52. Plaintiff reasserts and realleges the allegations in the above paragraphs as if stated herein verbatim.

53. Defendants intentionally or recklessly inflicted severe emotional distress or were certain or substantially certain that such distress would result from their conduct as described above, as well as by mishandling, mistreating, and failing to safeguard the human remains of Bonnie Walker.

54. Defendants' conduct was so extreme and outrageous as to exceed all bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community.

55. As a direct and proximate cause of Defendants' negligent, grossly negligent, careless, willful, wanton, and reckless conduct, Plaintiff suffered and will continue to suffer severe emotional distress that no reasonable person should be expected to experience.

56. As a direct and proximate cause of Defendants' negligent, grossly negligent, careless, willful, wanton, and reckless conduct and breach of the duties owed to Plaintiff and Bonnie Walker, Plaintiff suffered physical injury and harm, past and future medical expenses, past and future physical and mental pain and suffering, mental, emotional, and psychological damage, and loss of enjoyment of life.

57. As a further legal and proximate result of Defendants' outrageous conduct, Plaintiff has suffered economic damages in an amount to be awarded according to proof.

58. As a result, Plaintiff is entitled to an award of actual and punitive damages against all Defendants in such amounts as to be determined by a jury.

WHEREFORE, Plaintiff prays for:

- a. A trial by jury;
- b. Actual and other compensatory damages to be determined by a jury, but in excess of \$10,000.00;

- c. Punitive and exemplary damages in an amount to be determined by a jury, but in excess of \$10,000.00;
- d. Costs and disbursements in the pursuit of this action; and
- e. Such other and further relief as the Court deems just and proper.

Dated this 19th day of June 2017.

CONNOR & CONNOR, LLC

/s/ Kenneth L. Connor

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*Attorneys for Plaintiff*

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**EXHIBIT 2**

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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 Stephanie Walker Weaver, )  
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 Plaintiff, )  
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 vs. )  
 )  
 Brookdale Senior Living, Inc., HBP )  
 LeaseCo, LLC d/b/a Brookdale Charleston, )  
 Terri Robinson, John Does and Richard )  
 Roe Corporations, )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 Civil Action No. 2017-CP-10-03130

**MOTION TO DISMISS OR, IN THE  
 ALTERNATIVE, TO COMPEL  
 ARBITRATION**

FILED  
 2017 JUL 19 PM 4:02  
 JULIE J. ARBSTRONG  
 CLERK OF COURT  
 BY \_\_\_\_\_

Defendants Brookdale Senior Living, Inc. (hereinafter “Brookdale Senior Living”), HBP LeaseCo, LLC d/b/a Brookdale Charleston (hereinafter “HBP”), and Terri Robinson (hereinafter “Robinson”) (hereinafter collectively referred to as “Defendants”) hereby move the Court to dismiss Plaintiff’s Complaint and the claims raised therein against Defendants, or in the alternative, to compel arbitration of Plaintiff’s claims. This argument is made pursuant to Rule 12 of the South Carolina Rules of Civil Procedure, as amended; the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*; the Residency Agreement attached hereto as Exhibit A, specifically Section V, Agreement to Arbitrate; as well as applicable Federal and South Carolina jurisprudence.

As grounds for the motion, Defendants assert the following:

1. Plaintiff initiated these proceedings with the filing of her Summons and Complaint in the Court of Common Pleas for Charleston County on or about June 19, 2017. Thereafter, counsel accepted service of Plaintiff’s Summons and Complaint on or about June 21, 2017.

2. In her Complaint, Plaintiff alleges she is the granddaughter of non-party Bonnie S. Walker (hereinafter “Walker”), who was a resident in HBP’s assisted living facility located in Charleston, South Carolina, until her death on July 27, 2016. (Pl.’s Compl., ¶¶ 17-18) Plaintiff further alleges Walker wandered away from the facility during the early morning hours of July 27, 2016, and was thereafter mauled by an alligator in a nearby retention pond. (*Id.*, ¶¶ 22-29) Plaintiff claims to have sustained emotional trauma when she observed Walker’s remains several hours after the alligator attack. (*Id.*) Her Complaint sets forth causes of action sounding in negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress/outrage stemming from Walker’s care and treatment while she was a resident of Brookdale Senior Living. Plaintiff’s Complaint includes prayers for actual and punitive damages, costs, fees, and other undefined relief.

3. As of February 28, 2013, Walker signed a General Power of Attorney (With Health Care) appointing her adult children, James H. Walker and Jennifer D. Weinstein, with authority to act as her agents in all matters, including health care decisions. (*See* Power of Attorney, attached as Exhibit B) James H. Walker also is the duly appointed Personal Representative of Walker’s Estate, and Defendants have settled and fully resolved the Estate’s survival and wrongful death claims against them stemming from Walker’s injuries and death.

4. The wrongful death statute, S.C. Code Ann. §§ 15-51-10, *et seq.*, “constitutes the exclusive remedy” available to heirs of an individual killed by the allegedly negligent acts of another. *Banks v. Medical University of South Carolina*, 314 S.C. 376, 444 S.E.2d 519 (1994) (declining to recognize a cause of action for breach of implied contract based upon a physician’s alleged negligent performance of health care services and recognizing that wrongful death action was exclusive remedy available to mother of deceased child) (citing *Green v. Southern Railway*

*Company*, 319 F.Supp. 919 (D.S.C. 1970)). Moreover, a wrongful death action may be instituted and maintained only by the duly appointed personal representative of the decedent's estate. S.C. Code Ann. 15-51-20; *Glenn v. E.I. DuPont De Nemours & Co.*, 254 S.C. 128, 174 S.E.2d 155 (1970) (if an action for wrongful death is instituted by one other than the duly appointed personal representative of the decedent, it should be dismissed). Here, Plaintiff's claims stem from Defendants' alleged breach of the standard of care and are barred by the exclusive remedy available to her and the other heirs of Walker's Estate pursuant to the wrongful death statute. Indeed, Walker's Estate already has asserted and resolved its wrongful death and survival claims against Defendants.

5. Plaintiff's cause of action for negligent infliction of emotional distress fails for the additional reason that she cannot meet the elements established by *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985). Specifically, Plaintiff has not alleged and cannot establish: (1) that she was in close proximity to the alligator attack; (2) that she contemporaneously perceived the attack; or (3) that her alleged emotional distress has manifested itself by physical symptoms capable of an objective diagnosis. *Id.*, 286 S.C. at 582-583; 336 S.E.2d at 467 (citations omitted). Stated differently, Plaintiff did not witness the alligator attack and instead alleges she was "in close proximity to where her grandmother's body was discovered and contemporaneously perceived . . . her grandmother's dismembered body. . . ." (Pl.'s Compl. ¶ 47) Such after-the-fact perceptions are insufficient to give rise to an actionable claim for negligent infliction of emotional distress. *See, e.g., Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 155, 533 S.E.2d 597, 603 (Ct. App. 2000) (finding wife could not recover for bystander liability where she was not a bystander in close proximity to the accident and did not contemporaneously perceive the accident).

6. Plaintiff's claim for intentional infliction of emotional distress likewise fails for the additional reason that she has not alleged conduct on the part of these Defendants that was directed at the Plaintiff, that such conduct occurred in the presence of Plaintiff, and that such purposeful conduct was directed at someone, chiefly the Plaintiff, of whom Defendants were aware. In order to recover for the tort of intentional infliction of emotional distress, Plaintiff is required to establish the following elements: (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; (3) the actions of defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. *Id.* (additional citation omitted). Here, Plaintiff alleges Defendants mishandled, mistreated, and failed to safeguard the human remains of Bonnie Walker. (Pl.'s Compl. ¶ 53) She has not alleged any specific conduct by Defendants, that Defendants were aware of her, or that Defendants purposefully directed any conduct towards Plaintiff. Her claim for intentional infliction of emotional distress is therefore deficient and should be dismissed.

7. Even if the Court concludes Plaintiff's Complaint meets the pleading requirements to survive a motion to dismiss pursuant to Rule 12(b), SCRPC, it should compel Plaintiff to submit her claims to binding arbitration. As of May 30, 2016, Walker, by and through her duly appointed agent James H. Walker, and HBP LeaseCo, L.L.C. d/b/a Brookdale Charleston, entered into the Residency Agreement regarding the continued residency of Walker at its assisted living facility in Charleston, South Carolina. (*See* Residency Agreement, attached as Exhibit A)

8. As reflected in Section V of the Residency Agreement, Walker's legal representative and HBP anticipated and agreed that any dispute arising out of or under the Admission Agreement would be subject to and governed by arbitration. Specifically, the parties to the Residency Agreement understood and agreed that "[a]ny and all claims or controversies arising out of, or in any way relating to, this Agreement or any of your stays at the Community, excluding any action for involuntary transfer or discharge or eviction, and including disputes regarding interpretation, scope, enforceability, unconscionability, waiver, preemption and/or violability of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. **The parties to this Agreement further understand that a judge and/or jury will not decide their case.**" (Ex. A, pp. 7-8, ¶ 1) (Emphasis in the original)

9. Further, the parties expressly agreed that "this Arbitration Provision, the Residency Agreement and the Resident's stays at this Community substantially involve interstate commerce, and stipulate[d] that the Federal Arbitration Act ("FAA") shall exclusively apply to the interpretation and enforcement of this Agreement, and shall preempt any inconsistent State law . . . ." (Ex. A, p. 8, ¶ 2)

10. There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App.1999).

11. Here, the parties to the Residency Agreement agreed and stipulated to the existence of a transaction involving commerce, and nothing in the arbitration provisions of the Residency Agreement would render the arbitration provisions unconscionable or otherwise unenforceable. (Ex. A, p. 8, ¶ 2)

12. As such, the matters brought forth by Plaintiff are governed by the arbitration provisions of the Residency Agreement and should be resolved accordingly, not through this litigation.

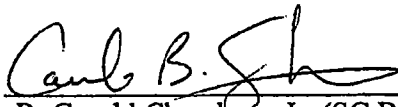
For these reasons, Defendants move to dismiss Plaintiff's Complaint, or, in the alternative, to compel arbitration in accordance with the arbitration provision of the Residency Agreement. This motion is based upon the pleadings, relevant statutes and authorities, the attached Exhibits A and B, and any affidavits and supporting memoranda that may be hereafter submitted.

**[Signature Page To Follow.]**

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

July 18, 2017

By:



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**ATTORNEYS FOR DEFENDANTS  
BROOKDALE SENIOR LIVING, INC., HBP  
LEASECO, LLC, AND TERRI ROBINSON**

**CERTIFICATE OF SERVICE**

I hereby certify that this 18th day of July 2017 a copy of the **MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO COMPEL ARBITRATION** has been served upon other counsel of record, by mailing same, postage prepaid in the United States Mail, addressed to the following:

Kenneth L. Connor, Esquire  
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**ATTORNEYS FOR PLAINTIFF**

FILED  
2017 JUL 19 PM 4:02  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

  
\_\_\_\_\_

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**EXHIBIT 3**

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
  
Civil Action No. 2017-CP-10-03130

Stephanie Walker Weaver, )  
 )  
Plaintiff, )

vs. )

Brookdale Senior Living, Inc., HBP )  
LeaseCo, LLC d/b/a Brookdale Charleston, )  
Terri Robinson, John Does and Richard )  
Roe Corporations, )  
 )  
Defendants. )

**MEMORANDUM IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS  
OR, IN THE ALTERNATIVE, TO  
COMPEL ARBITRATION**

FILED  
2017 AUG 31 PM 1:56  
CLERK OF COURT

Defendants Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston (hereinafter "HBP"), and Terri Robinson (hereinafter "Robinson") (hereinafter collectively referred to as "Defendants") hereby submit this memorandum in support of their motion to dismiss, or in the alternative, to compel arbitration.

**FACTS**

Plaintiff's claims stem from the care and treatment of Decedent Bonnie S. Walker (hereinafter "Walker") at Defendants' assisted living facility located in Charleston County, South Carolina. Prior to her admission at HBP, Walker entered into a Residency Agreement with HBP on May 30, 2016, by and through her duly appointed agent, non-party James H. Walker. (Ex. A to Defs.' Mot. to Dismiss) Walker previously had signed a General Power of Attorney (With Health Care) appointing her adult children, non-parties James H. Walker and Jennifer D. Weinstein, with authority to act as her agents in *all* matters, including health care decisions. (Ex. B to Defs.' Mot. to Dismiss) The Residency Agreement contained an arbitration provision

which provided, in part, that “[a]ny and all claims or controversies arising out of, or in any way relating to, this Agreement or any of your stays at the Community” would be resolved by arbitration. (Ex. A to Defs.’ Mot. to Dismiss, p. 7) (emphasis in the original) James H. Walker also is the duly appointed Personal Representative of Walker’s Estate, and Defendants have settled and fully resolved the Estate’s survival and wrongful death claims<sup>1</sup> against them stemming from Walker’s injuries and death, described in more detail below.

Plaintiff alleges she is the granddaughter of Bonnie S. Walker, deceased, who was a resident of HBP’s assisted living facility located in Charleston, South Carolina, from June 4, 2016, until her death on July 27, 2016. (Pl.’s Compl., ¶¶ 17-18) She further alleges Defendants had a duty to operate and manage the HBP facility with due care to monitor and supervise residents like Bonnie Walker, who had diminished mental and physical abilities and a tendency to wander or sleepwalk. (*Id.*, ¶¶ 20-21) Plaintiff does not allege to whom Defendants owed the duty but asserts Defendants “failed to exercise due care in monitoring, supervising, and otherwise providing services required to keep Bonnie Walker safe.” (*Id.*, ¶ 22)

Plaintiff alleges Walker left HBP in the early morning of July 27, 2016, without Defendant’s knowledge. (Pl.’s Compl., ¶ 23) Walker required monitoring and supervision due to her history of wandering and sleep-walking. (*Id.*, ¶ 21) Defendants contacted Plaintiff once they discovered that Walker was missing. (*Id.*, ¶¶ 24-25) When Plaintiff and other family members arrived, Defendants had not yet located Walker. (*Id.*, ¶ 26) Plaintiff further alleges she continued to search on her own and that she found Walker’s remains, which had been mauled by an alligator, in a nearby retention pond. (*Id.*, ¶ 29)

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<sup>1</sup> Defendants and Walker’s Estate resolved the wrongful death and survival claims prior to the filing of any notice of intent or complaint. The settlement is pending approval in the Charleston County Probate Court. *See* Case No. 2016-ES-10-1807.

In sum, Plaintiff's allegations amount to a thinly disguised and inartfully plead wrongful death action that must be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Should the Court conclude, however, that Plaintiff has stated valid causes of action, the arbitration provision of the Residency Agreement and the strong state and federal policies favoring enforcement of arbitration agreements mandate that the instant dispute should be resolved by binding arbitration. For these reasons, Defendants respectfully submit that Plaintiff's Complaint should be dismissed, or, in the alternative, Plaintiff should be compelled to submit her claims to binding arbitration.

### **LEGAL STANDARD**

#### **I. Rule 12(b)(6) Motion to Dismiss**

Rule 12(b)(6) of the South Carolina Rules of Civil Procedure contemplates the filing of a motion to dismiss where the plaintiff has failed "to state facts sufficient to constitute a cause of action." The Court's review is limited to the allegations set forth in the complaint, and dismissal is appropriate where the facts alleged and all inferences reasonably deducible from them reveal the plaintiff would not be able to recover under any theory. *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n.*, 407 S.C. 67, 74-75, 753 S.E.2d 846, 850 (2014); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 1966 (2007) ("when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court") (internal quotation and citations omitted).

#### **II. Arbitrability**

Absent agreement by the parties to the contrary, the question of arbitrability of a claim is an issue for the court. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118

(2001). Defendants' motion to compel arbitration does not rely on application of the South Carolina Uniform Arbitration Act ("SCUAA"), but rather upon application of the Federal Arbitration Act ("FAA"). The FAA provides as follows:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. § 2. Generally, a party seeking to compel arbitration under the FAA must establish the following four elements:

(1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and (4) the failure of, neglect or refusal of the [other party] to arbitrate the dispute.

*Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991); *McCutcheon v. THI*, 2011 U.S. Dist. Lexis 144288 (D.S.C. 2011). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 23-24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

## ARGUMENT

### **I. The South Carolina wrongful death statute provides Plaintiff's exclusive remedy.**

The South Carolina wrongful death statute, S.C. Code Ann. §§ 15-51-10<sup>2</sup>, *et seq.*, "constitutes the exclusive remedy" available to heirs of an individual killed by the allegedly

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<sup>2</sup> S.C. Code Ann. § 15-51-20 provides that wrongful death damages are 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 such, then for the benefit of the heirs of the person. . . ." Section 15-51-40 provides that wrongful death damages "shall be divided among the before-mentioned parties in those share as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate."

negligent acts or omissions of another. *Banks v. Medical University of South Carolina*, 314 S.C. 376, 444 S.E.2d 519 (1994) (declining to recognize a cause of action for breach of implied contract based upon physician's alleged performance of health services and recognizing that wrongful death action was exclusive remedy available to mother of deceased child) (citing *Green v. Southern Railway Company*, 319 F.Supp. 919 (D.S.C. 1970)). Moreover, the only person vested with authority to initiate, maintain, and compromise a wrongful death case is the duly appointed personal representative of the decedent's estate. See S.C. Code Ann. § 15-51-20; *Glen v. E.I. DuPont De Nemours & Co.*, 254 S.C. 128, 174 S.E.2d 155 (1970) (if an action for wrongful death is instituted by one other than the duly appointed personal representative of the decedent, is should be dismissed).

The gravamen of Plaintiff's Complaint is that Defendants failed to adequately care for Walker, that those acts or omissions led to Walker's death, and that Plaintiff was injured by Walker's death. These are precisely the types of claims, injuries, and recoverable damages contemplated by the wrongful death statute: pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship. See *Ballard v. Ballard*, 314 S.C. 40, 443 S.E.2d 802, 803 (1994) (listing recoverable wrongful death damages and citing *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993) (additional citations omitted)). As noted, Plaintiff is the granddaughter of Walker, and Walker's Estate already has asserted and resolved its wrongful death and survival claims against Defendants. This Court should conclude the exclusive remedy provision of the wrongful death statute applies and dismiss Plaintiff's Complaint.

**II. Plaintiff's Complaint fails to state a colorable claim under South Carolina law and, therefore, it should be dismissed.**

Plaintiff's negligence cause of action fails for the additional reason that she has failed to identify the source of any duty Defendants owed *to her*. In order to prevail on her claim for negligence, Plaintiff is required to establish the following elements: (1) Defendants owed a duty of care *to Plaintiff*; (2) Defendants breached the duty of care by a negligent act or omission; (3) Defendants' breach was the actual and proximate cause of Plaintiff's injury; and (4) Plaintiff suffered an injury or damages. *Graham v. Town of Latta*, 417 S.C. 164, 186, 789 S.E.2d 71, 82 (Ct. App. 2016) (internal quotations and citation omitted). Furthermore, "[t]he absence of any one of these elements renders the cause of action insufficient." *Id.* (quoting *Washington v. Lexington Cty. Jail*, 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct. App. 1999)). The existence of a duty is a matter of law for the court to decide, and the failure to prove that defendant owed a legal duty is fatal to a negligence cause of action. *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 391, 701 S.E.2d 776, 780 (Ct. App. 2010).

Here, Plaintiff alleges Defendants had a duty to use reasonable care in the operation of its Charleston facility, which included duties to monitor and supervise residents and to conduct timely searches for missing residents. To the extent Plaintiff is correct, these duties extended to HBP's residents and not to Plaintiff herself. Indeed, Plaintiff has failed to allege any duty owed to her or any other third party by Defendants. Given Plaintiff's failure to plead the existence of a duty Defendants owed to her or the breach of such a duty, her negligence cause of action should be dismissed.

**III. Plaintiff has failed to state causes of action for negligent or intentional infliction of emotional distress.**

South Carolina courts generally recognize two causes of action to recover for emotional distress: bystander liability, also known as negligent infliction of emotional distress, and intentional infliction of emotional distress. Given the requisite elements for these separate causes of action and how our courts have applied them, in addition to the legal impediments discussed in the preceding sections, Plaintiff cannot proceed on either claim.

**A. Bystander Liability**

In *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985), the South Carolina Supreme Court responded to a certified question asking whether South Carolina law would permit a mother, who herself was injured in an accident, to recover for shock and emotional trauma resulting in physical injury after witnessing severe injury to her daughter in the same incident. Responding affirmatively, the court recognized the cause of action for negligent infliction of emotional distress. In so doing, it established the following elements: (1) the negligence of the defendant must cause death or serious physical injury to another; (2) the plaintiff bystander must be in close proximity to the accident; (3) the plaintiff and victim must be closely related; (4) the plaintiff must contemporaneously perceive the accident; and (5) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony. *Id.*, 286 S.C. at 582-583; 336 S.E.2d at 467 (citations omitted).

In this case, Plaintiff is barred from recovering under a theory of bystander liability because she has not plead and cannot satisfy her burden to prove element 2 (close proximity) or element 4 (contemporaneous perception of the incident). *See, e.g., Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 155, 533 S.E.2d 597, 603 (Ct. App. 2000) (finding wife could not

recover for bystander liability where she was not a bystander in close proximity to the accident and did not contemporaneously perceive the accident). In *Doe v. Greenville County School Dist.*, 375 S.C. 63, 651 S.E.2d 305 (2007), the court recognized that the parameters of a claim for negligent infliction of emotion distress are limited to circumstances such as the one presented in *Kinard*. Thus, the parents of a student who was sexually abused by a substitute teacher could not seek recovery pursuant to a bystander theory.

Here, Plaintiff does not allege she perceived the incident or that she was in close proximity to the alligator attack when it occurred. Thus, any claim for bystander liability should fail as a matter of law.

#### **B. Intentional Infliction of Emotional Distress/Outrage**

South Carolina law also recognizes that “one’s willful, malicious conduct proximately causing another’s emotional distress may be actionable’ as intentional infliction of emotional distress or the tort of outrage.” *Williams v. Lancaster County School Dist.*, 369 S.C. 293, 305, 631 S.E.2d 286, 293 (Ct. App. 2006) (quoting *Ford v. Hutson*, 276 S.C.157, 161, 276 S.E.2d 776, 778 (1981)). In order to state a claim for intentional infliction of emotional distress, a party must establish the following elements: (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; (3) the actions of defendant caused the plaintiff’s emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. *Id.* (additional citation omitted). The trial court must first determine whether the conduct at issue

is extreme and outrageous enough to permit recovery and should submit the issue to the jury only where reasonable minds might differ on the issue.

Importantly, the Supreme Court of South Carolina has held that “[i]t is not enough that the conduct is intentional and outrageous. It must be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware.” *Upchurch v. New York Times Co.*, 314 S.C. 531, 536, 431 S.E.2d 558, 561 (1993) (citation omitted). In order to proceed, Plaintiff would have to adduce evidence that HBP or its agents acted with intentional or reckless conduct and in a manner that exceeds all possible bounds of decency. Here, Plaintiff has not alleged, and she cannot establish, that HBP or any of its agents directed any specific conduct towards her or that such conduct occurred in her presence. Rather, the conduct she alleges gives rise to her claims revolves around the care and treatment her grandmother, and not herself, received while a resident at HBP. That tenuous connection between Defendants’ actions and Plaintiff cannot give rise to liability pursuant to a cause of action for intentional infliction of emotional distress, and that claim should be dismissed.

**IV. Plaintiff should be compelled to arbitrate because the Residency Agreement’s arbitration provision is enforceable under the FAA and encompasses plaintiff’s claims.**

Even if the Court determines Plaintiff has adequately pled valid causes of action sufficiently to avoid dismissal pursuant to SCRCP 12(b)(6), it should nevertheless compel Plaintiff to submit her claims to binding arbitration as contemplated by the Residency Agreement. The arbitration provision set forth in the Residency Agreement applies to “[a]ny and all claims or controversies arising out of, or in any way relating to. . . .” Walker’s care and treatment while a resident of HBP. In accordance with the Residency Agreement, its nexus to interstate commerce, and in recognition that “[a]ny doubts concerning the scope of arbitrable

issues should be resolved in favor of arbitration. . . .” Plaintiff’s claims, if viable, belong in an arbitration forum.

**A. The Resident Agreement at issue evidences a transaction involving interstate commerce.**

Consistent with the FAA and the trend towards more liberal enforcement of arbitration agreements, South Carolina courts have consistently enforced arbitration agreements pursuant to the FAA, even where those agreements did not conform to the rigid requirements of the SCUAA. *See, e.g., Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977); *Soil Remediation Co. v. Nu-Way Envtl. Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996); *Munoz v. Greentree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001).

Since the United States Supreme Court announced the expansive interpretation of the scope and reach of the FAA in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the South Carolina Supreme Court has recognized that

[b]eginning in the mid-1980’s, the United States Supreme Court, interpreting the FAA, essentially “federalized” the law of arbitration by expanding the reach of the FAA to the full breadth of the Commerce Clause. The federal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements. The basic purpose of the FAA is to overcome state courts’ refusal to enforce arbitration agreements.

*Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 591-92, 553 S.E.2d 110, 115 (2001).

Following these principles, an arbitration provision is valid and enforceable under the FAA if the provision is contained in “a contract evidencing a transaction involving commerce.” 9 U.S.C.A. § 2; *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273 (1995). In *Dobson*, the Court clarified the correct interpretation of the phrase “evidencing a transaction” and specifically rejected any argument that the phrase requires a contract to evidence “on its face” a transaction involving interstate commerce. Thus, the *Dobson* court determined that the

question is not whether the contract itself evidences a transaction involving interstate commerce, but whether the transaction underlying the contract does. 513 U.S. at 273. *See also Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 123, 747 S.E.2d 461, 465 n.5 (2013) (overruling *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) “to the extent it determined the FAA did not apply because the contract on its face failed to demonstrate that the parties contemplated an interstate transaction”).

The *Dobson* Court also defined the appropriate scope of the FAA by broadly interpreting the phrase “involving commerce” as the equivalent of “affecting commerce,” thereby reaching the fullest contours of Congress’ Commerce Clause powers. *Dobson*, 513 U.S. at 277. The South Carolina Supreme Court has cited *Dobson* for this very proposition and elaborated as follows: “Under the reach of the Commerce Clause, ‘Congress has authority to regulate (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce . . . and (3) those activities having a substantial relation to interstate commerce.’” *Cape Romain Contrs., Inc.*, 405 S.C. at 125, 747 S.E.2d at 464 (quoting *United States v. Gould*, 568 F.3d 459, 470 (4th Cir. 2009)). Furthermore, “Congress’[s] Commerce Clause power ‘may be exercised in individual cases without showing any effect upon interstate commerce’ if in the aggregate the economic activity in question would represent ‘a general practice . . . subject to federal control.’” *Citizens Bank v. Alababco, Inc.*, 539 U.S. 52, 56-57 (2003) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)).

The South Carolina Supreme Court, along with many federal and state courts, has held that nursing home residence contracts implicate interstate commerce and the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727 (2014) (explicitly

overruling *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) in its entirety). “Generally the holdings center on one common theme: nursing home residency contracts usually entail providing residents with meals and medical supplies that are inevitably shipped across state lines from out-of-state vendors.” *Id.* Thus under the broad definition of interstate commerce, most residency contracts are governed by the FAA. *Id.* at 382, 759 S.E.2d at 733.

There can be no question the Residency Agreement in question evidences a transaction involving interstate commerce. The Residency Agreement itself states “[t]he parties hereby expressly agree that this Arbitration provision, the Residency Agreement and the Resident’s stays at the Community substantially involve interstate commerce, and stipulate that the [FAA] shall exclusively apply to the interpretation and the enforcement of this Agreement[.]” (Ex. A to Defs.’ Mot. to Dismiss, p. 8). In light of this language, there can be no question that the Arbitration Agreement at issue evidences a transaction involving interstate commerce. *See McCutcheon*, 2011 U.S. Dist. LEXIS 144288 at \*13-14 (finding that the Arbitration Agreement before it evidenced interstate commerce “on its face” where the agreement specifically stated that the underlying transaction involved interstate commerce).

Even further, the Residency Agreement contractually required Defendants to provide meals to Walker and medical assistance to monitor her physical health. (Ex. A to Defs.’ Mot. to Dismiss, p. 1). These are the kinds of services explicitly recognized in *Dean* as involving interstate commerce. *See Dean*, 408 S.C. at 381-82, 759 S.E.2d at 732-33. The services need not be in direct dispute in the current lawsuit in order for the Residency Agreement to evidence a transaction involving commerce as the Court must “focus upon what terms of the contract specifically require for performance in determining whether interstate commerce was involved.”

*See id.* (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)).

Consequently, the Residency Agreement is valid, irrevocable, and enforceable pursuant to the FAA because it evidences a transaction in interstate commerce both on its face and in its terms.

**B. The Residency Agreement's arbitration provision encompasses the claims asserted by Plaintiff.**

The policy of the United States and of South Carolina is to favor arbitration of disputes. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). “[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.” *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 119 (citing *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993)).

Moreover, “[a] clause which provides for arbitration of all disputes ‘arising out of or relating to’ the contract is construed broadly.” *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). As explained by the South Carolina Supreme Court in *Landers*,

Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. Thus, the scope of the clause does not limit arbitration to the literal interpretation or performance of the contract, **but embraces every dispute between the parties having a significant relationship to the contract.**

402 S.C. at 109-10, 739 S.E.2d at 214 (internal citations omitted) (emphasis added). Stated differently, an agreement to arbitrate will be enforced unless a party, in signing the agreement to arbitrate, could not possibly have been agreeing to arbitrate claims arising from wholly unexpected tortious conduct. *Aiken v. World Fin. Corp.*, 373 S.C. 144, 151, 644 S.E.2d 705, 709

(2007). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 110. *See also Landers*, 402 S.C. at 109, 739 S.E.2d at 214 (“The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.”) (internal citations omitted).

The Arbitration Agreement at issue covers all of the claims asserted in the Complaint.

The parties to the Residency Agreement understood and agreed that

“[a]ny and all claims or controversies arising out of, or in **any** way relating to, this Agreement or any of your stays at the Community, excluding any action for involuntary transfer or discharge or eviction, and including disputes regarding interpretation, scope, enforceability, unconscionability, waiver, preemption and/or violability of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. **The parties to this Agreement further understand that a judge and/or jury will not decide their case.**”

(Ex. A. to Defs.’ Mot. to Dismiss, p. 7) (emphasis in the original) The Residency Agreement’s broadly written language plainly covers all causes of action asserted in the Complaint – negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress/outrage – all of which arise from the care and services provided to Walker while she was a resident at HBP.

Lest there remain any doubt as to the enforceability of agreements to arbitrate, the Supreme Court of the United States has made clear that “[a] rule selectively finding arbitration contracts invalid because improperly formed fares no better under the [Federal Arbitration] Act than a rule selectively refusing to enforce those agreements once properly made.” *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017) (invalidating Kentucky

rule barring one granted a general power of attorney from entering into an agreement to arbitrate on behalf of the grantor). Here, James H. Walker had authority and voluntarily agreed, on behalf of Walker and her heirs, including Plaintiff, to binding arbitration of *any* dispute arising out of Walker's stay at HBP. The broad agreement to arbitrate covers Plaintiff's Complaint in its entirety, and, therefore, arbitration should be ordered pursuant to the foregoing authorities.

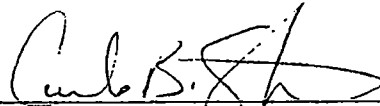
**CONCLUSION**

Plaintiff's claims in the Complaint are subject to the valid arbitration provision in the Residency Agreement governed by the FAA. As a result, the Court should compel Plaintiff to arbitrate her claims accordingly and not through this litigation.

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

August 28, 2017

By:



\_\_\_\_\_  
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BROOKDALE SENIOR LIVING, INC., HBP  
LEASECO, LLC, AND TERRI ROBINSON**

2017-CP-10-3130

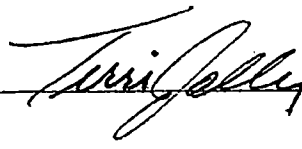
**CERTIFICATE OF SERVICE**

I hereby certify that this 28th day of August 2017 a copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO COMPEL ARBITRATION** has been served upon other counsel of record, by mailing same, postage prepaid in the United States Mail, addressed to the following:

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C. Caleb Connor, Esquire  
Laura S. Jordan, Esquire  
Connor & Connor, LLC  
302 Park Avenue SE  
Aiken, SC 29801

Eliza H. Cantwell, Esquire  
Joshua P. Cantwell, Esquire  
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P. O. Box 600  
Charleston, SC 29402

**ATTORNEYS FOR PLAINTIFF**

  
\_\_\_\_\_

FILED  
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JULIE J. ARYSTROPHOS  
CLERK OF COURT  
BY \_\_\_\_\_

# Turner | Padget

**Carmelo B. Sammataro**

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August 28, 2017

The Honorable Julie J. Armstrong  
Charleston County Clerk of Court  
100 Broad St., Suite 106  
Charleston, SC 29401-2210

Re: Stephanie Walker Weaver v. Brookdale Senior Living, Inc., et al.  
Case No.: 2017-CP-10-03130  
File No.: 80.1593

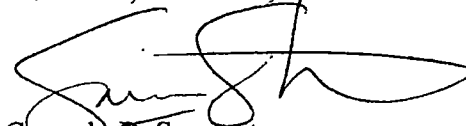
Dear Ms. Armstrong:

Enclosed please find the original and one copy of the Memorandum In Support Of Defendants' Motion To Dismiss Or, In The Alternative, To Compel Arbitration regarding the above-referenced matter. The hearing on this motion is scheduled for August 31st before Judge Nicholson. Please file the original Memorandum and return a clocked copy to me via the enclosed envelope. Thank you for your assistance with this matter, and please contact me if you have any questions.

With kind regards, I am

Very truly yours,

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



Carmelo B. Sammataro

CBS/tj

Enclosures

cc: The Honorable J.C. Nicholson, Jr.  
Kenneth L. Connor, Esquire  
C. Caleb Connor, Esquire  
Laura S. Jordan, Esquire  
Eliza H. Cantwell, Esquire  
Joshua P. Cantwell, Esquire  
(via regular mail and e-mail, w/enc.)

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**EXHIBIT 4**

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Rules of Civil Procedure. At the pleading stage, a plaintiff must plead the ultimate facts which will be proved at trial but not the evidence to prove those facts. *Clark v. Clark*, 293 S.C. 415, 416, 361 S.E.2d 328, 328 (1987).

In the present case, Plaintiff has alleged causes of action against all Defendants for Negligence, Negligent Infliction of Emotional Distress, and Intentional Infliction of Emotional Distress. After review of the Plaintiff's Complaint and hearing the arguments of counsel, I find that Plaintiff has sufficiently plead each cause of action as stated therein, and therefore, I deny Defendants' Motion to Dismiss.

## **II. Defendants' Motion to Compel Arbitration**

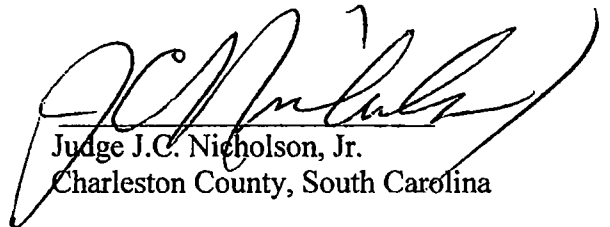
While there is a presumption in favor of arbitration agreements, this presumption only applies where a valid arbitration agreement exists between the parties. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110 (2001). Arbitration is a matter of contract, and a party cannot be forced to waive her constitutional right to a jury and arbitrate a claim where she has not agreed to do so. *Id.* at 597; *see also Chassereau v. Global Sun Pools, Inc.*, 611 S.E.2d 305 (S.C. Ct. App. 2005), *decision aff'd*, 644 S.E.2d 718 (2007); *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010). However, the United States Supreme Court and South Carolina Courts have recognized that under appropriate circumstances a nonsignatory may be bound by an arbitration provision in a contract executed by other parties. *See Arthur Andersen, LLP v. Carlisle*, 556 U.S. 624, 129 S. Ct. 1896, 1902 (2009) (noting theories of "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary, waiver or estoppel" may be used to bind a nonsignatory); *see also Wilson v. Willis*, 416 S.C. 395, 786 S.E.2d 571 (Ct. App. 2016), *reh'g denied* (June 24, 2016).

In the instant case, Defendants assert that Plaintiff's claims are subject to an arbitration agreement contained within the "Residency Agreement" for its Brookdale Charleston facility. The agreement relied on by Defendants shows that it was signed by James Walker as the power of attorney for Bonnie Walker, the grandmother of the Plaintiff. Nothing in the agreement shows that Plaintiff was a party to the arbitration agreement or that Mr. Walker had any authority to bind Plaintiff to such an agreement. Also, no facts have been presented to justify binding Plaintiff to arbitration under one of the theories cited above. Moreover, Plaintiff's tort claims appear to be separate and distinct from any wrongful death or survival claims arising out of the decedent's injuries and death.

#### CONCLUSION

For the above reasons, the Defendants' Motion to Dismiss and Motion to Compel Arbitration are hereby DENIED. This case is properly before the Court and discovery shall proceed.

IT IS HEREBY ORDERED this 7<sup>th</sup> day of September, 2017

  
Judge J.C. Nicholson, Jr.  
Charleston County, South Carolina

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**EXHIBIT 5**

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STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS )

COUNTY OF CHARLESTON )

NINTH JUDICIAL CIRCUIT )

STEPHANIE WALKER WEAVER )

CASE NO. 2017-CP-10--03130 )

PLAINTIFF, )

vs. )

BROOKDALE SENIOR LIVING, INC., )

HBP LEASECO, LLC D/B/A )

BROOKDALE CHARLESTON, TERRI )

ROBINSON, JOHN DOES and )

RICHARD ROE CORPORATIONS, )

DEFENDANTS. )

BY DS

JULIE J. ARMSTRONG  
CLERK OF COURT

2017 AUG 28 AM 10:15

FILED

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO COMPEL ARBITRATION**

Plaintiff, by and through undersigned counsel, files this response opposing the efforts of defendants to dismiss her claims, or alternatively to compel her to arbitration of her claims.

**FACTUAL & PROCEDURAL BACKGROUND**

Sometime in the morning hours of July 27, 2016, 90-year old Bonnie Walker eloped from her room at Brookdale Charleston, a community residential care facility owned and operated by the defendants (hereinafter "Brookdale"). Brookdale had accepted Mrs. Walker as a resident eight weeks earlier, was well aware of her cognitive challenges and risk for elopement, and represented they possessed the personnel and expertise necessary to ensure the safety of residents like Mrs. Walker.

Notwithstanding their purported knowledge and expertise, Brookdale allowed Mrs. Walker to wander out of her room, out of the facility, and toward a retention pond on the facility

property known to be populated with alligators. Mrs. Walker was last observed by Brookdale wandering the hallway shortly after midnight, but they did not appreciate the fact that she was missing until she had been out of their custody, supervision, and control for over seven hours.

Once Mrs. Walker's disappearance was recognized, shortly after 7:00 a.m., and prior to conducting an appropriate search or taking other measures to locate her, Brookdale notified her family of the disappearance. Stephanie Weaver, Mrs. Walker's granddaughter, was one of three family members, including her mother and father, who then traveled to the facility, only to be informed that Brookdale had still not located her or even called the police. As no one from the facility appeared to be searching, Weaver then began her own search, walking to the rear of the facility, in the direction of the retention pond. As she walked closer to the pond, Weaver was shocked and horrified to find the remains of her grandmother's body floating in the pond where it had been dismembered by an alligator.

On June 19, 2017, Weaver filed her Complaint in this matter, alleging that the reckless, negligent, wrongful and intentional acts of the defendants caused her to "suffer and continue to suffer, severe personal and emotional distress and injury, which includes but is not limited to: anxiety, worry, disturbance of sleep resulting in extreme fatigue, loss of quiet enjoyment of normal daily activities, irritability, feelings of dread and fear, feelings of reduced self-worth, shame, isolation and humiliation, impairment of interpersonal relationships, impaired ability to concentrate, and impaired ability to enjoy life." (*Complaint at ¶ 32*). Weaver's Complaint alleges three distinct causes of action for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. Weaver makes no claims whatsoever on behalf of Mrs. Walker's estate or her beneficiaries for the suffering and death of Mrs. Walker.

Defendants invite this court to dismiss Weaver's complaint, or alternatively, to require Weaver to arbitrate her claims based on a purported agreement to arbitrate between her grandmother's representative and Brookdale. For the reasons that follow, this court should decline the invitation.

## ARGUMENT

### I. Standard of Review on a Motion to Dismiss

In ruling on Brookdale's motions to dismiss, this court is bound by the allegations in the complaint and must deny the motion if the alleged facts and reasonable inferences would entitle Weaver to relief on any theory of the case. *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 395, 596 S.E.2d 42, 45 (2004). A complaint need only set forth a "short and plain statement of the facts showing the pleader is entitled to relief." Rule 8(a)(2), South Carolina Rules of Civil Procedure. At the pleading stage, a plaintiff must plead the ultimate facts which will be proved at trial but not the evidence to prove those facts. *Clark v. Clark*, 293 S.C. 415, 416, 361 S.E.2d 328, 328 (1987).

### II. Count I of Weaver's Complaint Properly Alleges a Cause of Action for Negligence.

Brookdale's motion recites the entirely uncontroverted law that the wrongful death statute provides the exclusive remedy "available to heirs of an individual killed by the allegedly negligent acts of another" (*Motion at ¶ 4*), but the wrongful death act has no relevance to Weaver's claims. The South Carolina Wrongful Death Act provides:

"Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled **the 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, notwithstanding the death of the person injured, although the death shall have been caused under such

circumstances as make the killing in law a felony. In the event of the death of the wrongdoer, such cause of action shall survive against his personal representative.”

*S.C. Code § 15-51-10 (emphasis added).* Plaintiff’s Complaint does not allege a claim for wrongful death and seeks no damages for the wrongful death of Mrs. Walker. Rather, Count I of the Complaint alleges that Brookdale’s negligence in the operation of their business caused Stephanie Weaver to suffer injuries and damages. Some of the negligent acts and omissions of Brookdale which constituted a breach of the standard of care with regard to Mrs. Walker may also constitute acts and omissions which breached a duty to others, including Weaver. To illustrate, consider a situation wherein a patient under the care and custody of a mental health facility, known to be a risk for harm to others, escapes a facility where he was legally confined for care. If the patient’s elopement results in foreseeable injury to him, he may well have a claim for breach of the standard of care. In addition, if the patient commits a foreseeable attack on a third party, the injured third party may also have a different claim against the facility. If the patient is somehow killed in the attack, the wrongful death act brought by his representative certainly would not encompass the injuries and damages of the injured third party. The instant situation is no different. Weaver has distinct claims not part and parcel of a wrongful death claim. Obviously, the personal representative of her grandmother’s estate has no standing to bring (or resolve) such claims on Weaver’s behalf.

Negligence is the failure to use “that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances.” *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011). To properly plead a claim for negligence, Weaver was required to allege (1) a duty of care owed by defendants to plaintiff; (2) a breach of that duty by a negligent act or failure to act; (3) damages; and (4) that the damages proximately resulted from the breach of duty.” *Thomasko v. Poole*, 349 S.C. 7, 11-12, 561 S.E.2d 597, 599 (2002) (*citations*

omitted).

Weaver's direct negligence claim is not novel in this state. In *Bray v. Marathon Corp.*, 356, S.C. 111, 588 S.E.2d 93 (2003), a plaintiff who observed her co-worker be crushed to death properly alleged a claim for negligence. Although the plaintiff's only physical injury arose from her emotional trauma, she was not required to meet the "bystander" definition required for a claim for negligent infliction of emotional distress. *Id.* at 95-96; see also *Padgett v. Colonial Wholesale Distributing*, 232 S.C. 593, 605, 103 S.E.2d 265, 271 (if negligence caused a mental injury that results in injury to the nervous system, plaintiff can recover for physical injuries and is outside the bystander recovery line of cases).

Count I of the Complaint alleges all the required elements for a negligence cause of action. (*Complaint at ¶¶ 34-43.*) Weaver's claim in Count I is not a claim for negligent or intentional infliction of emotional distress, despite Brookdale's misguided attempt to so characterize it. Rather, Count I is simply a claim for negligence wherein Weaver alleges she was injured by the negligent conduct of Brookdale. Weaver's claim in Count I is not dependent on or entangled with the wholly distinct claims for negligence and wrongful death which may be brought on behalf of Ms. Walker's estate or her beneficiaries.

### **III. Weaver's Complaint Properly Alleges a Claim for Negligent Infliction of Emotional Distress.**

Count II of Weaver's Complaint asserts a cause of action for negligent infliction of emotional distress ("NIED"). South Carolina recognizes a distinct claim for negligent infliction of emotional distress ("NIED") where a plaintiff suffers injury as a "bystander." *Kinard v. Augusta Sash & Door*, 286 S.C. 579, 582, 336 S.E.2d 465, 467 (1985). In *Kinard*, the South

Carolina Supreme Court recognized that parents may have a cause of action for negligent infliction of emotional distress as a result of witnessing an injury to their child. *Id.*

The *Kinard* court explained that a cause of action for negligent infliction of emotional distress (“NIED”) must allege that (1) the negligence of the defendant caused death or serious physical injury to another; (2) the plaintiff bystander must be in close proximity to the accident; (3) the plaintiff and the victim must be closely related; (4) the plaintiff must contemporaneously perceive the accident; and (5) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony. *Id.* at 467; *See also, Anderson’s South Carolina Requests to Charge – Civil, SC-JICIV 29-1.*

Brookdale rests much of their argument on the assertion that Weaver did not “contemporaneously perceive” the alligator attack on her grandmother. This argument, however, is a red herring – the Complaint never alleges that the attack was the event which caused Weaver’s distress. Paragraphs 47 and 48 of the Complaint allege:

47. Plaintiff was in close proximity to where her grandmother’s body was discovered and **contemporaneously perceived and was herself injured by discovering her grandmother’s dismembered body** floating in the retention pond.

48. As a direct and proximate cause of Defendants’ negligent, grossly negligent, careless, willful, wanton, and reckless conduct, Plaintiff suffered and will continue to suffer severe emotional distress that no reasonable person should be expected to experience.

*(emphasis added)*. Weaver having properly pled her claim for NIED, Defendants’ motion as to this issue must be denied.

#### **IV. Weaver’s Complaint Properly Alleges a Claim for Intentional Infliction of Emotional Distress.**

A cause of action for intentional infliction of emotion distress (“IIED”) must allege that (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community, (3) the actions of the defendant caused the plaintiffs emotional distress; and (4) the emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it. *Ford v. Hutson*, 276 S.C. 157, 160, 276 S.E.2d 776, 778-79 (1981); *See also, Anderson’s South Carolina Requests to Charge – Civil, SC-JICIV 24-1*.

Brookdale argues that this count should be dismissed on the grounds that it does not allege “any specific conduct by Defendants, that Defendants were aware of her [Weaver], or that Defendants purposefully directed any conduct towards Plaintiff.” (*Motion at ¶ 6*). Brookdale has apparently overlooked paragraph 52 of the Complaint, which incorporates and realleges the preceding paragraphs, including paragraphs 22 through 30, which describe the conduct at issue and allege Brookdale’s knowledge of Weaver’s presence and exposure. Specifically, the Complaint alleges that notwithstanding their responsibility for monitoring and supervision of Mrs. Walker, Brookdale completely lost track of her for over seven hours, failed to conduct a search for her in a timely manner, and took no measures to prevent family members (who Brookdale staff invited to the facility) from discovering her dismembered remains in a retention pond on their property and which they knew to be populated by alligators. Plaintiff submits that the court should find this conduct “may reasonably be regarded as extreme and outrageous” and permit the ultimate determination to be made by the jury. *See, Fleming v. Rose*, 338 S.C. 524,

537, 526 S.E.2d 732, 739 (App. 2000), *rev'd on other grounds*, 350 S.C. 488, 567 S.E.2d 857 (2002); *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 401, 596 S.E.2d 42, 48-49 (2004).

**V. Weaver Cannot be Forced to Arbitrate Her Claims.**

Should the court deny their motion to dismiss, Brookdale alternatively argues that Weaver's claims should be subject to arbitration, notwithstanding the fact that Weaver never agreed to arbitrate her claims. The purported arbitration agreement is a document signed by James H. Walker, as Mrs. Walker's power of attorney and by Terri Robinson, on behalf of Brookdale on May 30, 2016. The arbitration provision is only one of many provisions in a thirteen-page "Residency Agreement" signed by Mr. Walker to procure his mother's admission to Brookdale Charleston. (*Exhibit B to Motion to Dismiss*). The "Agreement to Arbitrate" is buried in the middle of the Residency Agreement and covers parts of four pages. (*Exhibit B, pp. 4-7*). Most importantly, Stephanie Weaver has never been a party to these agreements and held no authority whatsoever to enter such agreements on her grandmother's behalf.

As discussed above, Weaver's claims are entirely separate and distinct from any claims brought on behalf of the estate or heirs of Mrs. Walker. A party simply cannot be forced to waive constitutional rights and arbitrate claims where she has not agreed to do so. *Hilton Head Resort Four Seasons Ctr. Horizontal Property Regime Council of Co-Owners v. Resort Inv. Corp.*, 311 S.C. 394, 429 S.E.2d 459 (Ct. App. 1993). In cases such as this, where the Plaintiff's claim is not contemplated by the agreement, arbitration cannot be compelled. See, *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 611 S.E.2d 305 (Ct. App. 2005), *decision aff'd*, 373 S.C. 168, 644 S.E.2d 718 (2007).

Furthermore, South Carolina courts will not enforce arbitration contracts which purport to cover outrageous torts which were unforeseeable and could not have been in the contemplation

of the parties at the time of the agreement. *Aiken v World Finance Corporation of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007) (theft of customer's personal information by finance company employees is outrageous conduct that customer could not possibly have foreseen and not within scope of arbitration agreement. The *Aiken* court emphasized that due consideration was given to state and federal policies favoring arbitration, and that the court "merely seeks, as a matter of public policy, to promote the procurement of arbitration in a commercially reasonable manner. To interpret an arbitration agreement to apply to actions completely outside the expectations of the parties would be inconsistent with this goal." *Id.* at 153.

One could certainly argue that in this case, even Mrs. Walker's claims for her own injuries and death should not be subject to the arbitration agreement, as the possibility of an alligator attack being within the contemplation of the parties at the time of the agreement surely stretches the bounds of imagination. Contemplation of a claim by a family member discovering a grandmother's dismembered body – a family member who had no role in the arbitration agreement – is simply an outrageously specious argument.<sup>1</sup>

Nevertheless, should the court be inclined to consider such an argument, Weaver urges the court to find the arbitration agreement unenforceable for other reasons, including unconscionability, and requests the court permit discovery to appropriately develop these arguments and their factual underpinning.

Dated this 28th day of August 2017.

---

<sup>1</sup> The speciousness of Defendants' argument in this regard may well implicate Rule 11 and the South Carolina Frivolous Proceedings Act, particularly if Defendants seek to appeal a denial of this motion.

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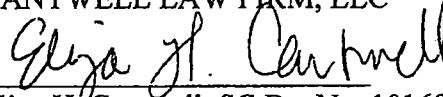
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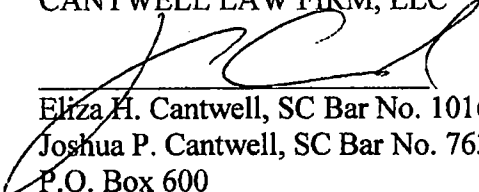
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE** 2017-CP-10-3130

I HEREBY CERTIFY that I have on this day, August 28, 2017, served a copy of Plaintiff's Response in Opposition to Defendants' Motion to Dismiss or, in the alternative, to Compel Arbitration upon all attorneys in this action by U.S. Mail and email as follows:

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*Attorneys for Plaintiff*

BY JS

JULIE J. ARMSTRONG  
CLERK OF COURT

2017 AUG 28 AM 10:15

FILED

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2017-002241

**RECEIVED**  
MAR 02 2018  
SC Court of Appeals

Stephanie Walker Weaver,.....Respondent,

v.

Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston, Terri Robinson,  
John Does, and Richard Roe Corporations, .....Defendants,

Of whom Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston, and  
Terri Robinson are the .....Appellants.

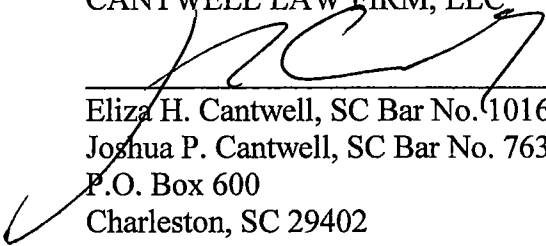
PROOF OF SERVICE

I, Joshua P. Cantwell, of Cantwell Law Firm, LLC, counsel for the Respondent above named, do hereby certify that I have served RESPONDENT’S MOTION TO DISMISS ISSUE I (AND ITS SUBPARTS) OF APPELLANTS’ INITIAL BRIEF AS UNAPPEALABLE & MOTION TO STAY THE TIME FOR FILING RESPONDENT’S INITIAL BRIEF AND DESIGNATION OF THE MATTER PENDING THE COURT’S DECISION ON RESPONDENT’S MOTION TO DISMISS on all parties to this appeal by depositing a copy of the same in the United States Mail, postage prepaid, on March 2, 2018, addressed as follows to opposing counsel of record.

R. Gerald Chambers, Esq.  
Carmelo B. Sammataro, Esq.  
Turner, Padgett, Graham, & Laney  
P.A.  
P.O. Box 1473  
Columbia, SC 29202

Richard A. Simpson, Esq.  
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&

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*Attorneys for Respondent*

# Cantwell Law Firm, LLC

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March 2, 2018

RECEIVED

MAR 02 2018

SC Court of Appeals

**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
Clerk of Court for the Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

Re: *Stephanie Weaver Walker v. Brookdale Senior Living, Inc., et al.*  
Appellate Case No. 2017-002241

Dear Mrs. Kitchings:

Enclosed for filing please find the original and seven copies of Respondent Stephanie Weaver Walker's *Motion to Dismiss Issue I (and its subparts) of Appellants' Initial Brief as Unappealable* and *Motion to Stay the Time for Filing Respondent's Initial Brief and Designation of Matter Pending the Court's Decision on Respondent's Motion to Dismiss*. Also enclosed is proof of service and the \$25 motion filing fee for each motion.

By copy of this letter, I am serving all counsel of record with a copy of the same. If you have any questions or concerns, please do not hesitate to contact our office.

Kind regards,

Cantwell Law Firm, LLC



Eliza H. Cantwell

EHC/

Cc: R. Gerald Chambers, Esq.  
Carmelo B. Sammataro, Esq.  
Richard A. Simpson, Esq.  
Kimberley A. Ashmore, Esq.