THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

COURT OF COMMON PLEAS

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-002241
Civil Action No. 2017-CP-10-03130

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.

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INTRODUCTION

Respondent Stephanie Walker Weaver seeks to rewrite both the allegations in her Complaint and South Carolina law. The facts alleged in the Complaint state no independent negligence cause of action. Likewise, Ms. Weaver has not and cannot plead a viable claim of bystander liability or intentional infliction of emotional distress. The circumstances surrounding the death of Ms. Weaver's grandmother unquestionably are tragic, but it would do violence to South Carolina law to permit Ms. Weaver's claims to proceed.

If any of those claims do proceed, however, they must be arbitrated. The face of the Complaint shows that Ms. Weaver's claims are encompassed by the broadly-worded Arbitration Provision. In addition, Ms. Weaver seeks to enforce or receive a benefit from the Residency Agreement; her claims at their core depend on that Agreement. She therefore is bound by the Agreement's arbitration mandate.

ARGUMENT

I. Ms. Weaver's negligence cause of action is barred by South Carolina's wrongful death statute, and she fails to point to facts in the Complaint alleging an independent cause of action for negligence.

A. Ms. Weaver's negligence claim fails because the wrongful death statute provides the sole and exclusive remedy, and that claim has already been made and settled.

South Carolina's wrongful death statute, S.C. Code Ann. § 15-51-10 (1977), *et seq.*, "constitutes the exclusive remedy" available to family members or heirs of a decedent for wrongful or negligent acts that caused the decedent's death. *Banks v. Med. Univ. of S.C.*, 314 S.C. 376, 380, 444 S.E.2d 519, 521 (1994). The wrongful death statute requires that any claim be brought by the personal representative/executor of the deceased. *Roberts v. Bodison*, No. 2:14-cv-00705, 2015 WL 13215670, at *2 (D.S.C. Nov. 20, 2015) (quoting *Glenn v. E.I. DuPont*

De Nemours & Co., 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970))). Following Ms. Walker's death, her estate brought a wrongful death claim against Brookdale, which the parties settled.

It is apparent from the allegations in the Complaint that Ms. Weaver is seeking damages based on Brookdale's alleged "wrongful act, neglect or default," which purportedly caused Ms. Walker's death. *See* S.C. Code Ann. § 15-51-10 (civil action for wrongful act causing death). Ms. Weaver's purported cause of action stems directly from alleged duties Brookdale owed to Ms. Walker to keep her safe during her residency at the facility. *See, e.g.,* Compl. ¶¶ 20-21 (Brookdale had a duty to "appropriately monitor and supervise residents, including Bonnie Walker" and to "minimize wandering and prevent elopement from the facility"). Moreover, the Complaint specifically alleges that Brookdale's negligence "caused physical injuries and the death of Bonnie Walker" and that Brookdale "should have reasonably foreseen that its negligent, gross [sic] negligent, and reckless conduct would cause harm to Bonnie Walker's family members, including Plaintiff." Compl. ¶ 40. These are exactly the types of conduct, damages, and outcomes contemplated by the wrongful death statute. *See* S.C. Code Ann. § 15-51-10. And that claim already has been made and settled by Ms. Walker's estate.

It does not matter whether Ms. Weaver shared in the recovery on the wrongful death claim. *See id.* § 15-51-20 (limiting the wrongful death cause of action to benefit wife, husband, children, or, alternatively, heirs). The cases on which Ms. Weaver relies are not to the contrary; they simply recognize the distinction between a claim for wrongful death and a claim for loss of consortium, including the differing nature of damages sought in each. *See* Resp't Br. 6-7 (citing *White v. United States*, 907 F. Supp. 2d 703 (D.S.C. 2012); *Burroughs v. Worsham*, 352 S.C. 382, 406, 574 S.E.2d 215, 227 (Ct. App. 2002)). Here, however, the negligence cause of action that Ms. Weaver asserts, and the damages she seeks, directly overlap with the wrongful death

claim that Ms. Walker's estate previously asserted and settled. Ms. Weaver cannot now assert a second wrongful death action under a different name. *See Dickey v. Clarke Nursing Home*, No. 2007-UP-344, 2007 WL 8327928, at *3 (Ct. App. June 29, 2007) (unpublished opinion) (confirming that a party cannot seek to avoid the wrongful death statute by trying to "plead around" its confines by labeling a cause of action as "negligence" as opposed to wrongful death).

B. Ms. Weaver's "duty to warn," "duty to search first," and "foreseeability of harm" theories are not viable under South Carolina law.

On appeal, Ms. Weaver attempts to refocus her negligence claim, arguing that it actually stems from Brookdale's alleged "duty to warn" her. *See* Resp't Br. 9-13. The Complaint mentions the word "warn" only twice; both times in the context of a failure to warn of a "dangerous condition" or of the "hazards associated with the retention pond." Compl. ¶¶ 36, 38. Ms. Weaver now, however, concentrates heavily on this theory, arguing that Brookdale had (and breached) an independent duty to warn her of the potential discovery of her grandmother's body, and that this provides the basis for her negligence claim. *See* Resp't Br. 11-12. South Carolina law does not support Ms. Weaver's arguments.[1]

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[1] With respect to Footnote 5 in Ms. Weaver's brief, this Court does not prohibit parties from raising arguments in footnotes. *See, e.g.*, *State v. Bostick*, 307 S.C. 226, 229 (Ct. App. 1992) (considering an argument made in a footnote). Instead, the Court focuses on the substance of the argument to assess whether the argument was "conclusory" or whether it "cited . . . supporting authority." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 691–92 (Ct. App. 2001); *cf. Leventis v. S.C. Dep't. of Health and Envtl. Control*, 340 S.C. 118, 137 n.10 (Ct. App. 2000) (noting that "conclusory arguments may be treated as abandoned"). Brookdale's argument on the duty to warn a third party was not conclusory, and it cited significant supporting authority. Moreover, the duty to warn issue was discussed in greater depth in text, with the footnote as a supplement. *See* Appellant Br. 17-18. In addition, until now, Ms. Weaver has not pressed a duty to warn theory as the basis for her negligence claim – either in the Complaint or in the trial court briefing. To the extent that Ms. Weaver addressed a purported duty to warn, she did so in passing. Accordingly, Brookdale reasonably focused on the arguments Ms. Weaver emphasized in the trial court and afforded any duty to warn theory less attention. Brookdale more than adequately addressed the "duty to warn" argument solely in anticipation of Ms. Weaver's potential arguments on appeal.

As a general matter, "South Carolina law does not recognize a general duty to warn a third party or potential victim of danger." *Doe 2 v. Citadel*, 421 S.C. 140, 146, 805 S.E.2d 578, 581 (Ct. App. 2017); *see also Chappell v. Int'l Bhd. Elec. Workers Local Union 772*, 120 F. Supp. 3d 492, 498 n.3 (D.S.C. 2015); *Faile v. S.C. Dep't. of Juvenile Justice*, 350 S.C. 315, 334 566 S.E.2d 536, 546 (2002); *Roe v. Bibby*, 410 S.C. 287, 293, 763 S.E.2d 645, 648 (Ct. App. 2014).[2] In discussing her duty to warn theory, Ms. Weaver employs language and standards consistent with the duty of care in premises liability cases (*e.g.*, "duty to warn," "dangerous condition"). Ms. Weaver does not, however, explain why or how this line of cases applies to her allegations that Brookdale had a duty to warn her of the potential for finding her grandmother's remains.

Even assuming these premises liability cases apply here, and that Ms. Weaver qualifies as either an "invitee" or a "licensee" on Brookdale's property, Brookdale's duties to her remain limited. Brookdale would have had a duty to warn her of concealed dangerous conditions (if she were a licensee) or, at best, of latent or hidden dangers of which Brookdale had or should have had knowledge (if she were an invitee). *See Singleton v. Sherer*, 377 S.C. 185, 201-03, 659 S.E.2d 196, 204-05 (Ct. App. 2008) (holding no duty to warn individual, regardless of status, about a racoon, which bit the individual, on the property); *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 256, 607 S.E.2d 362, 365 (Ct. App. 2004) (holding no duty to warn of open or obvious condition).

Ms. Weaver's only claim is that she suffered emotional harm from "discovering her grandmother's dismembered body." *See* Resp't Br. 11 (quoting Compl. ¶ 39). The only

[2] While there are five recognized exceptions to this general rule, the Complaint does not allege facts supporting any of these exceptions. *See Doe 2*, 421 S.C. at 146, 805 S.E.2d at 581; *see also* Resp't Br. 11-13.

"danger" of which Brookdale allegedly failed to warn Ms. Weaver was that she might see harm (or, more accurately, the aftermath of harm) to another person, which could cause her emotional distress. There is no basis in South Carolina law for holding that the risk of observing injury to another person is the kind of concealed dangerous condition or latent or hidden danger recognized under a premises liability duty to warn theory. To recognize such a duty on the facts alleged here would open the door to transforming every bystander claim for negligent infliction of emotional distress into a premises liability claim for failure to warn of the "danger" of emotional distress. Ms. Weaver's claim is in substance a claim for emotional distress based on bystander liability and it must be treated as such.

Ms. Weaver also suggests that Brookdale "had a duty to reasonably conduct the search" for Ms. Walker, presumably before calling her family to notify them of her disappearance. *See* Resp't Br. 11. The cases on which Ms. Weaver relies do not support her position, as they involved wrongful death or direct physical injury based on the affirmative action of the defendant. Resp't Br. 11-12 (citing *Vaughan v. Town of Lyman*, 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006); *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997)). Ms. Weaver cites no case that supports her novel "duty to search first" theory.

Finally, contrary to Ms. Weaver's assertions, foreseeability of a potential injury (here, the alleged foreseeability that Ms. Weaver may discover Ms. Walker's remains) does not alone create a duty of care. *See Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 391-92, 701 S.E.2d 776, 781 (Ct. App. 2010). Instead, "[a] plaintiff must identify a duty that the defendant has to protect her from a particular harm to merit consideration of her claim by a jury." *Id.* Nothing in Respondent's Brief, let alone in the Complaint, identifies a duty that Brookdale had to protect Ms. Weaver from a *particular* harm.

C. Ms. Weaver's negligence claim is, in substance, a claim for negligent infliction of emotional distress.

As the discussion above demonstrates, Ms. Weaver's arguments as to why Brookdale directly owed her a duty of care are all over the map. The reason for this is simple: Ms. Weaver's purported claim of negligence is in substance a claim for negligent infliction of emotional distress. The Complaint alleges that Brookdale was negligent in failing to supervise Ms. Walker, resulting both in Ms. Walker's death and in Ms. Weaver's emotional distress stemming from Ms. Walker's death. That is the very essence of a claim for negligent infliction of emotional distress. And, for the reasons discussed below, that claim likewise fails.

II. Ms. Weaver's bystander liability claim fails as a matter of law because she has not and cannot allege facts necessary to sustain her claim.

A. Ms. Weaver was not in close proximity to and did not contemporaneously perceive the accident that resulted in Ms. Walker's death.

Two necessary elements of Ms. Weaver's claim for negligent infliction of emotional distress are visibly absent from the allegations in the Complaint, and understandably so. Ms. Weaver cannot in good faith allege that she was in close proximity to or contemporaneously perceived the accident that caused her grandmother's death.

In *Kinard v. Augusta Sash & Door*, the Supreme Court carefully limited recovery for negligent infliction of emotional distress to circumstances where there is emotional trauma based on *bystander* liability. 286 S.C. 579, 582-83, 336 S.E.2d 465, 467 (1985). *Kinard* expressly provides that the cause of action requires (1) the negligence of the defendant causes the death or serious 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 manifest by physical symptoms. *Kinard*, 286 S.C. at 582-83, 336 S.E.2d at 467. Under *Kinard*, therefore, to assert a viable claim

of bystander liability, Ms. Weaver must allege that (1) Brookdale's negligence toward Ms. Walker caused Ms. Walker's death or serious injury, and (2) Ms. Weaver was in close proximity to and contemporaneously perceived the "accident" (*i.e.*, the alligator attack) that resulted from Brookdale's alleged negligence.

Although Ms. Weaver concedes the *Kinard* test applies, she asks the Court to adopt an absurd interpretation of the word "accident." According to Ms. Weaver, the "negligence" that "causes the death or serious injury to another" can be completely separate from the "accident" to which the plaintiff was in close proximity and contemporaneously perceived. Thus, she argues that, while Brookdale's negligence caused Ms. Walker's death, the "accident" resulting in Ms. Weaver's emotional distress did not come until later, when Brookdale called Ms. Walker's family members before searching for her, which led to Ms. Weaver witnessing the aftermath of the alligator attack. *See* Resp't Br. 14. This interpretation is not consistent with any South Carolina bystander liability case. *See, e.g.*, *Kinard*, 286 S.C. at 582-83, 336 S.E.2d at 467 (mother witnessed trucking accident that caused serious injury to her daughter; sufficiently pleaded claim for negligent infliction of emotional distress); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 154, 533 S.E.2d 597, 603 (Ct. App. 2000) (holding no claim for negligent infliction of emotional distress when wife did not witness the *car accident* that injured husband, but was later present in hospital to witness his injuries); *Canty v. Med. Univ. of S.C.*, No. 2005-CP-10-1132, 2006 WL 4037737 (Ct. Com. Pl. Aug. 17, 2006) (holding no claim for negligent infliction of emotional distress where family member was in waiting room and did not personally see doctor's medical malpractice occur, and noting that "[i]t's the shock and trauma of *actually witnessing* a loved one suffer serious physical injury or death which is the basis for [a negligent infliction of emotional distress] claim" (emphasis added))

Indeed, this Court in the analogous case *Stewart v. State Farm Mutual Automobile Insurance Co.* established that witnessing the consequences of an "accident" cannot support a claim for negligent infliction of emotional distress. 341 S.C. at 154, 533 S.E.2d at 603. In *Stewart*, a wife who did not witness the car accident that injured her husband but who was later present in the hospital to witness his injuries, could not bring a viable claim for negligent infliction of emotional distress. *Id.* The Court concluded that the wife "was not a bystander in close proximity to the accident in which Husband was involved and did not contemporaneously perceive the accident." *Id.* at 155, 533 S.E.2d at 603. That the wife was injured "as a result of her husband's bodily injuries" meant the damages were consequential, rather than direct, and could not be recovered under a negligent infliction of emotional distress cause of action. *Id.* Thus, witnessing the aftermath or the mere consequences of the "accident" cannot support a claim for negligent infliction of emotional distress under a bystander liability theory. That is exactly what is alleged here and, accordingly, *Stewart* compels dismissal of Ms. Weaver's claim.

B. Ms. Weaver misstates the holding in *Strickland v. Madden* to suit her argument and to evade the "close proximity to" and "contemporaneously perceive" elements.

Purporting to rely on *Strickland v. Madden,* Ms. Weaver also argues that claims for negligent infliction of emotional distress may proceed on a theory other than bystander liability. *See* Resp't Br. 14-16 (discussing *Strickland v. Madden*, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994)). *Strickland* does not support that argument. In *Strickland*, the "negligence" at issue – incorrectly telling the plaintiff that her father had died when he was still alive – was directed toward the plaintiff herself. *Strickland*, 323 S.C. at 67, 668 S.E.2d at 583. The plaintiff's emotional distress was not the result of a negligent act that caused injury or death to the plaintiff's father; the doctor's negligence was directed toward the plaintiff and was unrelated to any injury or death of the father, which in fact there was none. *See id.* For these reasons, the

Court concluded that the bystander liability line of cases was inapplicable. *Id.* Significantly, the *Strickland* Court confirmed that "a cause of action based solely on emotional trauma without proof of physical injury is limited to bystander recovery as announced in *Kinard*, 286 S.C. at 582, 336 S.E.2d at 467 n.2." *Id.* The *Strickland* Court allowed the plaintiff's claim to proceed past summary judgment only because the plaintiff alleged "severe bodily . . . injuries" in connection with the alleged negligence. *Id.* at 67-68, 448 S.E.2d at 583-84.

Strickland is inapposite here, where the facts presented fall squarely within the bystander liability framework of *Kinard.* There are no allegations to support a claim for direct negligence in the confines of *Strickland.* To the contrary, Ms. Weaver asserts that she suffered emotional trauma based on a string of events following directly from Brookdale's alleged negligence toward Ms. Walker. Ms. Weaver's negligent infliction of emotional distress claim is analogous to that of the plaintiff in *Canty*, 2006 WL 4037737, where the court rejected the application of *Strickland.* In *Canty,* the court held that a doctor's disclosure to a patient's family member that he had operated on the wrong eye of the patient did not support a claim for negligent infliction of emotional distress. *Id.* According to the Court, the plaintiff's claim fell "far short" of satisfying the *Kinard* elements because the plaintiff "was not a bystander or in close proximity to" the surgery, and did not "contemporaneously perceive" the surgery. *Id.* For Ms. Weaver's claim for negligent infliction of emotional distress to survive, it must fit within the narrow framework of *Kinard.* It does not.

C. Recognizing bystander liability here would expand *Kinard* exponentially, materially change South Carolina law, and invite a flood of bystander liability claims.

This Court would fundamentally change the nature of bystander liability claims if it accepts Ms. Weaver's arguments. Under Ms. Weaver's formulation of *Kinard*, a viable bystander liability claim could be asserted every time a family member is called as an emergency

contact in the aftermath of an accident, which occurs in nearly every single accident. *Cf. Canty*, 2006 WL 4037737 ("Allowing a cause of action for negligent infliction of emotional distress in a situation . . . where a physician needs to truthfully and accurately inform the family of what took place would set an extremely dangerous precedent. It would provide the foundation for a negligent infliction of emotional [distress] claim by default anytime a negligent act occurred in a healthcare setting that required disclosure to a family member."). In addition, characterizing the "accident," not as the event that caused the injury or death to a family member, but as the failure to warn the family member's next of kin properly about the potential to witness the aftermath of the event, is at direct odds with the rationale of *Kinard*.

In *Kinard*, a mother was in the car with her daughter when a truck accident injured the daughter. *Id.* at 581, 336 S.E.2d at 466. The Supreme Court allowed the mother to pursue a bystander liability claim based on the "severe shock and emotional trauma" she suffered, "caused by *witnessing* serious injury to her daughter." *Id.* (emphasis added). The *Kinard* Court carefully imposed limits to the new cause of action to avoid opening the floodgates to bystander liability claims. *Id.* at 581-82, 336 S.E.2d at 467 ("Developing any cause of action necessarily includes setting limits. Such limits are required to control liability."). In emphasizing the narrow confines of the cause of action it was recognizing, the Supreme Court observed that the mother would *not* have the right to recover for "emotional upset" arising from a vigil at her daughter's bedside "*following the accident*." *Id.* at 583 n.3, 336 S.E.2d at 467 n.3 (emphasis added). The critical and essential fact permitting the mother to assert a claim was that she actually witnessed the accident itself; it would not have been enough if the mother merely witnessed the injuries and suffering caused by the accident after-the-fact.

Ms. Weaver did not witness the alligator attack; she came upon the aftermath of the accident some time later. She now claims that the "accident" was the discovery of her grandmother's body. Not only does that argument conflict with the *Kinard* framework, but everyone who sees a family member's injuries in the aftermath of an accident could make the same allegation. To permit Ms. Weaver to recover for bystander liability under these facts would conflict with the holding in *Kinard* and fundamentally expand South Carolina law.

III. Ms. Weaver's claim for intentional infliction of emotional distress fails because the Complaint does not and could not in these circumstances allege that Brookdale engaged in "extreme and outrageous" conduct directed at her.

Often called "outrage," a claim for intentional infliction of emotional distress requires conduct that is not just intentional, but "extreme and outrageous," and directed at the plaintiff. *Upchurch v. N.Y. Times Co.*, 314 S.C. 531, 536, 431 S.E.2d 558, 561 (1993). The facts alleged in the Complaint do not come close to meeting this "outrage" standard. To begin with, there are no allegations showing that Brookdale "directed" any wrongful conduct at Ms. Weaver specifically. *See* Appellant Initial Br. 21-22 (discussing "directed at" element and collecting cases).

Moreover, although the Complaint alleges in a conclusory fashion that Brookdale's conduct was "so extreme and outrageous as to exceed all possible bounds of decency," Resp't Br. 17 (citing Compl. ¶¶ 54, 56, 32), there are no facts alleged that possibly could support that conclusion. It is for this Court to determine whether the facts pleaded in the Complaint as to Brookdale's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 167, 321 S.E.2d 602, 609 (Ct. App. 1984), *rev'd in part on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985). "[T]he quality of the defendant's conduct is to be judged by an objective standard, *i.e.*, whether it can reasonably be considered extreme, outrageous, and utterly intolerable in a civilized community."

Corder v. Champion Rd. Mach. Intern'l Corp., 283 S.C. 520, 523, 324 S.E.2d 79, 81 (Ct. App. 1984).

Here, it cannot be considered "extreme, outrageous, and utterly intolerable in a civilized society" to call family members to inform them that their mother or grandmother is missing, or to enlist their help in the search. That is so even if the caller fails to warn that the mother or grandmother may be dead or injured and that the family member may see something emotionally upsetting (which, in any event, is inherent in calling to alert family members to the situation in the first place). Brookdale's alleged actions are not remotely comparable to those of defendants in the few South Carolina cases in which courts have recognized "extreme and outrageous" conduct. *See, e.g.*, *In re Thomas*, 254 B.R. 879 (D.S.C. 1999) (applying South Carolina law and recognizing potentially "extreme or outrageous" conduct where defendant mailed plaintiff photos of plaintiff's fiancée in sexually explicit poses with letters demanding money and sex); *McSwain v. Shei*, 304 S.C. 25, 402 S.E.2d 890 (1991) (stating a jury could find extreme or outrageous conduct where defendants, with knowledge of plaintiff's incontinence, repeatedly forced her to engage in daily exercises in public which revealed her incontinence); *see also Wright v. Sparrow*, 298 S.C. 469, 473, 381 S.E.2d 503, 506 (Ct. App. 1989) (holding no extreme and outrageous conduct because there was "no evidence of hostile or abusive encounters or coercive or oppressive abuse"); *Ford v. Tutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981) (holding defendant's continued pattern of confrontation, anger, and profanity directed solely toward the plaintiff was legally sufficient to constitute "extreme and outrageous" conduct).

Here, construing the Complaint as broadly as possible against Brookdale, it did not engage in "extreme and outrageous" conduct by calling Ms. Weaver to alert her that her

grandmother was missing and by not warning her that she may see something emotionally upsetting if she joined the search for her grandmother.

For these reasons, Ms. Weaver's allegations regarding Brookdale's conduct toward her grandmother cannot support her intentional infliction of emotional distress claim. First, there are no allegations that Brookdale directed any intentional, wrongful conduct at Ms. Weaver. And second, the alleged acts and omissions leading to Ms. Walker wandering from the facility and being killed are at most negligent. There is nothing to suggest that Brookdale engaged in any intentional misconduct, let alone intentional misconduct that was extreme and outrageous, and directed at Ms. Weaver.

IV. Ms. Weaver seeks to rewrite her Complaint to avoid the reach of the Arbitration Provision, which plainly encompasses her claims.

The Arbitration Provision covers "[a]ll claims or controversies arising out of, or in any way relating to, [the Residency] Agreement or any of [Ms. Walker's] stays at [Brookdale]." Residency Agreement, Section V.A.1. Ms. Weaver's assertion that her claims "do not arise out of or relate to the Residency Agreement or to Ms. Walker's stay at Brookdale" is not a reasonable interpretation of Ms. Weaver's Complaint or the plain language of the Residency Agreement. Resp't. Br. 22. *See Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) ("A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly.").

The crux of Ms. Weaver's claims is that Brookdale failed to exercise due care in monitoring and supervising Ms. Walker, and then in failing to locate her promptly when she went missing, which resulted in Ms. Walker being killed and, later, Ms. Weaver discovering the body. Compl. ¶¶ 21-22, 30, 38. Ms. Weaver's assertion that her claims arise solely out of her discovery of the body and are unrelated to Ms. Walker's stay makes no sense; Brookdale's

alleged failure to supervise Ms. Walker properly and Ms. Walker's resulting death are the foundation of Ms. Weaver's claims. Thus, Ms. Weaver's claims necessarily "arise out of" or at least in some "way relate to" the Residency Agreement and to Ms. Walker's status as a resident.

Further, Ms. Weaver's argument that the Arbitration Provision's reference to third parties does not encompass her claims because she is not seeking to bring them "through the Resident" or "through the Resident's estate" is demonstrably wrong. *See* Resp't Br. 23-24. The Arbitration Provision states that it "binds third parties not signatories to this Arbitration Provision, including any spouse, children, heir, representatives, agents, executors, administrators, successors, family members, or other persons claiming through the Resident, or persons claiming through the Resident's estate. . . ." Residency Agreement, Section V.A.14. Under a natural reading of this language, the "through the Resident" language can reasonably be read as applying only to the claims of "other persons" who do not fall within one of the other enumerated categories, such as family members or heirs. Family members such as Ms. Weaver are expressly included within the category of persons bound by the Arbitration Provision, and are bound regardless of whether their claims are brought in a representative capacity (*i.e.,* brought "through the resident" or "through the resident's estate"). Reading the Arbitration Provision as a whole further confirms this common-sense interpretation because it goes on to state that the arbitration mandate applies to third-party claims brought *either* in a representative *or* a personal capacity. *Id.*, Section V.A.14.

Even if there were some doubt about this reading of the Arbitration Provision, which there is not, the Federal Arbitration Act mandates that the Arbitration Provision be broadly construed. *See* 9 U.S.C. §§ 1-307; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23, 24 (1983) (holding any doubts concerning the scope of arbitrable issues

are to be resolved in favor of arbitration); *Landers*, 402 S.C. at 109, 739 S.E.2d at 213-14 (noting that the presumption of arbitrability is "strengthened when an arbitration clause is broadly written"). Surely, under a broad reading, the Arbitration Provision binds those falling within the named categories of persons bound, which includes Ms. Weaver as both a "family member" and an "heir."

The fact that Ms. Weaver is a nonsignatory to the Residency Agreement does not preclude enforcement of the Arbitration Provision. *See Wilson v. Willis*, 416 S.C. 395, 417, 786 S.E.2d 571, 582 (Ct. App. 2016) ("In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000))). Ms. Weaver's efforts to distinguish *Wilson v. Willis* fail. *See* Resp't Br. 26. As with the plaintiff in *Wilson*, Ms. Weaver seeks to benefit from terms, duties, and obligations created by the agreement at issue: the duties purportedly owed to Ms. Walker based on the Residency Agreement. *See Wilson*, 416 S.C at 417-18, 786 S.E.2d at 582-83. It matters not whether Ms. Weaver's claims ultimately are successful or whether she actually benefits (*i.e.*, prevails on her claims). The point is that, in asserting her claims, Ms. Weaver necessarily must rely at least in part on the fact that her grandmother was a resident of Brookdale, on the terms of the Residency Agreement, and on the duties owed to her grandmother under that Agreement. She cannot, at the same time, dodge the effect of the Arbitration Provision because that section of the Agreement as a whole does not suit her. *See id.* at 417, 786 S.E.2d at 582 ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and

contravene the purposes underlying enactment of the [FAA]." (quoting *Int'l Paper*, 206 F.3d at 418)).

Finally, Ms. Weaver argues that an "outrageous and unforeseeable torts exception" shields her claims from mandatory arbitration. *See* Resp't Br. 27. She asserts that courts refuse to enforce arbitration clauses when the conduct consists of "illegal or outrageous acts that no reasonable person would have foreseen at the time the parties executed the agreement to arbitrate." Resp't Br. 28 (quoting *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007)). As explained above, Brookdale's alleged conduct, construed most strongly in Ms. Weaver's favor, does not come close to meeting the standard Ms. Weaver herself acknowledges.

CONCLUSION

This is a straightforward case that presents important issues of South Carolina law. No one could fail to sympathize with Ms. Weaver and Ms. Walker. Even so, the claim recognized by law based on the facts alleged is a wrongful death claim, which has been pursued and settled. It would change South Carolina law significantly to permit Ms. Weaver to proceed on what is in substance a bystander liability claim, pure and simple, because she has not alleged and cannot allege the essential elements of that claim. Ms. Weaver's claims should be dismissed, with prejudice. Moreover, although there is no need to reach the issue, Ms. Weaver's claims are subject to mandatory arbitration.

(Signature page to follow.)

Respectfully submitted,

June 22, 2018

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-002241
Civil Action No. 2017-CP-10-03130

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 certify this 22nd day of June 2018 that I have served a copy of the INITIAL REPLY BRIEF OF APPELLANTS upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

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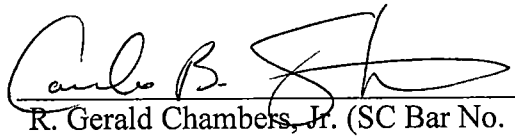
June 22, 2018

By: 

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June 22, 2018

VIA HAND DELIVERY:

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Stephanie Walker Weaver v. Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston, Terri Robinson, John Does and Richard Roe Corporations
Appellate Case No.: 2017-002241
File No.: 80.1593

Dear Ms. Kitchings:

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

With kind regards, I am

Very truly yours,

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

Carmelo B. Sammataro

CBS/tj
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