ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	C.A. No: 2018-CP-23-05088
Estate of Mozana Clinkscales, by and through the appointed Personal Representative Charlie E. Clinkscales, Individually, and on behalf of Statutory Beneficiaries, Plaintiffs, v. Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville, Defendants.	**ORDER DENYING MOTION TO COMPEL ARBITRATION**

RECEIVED
MAY 30 2019
SC Court of Appeals

This matter came before the Court on December 18, 2018 for Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville's Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and reviewed the parties' legal memoranda, for the reasons more fully set forth below, the Court hereby denies the Motion to Compel Arbitration as to "Survival Action" and the "Wrongful Death Action".

I. BACKGROUND

This matter arises out of two civil actions --- a Survival Action and a Wrongful Death action. Both actions involve allegations of nursing home neglect and corporate negligence resulting in the wrongful death of Mozana Clinkscales ("Decedent"). Charlie Clinkscales was Decedent's son and serves as the personal representative of Decedent's estate. The claims are brought against the nursing home facility THI of South Carolina at Magnolia Place at Greenville, LLC (d/b/a Magnolia Place – Greenville), as well as Fundamental Clinical and Operational Services, LLC (which Defendants assert provided "clinical services" to the facility), and

Fundamental Administrative Services, LLC (which Defendants assert provided "administrative services" to the facility), these latter two entities being hereinafter referred to as the "Corporate Defendants."

Plaintiffs allege that while the Corporate Defendants did not provide direct care or services to Decedent, they are indispensable parties and proper Defendants in this matter because their control over the Facility directly affected the quality of care received by Decedent. Plaintiffs allege the Corporate Defendants are related entities[1] of the nursing home and have a significant relationship in the operation and management of the nursing home, and derive significant economic benefits from its revenue.[2] Agency law extends the right to enforce an arbitration award against agents, sister corporations, subsidiaries, and parent/ownership entities of a contracting party "where the interests of such parties are directly related to, if not congruent with, those of a signatory."[3] Plaintiffs allege the Corporate Defendants should be included in the arbitration proceedings if the Court compels arbitration because the Court finds the Corporate Defendants were intended beneficiaries of the Arbitration Agreement as the allegations against them are based on the same facts and are inherently inseparable from the claims made against the Facility.[4]

Decedent was admitted to Magnolia Place-Greenville ("Facility") on January 15, 2011 according to the original Admission Agreement. The Admission Agreement governed the type of care Decedent would receive at the Facility and Decedent's financial obligation to pay for those

---

[1] Related entity is an industry term that means the entities are have common ownership, management, and control.

[2] A parent company has been forced to arbitrate under a theory of equitable estoppel even though the parent company was not a party to the agreement when the subsidiary was a party to the agreement. Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000) quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988)) (citing Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993). Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App., 2012).

[3] Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (1993) (citing Isidor Paiwonsky Associates, Inc. v. Sharp Properties, 998 F.2d 145, 155 (3d Cir. 1993)).

[4] Int'l Paper Co. v. Schwabedissen Maschenen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000); see also Pearson v. Hilton Head Hospital, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012).

ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

services. On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement"[5] provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Decedent's admission to the Facility. The date on this document is January 15, 2011.

A contract called "Arbitration Agreement" was signed on August 30, 2013. This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and Decedent, provides for alternative dispute resolution to any claim a party may bring against another arising out of Decedent's care at the Facility. Defendant has admitted agreeing to arbitrate was not a prerequisite to admission at the Facility or a condition of admission. The Arbitration Agreement was allegedly signed by Charlie Clinkscales on **August 30, 2013**—more than 30 months after the original Admission Agreement was signed.

II. BURDEN OF PROOF

The party seeking to force arbitration has the burden of establishing the existence of a valid arbitration agreement.[6] Of those courts that have decided this question, most have held the proponent of the waiver bears the burden, reasoning that the jury trial right is fundamental, and should not be waived absent clear evidence.[7] A party seeking judicial enforcement of a contract

[5] "I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties and may not be amended except by written agreement of the parties."

[6] See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008).

[7] See e.g., Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986) ("Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed."); Nat'l Equip. Rental Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (implying that party defending waiver bears burden of proof); Luis Acosta, Inc. v. Citibank, N.A., 920 F. Supp. 15, 18 (D.P.R. 1996) (rejecting a waiver, after concluding that "the burden of proving the waiver of such a fundamental right properly rests upon the party seeking to enforce such a waiver"); Phoenix Leasing Inc. v. Sure Broadcasting, Inc., 843 F. Supp. 1379, 1384 (D. Nev. 1994) ("An informal survey indicates the majority of courts having considered this question followed the approach in Leasing Service [and placed

ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

bears the burden of persuasion.[8] Defendant carries the burden to prove a valid and enforceable arbitration agreement was signed in a "knowing, voluntary and intentional" capacity. In interpreting a jury trial waiver narrowly, some courts have also emphasized "the basic principle that ambiguities in a contract are construed against the drafting party."[9] When faced with a motion to compel arbitration that is opposed based on whether an agreement to arbitrate has been made between the parties, the court must give to the opposing party the benefit of all reasonable doubts and inferences that may arise.[10] Pro-arbitration policy does not validate a contract that lacks the building blocks of a binding contract. Whether the parties agreed to arbitrate is a question of substantive state law.[11] In Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007), the Supreme Court stated: "Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis."

The parties agree the FAA applies and that it represents pro-arbitration federal policy. "Congress's purpose in enacting the FAA was "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."[12] However, the policy only applies in instances where a valid arbitration agreement has been established. See 9 U.S.C. § 4. ("The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement...is not in issue."). When the parties dispute the existence of a valid arbitration agreement, the presumption in favor of arbitration

burden of proof on proponent of waiver]."); Smyly v. Hyundai Motor Am., 762 F. Supp. 428, 429 (D. Mass. 1991) (concluding that "since it is a waiver of a constitutional right," proponent of waiver bears burden of showing agreement was made knowingly and intentionally).

[8] Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986).

[9] Nat'l Acceptance Co., 381 F. Supp. at 271).

[10] See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir. 1980).

[11] Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

[12] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

disappears.[13] The FAA requires state courts enforce arbitration agreements unless the agreement is otherwise revocable under existing legal or equitable principles. 9 U.S.C. § 2. Moreover, while it is true the U.S. Supreme Court has held that the FAA "leaves no place for the exercise of discretion," the Court also cited the FAA's savings provision that denies enforcement of agreements susceptible to the general contract defenses of fraud, duress, and unconscionability.[14] The FAA requires the Court to look to South Carolina law to decide the threshold questions of contract formation.[15] The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.[16] Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.[17] Arbitration agreements may thus be invalidated by generally applicable contract defenses, such as vagueness, indefiniteness, lack of consideration, fraud, duress, or unconscionability. Id. A court should only decide as a matter of law whether the parties entered into an agreement to arbitrate when there is no genuine issue of material fact concerning the formation of the agreement.[18] In determining whether adequate consideration exists in a contract or arbitration agreement under the FAA guided by principles of contract law, we must examine and stay within the confines of the four corners of the instrument.[19]

---

[13] Dumais v. American Golf Corp., 299 F.3d 1216, 1220 (10th Cir. 2002).
[14] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).
[15] Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").
[16] See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir. 2001).
[17] Rent-A-Center, West. Inc., 130 S. Ct at 2776; Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").
[18] See Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1283 (10th Cir. 1997).
[19] State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)).

ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

III. LEGAL REASONING

A. *The Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances.*

The necessary elements of a contract are an offer, acceptance, and valuable consideration.[20] To be legally enforceable, a contract must have an offer, acceptance, consideration, and mutual assent or meeting of the minds on all material terms. It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration.[21] "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."[22] Consideration is a promise to do something that a party has no legal obligation to do or to forbear from doing something it has a legal right to do. A valid contract requires that both sides provide consideration. The Arbitration Agreement is only enforceable if it contains bargained for consideration and a mutuality of obligations between its parties. The Court finds these essential contract formation requirements are not met here. Many of the arguments Defendant raises in support of the Arbitration Agreement are misguided because they conflate the Arbitration Agreement and the Admission Agreement which, for the reasons discussed above, are distinct documents that do not merge.

The Arbitration Agreement was signed on August 30, 2013, but the Admission Agreement was signed on January 15, 2011.[23] Thus, the Admission Agreement and Arbitration Agreement

[20] Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003).
[21] Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984).
[22] Plantation A.O., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)).
[23] No family member had Power of Attorney when Mozana was admitted on January 15, 2011.

ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

are separate contracts that do not merge.[24] Our Supreme Court in Coleman refused to apply the merger doctrine when language in the contracts "recognized the 'separateness' of the admission and arbitration agreements."[25] Our Supreme Court went further in Thompson and Hodge applying Coleman and providing further examples of factors demonstrating "separateness" and preventing merger including the fact that the Arbitration Agreement was not necessary for admission and that *there was no bargain for exchange nor consideration to the Arbitration Agreement.*[26]

An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. "this Admission Agreement *or* in the Arbitration Agreement."[27] In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "Arbitration Agreement" atop its first page, these factors further "indicate the parties' intent for it to stand by itself as an independent contract."[28] Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home.[29]

The "Admission Agreement" in this case contains an "Entire Agreement" provision stating that "this Agreement represents the entire agreement" related to admission to the Facility. Thus, "Agreement" is a defined term in this contract and, as stated in the contract's opening paragraph, is limited to the "Admission Agreement," not the separate Arbitration Agreement. Like in Hodge, the separate contracts have separate signature pages and separate pagination—i.e. the Admission

[24] See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014).
[25] 407 S.C. at 355, 755 S.E.2d at 455.
[26] 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.
[27] Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).
[28] Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.
[29] Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

Agreement ends with "Page 12 of 12" while the Arbitration Agreement is "Page 1 of 1." As in Thompson, the arbitration agreement states its independence with its "Arbitration Agreement" title. To the extent there are any ambiguities in this contract language, they must be resolved against merger.[30] The Facility was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired. In sum, the Facility cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit. Where a contract lacks valuable consideration, the contract will be deemed unenforceable. No valuable consideration exists in this case. There was no consideration given for Charlie Clinkscales to sign the Arbitration Agreement, because Mozana Clinkscales had already been admitted and received care.

In its most elemental sense, the doctrine of mutuality of obligation means that unless both parties to a contract are bound by its terms, neither is bound. Mutuality of obligation in bilateral contracts is but another way of stating that consideration is essential. 25 Richard Lord, Williston on Contracts § 67:42 at 332 (4th ed.2002)). Mutuality becomes a nonissue when consideration has otherwise been conferred upon one of the parties. There exists a lack of mutuality that makes the Arbitration Agreement unenforceable. The mutuality requirement is satisfied if each party has given sufficient consideration for the other's promise—something of value. Valuable consideration for a contract consists of some right, interest, profit or benefit accruing to one party or undertaken by the other. Where there is a mutual promise to arbitrate, there must be additional consideration. The mutual promise to arbitrate is illusory and of no benefit to Decedent or Plaintiff. The agreement provides that claims primarily brought by patients, such as those for medical malpractice, claims arising from the provision of services by defendant, and

[30] Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685 (citing Coleman).

ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

elder abuse claims are to be arbitrated. Defendants argue the Arbitration Agreement meets the mutuality requirement because both sides are forced to arbitrate. However, while the Arbitration Agreement purports to require arbitration for any "dispute over care," the reality is that this obligation falls almost exclusively on the patient. It is virtually inconceivable that Defendants would sue its patient regarding a dispute over care. Since admission is unavailable as a "direct benefit" to support estoppel, Defendants would be required to point to some benefit Mrs. Clinkscales received from the Arbitration Agreement alone. Any such attempt to find a benefit would have been futile given the Court of Appeals' unambiguous ruling in Thompson which held that "any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial."[31] The contract is also silent as to any consideration exchanged between the parties. The Arbitration Agreement itself contains insufficient consideration in the form of a mutual exchange of promises to arbitrate. There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the Admission Agreement. Admission can be the "direct benefit" that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract.

In sum, Defendants have not met their burden to prove merger, consideration, or any other benefit for the Arbitration Agreement. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a single contract. If the jury waiver was not a precondition to admission, then it fails for lack of consideration. The Court finds it would

---

[31] 416 S.C. at 60, 784 S.E.2d at 688 (emphasis added).

be inconsistent for Defendants to argue that agreeing to arbitrate was not consideration for the admission but, on the other, argue that the admission was valuable consideration to support arbitration. For the proposed arbitration contract to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party, when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself.

The Arbitration Agreement was not part of the Admission Agreement and thus, separate consideration was required for the Arbitration Agreement to be valid. See Thompson v. THI of N.M. at Casa Arena Blanca, LLC, No. CIV 05-1331 JB/LCS, 2006 WL 4061187, at *12 (D.N.M. Sept. 12, 2006); THI of N.M. at Vida Encantada, LLC v. Archuleta, No. CIV 11-399 LH/ACT, 2013 WL 2387752 (D.N.M., 2013).

Plaintiffs also rely upon the fact that the federal government at the time prohibited a nursing home from requiring a current resident to sign an arbitration agreement as a condition of continued residency, relying on a policy set forth by the Center for Medicaid and State Operations ("CMS") on January 9, 2003. The memorandum states: "A current resident is not obligated to sign a new admission agreement that contains binding arbitration. Federal regulations, at 42 C.F.R. § 483.12(a)(2) limit the circumstances under which a facility may discharge or transfer a resident."

ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

The Court is further persuaded by Plaintiff's argument that to construe admission as valid consideration to support the Arbitration Agreement would be inconsistent with federal law. The parties agree Decedent was a Medicare and Medicaid beneficiary while residing at Defendants' facility and that the facility was billing and accepting payment from Medicare and Medicaid for Decedent's care. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full and *expressly forbid* acceptance of additional consideration for nursing home services. See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15. Such facilities must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility." 42 U.S.C. § 1396r(c)(5)(A)(iii).

It is undisputed that this Federal Medicare and State Medicaid law applies to the Defendants' nursing home in this case. The fact is if a facility were to charge an additional five dollar fee to Medicaid beneficiaries as a condition for any reason, this would be strictly prohibited. Therefore, a facility should not be able to demand a waiver of a constitutional right as the price of admission. See Berkebile v. Outen, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993) (noting general rule that courts will not enforce a contract which is "violative of public policy, statutory law, or provisions of the Constitution").

B. ***The Arbitration Agreement does not govern the wrongful death claim***

The Court further finds the Arbitration Agreement should not include the wrongful death cause of action because no one with legal authority could enter an agreement that waives the right to a jury trial on behalf of Decedent's statutory beneficiaries. Only the court-appointed personal representative can waive the beneficiaries' rights.

ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

A wrongful death claim is separate from a Decedent's personal injury/survival claim and an individual's wrongful death beneficiaries are defined by statute. S.C. Code Ann. § 15-51-20 (1977). South Carolina law provides that a wrongful death claim exists for the statutory beneficiaries, and that such claims are distinct and separate claims from those that are brought under the survival statute.[32] It appears the question of whether a wrongful death action is subject to mandatory arbitration pursuant to the terms of a contract is one of first impression in South Carolina, and there is a split in authority in other jurisdictions. This Court finds persuasive the reasoning of those jurisdictions that have held that an arbitration agreement executed by a decedent cannot bind the decedent's statutory beneficiaries who were not parties to the agreement.[33]

For example, in Ping v. Beverly Enterprises, the Supreme Court of Kentucky held:

> [W]e are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. It is something else entirely, however, to say that incidental beneficiaries of a contract-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants.

376 S.W.3d 581, 599-600 (Ky. 2012).

In line with these principles, the Court finds the Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the

---

[32] See Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914).

[33] See e.g., Woodall v. Avalon Core Ctr.-Fed. Way, LLC, 231 P.3d 1252, 1258 (Wash. App. Div. 1 2010) (refusing to compel arbitration of wrongful claim because wrongful death claim never belonged to decedent); Lawrence v. Beverly Manor, 273 S.W.3d 525, 528-29 (Mo. 2009) (en banc); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007) (concluding decedent "could not restrict his beneficiaries to arbitration of their wrongful death claims, because he held no right to those claims"); Bybee v. Abdulla, 189 P.3d 40, 43 (Utah 2003) ("a decedent does not have the power to contract away the wrongful death action of his heirs").

ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries. Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, South Carolina's federal district court has analyzed this issue in the damages context.[34] Boyle concluded wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims from that of the survival action.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings, is DENIED.

AND IT IS SO ORDERED.

Signature to Follow

[34] Boyle v. U.S., 944 F.Supp.2d 577 (D.S.C. 2012).

ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

Greenville Common Pleas

Case Caption:	Mozana Clinkscales , plaintiff, et al vs. Fundamental Clinical And Operational Services LLC , defendant, et al
Case Number:	2018CP2305088
Type:	Order/Other

So Ordered

s/ Robin B. Stilwell 2158