

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,

RECEIVED

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SC Court of Appeals

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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JULIE H. HESTON
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

STEPHANIE WALKER WEAVER

PLAINTIFF,

vs.

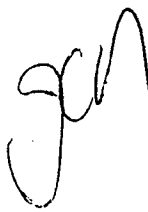
BROOKDALE SENIOR LIVING, INC.,
HBP LEASECO, LLC D/B/A
BROOKDALE CHARLESTON, TERRI
ROBINSON, JOHN DOES and
RICHARD ROE CORPORATIONS,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO. 2017-CP-10-3130

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS AND COMPEL
ARBITRATION**

 On August 31, 2017, this matter was before the Court on Defendants' Motion to Dismiss or Alternatively to Compel Arbitration. All parties were represented by counsel, provided oral arguments, and submitted written memoranda and exhibits supporting their positions. After reviewing all memoranda and hearing arguments by counsel, the Court hereby denies Defendant's Motion to Dismiss and denies Defendant Motion to Compel Arbitration for the reasons set forth below.

ANALYSIS

I. Defendants' Motion to Dismiss

In ruling on a motion to dismiss, this Court is bound by the allegations contained within the Complaint and must deny the motion if the alleged facts and reasonable inferences would entitle plaintiff 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).

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

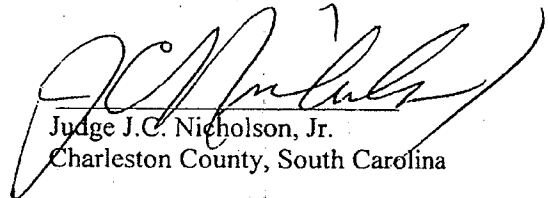
While there is a presumption in favor of arbitration agreements, this presumption only applies where a valid arbitration agreement exists between the parties. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110 (2001). Arbitration is a matter of contract, and a party cannot be forced 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 7th day of September, 2017


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

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO. 2017-CP-10-

COMPLAINT
(JURY TRIAL REQUESTED)

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JULY 10 2017
CLERK OF COURT

Plaintiff, Stephanie Walker Weaver, by and through undersigned counsel, complains and alleges as follows:

1. Stephanie Walker Weaver (hereinafter "Plaintiff" or "Weaver") is a citizen and resident of Charleston County, South Carolina.

2. At all material times, Defendant Brookdale Senior Living Communities, Inc. ("Brookdale Senior Living") was a Delaware corporation, authorized to do business, and doing business in the State of South Carolina. Brookdale Senior Living may be served via their registered agent for service of process, Corporation Service Company, 1703 Laurel Street, Columbia, SC 29201.

3. At all material times, Defendant HBP Leaseco, LLC was a Delaware limited liability company, authorized to do business, and doing business in the State of South Carolina.

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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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2017-CP-10-03130

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

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JAMES L. GIBSON, 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), SCRCp, 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.

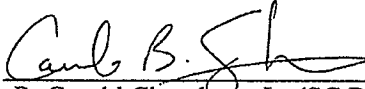
For these reasons, Defendants move to dismiss Plaintiff's Complaint, or, in the alternative, to compel arbitration in accordance with the arbitration provision of the Residency Agreement. This motion is based upon the pleadings, relevant statutes and authorities, the attached Exhibits A and B, and any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

[Signature Page To Follow.]

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

July 18, 2017

By:



R. Gerald Chambers, Jr. (SC Bar No. 12065)

Carmelo B. Sammataro (SC Bar No. 69746)

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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
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
Cantwell Law Firm, LLC
P. O. Box 600
Charleston, SC 29402

ATTORNEYS FOR PLAINTIFF



FILED
2017 JUL 19 PM 4:18
CLERK OF COURT

EXHIBIT A



RESIDENCY AGREEMENT

This Agreement ("Agreement") dated May 30, 2016 is made by and between HBP LeaseCo, L.L.C. d/b/a Brookdale Charleston (the "Company," "us," "we" or "our") and Bonnie Walker ("Resident," "you" or "your").

We operate the community located at 2030 Charlie Hall Boulevard, Charleston, SC 29414 (the "Community") which is licensed by the State of South Carolina as a/an Community Residential Care Facility and residency in the Community has been requested by you or on your behalf. The terms and conditions of this Agreement are as follows:

I. SERVICES AND ACCOMMODATIONS.

A. **BASIC SERVICES.** We will provide you with the following Basic Services, which are included in the Basic Service Rate, subject to the terms of this Agreement:

- ♦ **Accommodations** – You have elected to live in the Suite described in Exhibit A. You are also entitled to use and enjoy with all other residents the common areas of the Community. You are to provide your own furnishings and personal property; however, we reserve the right to limit the number and type of furnishings/small appliances. You agree that you are responsible for the maintenance and repair of any personal belongings you bring to the Community.
- ♦ **Dining Services** – Unless otherwise noted in the Addendum to the Residency Agreement, we will furnish three meals daily. Snacks are available 24 hours a day.
- ♦ **Utility Service** – Unless otherwise noted in the Addendum to the Residency Agreement, the cost of gas, electric, heat, air conditioning water, basic cable, satellite or comparable television service is included. You are responsible for paying any other utility charges including, but not limited to, telephone, internet or premium cable charges.
- ♦ **Housekeeping Service** – Unless otherwise noted in the Addendum to the Residency Agreement, we will provide light housekeeping once a week.
- ♦ **Laundry and Linen Service** – We will launder your personal belongings and bed linens as set forth in the Addendum to the Residency Agreement.
- ♦ **Activities Program** – We will provide planned social and recreational programs.
- ♦ **Parking** – Each Suite (whether occupied by one or two Residents) will have access to shared and uncovered parking spaces. Covered parking may be available as set forth in the Addendum to the Residency Agreement.
- ♦ **Transportation** – We will make available scheduled routine transportation services as described in the Addendum to the Residency Agreement.
- ♦ **Staffing 24 hours a day** – Associates are available 24 hours a day, seven days a week.
- ♦ **Wellness Assessments** – We will provide limited periodic wellness assessments to help you monitor your physical health.

We will provide thirty (30) days written notice of any change in Basic Services.

- B. PERSONAL SERVICE PLAN. Prior to moving in and periodically throughout your residency, we will use a personal service assessment to determine the personal services you require. The personal service assessment will be used to develop your Personal Service Plan. The results of the assessment and the cost of providing the additional personal services (the "Personal Service Rate") will be shared with you. Your initial Personal Service Rate is set forth in Exhibit A.
- C. AVAILABLE SELECT AND THERAPEUTIC SERVICES. Select Services and Therapeutic Services are available to you at your request. Such additional services are not included in the Basic Service Rate or the Personal Service Rate. Where available, such services may include, but are not limited to guest meals, transportation beyond that which is included in the Basic Service Rate, transportation escort services, enhanced cable television, special events or certain clinical services. The available Select Services and Therapeutic Services as well as the associated prices are found on Exhibit X and Exhibit Y to this Agreement.
- D. SERVICES NOT COVERED BY RESIDENCY AGREEMENT. In addition to any Select or Therapeutic Services you may receive, in some circumstances, you may need the services of other third party providers in order to continue to safely remain at the Community. An outside agency or individual will be permitted to provide these services or any related personal services only if we have given prior approval.

You are responsible for obtaining and paying for all third party provider services, whether provided by Company affiliates, our subcontractors, third party health care and medical providers, or others. These services may include, but are not limited to, pharmacy, therapy, podiatry, dentistry, ophthalmology, home health, hospice, private companion, beauty/barber or other health care services. These third party provider services are not included in the Basic Service Rate, Personal Service Rate or rates for Select Services and Therapeutic Services. Fees for such services will be billed to you directly by the third party service provider, unless otherwise agreed to by the parties. All third party service providers (including, but not limited to, health care service providers) must agree to adhere to our standards for outside providers prior to being permitted to provide services in the Community.

You may not hire our current associates to provide services in the Community. You may contract with former associates to perform any services at the Community only with our consent. We reserve the right to refuse entry to (1) former associates; (2) persons whose actions may be disruptive to the Community; or (3) persons whose actions may threaten the safety of any resident or associate.

II. YOUR RESPONSIBILITIES AND REPRESENTATIONS.

- A. CARE OF SUITE. You agree that the Community and the Suite are in satisfactory, habitable condition and we have made no promise to decorate, alter or improve the Community or Suite unless otherwise provided in writing and attached as part of this Agreement. You agree to maintain the Suite and to leave the Suite upon termination of this Agreement in good condition, except for normal wear and tear. You agree to pay all damages, beyond normal wear and tear, which you (including your agent, employee, contractor, or other invitee) cause to our property. The Community may invoice you for the cost of such repairs.

B. ALTERATIONS. We, in our sole discretion, will permit reasonable alterations to the Suite if you have a disability and the proposed modification is necessary to afford you full enjoyment of the Suite. Structural or physical alterations, whether based on a handicap or not, may be made only upon our prior written approval. All structural or physical changes to the Suite shall remain at the Suite and be considered part of the Suite and the Community. Any changes or modifications to the Suite that require assistance of appropriately licensed and insured electricians, contractors or similar professionals must be approved in advance by us in our sole discretion. The cost of any alterations made by you shall be paid by you unless otherwise agreed to in writing. You agree that you will bear the cost of restoring the Suite to its original condition, reasonable wear and tear excepted, upon the termination of this Agreement, unless we specifically exempt you from this requirement in writing. We may enter and make any modifications or alterations to the Suite to meet the requirements of any applicable law.

C. RIGHT OF ENTRY. For your safety and comfort, our associates must be permitted to enter your Suite to provide services under the terms of this Agreement, to respond to emergencies, to make repairs and improvements, or if there is reasonable belief that your safety or the safety of others is in question or that our policies and procedures are being violated, as we deem necessary or advisable. Therefore, it is not permissible to change the locks or add additional locks to the entrance door to your Suite. When feasible, our associates will attempt to give you reasonable notice before entering your Suite.

We reserve the right to relocate you to a more appropriate Suite within the Community as required for your health or safety, or because the residents of a companion Suite are incompatible.

D. HEALTH ASSESSMENT. You agree that we may periodically assess your health to create and update a Personal Service Plan and/or to determine whether you are appropriate to remain at the Community. You agree that we may perform brief periodic wellness assessments performed by therapists, nurses or other appropriately qualified individuals to help both you and us monitor your physical health and wellbeing; but, you acknowledge that these wellness assessment will not be performed by a physician and do not replace the need for you to obtain regular and thorough medical care; and, that we are not and will not provide general medical care for you. In addition, not more than thirty (30) days prior to the date of this Agreement, and at least annually thereafter or upon our request, you agree to undergo an examination by your physician (or other licensed provider as allowed by law). You agree to undergo examination by a particular specialist, at your cost, as we determine is warranted by your current physical or mental status. You will request the examiner to provide us with recommendations, including a statement attesting to the appropriateness of your continued placement. Based upon the assessment(s) and our judgment, we may determine your appropriateness to remain in the Community. You will request the examiner to perform any tests and complete any forms required by us or applicable law.

E. HEALTH CARE PROVIDER NOTIFICATION. You authorize us to contact your legal representative/family, health care providers, and/or other persons listed in your records (1) if it is necessary in our judgment to advise them of your situation; (2) to arrange for required health care services and other assistance; or (3) in case of an emergency.

If your designated health care providers are unavailable, you authorize us to arrange for the services of other health care providers. You agree we may provide such persons with copies of your records, including, but not limited to, resident records, advance directives, living will, and the names of persons empowered to make health care decisions.

- F. **SUBSTITUTE DECISION MAKERS/ADVANCE DIRECTIVES.** You will provide us with accurate, complete and current information about yourself, substitute decision-makers and health care providers, including but not limited to addresses and phone numbers, and your health care status and needs. You will provide us with copies of any power of attorney, guardianship, living will, or conservator documents, or other legal documents relating to the making of health or financial decisions or decision-makers. You authorize us to rely on the instructions of such designees or appointees or on the instructions found within such documents. You further agree to immediately notify us of changes relating to the information stated above.

It is strongly suggested that you have advance directives in place in the event you become incapacitated. If you do not have such advance directives in place, you understand that a court may name a guardian upon application of any interested party (including the Company). Neither we nor any of our associates or agents may be your guardian. If it is necessary for us to petition the court for appointment of a guardian, any costs associated therein shall be paid by you and we may invoice you for such costs.

- G. **MOTORIZED VEHICLES AND CARTS.** Individual motorized vehicles such as electric scooters, wheelchairs, or carts and similar vehicles may be used, subject to the following:

1. Your ability to walk is substantially limited due to a disability;
2. Your operation of the vehicle does not pose a threat to the health and safety of yourself or others;
3. The vehicle is operated at a low speed setting; and
4. You agree to abide by our safety guidelines for the use of motorized vehicles on the premises, which may be modified from time to time.

Reasonable accommodations will be made to the rules, policies and practices (upon a showing of necessity) so long as the requested accommodation does not constitute a threat to the health or safety of you, the other residents, our associates or visitors.

You agree to pay for all damages to others or to the Community, which are caused by you or your motorized vehicle and that we may invoice you for such costs. You further understand and agree that we may, at our sole discretion, prohibit your further use of an electric scooter or similar vehicle at any time.

- H. **EXAMINATION OF RECORDS.** You acknowledge that we are licensed by the State of South Carolina as an Community Residential Care Facility. You understand that regulatory officials having jurisdiction over the Community may inspect your records as part of an evaluation of the Community. You have the right to review and access your health care records in accordance with the requirements of applicable law.

- I. **RULE AND REGULATION COMPLIANCE.** You understand that the Community has shared common areas, and you agree to honor all rules of courtesy and respect for others. You agree to abide by and conform to our rules, regulations, handbook, policies and procedures as they now exist and as amended from time-to-time. You understand that failure to abide by such policies may result in your discharge from the Community.

- J. **GUESTS.** You have the right to associate with your friends and family during reasonable hours. Because the Community is a licensed building, overnight guests are generally not permitted in a resident's room. Limited exceptions may be granted by the Executive Director based upon the circumstances.

You acknowledge and understand that your guests are subject to our rules and regulations, and if your guests become disruptive to the operations of the Community and/or are verbally or physically abusive to residents, our associates or others, we may request that they leave the Community until their behavior is under control or may restrict their visitation. Where circumstances warrant, we may exclude such individuals from the Community.

- K. **RELEASE OF INFORMATION.** We will keep your health, medical, personal and other information that identifies you (collectively, "Resident Data") confidential in compliance with applicable law. You agree that we may use and disclose Resident Data for purposes of treatment, to provide to you services covered by this Agreement (collectively "Services"), to obtain payment for our Services, in connection with our operations, including training, care management and quality assessment and improvement, to coordinate with any third party providers you select, and as otherwise permitted by law. You agree that we may also use and disclose Resident Data in order for us or other companies to provide information to you about services and products offered by us or other companies that we believe may be of interest to you.

III. RATES.

- A. **COMMUNITY FEE.** We require a one-time non-refundable Community Fee in an amount indicated in Exhibit A to be paid at the time this Agreement is signed. The Community Fee does not excuse you from financial responsibility for any damage caused to your Suite beyond normal wear and tear upon move-out.

B. **MONTHLY SERVICE RATE.**

1. **Rate.** You agree to pay the Basic Service Rate and, if applicable, the Personal Service Rate as indicated in Exhibit A (together the "Monthly Service Rate").
2. **Refund.** In accordance with Section IV, we will refund a prorated share of the Monthly Service Rate if this Agreement is terminated before the end of a month:
 - a. following thirty (30) days; written notice from us;
 - b. following fourteen (14) days' written notice from you;
 - c. because you require care that is not offered by us; or
 - d. by reason of death.

Refunds will be based on the actual number of days you were in the Community or a bed was held for you in the Community. A storage fee equal to the prorated (using 30.5 days to calculate the Daily Rate) share of the Monthly Services Rate will be charged until all of your property is removed from the Suite. Unless prohibited by law, you agree we may offset such refunds by any amount due under the terms of this Agreement.

C. **ABSENCES.**

1. **Notice of Absence.** Except for an emergency medical absence, if you will be absent from the Community for any period of time, you must inform us of your plans prior to leaving and sign the Sign In/Sign Out Book upon exiting and re-entering the Community. We assume no responsibility or liability for your welfare during times that you are away from the Community.
2. **Fees during Absence.** If you are absent from the Community for any reason, such as, for a hospitalization, vacation, temporary nursing home care or rehabilitation, the Residency

Agreement will remain effective and you will be charged the full Monthly Service Rate. If you provide written notice of your intent to terminate the Agreement pursuant to Section IV, termination will be effective and charges will cease the later of the end of any applicable notice period or the removal of all of your personal belongings.

D. **SELECT & THERAPEUTIC SERVICES.** In addition to the Monthly Service Rate, you agree to pay the established charges for any Select Services or Therapeutic Services provided to you by us.

E. **PAYMENT.** We will issue a monthly statement before the first day of the month itemizing the Monthly Service Rate for the upcoming month and, if any, charges incurred for Select Services and Therapeutic Services provided during the prior month. Payment for all charges shown on the statement is due on the first (1st) calendar day of each month. The first payment of the Monthly Service Rate is due prior to taking occupancy. If you move in after the first of the month, your first Monthly Service Rate will be prorated (using 30.5 days to calculate the Daily Rate).

We will charge a \$250.00 late fee if we have not received all fees when due. We will also charge a \$50.00 returned payment fee for each check or automatic withdrawal that is returned or denied for any reason. After two such occurrences, you agree to pay all amounts due by cashier's check or such other method specified by us. You also agree to pay interest on all outstanding amounts based upon the lesser of 1.5% per month or the highest rate permitted by law.

F. **RATE CHANGES.** We will provide thirty (30) days written notice of any change in the rates or pricing method for Basic Services, Personal Services, Select Services, Therapeutic Services, and. We may offer or require a change in the Personal Service Plan when we determine additional services are requested or required. The new Personal Service Rate resulting from a change in your Personal Service Plan is effective immediately after written notice is given.

IV. TERM AND TERMINATION.

A. **TERM.** This Agreement begins on the date set forth above and continues until terminated as provided below.

B. **TERMINATION BY RESIDENT.** You may terminate this Agreement upon fourteen (14) days written notice to us. Termination occurs on the later of the end of the notice period or upon the removal of all of your personal belongings. However, if another resident moves into the Suite before the end of the notice period and all of your belongings have been removed from the Community, your Monthly Service Rate charges will cease as of the date the new resident moves into the Suite.

C. **TERMINATION BY THE COMPANY.** We may terminate this Agreement, upon providing you thirty (30) days written notice, for any of the following events, as determined by us:

1. You require care or services that we are unable to provide or which requires staff that are not available at the Community;
2. Your or your visitors' behavior impairs the well-being, care or safety of yourself or others, creates unsafe conditions, is physically or verbally abusive to others, or otherwise interferes with the orderly operation of the Community.

3. For your welfare or the welfare of others in the Community;
4. You or your third party payor fail to pay fees and charges when due, or you breach any representation, covenant, agreement, or obligation under this Agreement.

We may, upon written notice to you, immediately terminate this Agreement, and transfer or discharge you for emergency medical or welfare reasons that would endanger the health and safety of yourself or others. If the emergency requires your immediate transfer, we will notify your legal representative as soon as practical. We will provide a written explanation for termination with less than thirty (30) days' notice.

- D. **TERMINATION BY EITHER PARTY.** Either party may terminate this Agreement immediately upon written notice in the event of your death or if you must be relocated due to your health. The Community may request a physician to certify in writing that based upon his/her examination, you must be relocated to facility which offers a higher level of care.

In the event of your death, your estate will be charged the Monthly Service Rate through the later of the seventh (7th) day after your death or the day on which all of your belongings are removed from the Community. If you must relocate due to your need for a higher level of care, you will be charged the Monthly Service Rate through the later of fourteen (14) days after the date of your written notice of termination or the day on which all of your belongings are removed from the Community.

- E. **SERVICES PENDING TERMINATION.** You acknowledge and agree that, pending termination of the Agreement due to requiring services or staff not available in the Community, we may arrange for the provision of one-on-one care and you will pay for such care if we determine that such care is needed to protect your health or safety or the health or safety of others.

- F. **COMMUNITY CEASES TO OPERATE.** If the Community's license is revoked or the Community otherwise ceases to operate, this Agreement shall terminate upon written notice from the Community on the date as stated in the notice. Any advance payment for services not received shall be refunded to the Resident.

- G. **RESPONSIBILITIES UPON TERMINATION.** You will vacate premises, removing all belongings on or before the effective date of termination. If you fail to remove your belongings by the effective date of termination, you understand and agree that we may continue to charge you for the Basic Service Rate of your Suite, or have your belongings placed in storage at your cost. You further agree that we may donate any unclaimed property after forty-five (45) days. You will provide written notice of a forwarding address where you can be reached and receive mail. Termination will not release you or us from any liability or obligation to the other party under the terms of this Agreement.

V. AGREEMENT TO ARBITRATE.

Should any of sub-sections A & B provided below, or any part thereof, be deemed void or invalid, the validity of the remaining sub-sections, or parts thereof, will not be affected.

A. **ARBITRATION PROCEEDINGS.**

1. Any 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 breach of contract, 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.

2. The 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 Federal Arbitration Act ("FAA") shall exclusively apply to the interpretation and enforcement of this Agreement, and shall preempt any inconsistent State law and shall not be reverse preempted by the McCarran-Ferguson Act; United States Code Title 15, Chapter 20, or other law. Any party who demands arbitration must do so for all claims or controversies that are known, or reasonably should have been known, by the date of the demand for arbitration, and if learned of during the course of the arbitration proceeding shall amend the claims or controversies to reflect the same. All current damages and reasonably foreseeable damages arising out of such claims or controversies shall also be incorporated into the initial demand or amendment thereto.
3. A demand for Arbitration by you, your legal representative, a person or organization acting on your behalf with your consent, or the personal representative of your estate (collectively "Resident Party") shall be made in writing and submitted to Timothy Cesari, Brookdale Senior Living Inc., 6737 W. Washington St. #2300, Milwaukee, WI 53214, via certified mail, return receipt requested. Demand for Arbitration by us shall be made in writing and submitted to you or your agent, representative, successor or assign and/or your legal representative via certified mail, return receipt requested.
4. The arbitration proceedings shall take place in the county in which the Community is located, unless agreed to otherwise by mutual consent of the parties.
5. The arbitration panel shall be composed of one (1) arbitrator. Subject to the requirements of section A.6, the parties shall agree upon an arbitrator that must be a member of the South Carolina Bar with at least ten (10) years of experience as an attorney. If the parties cannot reach an agreement on an arbitrator within twenty (20) days of receipt of the Demand for Arbitration, then each party will select an arbitrator. These arbitrators will act only for the purpose of appointing a sole arbitrator to hear the case, subject to the criteria above. If either party fails to select their arbitrator within the (20) days mentioned above, they effectively forfeit their right to choose an arbitrator.
6. The arbitrator shall be unbiased of all parties, witnesses, and legal counsel. No past or present officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.
7. Discovery in the arbitration proceeding shall be governed by the South Carolina Rules of Civil Procedure. However, discovery may be modified by agreement of the parties.
8. The arbitrator shall designate a time and place within the county in which the Community is located, for the arbitration hearing and shall provide thirty (30) days' notice to the parties of the arbitration hearing.

9. The arbitrator shall apply the South Carolina Rules of Evidence and South Carolina Rules of Civil Procedure in the arbitration proceeding except where otherwise stated in this Agreement. Also, the arbitrator shall apply, and the arbitration decision shall be consistent with, South Carolina law except as otherwise stated in this Arbitration Provision.
 10. The arbitration decision should be signed by the arbitrator and delivered to the parties and their counsel within thirty (30) days following the conclusion of the arbitration. The decision shall set forth in detail the arbitrator's findings of fact and conclusions of law.
 11. The arbitrator's decision shall be final and binding and such decision may only be vacated or modified as allowed by the Federal Arbitration Act.
 12. The arbitrator's fees and costs associated with the arbitration shall be divided equally among the parties. The parties shall bear their own attorneys' fees and costs and hereby expressly waive any right to recover attorney fees or costs, actual or statutory.
 13. The arbitration proceeding shall remain confidential in all respects, including the Demand for Arbitration, all arbitration filings, deposition transcripts, documents produced or obtained in discovery, or other material provided by and exchanged between the parties and the arbitrator's findings of fact and conclusions of law. Following receipt of the arbitrator's decision, each party agrees to return to the producing party within thirty (30) days the original and all copies of documents exchanged in discovery and at the arbitration hearing, except those documents required to be retained by counsel pursuant to law. Further, the parties to the arbitration also agree not to discuss the amount of the arbitration award or any settlement, the names of the parties, or name/location of the Community except as required by law.
 14. This Arbitration Provision 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, whether such third parties make a claim in a representative capacity or in a personal capacity. Any claims or grievances against the Community or the Community's corporate parent, subsidiaries, affiliates, employees, officers or directors shall also be subject to and resolved in accordance with this Arbitration Provision.
 15. The terms of this Arbitration Provision are severable.
 16. The Arbitration Provision shall survive your death.
- B. BENEFITS OF ARBITRATION. The parties' decision to select arbitration is supported by the potential cost-effectiveness and time-savings offered by selecting arbitration, which may avoid the expense and delay of judicial resolution in the court system. The parties' decision to select arbitration is supported by the potential benefit of preserving the availability, viability, and insurability of a long term care company for the elderly and disabled in South Carolina, by limiting such company's exposure to liability. With this Agreement, we are better able to offer our services and accommodations at a rate that is more affordable to you. In terms of the potential time-savings offered by selecting arbitration, the parties recognize that selecting a quick method of resolution is potentially to a resident's advantage.

You and/or your legal representative understand that other long term care companies' Agreements may not contain an arbitration provision. The parties agree that the reasons stated above are proper consideration for the acceptance of the Arbitration Provision. The

undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an attorney. The parties to this Agreement further understand that a judge and/or a jury will not decide their case.

VI. MISCELLANEOUS.

- A. WAIVER OF TRIAL BY JURY. If a court determines that the Arbitration Provision provided above is invalid, the parties express their desire to waive a jury trial and resolve any claims in the appropriate court solely before a judge.
- B. NON-DISCRIMINATION. We operate on a non-discriminatory basis and afford equal treatment and access to services to eligible persons regardless of race, religion, color, national origin, sex, disability or any other category protected by applicable law.
- C. RISK AGREEMENT. You are responsible for your personal, financial and health care decisions. You are also responsible for maintaining health, personal property, liability, automobile (if applicable), and other insurance coverages in adequate amounts. You agree to obtain insurance in an amount adequate to cover your personal property and your general liability. You acknowledge that we do not insure your person or property. You understand and agree that:
1. We may encourage you to participate in community, leisure, and social activities and to maintain an appropriate level of independence in activities of daily living, as well as your personal and financial affairs;
 2. Independent activities, responsibility for personal, financial, and health care decisions, and lifestyle and care preferences may involve risks of personal injury and/or property damage or loss;
 3. Throughout the Community, there may be public balconies and/or a balcony in your Apartment. If you choose to use such balcony, you do so at your own risk. We are not responsible for any injury that may result from use of a balcony. We are also not responsible for damage or loss of any property used or placed on a balcony;
 4. The standard of service for an assisted living community does not include one-on-one care, assistance or supervision, e.g., one resident assistant for each Resident, or immediate response to non-emergent needs. There may be short and long periods of time in which you will be left alone, unsupervised such as while watching television, listening to music, reading, and sleeping at night;
 5. We make no representations or guarantees that our associates can prevent falls. We do not represent or guarantee that your health condition will not change or deteriorate;
 6. We make no representations or guarantees that our associates can prevent the onset of skin break down or the worsening of existing skin break down;
 7. Our services may not meet all of your personal, social, or health care needs and we will attempt to assist you in arranging for such services which are not included in this Agreement;
 8. Many residents suffer from cognitive impairment, including Alzheimer's disease and dementia. This condition can cause unexpected behavior such as wandering, forgetfulness, agitation towards others and confusion. We make no representations or guarantees that we can predict the behavior of our residents. Therefore, we also make no representations or guarantees that we can always prevent a resident from wandering or

attempting to wander from the Community, entering into a private area, misplacing or losing items or engaging in physical contact with another resident;

9. We make no representations or guarantees that we can prevent the loss of personal items, including but not limited to clothing, jewelry, dentures, hearing aides or other medical equipment. We will not be responsible for the loss of such items. We make no representations or guarantees that we can prevent theft or other criminal acts perpetrated by another resident or person; therefore, we recommend that valuables such as jewelry and large sums of money, not be kept at the Community. If you choose to bring in valuables, you do so at your own risk and we will not be held responsible for any theft or loss of such items;

10. Due to state regulations and fire code, we may not lock our exterior doors against exiting. Therefore, we cannot guarantee that a resident will not wander from the Community. Some buildings have exterior doors that are alarmed with a delayed egress feature and our systems are designed to alert our associates to respond and assist a resident if they wander from the building.

You understand and agree to assume the risks inherent in this Agreement. You agree to hold us, our associates and agents harmless for any damages, injury or other loss resulting from: (1) reasonable acts or omissions made in good faith; (2) action by a third party, fire, water, theft or the elements; or (3) loss of personal property.

D. PETS. The Community's pet policy is described in the Addendum to the Residency Agreement.

E. SMOKING. Except as otherwise set forth in the Addendum to the Residency Agreement, smoking is not permitted in any part of the Community.

F. WEAPONS. Weapons, as defined by us, are not allowed in the Community or on Community property. This includes but is not limited to firearms, explosive materials, ammunition, and collectible or antique weapons.

G. NO TENANCY INTEREST. You have none of the rights of a tenant under this Agreement, subject to applicable state law.

H. ASSIGNMENT. This Agreement is not assignable without our prior written consent. Our rights and obligations may be assigned to any person or entity which will be responsible to ensure our obligations under this Agreement are satisfied in full from the date of notification. We may engage another person or entity to perform any or all of the services under this Agreement.

I. AMENDMENTS. This Agreement and any written amendments constitute the entire agreement between the parties and supersede all prior and contemporaneous discussions, representations, correspondence, and agreements whether oral or written. Except for our right to modify fees, rates and charges, amend services provided and establish and modify reasonable operating procedures and rules for the general welfare and safety of the residents, this Agreement may be amended only in writing signed by both parties.

J. SEVERANCE. Should any part of this Agreement be invalid, the validity of the other parts of this Agreement will not be affected.

K. FINANCIAL RESPONSIBILITY. You have designated a Guarantor, who has agreed to the terms of the attached Statement of Financial Responsibility.

- L. **SUBORDINATION.** This Agreement and the parties' rights hereunder are subordinate to any lease, mortgage or deed of trust placed upon the Community, but you may remain in your Suite so long as you comply with the provision of this Agreement.
- M. **REPRESENTATION AND WARRANTY.** By executing this Agreement you represent and warrant that all representations made by you or on your behalf, whether written or verbal, with respect to your application for admission to the Community were true when made. You understand that we rely upon the truthfulness of this information in making our decision to enter into this Agreement. Your application forms, including personal data forms, statement of financial condition (if applicable), health history and medical reports submitted by you or on your behalf to us, are incorporated by reference into this Agreement and made an express part of it. You understand and agree that any material misrepresentation or omission made by you or on your behalf in connection with these documents shall make this Agreement voidable at our option, to the extent permitted by law.
- N. **CHOICE.** You have a choice of providers for private sitters, therapy, rehabilitation, home health, hospice and other health care services. As part of the complement of services offered by the Company and its affiliates, therapy, rehabilitation, home health, hospice or other services may be available at the Community through Company affiliates. If you require such services, Community associates will assist you in obtaining such services from Company affiliates or another service provider of your choice.
- O. **OBLIGATORY INFORMATION.** You agree to provide accurate, complete and current information about yourself and about any emergency contact, including but not limited to addresses, phone numbers, and email address. You understand that you must promptly notify us of changes to the information stated above. If you do not have advance directives in place, you understand that a court may appoint a guardian to make decisions on your behalf if you are no longer able to do so. Neither we nor any of our associates or agents may be your guardian. If it is necessary for us to petition the court for appointment of a guardian, you agree to pay any costs associated therein.
- P. **ASSIGNMENT OF BENEFITS.** To the extent that the Community participates in a government payor program, long term care insurance program or other insurance program ("Third Party Payor") of which you are a beneficiary, you authorize us to disclose any medical or administrative information and request payment. You certify that the information given in applying for payment from such Third Party Payor is correct. You authorize release of all medical and administrative records required to act on this request and request that payment of authorized benefits be made on your behalf. You authorize us to disclose any medical or administrative information required in the processing of applications for financial coverage for services rendered. To the extent permitted by your Third Party Payor, you authorize direct payment of all benefits to us.
- Q. **COUNTERPARTS.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original.
- R. **NOTICES.** Notices will be written and given by personal delivery or mailing by regular mail, postage pre-paid to the following or such other persons or places as the parties may notify each other. Notices shall be deemed given based upon the date personally delivered or upon the date postmarked.

Company:
Executive Director at Community
(At the Community)

Resident:
(At the Community)

Legal Representative/Responsible Party:

(as noted below)

We believe it is important to disclose all services and fees to the best of our ability and in accordance with the law. We recommend that you consult with legal counsel to ensure understanding of this Agreement before signing.

BY THEIR SIGNATURES, the parties or their representatives have executed this Agreement.

RONNIE WALKER BY JAMES H WALKER POA 5-30-16
Resident/Legal Representative Date

Terri L. Robinson Executive Director 5-31-16
For Company Title Date

LEGAL REPRESENTATIVE/RESPONSIBLE PARTY ADDRESS:

Name: James Walker
Address: 4096 Legacy Lane Yorges Island, SC 29449
Phone Nos.: (843) 693-4653
Email:

OTHER RELATED MATERIALS:

1. Resident Bill of Rights
2. Community Handbook
3. Emergency Evacuation Plan
4. Admissions Package
5. Medical Records Release (if additional permission is required under state law or necessary to address a use or disclosure not covered by Section I(K))
6. Personal Service Assessment
7. Personalized Service Plan

ATTACHMENTS INCLUDED

Addendum for Community-Specific Basic Services and Operating Policies
Exhibit A - Schedule of Services and Rates
Exhibit B - Statement of Financial Responsibility
Exhibit C - Pharmacy Services Agreement

ADDITIONAL EXHIBITS TO ATTACH AS PART OF THE AGREEMENT:

- X. Select Services List
- Y. Therapeutic Services List
- Z. Assessment Price Schedule

EXHIBIT B



BP0313830

RMC BK 0313 Pg 830 : pg 1 *

Prepared by: Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, Third Floor (29401)
Post Office Box 340, Charleston South Carolina 29402
HSB File No. 36964.0001

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

**GENERAL
POWER OF ATTORNEY
(WITH HEALTH CARE)**

I, Bonnie L. Walker, a citizen and resident of the County of Charleston, State of South Carolina, hereby appoint my son James H. Walker and daughter Jennifer D. Weinstein to serve as my Agents, jointly and severally, it being my intention that either of them may act alone. I direct that no posting of a bond shall be required of my Agents or of any successor named herein. The rights, powers, and authority of my Agents shall commence and be in full force and effect when this power of attorney is signed by me and recorded in the office of the Clerk of Court in the County in which I reside and shall continue in force until I have revoked it by a written instrument recorded in the same manner.

I hereby revoke all Powers of Attorney, general and/or limited, heretofore granted by me as principal and terminate all agency relationships created thereunder, including those of all successor agents named therein, if any, except that powers granted by me on forms provided by financial institutions granting the right to write checks on, deposit funds to and withdraw funds from accounts to which I am a signatory or granting access to a safe deposit box shall not be revoked, but shall continue in full force and effect.

**ARTICLE I
POWER OF ATTORNEY TO BE DURABLE**

This Power of Attorney shall not be affected by my physical disability or mental incompetence which renders me incapable of managing my own estate. This provision is intended to comply with Section 62-5-501 of the South Carolina Code (1976), as amended, and the terms hereof should be interpreted to so comply.

ARTICLE II AUTHORITY OF AGENT

This power of attorney is to be construed and interpreted as a general power of attorney. The enumeration of specific items, rights, acts, or powers herein is not intended to, nor does it, limit or restrict, and is not to be construed or interpreted as limiting or restricting the general powers granted to my Agent. My Agent is authorized in my Agent's sole and absolute discretion from time to time and at any time, with respect to any and all of my property and interests in property, real, personal, intangible and mixed, as follows:

1. **Power to Sell.** To sell or dispose of any and every kind of property that I may own now or in the future, real, personal, intangible, and/or mixed, including without being limited to, contingent and expectant interests, and any rights of survivorship incident to joint tenancy or tenancy by the entirety, upon such terms and conditions and security as my Agent shall deem appropriate and to grant options with respect to sales thereof; to make such disposition of the proceeds of such sale or sales (including expending such proceeds for my benefit) as my Agent shall deem appropriate.

2. **Power to Buy.** To buy or acquire every kind of property, real, personal, intangible, and/or mixed, upon such terms and conditions as my Agent shall deem appropriate; to obtain options with respect to such purchases; to arrange for appropriate disposition, use, safekeeping, and/or insuring of any such property; to borrow money for the purposes described herein and to secure such borrowings in such manner as my Agent shall deem appropriate; to use any credit card held in my name to make such purchases; and to sign such charge slips as may be necessary to use such credit cards; to repay from any funds belonging to me any money borrowed and to pay for any purchases made or cash advanced using credit cards issued to me.

3. **Power to Invest.** To invest and reinvest all or any part of my property and any interest (including undivided interest) in property, real, personal, tangible, and/or mixed, wherever located, including without being limited to, securities of all kinds, bonds, debentures, notes (secured or unsecured), stocks of corporations regardless of class, interests in limited partnerships, real estate or any interest in real estate whether or not productive at the time of investment, commodities contracts of all kinds, interests in trust, investment trusts, whether of the open and/or closed fund types, and participation in common, collective, or pooled trust funds or annuity contracts without being limited by any statute or rule of law concerning investments by fiduciaries; to sell (including short sales) and terminate any investments whether made by me or my Agent; to establish, utilize, and terminate savings and money market accounts with financial institutions of all kinds; to establish, utilize, and terminate accounts (including margin accounts) with securities brokers; to establish, utilize, and terminate managing agency accounts with corporate fiduciaries; to employ, compensate, and terminate the services of financial and investment advisors and consultants.

4. **Power to Manage Real Property.** With respect to real property (including but not limited to any real property I may hereafter acquire or receive and my personal residence) to lease, sublease, release; to eject, remove, and relieve tenants or other persons from, and recover possession of by all lawful means; to accept real property as a gift or as security for a loan; to collect, sue for, receive, and receipt for rents and profits and to conserve, invest, or utilize any and

all of such rents, profits, and receipts for the purposes described in this paragraph; to do any act of management and conservation, to pay, compromise, or to contest tax assessments and to apply for refunds in connection therewith; to employ labor; to subdivide, develop, dedicate to public use without consideration, and/or to dedicate easements over; to maintain, protect, repair, preserve, insure, build upon, demolish, alter, or improve all or any part thereof; to obtain or vacate plats and adjust boundaries; to adjust differences in valuation on exchange or partition by giving or receiving consideration; to release or partially release real property from a lien; to sell and to buy real property; to mortgage and/or convey by deed of trust or otherwise encumber any real property now or hereafter owned by me, whether required by me or for me by my Agent.

5. **Power to Manage Personal Property.** With respect to personal property, to lease, sublease, and release; to recover possession of by all lawful means; to collect, sue for, receive, and receipt for rents and profits therefrom; to maintain, protect, repair, preserve, insure, alter, or improve all or any part thereof; to sell and to buy the same or other personal property; to mortgage, pledge, and/or grant other security interest in any personal property or intangibles now or hereafter owned by me, whether required by me or for me by my Agent.

6. **Power to Operate Businesses.** To continue the operation of any business (including a ranch or farm) belonging to me or in which I have a substantial interest, for such time and in such manner as my Agent shall deem appropriate, including but not limited to hiring and discharging my employees, paying my employees salaries, and providing for employee benefits; employing legal, accounting, financial, and other consultants; continuing, modifying, terminating, renegotiating, and extending any contractual arrangements with any person, firm, association, or corporation whatsoever made by me or on my behalf; executing business tax returns and other government forms required to be filed by my business; paying all business related expenses, transacting all kinds of business for me in my name and on my behalf; contributing additional capital to the business, change in the name and/or the form of the business, incorporating the business, entering into such partnership agreement with other persons as my Agent shall deem appropriate; joining in any plan of reorganization, consolidation, or merger of such business; selling, liquidating, or closing out such business at such time and upon such terms as my Agent shall deem appropriate; and representing me in establishing the value of any business under "buy-out" or "buy-sell" agreements to which I may be a party; to create, continue, or terminate retirement plans with respect to such business and to make contributions which may be required by such plans; to borrow and pledge business assets; to exercise any right, power, privilege, or option I may have or may claim under any contract of partnership whether as a general, special, or limited partner; to modify or terminate my interest upon such terms and conditions as my Agent may deem appropriate; to enforce the terms of any such partnership agreement for my protection, whether by action, proceeding or otherwise if my Agent shall deem appropriate; to defend, submit to arbitration, settle, or compromise any action or legal proceeding to which I am a party because of my membership in such partnership; to exercise all rights with respect to corporate securities which I now own or may hereafter acquire, including the right to sell, grant security interest in, and to buy the same or different securities; to establish, utilize, and terminate brokerage accounts (including margin accounts); to make such payments as my Agent deems necessary, appropriate, incidental, or convenient to the owning and holding of such securities; to receive, retain, expend for my benefit, invest and reinvest, or make such disposition of as my Agent shall deem appropriate all additional securities, cash, or property (including the proceeds from the sales of my securities) to which I may be or become entitled by

reason of my ownership of any such securities; and to vote at all meetings of security holders, regular or special.

7. **Power to Demand and Receive.** To demand, arbitrate, settle, sue for, collect, receive, deposit, expend for my benefit, reinvest, or make such other appropriate disposition of as my Agent deems appropriate, all cash, rights to the payment of cash, property (real, personal, intangible, and/or mixed), debts, dues, rights, accounts, legacies, bequest, devises, dividends, annuities, rights and/or benefits to which I am now or may in the future become entitled, regardless of the identity of the individual or public or private entity involved, including but not limited to benefits payable to or for my benefit any governmental agency or body (such as supplemental social security (SSI), medicaid, medicare, and social security disability insurance (SSDI), and for the purposes of receiving social security benefits, my Agent is herewith appointed my "representative payee"); to utilize all lawful means and methods to recover such assets and/or rights, qualify me for and claim such benefits on my behalf, and to compromise claims and grant discharges in regard to the matters described herein; to make such compromises, release, settlements, and discharges with respect thereto as my Agent shall deem appropriate.

8. **Power With Respect to Bank Accounts and Safe-deposit Boxes.** To establish accounts of all kinds, including checking and savings, for me with a financial institutions of any kind, including but not limited to banks and thrift institutions; to modify, terminate, make deposits to, and write checks on or make withdrawals from and grant security interest in all accounts in my name or with respect to which I am an authorized signatory (except accounts held by me in a fiduciary capacity), whether or not any such account was established by me or for me by my Agent, to negotiate, endorse, or transfer any checks or other instruments with respect to any such accounts, to contract for any services rendered by any bank or financial institution; to contract with any institution for the maintenance of a safe-deposit box in my name; to have access to all safe-deposit boxes in my name or with respect to which I am an authorized signatory, whether or not the contract for such safe-deposit box was executed by me (either alone or jointly with others) or by my Agent in my name; and to add to and remove from the contents of any such safe-deposit box and to terminate any and all contracts for such boxes. Any institution in which any such safe-deposit box may be located is not required to make any inquiry, and shall not incur any liability to me or my estate as a result of permitting my Agent to exercise powers of this paragraph or any other power granted herein. These powers are exercisable without: (i) any contact with or notice to me, my spouse, and/or any persons interested in my estate; (ii) any prior court order or authorization; (iii) any knowledge of or any prior determination as to my mental or physical capacity or incapacity; (iv) any knowledge as to my whereabouts, regardless of whether my whereabouts are known or unknown; or (v) any inquiry.

9. **Power With Respect to Legal and Other Actions.** To institute, supervise, prosecute, defend, intervene in, abandon, compromise, arbitrate, settle, dismiss, and appeal from any and all legal, equitable, judicial, or administrative hearings, actions, suits, proceedings, attachments, arrests, or distresses, involving me in any way, including but not limited to claims by or against me arising out of property damage or personal injuries suffered by or caused by me or under such circumstances that the loss resulting there from will or may be imposed on me and otherwise engage in litigation involving me, my property, or any interest of mine, including any property or interest or person for which or whom I have or may have any responsibility.

10. **Power to Borrow Money.** To borrow money from any lender for my account upon such terms and conditions as my Agent shall deem appropriate and to secure such borrowing by the granting of a security interest in any property or interest in property which I may now or hereafter own; to borrow money upon any life insurance policies owned by me upon my life or any purpose and to grant a security interest in such policy to secure any such loans (including the assignment and delivery of any such policies as security); and no insurance company shall be under any obligation whatsoever to determine the need for such loan or the application of the proceeds by my Agent.

11. **Power to Create Trust and to Withdraw Funds from Trust.** To create trusts, revocable or irrevocable, to withdraw and/or receive the income or corpus of any trust over which I may have a right of receipt or withdrawal; and to request and receive the income or corpus of any trust with respect to which the trustee thereof has the discretionary power to make distributions to or on my behalf, and to execute and deliver to such trustee or trustees a receipt and release or similar document for the income or corpus so received; to exercise (in whole or in part), release, or let lapse any power of appointment held by me, whether general or special, or any power of amendment or revocation under any trust (including any trust with respect to which I may exercise any such power only with the consent of another person, even if my Agent is such other person), whether or not such power of appointment was created by me, subject however, to any restrictions upon such exercise imposed upon my Agent and set forth in other provisions of this instrument.

12. **Power to Renounce and Resign from Fiduciary Positions.** To renounce any fiduciary position to which I have been or may be appointed or elected, including but not limited to personal representative, trustee, guardian, attorney-in-fact, and officer or director of a corporation; and any governmental or political office or position to which I have been or may be elected or appointed; to resign any such positions in which capacity I am presently serving; to file an accounting with a court of competent jurisdiction or settle on a receipt and release or such other informal method as my Agent shall deem appropriate.

13. **Power to Disclaim, Renounce, Release, or Abandon Property Interest.** To renounce and disclaim any property or interest in property or powers to which for any reason and by any means I may become entitled, whether by gift or testate or intestate succession; to release or abandon any property or interest in property or powers which I may now or hereafter own, including any interest in or rights over trusts (including the right to alter, amend, revoke, or terminate) and to exercise any right to claim an elective share in any estate or under any will. In exercising such discretion, my Agent may take into account such matters as shall include but shall not be limited to any reduction in estate or inheritance taxes on my estate, and the effect of such renunciation or disclaimer upon persons interested in my estate and persons who would receive the renounced or disclaimed property; provided, however, that my Agent shall make no disclaimer that is expressly prohibited by other provisions of this instrument.

14. **Power With Respect to Insurance.** To purchase, maintain, surrender, collect, or cancel (a) life insurance or annuities of any kind on my life or the life of anyone in whom I have an insurable interest, (b) liability insurance protecting me and my estate against third party claims; (c) hospital insurance, medical insurance, medicare supplement insurance, custodial care insurance, and disability income insurance for me or any of my dependents, and (d) casualty insurance

insuring assets of mine against loss or damage due to fire, theft, or other commonly insured risks; to pay all insurance premiums, to select any options under such policies, to increase coverage under any such policy, to borrow against any such policy, to pursue all insurance claims on my behalf, to adjust insurance losses; and the foregoing powers shall apply to private and public plans, including but not limited to medicare, medicaid, SSI, and workers' compensation; to designate and change beneficiaries of insurance policies insuring my life and beneficiaries under any annuity contract in which I have an interest; to decrease coverage under or cancel any of the policies described herein; to receive and make such disposition of the cash value upon termination of any such policy as my Agent shall deem appropriate.

15. **Power With Respect to Taxes.** To represent me in all tax matters; to prepare, sign, and file federal, state, and/or local income, gift, and other tax returns of all kinds, including, where appropriate, joint returns, FICA returns, payroll tax returns, claims for refunds, requests for extensions of time to file returns, and/or pay taxes, extensions, and waivers of applicable periods of limitation, protests and petitions to administrative agencies or courts, including the tax court, regarding tax matters, and any and all other tax related documents, including but not limited to consents to split gifts, closing agreements, and any power of attorney form required by the Internal Revenue Service and/or any state and/or local taxing authority with respect to any tax year; to pay taxes due, collect and make such disposition of refunds as my Agent shall deem appropriate, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service and/or any state and/or local taxing authority; to exercise any elections I may have under federal, state or local tax laws; to allocate any generation-skipping tax exemption to which I am entitled; and generally to represent me or obtain professional representation for me in all tax matters and proceedings of all kinds and for all periods before all officers of the Internal Revenue Service and state and local authorities and in any and all courts; to engage, compensate, and discharge attorneys, accountants and other tax and financial advisors and consultants to represent and/or assist me in connection with any and all tax matters involving or in any way related to me or any property in which I have or may have an interest or responsibility.

16. **Power to Make Gifts.** Reserved.

17. **Power to Make Loans.** Reserved.

18. **Power To Provide for Principal Support.** To do all acts necessary for maintaining my customary standard of living, to provide living quarters by purchase, lease, or other arrangement, or by payment of the operating cost of my existing living quarters, including interest, amortization payments, repairs, and taxes, to provide normal domestic help for the operation of my household, to provide clothing, transportation, medicine, food, and incidentals, and if necessary to make all necessary arrangements, contractual or otherwise, for me at any hospital, hospice, nursing home, convalescent home, or similar establishment, or in my own residence should I desire it, and to be sure that all of my essential needs are provided for at such a facility or in my own residence, as the case may be.

19. **Power to Hire and Fire.** To employ, compensate, and discharge such domestic, medical, and professional personnel including lawyers, accountants, doctors, nurses, brokers, financial consultants, advisors, consultants, companions, servants, and employees as my Agent shall deem appropriate.

20. **Power to Sign Documents.** To sign, execute, endorse, seal, acknowledge, deliver, and file or record instruments and documents, including but not limited to contracts, agreements, and conveyances of real and personal property, instruments granting and perfecting security instruments and obligations, orders for the payment of money, receipts, releases, waivers, elections, vouchers, consents, satisfactions, and certificates; in addition, any agent of mine who has the authority to incur costs on my behalf may render the bills for such costs to any Agent of mine who has been granted the authority to pay such cost or to any trustee of any revocable living trust of mine, or guardian, committee, or conservator who has authority to pay such costs and the recipient thereof shall promptly pay such costs.

21. **Power To Do Miscellaneous Acts.** To open, read, respond to, and redirect my mail; to represent me before the U. S. Postal Service in all matters relating to mail service; to establish, cancel, continue, or initiate my membership in organizations and associations of all kinds, to take and give or deny custody of all of my important documents, including but not limited to my Will, Codicils, Trust Agreements, deeds, leases, life insurance policies, contracts, and securities and to disclose or refuse to disclose such documents; to obtain and release or deny information or records of all kinds relating to me, any interest of mine or any person from whom I am responsible.

ARTICLE III HEALTH CARE

The powers granted in this Article shall relate to my health care and I hereby waive voluntarily any physician-patient privilege or psychiatrist-patient privilege that may exist in my favor and I authorize physicians and psychiatrists to examine me and disclose my physical and mental condition and report hereon for purposes of this Article. When considering or making health care decisions for me, all individually identifiable health information and medical records shall be released without restriction to my Agent including, but not limited to, (i) diagnostic, treatment, other health care, and related insurance and financial records and information associated with any past, present, or future physical or mental health condition including, but not limited to, diagnosis or treatment of HIV/AIDS, sexually transmitted disease(s), mental illness, and/or drug or alcohol abuse and (ii) any written opinion relating to my health that my Agent may have requested. Without limiting the generality of the foregoing, this release authority applies to all health information and medical records governed by the Health Information Portability and Accountability Act of 1996 (HIPAA), 42 USC 1320d and 45 CFR 160-164; is effective whether or not I am mentally competent; has no expiration date; and shall terminate only in the event that I revoke the authority in writing and deliver such writing to my health care provider.

My Agent is authorized in my Agent's sole and absolute discretion from time to time and at any time to exercise the authority described below relating to matters involving my health and medical care. In exercising the authority granted to my Agent herein, I first direct my Agent to try to discuss with me the specifics of any proposed decision regarding my medical care and treatment if I

am able to communicate in any manner, however rudimentary. My Agent is further instructed that if I am unable to give an informed consent to medical treatment, and my Agent cannot determine the treatment choice I would want made under the circumstances, my Agent shall give, withhold, or withdraw such consent for me based upon any treatment choices that I may previously have expressed on the subject while competent, whether under this instrument or otherwise. If my Agent cannot determine the treatment choice I would want made under the circumstances, then my Agent should make such choice for me based upon what my Agent believes to be in my best interest. Accordingly, my Agent is authorized as follows:

1. **Power to Contract for Health Care.** To contract on my behalf for any health care related service or facility without my Agent incurring personal financial liability for such contracts.

2. **Power to Admit and Discharge from Care Facility.** To authorize my admission to or discharge from any hospital, nursing home, residential care, assisted living, or similar facility, even against medical advice.

3. **Power of Access and Disclosure of Medical Records.** To request, receive, and review any information, verbal or written, regarding my personal affairs or my physical or mental health, including medical and hospital records, and to execute any releases or other documents that may be required in order to obtain such information, and to disclose or deny such information to such persons, organizations, firms, or corporations as my Agent shall deem appropriate.

4. **Power to Employ and Discharge Health Care Personnel.** To employ and discharge medical personnel, including physicians, psychiatrists, dentists, nurses, and therapists as my Agent shall deem necessary for my physical, mental, and emotional well-being, and to pay them (or cause them to be paid) reasonable compensation.

5. **Power to Give, Withhold or Withdraw Consent to Medical Treatment.** To give or withhold consent to any medical procedures, diagnostic tests, or treatment, including surgery and the use of mechanical or other procedures which affect any bodily function, including, but not limited to, artificial respiration, nutritional support, and hydration and cardiopulmonary resuscitation; to arrange for my hospitalization, convalescent care, hospice, or home care; to summon paramedics or other emergency medical personnel and seek emergency treatment for me, as my Agent shall deem appropriate; and under circumstances in which my Agent determines that certain medical procedures, diagnostic tests, or treatments are no longer of any benefit to me or where the benefits are outweighed by the burdens imposed, to revoke, withdraw, modify, or change consent to such procedures, tests, and treatments, as well as hospitalization, convalescent care, hospice, or home care which I or my Agent may have previously allowed or consented to or which may have been implied due to emergency conditions. My Agent's decision should be guided by the physicians treating me as to my medical diagnosis and prognosis and the intrusiveness, pain, risks, and side-effects of the treatment.

6. **Power to Authorize Relief from Pain.** To consent to and arrange for the administration of pain-relieving drugs of any kind, or other surgical or medical procedures calculated to relieve my pain, including unconventional pain-relief therapies which my Agent believes may be helpful to me, even though such drugs and procedures may lead to permanent physical damage, addiction, or even hasten the moment of (but not intentionally cause) my death.

7. **Power to Make Anatomical Gifts.** To make anatomical gifts which will take effect at my death to such persons and organizations as my Agent shall deem appropriate and to execute such papers and do such acts as shall be necessary, appropriate, incidental or convenient in connection with such gifts. Also, to authorize an autopsy and direct the disposition of my remains, to the extent permitted by law.

8. **Power to Take Other Necessary Action.** To take any other action necessary to do what I authorize here, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, or other health care provider, signing any documents related to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name and at the expense of my estate to force compliance with my wishes as determined by my Agent, or to seek actual or punitive damages for the failure to comply.

9. **Reference to Living Will.** I specifically direct my Agent to follow any health care declaration or "living will" executed by me. I do not want my life to be prolonged, nor do I want life-sustaining treatment to be provided or continued if (a) I have a condition that is incurable or irreversible or terminal, and which, without the administration of life-sustaining treatment is expected to result in my death in a relatively short period of time, or if (b) I am in a coma or persistent vegetative state which is reasonably concluded to be irreversible. I intend that nutrition and hydration be included among those procedures that may be held or withdrawn under the conditions given above.

ARTICLE IV RELIANCE ON AGENT

Third parties may rely upon the representations of my Agent as to all matters relating to any power granted to my Agent herein, and no person acting in reliance upon this Power of Attorney or upon representations of my Agent shall incur any liability to me, or my estate as a result of permitting my Agent to exercise any power granted herein.

ARTICLE V NOMINATION OF AGENT AS CONSERVATOR AND GUARDIAN FOR PRINCIPAL

I herewith nominate, constitute, and appoint my Agent to serve as my Guardian, Conservator, and/or in any similar representative capacity, and request that any Court of competent jurisdiction which may receive and be asked to act upon a petition by any person to appoint a Guardian, Conservator, or similar representative for me, give the greatest possible weight to this request.

ARTICLE VI APPOINTMENT OF ANCILLARY AGENT

If at any time my Agent shall deem it necessary or desirable in my Agent's discretion to appoint one or more Agents to act in another jurisdiction under this Power of Attorney (such Agent or Agents being hereinafter referred to in the aggregate as my "Ancillary Agent"), my Agent from time to time and at any time may appoint one or more such Ancillary Agent. In making such appointment, my Agent may sign, execute, deliver, acknowledge, and make declarations in any documents as may be necessary, desirable, convenient, or proper in order to effectuate any such ancillary appointment, and my Agent may grant to any Ancillary Agent, some or all of the powers and duties and authorities granted them hereunder, but may not grant any such Ancillary Agent powers which are inconsistent with or different from those powers granted to my Agent hereunder.

ARTICLE VII ADMINISTRATIVE PROVISIONS

1. **Discharge of Liability.** My Agent and my Agent's estate, heirs, successors, and assigns, acting in good faith, are hereby released and forever discharged from any and all liability and from all claims or demands of all kinds whatsoever by me or my estate, heirs, successors, and assigns, arising out of the acts or omissions of my Agent, except for willful misconduct or gross negligence.

2. **Compensation.** My Agent shall not be entitled to compensation for services rendered hereunder, but he shall be entitled to reimbursement for all reasonable costs and expenses actually incurred and paid by my Agent on my behalf as a result of carrying out any provisions of this power of attorney.

3. **Amendment and Revocation.** As Principal, I reserve the right to amend or revoke this Power of Attorney at any time by the execution of a written instrument of revocation or amendment delivered to my Agent and recorded in the same place and in the same manner as this Power of Attorney may be recorded.

4. **Resignation of Agent.** My Agent may resign by giving written notice to me or, if I am incapacitated, by delivery to any person with whom I am residing or who has the care and custody of me and recording a resignation in the same place and in the same manner as this Power of Attorney is recorded. Upon such resignation and recording my said Agent shall thereupon be divested of all authority under this Power of Attorney.

5. **Governing Law.** This instrument shall be governed by the laws of the State of South Carolina in all respects, including its validity, construction, interpretation and termination and to the extent permitted by law shall be valid in any jurisdiction in which it is presented.

IN WITNESS WHEREOF, I have executed this Power of Attorney this the 28th day of February, 2013.

Bonnie L. Walker
Bonnie S. Walker
L.

The Principal whose signature appears above signed, sealed, and declared this as her General Power of Attorney (with Health Care) in our presence on the date shown above. At such Principal's request we have signed our names as Witnesses, believing her to be of sound mind and memory and acting under no constraint or undue influence. All of this occurred at the same time and we and such Principal were present together throughout.

[Signature] of Charleston, South Carolina
Cornelia J. Lunn of Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

PERSONALLY appeared before me Cornelia T. Burr, one of the witnesses whose signatures appear above, who, being first duly sworn, deposes and says that:

1. (S)he saw the Principal whose signature appears above sign, seal and as her act and deed deliver the foregoing General Power of Attorney (with Health Care);

2. (S)he and the other witness whose signature appears above both witnessed such Principal's execution of the foregoing General Power of Attorney (with Health Care) as well as that of each other;

3. Neither (s)he nor the other witness whose signature appears above is related to such Principal by blood, marriage, or adoption, either as her husband, a lineal ancestor, descendant of the parents of such Principal, or as the spouse of any of them and that neither of such witnesses, to the best of his or her knowledge, is directly financially responsible for the Principal's medical care;

4. Neither (s)he nor the other witness whose signature appears above is entitled to any portion of such Principal's estate upon his decease, whether under any Will or as an heir by intestate succession, nor is either of them, to the best of his or her knowledge, the beneficiary of an insurance policy on such Principal's life, nor do they, or either of them, have a claim against such Principal's estate as of the date hereof;

5. Neither (s)he nor the other witness whose signature appears above is such Principal's attending physician, or an employee of such Principal's attending physician, and that no more than one of such witnesses is an employee of a health facility in which such Principal is a patient, if at all, at the execution hereof; and

6. Neither (s)he nor the other witness whose signature appears above is the Agent or Successor Agent appointed by this instrument.

Cornelia T. Burr
 Witness

SWORN TO before me this the 28th day of February, 2013.

[Signature]
 Notary Public for SC
 My Comm. Exp.: 7/13/19

RECORDER'S PAGE

NOTE: This page MUST remain
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RECIPIENT:

WALKER JAMES H AL

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IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-10--03130

CASE NO. 2017-CP-10--03130

BY _____

BY _____

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JULIE L. GIBSON
CLERK OF COURT

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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.¹

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.

¹ 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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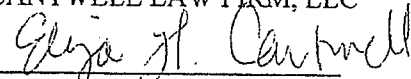
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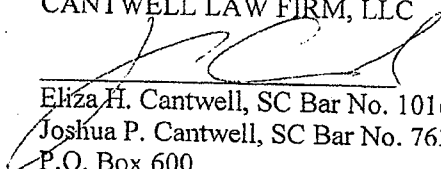
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

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

2017 AUG 28 AM 10:16
JULIE J. ANDERSON
CLERK OF COURT

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
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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 claims¹ 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)

¹ 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. §§ 15-51-10², *et seq.*, "constitutes the exclusive remedy" available to heirs of an individual killed by the allegedly

² 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.

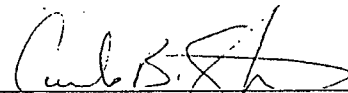
CONCLUSION

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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2017-CP-10-3130

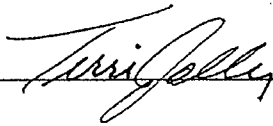
CERTIFICATE OF SERVICE

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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ATTORNEYS FOR PLAINTIFF



FILED
2017 AUG 31 PM 1:56
JULIE J. ARMSTRONG
CLERK OF COURT
NY

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

OCT 27 2017

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

SC Court of Appeals

Appellate Case No. _____
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,

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

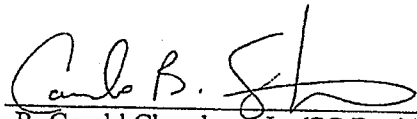
NOTICE OF APPEAL

Pursuant to Rules 201 and 203 of the South Carolina Appellate Court Rules, Appellants Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston, and Terri Robinson ("Appellants") hereby appeal the Order of the Court of Common Pleas dated September 28, 2017, and filed on September 28, 2017. Appellant received written notice of entry of the Order on October 6, 2017.

(Signature page to follow.)

October 27, 2017

By:



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STATE OF SOUTH CAROLINA)

THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

DOCKET NO. 2017-CP-10-3130

STEPHANIE WALKER WEAVER)

Plaintiff)

vs.)

BROOKDALE SENIOR LIVING, INC.)

Defendant)

TRANSCRIPT OF RECORD

August 31, 2017

Charleston, South Carolina

B E F O R E:

THE HONORABLE J. C. NICHOLSON, JUDGE

A P P E A R A N C E S:

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Circuit Court Reporter

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No exhibits were introduced.

PROCEEDINGS

THE COURT: Weaver versus Brookdale Senior Living, Inc. We've got a motion to dismiss or in alternative to compel arbitration. Who is here representing who?

MR. SAMMATARO: Your Honor, I'm Sam Sammataro of Turner Padget and I represent the defendants in this case.

THE COURT: Let me back up just a second.

[Off the record momentarily]

THE COURT: Who's here representing who; I'm sorry.

MR. SAMMATARO: Thank you Your Honor, Sam Sammataro from Turner Padget for the defendants.

THE COURT: Okay.

MR. CONNOR: Kenneth Connor on behalf of the plaintiff, Your Honor, and my colleague and co-counsel Eliza Cantwell on behalf of the plaintiff.

THE COURT: Okay. I'll be glad to hear you.

MR. SAMMATARO: Thank you, Judge. Your Honor, this action stems from an unfortunate incident at Brookdale Charleston that occurred last summer. Ms. Bonnie Walker who is now deceased had a tendency to wander. And she eloped one night and found her way to a nearby retention pond and was attacked by an alligator is now deceased. Her son, Mr. Walker who is not a party to this action had her power of attorney and had entered into a residency

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1 agreement with Brookdale Charleston for her admission to
2 the facility and also was acting as her personal
3 representative. The estate has now settled and resolved
4 its claims against the defendants. That settlement was
5 actually approved this morning over in the Probate Court.

6 The current action is brought by Ms. Stephanie
7 Weaver who is James Walker's daughter and would have been
8 is an heir of Ms. Walker's. Based on the will that she
9 had and it tracked the laws of intestacies so Mr. Walker
10 took a 50 percent share and his surviving niece and
11 nephew; she had a sister who is deceased, they each share
12 25 percent of the settlement value that we got approved
13 this morning.

14 Now Ms. Weaver is trying to bring claims against the
15 defendant stemming from allegedly witnessing or seeing
16 her grandmother's body in the retention pond the next
17 morning after she was attacked at Brookdale Charleston.
18 Our motion is primarily a Rule 12 motion to dismiss for
19 failure to state a claim but in the event Your Honor
20 determines that she ---

21 THE COURT: --- was she present when the alligator
22 was attacking her?

23 MR. SAMMATARO: No, Your Honor. She was on scene
24 the next morning after Ms. Walker was already deceased.

25 THE COURT: She didn't come back until the next

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1 morning or didn't see the body or what? Tell me the
2 facts. Where was she when the attack of the alligator
3 occurred?

4 MR. SAMMATARO: Nobody was there except Ms. Walker
5 when the alligator attacked her.

6 THE COURT: Okay.

7 MR. SAMMATARO: She went out during the night at
8 some point on July the 26th of last year, wandered across
9 the property and found her way to the retention pond and
10 by all accounts was attacked by the alligator and was
11 deceased. The family came the next day to the facility,
12 that they had been alerted to her absence; the search was
13 underway to try to find Ms. Walker ---

14 THE COURT: --- what is the cause of action the
15 plaintiff has alleged?

16 MR. SAMMATARO: Ms. Weaver has alleged negligence,
17 negligent infliction of emotional distress and
18 intentional infliction of emotional distress; three
19 causes of action, Your Honor.

20 THE COURT: Okay.

21 MR. SAMMATARO: So the family arrives the next
22 morning. Ms. Weaver takes it upon herself to join in the
23 search for her grandmother. And the allegation is that
24 she went to the retention pond and observed her
25 grandmother's remains in the pond. She wasn't there when

1 the alligator attacked. Nobody was there when the
2 alligator attacked except for the decedent in this case.

3 THE COURT: Okay.

4 MR. SAMMATARO: So turning to the causes of action
5 under the negligence cause of action obviously an element
6 of that is that the defendant owed a duty to the
7 plaintiff. If you review the complaint in this case
8 there are allegations about the duty that Brookdale owed
9 to Ms. Walker to properly care for her and to guard her
10 against her tendencies to elope and get out of the
11 facility.

12 She has not alleged any particular duty that these
13 defendants owed to Ms. Weaver. There is no allegation of
14 that duty. So she has failed to make any allegation of
15 the duty that was owed to her with regard to what
16 happened with her grandmother, with the alligator attack.
17 Turning to the negligent infliction of emotional distress
18 Your Honor has already hit on that.

19 Our argument is that Ms. Weaver was not present when
20 the attack occurred and therefore she wasn't in close
21 proximity and didn't contemporaneously perceive the
22 accident. There is a State Farm case that we cite in
23 support of that where ---

24 THE COURT: --- what did she see as far as the body
25 is concerned. I mean was the body mangled or bones or

1 torn up? What did she actually see? Have you got any
2 pictures of it?

3 MR. SAMMATARO: I don't know what she actually saw
4 but this is -- I'm sorry because the family is here ---

5 THE COURT: --- so I guess my question to you is
6 would viewing the damaged body be sufficient for the
7 emotional distress or do you think she had to see the
8 attack?

9 MR. SAMMATARO: Our position is she has to see the
10 attack and there is case law directly on point that we
11 cite ---

12 THE COURT: --- I understand. But is there any
13 case law on viewing a mangled body after an alligator
14 gets through chewing on it and tearing it up is my
15 question.

16 MR. SAMMATARO: I've not seen that authority, Your
17 Honor. I'm not aware of any authority.

18 THE COURT: Pardon?

19 MR. SAMMATARO: I'm not aware of any authority to
20 that extent. They in their responsive pleading -- oh,
21 I'm sorry responsive memorandum they cited the Bray v
22 Marathon Corp case where the person was smashed in a
23 trash compactor. But that doesn't have any application
24 here. Bray was a products liability action and they said
25 that the plaintiff could recover because she was a user.

1 She was actually pressing the buttons on the trash
2 compactor. It wasn't -- and she had emotional damages
3 from being ---

4 THE COURT: --- is there any distinction with the
5 case between a negligent emotional distress and
6 infliction of emotional distress as far as present when
7 it occurred?

8 MR. SAMMATARO: Well, right. No, the intentional
9 infliction cause of action doesn't have the same
10 requirement for the contemporaneous observation ---

11 THE COURT: --- observation of the occurrence,
12 right?

13 MR. SAMMATARO: Right.

14 THE COURT: How about the negligence?

15 MR. SAMMATARO: No, sir.

16 THE COURT: Okay.

17 MR. SAMMATARO: Just that one element is what we're
18 talking about right. So under the intentional infliction
19 of emotional distress her claims fail because she's
20 required under South Carolina law to demonstrate that the
21 plaintiffs -- I'm sorry, that the defendants acted in a
22 way that shocks the conscious and that they direct that
23 conduct at the plaintiff. Here if there was any action
24 or inaction on the part of the defendants it was directed
25 if you will at Ms. Walker, the decedent, not to Ms.

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1 Weaver. She didn't get there until the next day. And
2 there was no conduct on the part of Brookdale or any of
3 the related entities ---

4 THE COURT: --- well most of your intentional
5 infliction of emotional distress are third parties. The
6 negligence wasn't directed at them. They are third
7 parties of observation.

8 MR. SAMMATARO: Under the intentional?

9 THE COURT: Well negligent or intentional. Aren't
10 they generally third parties?

11 MR. SAMMATARO: No, Your Honor. The negligent --
12 well, I guess they would be. You have the example of ---

13 THE COURT: --- I mean the old classic case in law
14 school is when the plank walk going to the ship broke and
15 the child or someone saw the parent fall.

16 MR. SAMMATARO: Right. So what you have there is
17 the requirement of the close relationship, right?

18 THE COURT: Right.

19 MR. SAMMATARO: In your example the child and the
20 parent. You also have the requirement of being in close
21 proximity. I'm standing at the dock and I see the child
22 walking the plank and you also have to have a
23 contemporaneous observation of the event.

24 THE COURT: That's why I asked you about the
25 mangled body. That's what she saw. That's what caused

1 the emotional distress I assume.

2 MR. SAMMATARO: I think that is there allegation.
3 That's their take on this. But under the law and under
4 the case that I've cited in the memorandum that I
5 submitted that's not enough. Seeing the after effect of
6 the incident is insufficient. You have to
7 contemporaneously perceive the incident itself. The
8 State Farm ---

9 THE COURT: --- well, the incident itself was
10 seeing the body, the mangled body.

11 MR. SAMMATARO: I think that's an after effect,
12 Your Honor. It's not actually seeing the actual attack I
13 think that gave rise to Ms. Walker's demise. The State
14 Farm case the husband was badly injured. The woman, the
15 wife was shocked at seeing what had happened to her
16 husband but she didn't see the accident and therefore the
17 court said there is no negligent infliction claim. Same
18 thing applies here ---

19 THE COURT: --- well, its a little difference
20 between being involved in an accident and someone being
21 injured and seeing a mangled body from the alligator
22 tearing on it or chewing on it or biting on it or
23 whatever the alligator did.

24 MR. SAMMATARO: I think legally not, Your Honor.
25 The case that I cited in the memorandum is precisely on

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1 point. The event itself, the accident itself, the attack
2 itself is the thing that sets the claim in motion. So if
3 there is a claim at all she would have to have seen the
4 accident, not just after effect of the accident, which is
5 seeing the mangled body. I'm not saying that she wasn't
6 emotionally distraught at seeing it ---

7 THE COURT: --- I understand ---

8 MR. SAMMATARO: --- but in a legal sense that is
9 not sufficient to give rise to the negligent infliction
10 claim. Same thing and I think I've already said this
11 with regard to the intentional infliction of emotional
12 distress they can't cite to any conduct on the part of
13 these defendants that was specifically directed at Ms.
14 Weaver or that was so egregious as to give rise to a
15 cause of action for intentional infliction.

16 So moving on to the next part of the argument I'd
17 like to talk about briefly just the arbitration provision
18 in this case.

19 THE COURT: Let me hear him on this other first,
20 okay.

21 MR. SAMMATARO: Thank you, Judge.

22 MR. CONNOR: Thank you, Your Honor. May it please
23 the court?

24 THE COURT: Yes, sir.

25 MR. CONNOR: Ken Connor on behalf of the plaintiff.

1 I think Your Honor has put your finger on the quivering
2 nerve point of distinction between this case and the
3 cases that counsel relies on.

4 THE COURT: From the case he cited about the
5 injured husband I mean that's basically one in the same.
6 In this case the injured would just be death and more
7 gruesome to see I would assume.

8 MR. CONNOR: I'm sorry, Your Honor, I didn't hear
9 the last part.

10 THE COURT: In this particular case wouldn't it be
11 the same thing as the accident case where the lady saw
12 the husband but in this case it's just more gruesome to
13 look at?

14 MR. CONNOR: No, Your Honor. This is a very
15 different case. And I'm glad you pointed that out and
16 asked that question. In this case what is different
17 about this case is this. In the accident cases they were
18 suing the person who caused the accident. They were
19 suing the perpetrator of the accident event itself at
20 that time.

21 Our claim is rooted not only in a failure to conduct
22 an adequate search for the decedent after she wandered
23 off but with full knowledge of the fact that they have a
24 pond on their premises which is inhabited by alligators
25 and that there is a strong likelihood ---

1 THE COURT: --- did they have knowledge that there
2 were alligators in the pond ---

3 MR. CONNOR: --- they do and we aver that Your
4 Honor, we aver that. The pond is on their property.
5 They know of the presence of alligators. These are the
6 averments. And our complaint is that when our client
7 comes and they indicated they couldn't locate her
8 grandmother when she comes to the facility. She's
9 effectively in ---

10 THE COURT: --- had they even started looking for
11 her?

12 MR. CONNOR: No one appears to be looking for so
13 and so she embarks on a search, goes down and encounters
14 the dismembered remains in the alligator pond and she --
15 your point is very well taken. She contemporaneously
16 perceives and views the mangled body. What is different
17 about this case unlike the accident cases is those
18 incidents typically involve negligence at a point in time
19 that there is a defective plank; there is a vehicle that
20 is out of control.

21 Here the negligence of the defendants precedes the
22 event, is part and parcel of causing the event and
23 continues after the event. Our complaint has to do with
24 what goes on after the event. They failed to conduct an
25 adequate search. They failed to warn plaintiff about the

1 likelihood of finding her grandmother in the alligator
2 pond eaten by alligators. And that's a very different
3 situation than where you have a vehicle that hits the
4 child in the presence of the mother and that's it. We
5 didn't sue the alligator, Judge; we sued the defendants
6 in this case.

7 THE COURT: He probably doesn't have a very deep
8 pocket.

9 MR. CONNOR: Well, probably not, Your Honor. But
10 this is an event which the defendant should have foreseen
11 and should have warned against. If I may ---

12 THE COURT: --- do you think there is a duty to
13 warn?

14 MR. CONNOR: Yes, Your Honor, we absolutely do
15 because -- and let me if I may sort of outline the
16 factual circumstances that I think will demonstrate and
17 enhance of the duty in this situation. What we have
18 here, Judge factually is is a demented resident who is
19 admitted to an assisted living facility who, and these
20 are the averments who is known to be prone to wander and
21 to sleepwalk.

22 She is permitted to elope from the facility. She is
23 gone for seven hours -- these are the averments and they
24 begin at paragraph 20 in our complaint. She is missing
25 for seven hours before the defendants appreciate it. On

1 the premises there is an alligator pond known to be
2 inhabited by alligators. The defendants notified the
3 family of the missing patient. We aver they failed to
4 conduct an adequate search for the decedent in this case.
5 The family is notified and the family arrives pursuant to
6 having received that notification. Then they are
7 informed when they arrive that the facility has been
8 unable to locate the decedent.

9 The plaintiff in this case undertakes to conduct a
10 search for the decedent because it doesn't appear that
11 anyone is searching. She goes to the alligator pond as
12 part and parcel of her search and discovers her
13 grandmother's dismembered body and she suffers physical
14 and emotional injury as a consequence of that.

15 Judge, she doesn't have to have perceived the attack
16 itself. We maintain that the defendants in this case,
17 and if you look at paragraph -- do you have a copy of the
18 complaint? I'll be happy to hand it up.

19 THE COURT: Just tell me about it.

20 MR. CONNOR: Okay. If you look at paragraphs 36
21 and 38 I think these are the operative distinctions as
22 they bear on this case contrary to those the defendants
23 have cited. Paragraph 36, defendants were negligent,
24 grossly negligent, careless, willful, wanton, and
25 reckless and breached their duties by failing to maintain

1 property subject to their control in a reasonably safe
2 condition. Failing to correct dangerous conditions of
3 which defendants were aware or should have been aware and
4 to exercise reasonable care. And failing to warn
5 plaintiff of dangerous conditions; plaintiff.

6 It goes on to say in paragraph 38 defendants were
7 further negligent, grossly negligent, careless, willful,
8 wanton, and reckless and breached their duties by failing
9 to conduct an adequate timely search for Bonnie Walker,
10 failing to warn plaintiff of the hazards associated with
11 the retention pond and circumstances foreseeably created
12 if Bonnie Walker entered the pond known to be inhabited
13 by alligators and otherwise failing to act to prevent the
14 horrific discovery by plaintiff of Bonnie Walker's
15 dismembered remains in the retention pond.

16 Therein lies the heart of our complaint and the
17 distinction between this case and the accident cases.
18 What we're saying is look, under the circumstances of
19 this case we think the defendant not only acted
20 negligently and negligently inflicted emotional distress
21 but acted in an outrageous fashion because they knew she
22 was gone. They didn't conduct an adequate search. They
23 summoned the family. The family is foreseeably going to
24 look for their lost mother or grandmother as the case may
25 be; in this case its Stephanie Weaver's grandmother.

1 They know of the pond. They know of the alligators.
2 They know she's gone and been gone for seven hours. They
3 maintain they cannot find her. It's entirely perceivable
4 that Stephanie Weaver would go inquest for her
5 grandmother. And then she comes upon this horrific
6 almost unspeakable unimaginable scene, which is entirely
7 foreseeable. Here you've got elderly demented people on
8 property where there is an adjacent alligator pond known
9 to be inhabited by alligators.

10 And so the gravamen of our complaint is negligence,
11 negligent infliction of emotional distress, and
12 outrageous conduct under these circumstances. And under
13 12(b)(6) when the court construes the complaint it's to
14 view the facts and the inferences arising ---

15 THE COURT: --- I understand all that.

16 MR. CONNOR: Very well.

17 THE COURT: Thank you very much.

18 MR. CONNOR: Yes, Your Honor. Thank you.

19 THE COURT: Anything very briefly in reply on that
20 issue?

21 MR. SAMMATARO: Briefly, Your Honor. Negligence
22 always precedes the injury. This is not any different
23 than those wreck cases cited in the memorandum and all
24 the cases that talk about the negligent infliction. I
25 would just say these are precisely the types of claims

1 that the state itself would pursue. Her exclusive remedy
2 would have been under the wrongful death statute. She is
3 trying to kind of step out from that and bring her own
4 cause of action. But Your Honor first has to determine
5 where the duty lies. Did -- even as pled they all talk
6 about all the allegations in the complaint about the duty
7 that the defendants owed to the decedent ---

8 THE COURT: --- let me hear you on the arbitration.

9 MR. SAMMATARO: Okay. Just briefly on that, Your
10 Honor. It's pretty exhaustively discussed in the
11 memorandum. Mr. Walker acting as his mother's power of
12 attorney signed a residency agreement with Brookdale.
13 That agreement is attached to the motion we filed in this
14 case. There are two pretty key provisions within the
15 arbitration section that starts I think on page seven in
16 the residency agreement.

17 THE COURT: Just tell me how it would apply to her
18 granddaughter.

19 MR. SAMMATARO: Any and all claims ---

20 THE COURT: --- she's not a party to that
21 agreement.

22 MR. SAMMATARO: Well, but Your Honor the agreement,
23 and the Supreme Court has endorsed this; the Supreme
24 Court of the United States. The agreement talks ---

25 THE COURT: --- is it under the interstate commerce

1 arbitration or state arbitration?

2 MR. SAMMATARO: It's under the Federal Arbitration
3 Act.

4 THE COURT: Okay. Go ahead.

5 MR. SAMMATARO: So the residency agreement the
6 parties stipulated that the FAA controls and the federal
7 case law controls.

8 THE COURT: Okay.

9 MR. SAMMATARO: So one of the provisions and its I
10 believe on page nine, paragraph 14 of the residency
11 agreement the parties contemplated that that agreement
12 would bind third parties including family members like
13 Ms. Weaver. That is explicitly stated in the residency
14 agreement within the arbitration provision.

15 So these are precisely the types of claims that
16 would be subject to the arbitration provision because it
17 dealt -- it addresses any and all claims including torts
18 regardless of the origin of any alleged duty owed by the
19 facility. All of that is discussed in the arbitration
20 provision which was willingly signed by the PR, at that
21 time he was the power of attorney but now is the PR of
22 Ms. Walker's estate.

23 So all claims, any claim that stems from her care
24 and treatment, injury etcetera at Brookdale Charleston
25 would be wrapped up and bound by the arbitration

1 provisions of the residency agreement.

2 THE COURT: Okay. Thank you very much. Mr.
3 Connor?

4 MR. CONNOR: Respectfully, Your Honor this case is
5 not about the wrongful death of Ms. Walker. Jimmy Walker
6 who signed the arbitration ---

7 THE COURT: --- he says anything arising between I
8 guess her grandmother and the nursing home arbitration
9 applies according to the agreement is what he says;
10 anything and everybody.

11 MR. CONNOR: Your Honor, the ---

12 THE COURT: --- I assume that's what he said.

13 MR. CONNOR: That's essentially what he's saying
14 but United States Supreme Court and the South Carolina
15 Supreme Court have both said very clearly that a party
16 cannot be required to arbitrate a dispute he has not
17 agreed to arbitrate. In South Carolina that's the
18 Chessereau [phonetic] case and in the Supreme Court that
19 is the Rent A Center, Inc. v Jackson case. And that
20 makes simple -- that makes imminently good sense.

21 The first thing this court has to do is determine
22 number one is there an agreement to arbitrate between the
23 parties to this lawsuit; number two is the agreement
24 enforceable. Counsel maintains that this is merely an
25 extension of the wrongful death claim and that our client

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1 is an heir of the estate and her claims are derived
2 through the estate and that is simply not true. They
3 just concluded a settlement where they identified the
4 statutory beneficiaries and heirs of the estate and
5 Stephanie Weaver was not among them. She wasn't notified
6 of the hearing. She didn't participate in the hearing.
7 She is not a taker in the proceeds of the recovery or
8 anything else like that.

9 So imagine if Ms. Walker had eloped and gotten in a
10 car and run over someone out on the street. The
11 defendants would maintain well that is rooted in the
12 failure to properly assess and plan and do appropriate
13 interventions to prevent Ms. Weaver from eloping. And so
14 this third party who was killed in the car is bound by
15 the arbitration agreement that Mr. Walker signed when he
16 was acting for -- that Mr. Weaver signed when he was
17 acting for Ms. Walker.

18 No one could credibly maintain that an injured third
19 party who was either injured or killed would be bound by
20 an arbitration agreement that they did not know of,
21 didn't participate in and that nobody had authority to
22 sign on their behalf. We respectfully maintain that this
23 claim ultimately this claim ripe for arbitration is
24 absolutely frivolous. First of all there is not an
25 agreement in effect. Secondly the South Carolina Supreme

1 Court cases have said unequivocally that outrageous
2 conduct is beyond the contemplation of the parties and
3 the court will not enforce arbitration agreements where
4 unconscionable conduct where an outrageous conduct not
5 within the contemplation of the parties was in view. And
6 here surely the defendants do not maintain that within
7 the contemplation of the parties was the notion that a)
8 Ms. Walker would be eaten by an alligator or b) ---

9 THE COURT: --- earlier you said on your notice you
10 said they did. Now you're making an argument just the
11 opposite.

12 MR. CONNOR: Well, I'm talking about ---

13 THE COURT: --- you can't have it both ways.

14 MR. CONNOR: In terms of the arbitration, Judge.

15 THE COURT: Okay.

16 MR. CONNOR: But most assuredly not within the
17 contemplation of the parties at the time or to bind her
18 would be that Stephanie Walker would come upon her
19 grandmother's dismembered remains. The fact is she is
20 not a party to the agreement number one and number two
21 ---

22 THE COURT: --- I appreciate it Mr. Connor. Thank
23 you, I've heard enough. The motion to dismiss is denied
24 and the arbitration motion denied. Mr. Connor, you send
25 me a proposed order, please sir.

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1 MR. CONNOR: I will.

2 THE COURT: Thank you very much.

3 MR. CONNOR: And Your Honor may I respectfully ask
4 if the court -- we would ask the court to make a specific
5 finding of the frivolous nature of the arbitration claim.
6 And the reason for that ---

7 THE COURT: --- just send me a proposed order.
8 I'll change it as I -- and run it by opposing counsel and
9 anything he thinks is appropriate to add add it and send
10 it to me and I'll edit it as I feel necessary, okay.

11 MR. CONNOR: Thank you so much, Your Honor.

12 THE COURT: As a matter of fact why don't both of
13 you send me proposed orders, okay.

14 MR. SAMMATARO: Yes, Your Honor.

15 THE COURT: Do that please. Both of you send me
16 proposed orders and I'll look at both of them and
17 probably consolidate the good parts of both of them okay,
18 and eliminate the bad parts.

19 MR. CONNOR: Thank you, Your Honor.

20 MR. SAMMATARO: Thank you, Your Honor.

21 THE COURT: Thank you so very much.

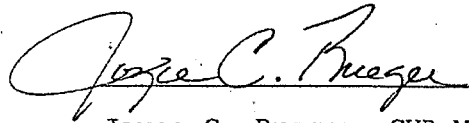
22 *****END OF TRANSCRIPT OF RECORD*****
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C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of Common Pleas for Charleston County, South
Carolina on the 31st day of August, 2017.

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

October 30, 2017



Joyce C. Rueger, CVR-M
Court Reporter

Certified Transcript provided to Carmelo Sammataro, Esq.

Certification reference # 103017 (Original)

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.

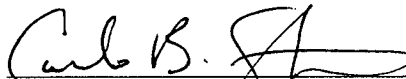
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

(Signature page to follow.)

July 20, 2018

By:



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