THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

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

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

Stephanie Walker Weaver,..... Respondent,

v.

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

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

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

Plaintiff Stephanie Walker Weaver brought this action against Defendants Brookdale Senior Living, HBP LeaseCo, LLC d/b/a Brookdale Charleston, *et al.*, arising out of the death of her grandmother, Bonnie Walker, who wandered from her Brookdale residence and was killed by an alligator. Ms. Weaver alleges she discovered her grandmother's remains. In a separate action, Ms. Walker's Estate asserted and settled a wrongful death action against Brookdale. The Residency Agreement between Brookdale and Ms. Walker includes an arbitration agreement, which broadly requires arbitration of any disputes arising from the Residency Agreement, including claims brought by relatives or other third parties.

Ms. Weaver asserts claims for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. The following issues are presented on appeal.

1. (a) The wrongful death statute provides the exclusive remedy for negligent acts causing a decedent's death. Bonnie Walker's Estate asserted and settled a wrongful death claim. Ms. Weaver has not alleged any duty Brookdale owed to her, as opposed to her grandmother.

(b) A claim for negligent infliction of emotional distress lies only for "bystander liability," and requires that the plaintiff was in close proximity to and contemporaneously perceived the event causing death or serious injury to another. Ms. Weaver does not allege that she was in close proximity to her grandmother when the alligator attack occurred, or that she contemporaneously perceived the attack.

(c) To prevail on a claim for intentional infliction of emotional distress, a plaintiff must establish that the defendant engaged in outrageous conduct specifically directed at the plaintiff, intending to cause emotional distress. Ms. Weaver has not alleged any facts that could support a

finding of intentional conduct by Brookdale, let alone that any such conduct was directed specifically at her.

Did the trial court err by denying Brookdale's motion to dismiss Ms. Weaver's negligence, and negligent and intentional infliction of emotional distress claims?

2. A non-party to a contract may be bound by the contract's arbitration provision if the non-party simultaneously seeks to benefit from other terms of the agreement. The Residency Agreement "binds third parties not signatories to this Arbitration Provision." Ms. Weaver is pursuing claims against Brookdale that rely on duties it purportedly owed under the Residency Agreement. Did the trial court err in refusing to enforce the Arbitration Provision?

STATEMENT OF THE CASE

Ms. Weaver initiated this action in the Court of Common Pleas for Charleston County on June 19, 2017. (Pl.'s Compl., R. pp. 4-14.) She alleges claims against Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston and Terri Robinson (together, "Brookdale"), along with unnamed "Doe" and "Roe" defendants, for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress, in connection with the death of her grandmother, Bonnie Walker, who wandered from her Brookdale residence and was killed by an alligator. (*Id.*) Following the accident, Ms. Walker's Estate asserted wrongful death and survival claims against Brookdale, which Brookdale promptly resolved through a pre-suit settlement that was then approved by the Charleston County Probate Court. (*See* Case No. 2016-ES-10-1807 (the "Wrongful Death Settlement"); Aug. 31, 2017 Trial Tr. R. 3:24-4:13, 20:24-21:6, R. pp. 82-83, 99-100.)[1] Ms. Weaver filed this separate action, purporting to assert her own claims arising out of Ms. Walker's death. (*See generally* Pl.'s Compl., R. pp. 4-14.)

On July 19, 2017, Brookdale moved to dismiss Ms. Weaver's complaint pursuant to South Carolina Rule of Civil Procedure 12(b) or, in the alternative, to compel arbitration. (Defs.' Mot. Dismiss or Compel Arbitration ("Defs.' Mot."), R. pp. 15-22.) In its motion to dismiss, Brookdale argued that Ms. Weaver's negligence claim is barred because South Carolina's wrongful death statute provides the exclusive remedy, and the wrongful death and survival

[1] The Court should take judicial notice of the wrongful death pre-suit settlement approved by the Charleston County Probate Court. *See* Rule 201(f), SCRE ("Judicial notice may be taken at any stage of the proceeding."); *S.C. Dep't of Soc. Servs. v. Janice C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009) (facts subject to judicial notice are those whose "accuracy may be ascertained by reference to readily available sources of indisputable reliability"); *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984) ("A court can take judicial notice of its own records, files and proceedings.").

claims had been asserted and settled. (*Id.* ¶¶ 3-4, R. p. 16; *see also* Mem. Supp. Defs.' Mot. Dismiss or Compel Arbitration ("Defs.' Reply") 4-6, R. pp. 65-67.) Brookdale further asserted that Ms. Weaver failed to allege that Brookdale breached any independent duty of care owed to her and, as such, failed to plead adequately any separate claim of negligence. (Defs.' Mot. ¶ 4, R. p. 16; Defs.' Reply 6, R. p. 67.)

Brookdale also sought dismissal of Ms. Weaver's claims for negligent infliction of emotional distress and intentional infliction of emotional distress. (Defs.' Mot. ¶¶ 5-6, R. p. 17; Defs.' Reply 7, R. p. 68.) Brookdale asserted that Ms. Weaver's complaint failed to allege facts to support a claim for bystander liability, which is the sole theory of negligent infliction of emotional distress recognized under South Carolina law, because she did not and could not allege that she was in close proximity to the accident when it occurred or that she perceived the incident contemporaneously. (Defs.' Mot. ¶ 5, R. p. 17; Defs.' Reply 7-8, R. pp. 68-69.) With respect to the intentional infliction of emotional distress claim, Brookdale asserted that Ms. Weaver failed to allege any facts establishing that Brookdale directed its actions at her with the intent to cause her severe emotional distress, as is required to state a legally cognizable claim under established South Carolina law. (Defs.' Mot. ¶ 6, R. p. 18; Defs.' Reply 8-9, R. pp. 69-70.)

Brookdale also moved in the alternative to compel arbitration under the arbitration provision (the "Arbitration Provision") set forth in Section V of the Residency Agreement that Ms. Walker entered into with Brookdale before moving into the facility (the "Residency Agreement"). (Defs.' Mot. ¶¶ 7-12, R. pp. 18-20; Defs.' Reply 9-14, R. pp. 70-75.)

Ms. Weaver opposed Brookdale's motion. She argued that her negligence claim is distinct from the already resolved wrongful death claim. (Pl.'s Resp. Opp'n Defs.' Mot. Dismiss

or Compel Arbitration ("Pl.'s Opp.") 3-5, R. pp. 53-55.) Ms. Weaver further asserted that her negligent infliction of emotional distress claim derives from her discovery of Ms. Walker's remains, and she contends that this after-the-fact discovery provides a sufficient basis to sustain her claim. (*Id.* at 6, R. p. 56.) Finally, Ms. Weaver summarily disputed, without any explanation, Brookdale's argument that her complaint fails to allege facts sufficient to support a viable claim for intentional infliction of emotional distress. (*Id.* at 7, R. p. 57.) With respect to Brookdale's motion, in the alternative, to compel arbitration, Ms. Weaver argued that she could not be compelled to arbitrate her claims, based solely on the fact that she was a nonsignatory to the Residency Agreement that contains the Arbitration Provision. (*Id.* at 8-9, R. pp. 58-59.)

The trial court heard oral argument on Brookdale's motion on August 31, 2017. (*See* Trial Tr. R., R. pp. 80-103.) On September 28, 2017, the trial court entered an Order denying Brookdale's motion to dismiss and to compel arbitration. (Order Den. Defs.' Mot. Dismiss and Compel Arbitration ("September 28 Order"), R. pp. 1-3.) The trial court concluded: (1) Ms. Weaver's complaint adequately stated claims for relief (*id.* at 2, R. p. 2), and (2) the Arbitration Provision could not be enforced as to Ms. Weaver because she was not a signatory to the Residency Agreement and no facts supported any theory under which she could be bound by its terms (*id.* at 2-3, R. p. 2-3). This timely appeal followed. (*See* Notice of Appeal, R. pp. 78-79.)

STATEMENT OF FACTS

The complaint alleges that Ms. Walker began residing at Brookdale, an assisted living facility located in Charleston, South Carolina, on June 4, 2016. (Pl.'s Compl. ¶¶ 17-18, R. p. 7.)[2] Shortly before her residency began at Brookdale, Ms. Walker, through her adult children who

[2] Brookdale accepts the allegations of the complaint as true for purposes of its motion to dismiss only.

held power of attorney on her behalf, entered into a binding Residency Agreement with Brookdale. (Def's Mot., Ex. A, Residency Agreement, R. pp. 23-36.)

The comprehensive Residency Agreement governed the relationship between Ms. Walker and Brookdale. (*Id.*) In particular, the Residency Agreement outlines in detail the services that Brookdale agreed to provide to Ms. Walker as a resident. (*Id.*, Section I, outlining "Services and Accommodations.") The Residency Agreement expressly distinguishes those services that are considered "Basic" and included in the "Basic Service Rate," from those services that could be provided for an additional cost, depending on the resident's individualized needs. (*See id.*) The Residency Agreement specifies that Basic Services do *not* include 24-hour supervision or one-on-one assistance, and confirms that there could be short and long periods of time in which the resident would be left alone. (*See id.*, Section VI.C.4, Risk Agreement, R. p. 33.) Per the terms of the Residency Agreement, any additional services that Brookdale agreed to provide for an additional cost were to be set forth separately in an Exhibit to the Residency Agreement. (*See id.*, Sections I.B. and I.C., R. p. 25.)

The Residency Agreement also includes a broadly-worded Arbitration Provision, mandating arbitration of all disputes that in any way relate to Ms. Walker's stay at Brookdale:

> 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.

(Residency Agreement, Section V(A)(1), R. pp. 30-31.)

Significantly, the Arbitration Provision to which Ms. Walker agreed expressly applies to claims by her family members, including Ms. Weaver (Ms. Walker's adult granddaughter), regardless of whether Ms. Weaver asserts claims in a representative capacity or, as here, in her personal capacity:

> 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.

(*Id.*, Section V(A)(14), R. p. 32.)

Ms. Walker allegedly wandered from her residence at Brookdale in the early morning hours of July 27, 2016. (Pl.'s Compl. ¶ 23, R. p. 8.) Upon discovering her disappearance, Brookdale employees promptly notified Ms. Walker's family and began searching for her. (*Id.* ¶¶ 24-25, R. p. 8.) Brookdale had not yet located Ms. Walker when Ms. Weaver and other family members arrived at Brookdale to assist in the search. (*Id.* ¶¶ 21, 26-27, R. pp. 7-8.) Ms. Weaver asserts that she joined the search effort and eventually located her grandmother's remains in a retention pond allegedly located at the rear portion of Brookdale's property. (*Id.* ¶¶ 27-29, R. p. 8.) Ms. Walker appeared to have been killed by an alligator. (*Id.* ¶ 29, R. p. 8.)

Ms. Weaver alleges that Brookdale was aware of Ms. Walker's diminished capacity and history of wandering and sleep-walking, and that it therefore had a duty to monitor Ms. Walker to prevent her from exiting her residence. (*Id.* ¶ 30, R. pp. 8-9.) Ms. Weaver further avers that Brookdale knew or should have known that alligators were present in the retention pond such that the pond posed a hazardous and dangerous condition to Brookdale residents, including Ms. Walker. (*Id.*) Ms. Weaver alleges that Brookdale's failure to properly supervise and monitor

Ms. Walker resulted in her accidental death. (*Id.*) Ms. Weaver further claims that, as a result of finding her grandmother's remains, she suffered "severe personal and emotional distress and injury," as well as "physical injury and harm." (*Id.* ¶¶ 32, 41, R. pp. 9, 11.) Based on these allegations, Ms. Weaver asserts causes of action against Brookdale for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. (*See generally* Pl's Compl., Causes of Action, R. pp. 10-14.)

SUMMARY OF ARGUMENT

This appeal presents straightforward questions of law based on the facts as alleged in Ms. Weaver's complaint. Accepting those facts as true, Ms. Weaver has failed to state any valid claim against Brookdale. As an initial matter, the trial court's denial of Brookdale's motion to dismiss is immediately appealable to this Court as a companion issue to the trial court's simultaneous refusal to compel arbitration. This Court may, in its discretion, review interlocutory orders not ordinarily appealable, such as orders denying motions to dismiss, when they are companion to reviewable issues, such as orders refusing to compel arbitration. The trial court here denied Brookdale's motion to dismiss and motion to compel arbitration in a single order (*See* September 28 Order, R. pp. 1-3.), and the Residency Agreement containing the Arbitration Clause is the basis for any obligations and duties Brookdale might have had in connection with Ms. Walker's death. Further, this Court's review of the motion to dismiss together with the motion to compel arbitration could eliminate the need for further proceedings or, at least, narrow the issues for trial.

Turning to the merits, Brookdale acted quickly and responsibly in resolving the Estate's wrongful death claim. Ms. Weaver has filed this separate lawsuit, contending that she is entitled to additional recovery from Brookdale for Ms. Walker's wrongful death. As a matter of law, Ms.

Weaver has not and cannot allege facts sufficient to state a legally cognizable claim against Brookdale.

Where a family member alleges that a defendant's negligent acts caused the death of another family member, her sole remedy lies in the wrongful death statute, which requires the wrongful death claim be brought by the personal representative of the decedent's estate. Under any fair reading of Ms. Weaver's complaint, this is the exact basis for her "negligence" cause of action, which is duplicative of the previously resolved wrongful death claim. Ms. Weaver fails to allege any facts sufficient to support a finding that Brookdale owed her any legal duty separate and independent from its duties to Ms. Walker. Consequently, Ms. Weaver has no basis for any "independent" claim of negligence against Brookdale.

Ms. Weaver's alleged claim of "negligence" is in substance a claim for negligent infliction of emotional distress. Ms. Weaver asserts that Brookdale failed to supervise Ms. Walker properly, that as a result Ms. Walker wandered into a dangerous area and was killed, and that Ms. Weaver suffered emotional distress when she later discovered Ms. Walker's remains.

Under established South Carolina law, however, the only recognized form of negligent infliction of emotional distress is for bystander liability, which applies only where the plaintiff was in close proximity to, and contemporaneously perceived, circumstances resulting in the death of a close family member. Ms. Weaver has not and cannot allege that either of these elements is present here, since she acknowledges that she did not observe the alligator attack on Ms. Walker.

To establish a claim for intentional infliction of emotional distress, a plaintiff must establish that the defendant engaged in outrageous conduct specifically directed at the plaintiff intending to cause emotional distress. Here, there are no allegations whatsoever that Brookdale

engaged in intentionally wrongful conduct of any sort in connection with Ms. Walker's death. To the contrary, the allegations uniformly sound in negligence. Likewise, there are not and cannot in these circumstances be any allegations that Brookdale specifically directed any actions toward Ms. Weaver intending to cause her emotional distress. The intentional infliction of emotional distress claim therefore fails as a matter of law.

Alternatively, if any of Ms. Weaver's claims can survive a motion to dismiss, those claims must proceed through arbitration. The Residency Agreement between Ms. Walker and Brookdale mandates arbitration of any claims in connection with Ms. Walker's residency at Brookdale. That Agreement applies broadly to include claims by family members brought in any capacity. Ms. Weaver, who relies on duties created by the Residency Agreement in asserting her claims against Brookdale, is estopped from selectively rejecting the Agreement's arbitration requirement. Accordingly, Ms. Weaver must be compelled to arbitrate any claims that remain following this Court's resolution of Brookdale's motion to dismiss.

ARGUMENT

I. The trial court erred in denying Brookdale's motion to dismiss Ms. Weaver's claims because the complaint fails to allege facts sufficient to state a claim for relief.

A. This Court reviews de novo the trial court's denial of Brookdale's motion to dismiss.

The trial court's denial of Brookdale's motion to dismiss presents issues of law, which this Court reviews *de novo*. *See Grimsley v. S.C. Law Enf't Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) (appeal of denial of motion to dismiss); *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (appeal of denial of motion to compel arbitration).

In reviewing a trial court's decision denying a Rule 12(b) motion to dismiss, like the trial court, this Court examines whether "the plaintiff has failed to state facts sufficient to constitute a

cause of action in the pleadings filed with the court." *Ashley River Props. I, LLC v. Ashley River Props. II, LLC*, 374 S.C. 271, 277, 648 S.E.2d 295, 298 (Ct. App. 2007); *see also Grimsley*, 396 S.C. at 281, 721 S.E.2d at 426; *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). A court asks "whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007); *see also Doe*, 373 S.C. at 395, 645 S.E.2d at 247.

B. The trial court's denial of Brookdale's motion to dismiss is immediately appealable as a companion issue to the court's corresponding denial of the motion to compel arbitration.

As a threshold matter, under South Carolina law, the trial court's denial of Brookdale's motion to dismiss is immediately appealable to this Court, as a companion matter to the denial of Brookdale's motion to compel arbitration.

This Court has discretion to review "interlocutory orders not ordinarily appealable when they are companion to reviewable issues." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 371, 628 S.E.2d 902, 918 (Ct. App. 2006); *see also Brown v. Cty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005) ("Courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable."); *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 338-39, 574 S.E.2d 502, 511-12 (Ct. App. 2002) (entertaining an appeal from a denial of summary judgment in conjunction with other issues properly before the court); *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001) (same for an appeal from a denial of a motion to dismiss). Here, the trial court's denial of Brookdale's motion to compel arbitration is immediately reviewable. *See Towles v. United HealthCare Corp.*, 338 S.C. 29, 35, 524 S.E.2d 839, 842 (Ct. App. 1999) ("[A]n order that . . . refuses to compel arbitration . . . is immediately appealable, *even if interlocutory*." (quoting

Stedor Enters., Ltd. v. Armtex, Inc., 947 F.2d 727, 730 (4th Cir. 1991)) (quotation marks omitted)). Accordingly, this Court has discretion to simultaneously review the court's denial of Brookdale's motion to dismiss.

In determining whether to exercise discretion to review an issue that typically would not be subject to immediate appeal, courts primarily consider (1) the relationship between the two "companion" issues, and (2) whether granting review would promote judicial economy by narrowing the issues or avoiding unnecessary litigation. *See Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (entertaining an appeal "in an effort to avoid another appeal in the future and potentially narrow the issues for trial"); *Brown*, 366 S.C. at 362 n.5, 622 S.E.2d at 538 n.5 (finding motions to dismiss unreviewable because they lacked a sufficient "nexus or companionship" to the reviewable issue to justify the exercise of immediate appellate review); *Morris v. Anderson Cty.*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002) (acknowledging the court's ability to "consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary litigation"); *Pitts*, 352 S.C. at 338-39, 574 S.E.2d at 511-12 (entertaining an appeal from a denial of summary judgment because it was so closely connected to other issues properly before the court). Both of these considerations weigh heavily in favor of this Court's immediate review of the trial court's rulings on all issues.

First, there is a close factual relationship between Brookdale's motion to dismiss and its motion to compel arbitration, which were presented in a single filing and decided in a single trial court order. Indeed, the Residency Agreement and the rights and obligations stemming from it are front and central to this Court's review of the denial of Brookdale's motion to compel arbitration and the denial of the motion to dismiss. Brookdale asserts that the duties it owed to Ms. Weaver, if any, necessarily derive from the Residency Agreement. Brookdale further

contends that any breach of those duties in connection with Ms. Walker's death properly were the subject of the Estate's wrongful death and survivor claims, which have been fully resolved through settlement. Brookdale contends that Ms. Weaver cannot now state any separate legally cognizable claim arising from Ms. Walker's death that is independent of the now-resolved wrongful death and survivor claims. If, however, any of Ms. Weaver's claims survive, Brookdale asserts that the Arbitration Provision in the Residency Agreement (upon which Ms. Weaver must necessarily rely in connection with her claims that Brookdale breached certain duties) is triggered and compels arbitration of Ms. Weaver's claims. Thus, based on the overlapping nature of the issues presented, there is "a sufficient nexus or companionship to justify . . . appellate review" of the trial court's denial of both motions. *Brown*, 366 S.C. at 362 n.5, 622 S.E.2d at 538 n.5.

Second, this Court's review of all issues may eliminate the need for further proceedings, regardless of forum. If the Court determines that Ms. Weaver fails to state a legally cognizable claim and that Brookdale's motion to dismiss properly should have been granted, there are no issues to arbitrate or further litigate. Even if this Court concludes that Brookdale's motion to dismiss should have been granted only in part, the result would be a useful narrowing of the issues remaining for resolution. This win-win result would save resources for all parties, would promote judicial economy by avoiding needless prosecution and defense of claims lacking any viable legal basis, and would further assure that this Court would not have to entertain these exact issues again in a subsequent appeal.

For these reasons, the trial court's denial of Brookdale's motion to dismiss is properly before this Court, and the Court should exercise its discretion to hear and decide the issues presented.

C. The facts alleged in the complaint fail to support legally cognizable claims for negligence, negligent infliction of emotional distress, or intentional infliction of emotional distress.

Ms. Weaver asserts causes of action against Brookdale for negligence, and for negligent and intentional infliction of emotional distress. Accepting as true the facts as alleged in Ms. Weaver's complaint, Ms. Weaver fails to state any legally cognizable claim. Accordingly, the trial court erred in denying Brookdale's motion to dismiss pursuant to Rule 12(b)(6), SCRCP.

i. The negligence claim is barred because South Carolina's wrongful death statute provides the exclusive remedy for any "negligence" claim stemming from Ms. Walker's death, and the personal representative of her Estate has settled the wrongful death claim with Brookdale.

South Carolina's wrongful death statute, S.C. Code Ann. §§ 15-51-10, *et seq.*, "constitutes the exclusive remedy" available to family members or heirs of a decedent for wrongful or negligent acts that caused the decedent's death. *Banks v. Med. Univ. of S.C.*, 314 S.C. 376, 380, 444 S.E.2d 519, 521 (1994) (a mother's wrongful death claim in her individual capacity for her decedent child was her exclusive remedy); *see also Green v. S. Ry. Co.*, 319 F. Supp. 919, 919-20 (D.S.C. 1970) (recovery under the South Carolina wrongful death statute is the exclusive remedy for an individual).

The wrongful death statute requires that any claim be brought by the personal representative/executor of the deceased. *Roberts v. Bodison*, No. 2:14-cv-00705, 2015 WL 13215670, at *2 (D.S.C. Nov. 20, 2015) ("In South Carolina, '[t]he right of action for wrongful death is purely statutory . . . and may be brought only by the executor or administrator of such deceased person.'" (quoting *Glenn v. E.I. DuPont De Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970))). Accordingly, "[i]f an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed by the Probate Court, it should be dismissed." *Glenn*, 254 S.C. at 134, 174 S.E.2d at 158. Moreover, a family member

cannot seek to avoid the wrongful death statute by attempting to "plead around" its confines by labeling a cause of action as "negligence," as opposed to wrongful death. *See Dickey v. Clarke Nursing Home*, No. 2007-UP-344, 2007 WL 8327928, at *3 (S.C. Ct. App. June 29, 2007) (unpublished opinion) (holding that the lower court properly dismissed a plaintiff's claims for negligence and gross negligence because they "arise out of the same alleged malfeasance as that alleged for wrongful death").

Here, the personal representative of Ms. Walker's Estate asserted wrongful death/survival claims against Brookdale following her death. (*See* Wrongful Death Settlement; Trial Tr. R. 3:24-4:13, 20:24-21:6, R. pp. 82-83, 99-100.) Brookdale acted promptly and responsibly by resolving those claims through settlement, before litigation was filed. (*See id.*) The probate court approved the settlement. (*See id.*)

Ms. Weaver separately filed this action against Brookdale in which she purports to assert a "negligence" cause of action. Regardless of its "negligence" label, however, the claim is in substance a claim for wrongful death because it "arise[s] out of the same alleged malfeasance" that was at issue in the wrongful death claim in connection with Ms. Walker's accident. *Dickey*, 2007 WL 8327928, at *3. Ms. Weaver cannot rely on artful pleading to circumvent the clearly articulated statutory scheme governing wrongful death claims. *See id.*

The significant overlap between Ms. Weaver's purported "negligence" claim, and the wrongful death claim previously asserted and settled is self-evident. Indeed, the gravamen of Ms. Weaver's complaint is that Brookdale failed to properly supervise Ms. Walker, which allowed her to wander from the facility and led to her death. Ms. Weaver claims she was injured as a result of Ms. Walker's death. More specifically, the complaint alleges that Brookdale "had a duty to operate and manage Brookdale Charleston with due care to adequately and appropriately

monitor and supervise residents, including Bonnie Walker." (Pl.'s Compl. ¶ 20, R. p. 7.) Ms. Weaver claims that Brookdale's alleged negligence "caused physical injuries and the death of Bonnie Walker" and that Brookdale "should have reasonably foreseen that its negligent, gross [sic] negligent, and reckless conduct would cause harm to Bonnie Walker's family members, including Plaintiff." (*Id.* ¶ 40, R. p. 11.) Moreover, Ms. Weaver's claimed damages are directly akin to those recoverable for a wrongful death action, "including pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship." *Ballard v. Ballard*, 314 S.C. 40, 41-42, 443 S.E.2d 802, 802 (1994); *see also* Pl.'s Compl. ¶ 41, R. p. 11.

Ms. Weaver's claim is a wrongful death claim, by a different name. Ms. Weaver is not the duly appointed personal representative of Ms. Walker's Estate, and the wrongful death statute dictates that she does not have standing to assert a wrongful death claim. Moreover, the personal representative of Ms. Walker's Estate has already asserted a wrongful death claim; that claim has been settled and the probate court has approved that settlement. (*See* Wrongful Death Settlement; Trial Tr. R. 4:3-5, R. p. 83.) Accordingly, Ms. Weaver's self-labeled "negligence" claim must be dismissed. To hold otherwise would encourage piecemeal litigation, trigger further attempts to circumvent the wrongful death statutory scheme, and discourage the resolution of wrongful death claims out of concern that settlement would not bring finality.

ii. Ms. Weaver fails to state an independent claim for negligence because she does not allege any facts establishing that Brookdale owed any legal duty to her.

The trial court summarily concluded that Ms. Weaver'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" and therefore not precluded by the wrongful death statutory scheme. (September 28 Order at 3, R. p. 3.) Putting aside that the allegations in Ms. Weaver's complaint refute this conclusion, any independent claim of negligence fails because Ms. Weaver has not and cannot

allege that Brookdale owed her any independent legal duty separate from the duty it owed Ms. Walker.

To prove a claim for negligence, a plaintiff must show: "(1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty by the defendant, and (3) damages proximately resulting from the breach of that duty." *Hubbard v. Taylor*, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (Ct. App. 2000); *see also Graham v. Town of Latta, S.C.*, 417 S.C. 164, 186, 789 S.E.2d 71, 82 (Ct. App. 2016) (listing the elements of negligence). "The absence of any one of these elements renders the cause of action insufficient." *Graham*, 417 S.C. at 186, 789 S.E.2d at 82 (quoting *Washington v. Lexington Cty. Jail*, 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct. App. 1999) (internal quotation marks omitted)).

"[N]egligence is based upon a breach of a duty owed. A breach of duty exists when it is foreseeable that one's conduct may likely injure the person to whom the duty is owed." *Horne v. Beason*, 285 S.C. 518, 521, 331 S.E.2d 342, 344 (1985). "Without a duty, there is no actionable negligence." *Roe v. Bibby*, 410 S.C. 287, 293, 763 S.E.2d 645, 648 (Ct. App. 2014) (quoting *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998)) (quotation marks omitted). Indeed, "if the plaintiff fails to prove the defendants owed her a legal duty of care, she fails to prove actionable negligence." *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 391, 701 S.E.2d 776, 781 (Ct. App. 2010).

The facts alleged show that Brookdale did not owe Ms. Weaver any separate legal duty. To the contrary, Ms. Weaver's complaint merely describes the duty of care Brookdale generally owes its residents, which included Ms. Walker, *but not Ms. Weaver*. (*See* Pl.'s Compl. ¶¶ 34-35, 37, R. p. 10.) Notably, the sole express reference to a duty of care allegedly owed to Ms. Weaver is conclusory, with no corresponding factual allegations in support. (*See id.* ¶ 41, R. p.

11 ("As a direct and proximate cause of Defendants' . . . breach of the duties owed to Plaintiff and Bonnie Walker, Plaintiff suffered damages . . . .").) This conclusory statement is insufficient to plead the duty element of Ms. Weaver's claim.

Although it is not entirely clear, based on Ms. Weaver's allegations regarding what Brookdale purportedly did wrong, it appears that Ms. Weaver may be asserting that Brookdale had an independent duty to warn her of dangerous conditions on the property, including the retention pond, and to warn her of the possibility of finding Ms. Walker's remains. (*See* Pl.'s Compl. ¶¶ 36, 38, R. p. 10.) If this is the basis for her negligence claim, it fails as a matter of law. First, as a matter of pure logic, any duty by Brookdale to warn of a dangerous condition – *i.e.*, the alligators in the retention pond – would run to Ms. Walker as a resident of the facility and the one who was harmed by that dangerous condition. Ms. Weaver has not and cannot allege a cognizable claim based on any duty to warn her that the pond was dangerous, because she does not allege that she suffered any harm from that dangerous condition.

Second, Ms. Weaver is, in substance, asserting a claim for negligent infliction of emotional distress for the death or injury to Ms. Walker. In doing so, Ms. Weaver necessarily argues Brookdale was negligent in failing to supervise Ms. Walker, resulting both in Ms. Walker's death and in Ms. Weaver's emotional distress because of Ms. Walker's death. That is the very essence of a claim for negligent infliction of emotional distress. Ms. Weaver cannot circumvent the strict pleading requirements for that type of claim, simply by alleging that Brookdale had a duty to warn her of the potential that she may suffer emotional distress.[3]

[3] Moreover, "South Carolina law does not recognize a general duty to warn a third party or potential victim of danger . . . ." *Doe 2 v. Citadel*, 421 S.C. 140, 146, 805 S.E.2d 578, 581 (Ct. App. 2017); *see also Chappell v. Int'l Bhd. Elec. Workers Local Union 772*, 120 F. Supp. 3d 492, 498 n.3 (D.S.C. 2015) (noting there is no general duty to warn a third party of potential danger under South Carolina law); *Roe v. Bibby*, 410 S.C. 287, 293, 763 S.E.2d 645, 648 (Ct.

The facts alleged support only that Brookdale owed a legal duty to residents of the facility. Ms. Weaver was not a resident. Ms. Weaver has not and cannot allege any facts sufficient to support that Brookdale owed her any separate and independent legal duty and therefore cannot state a claim for negligence.

iii. The negligent infliction of emotional distress claim fails because South Carolina law only recognizes bystander liability, and Ms. Weaver admits she was not in close proximity to and did not contemporaneously observe the accident that resulted in Ms. Walker's death.

Ms. Weaver has not stated a valid claim for negligent infliction of emotional distress because the facts alleged do not support several necessary elements of the claim. In *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985), the South Carolina Supreme Court first recognized a cause of action for negligent infliction of emotional distress. The Court carefully limited the claim to "emotional trauma manifested by physical symptoms" based on *bystander* liability. *Kinard*, 286 S.C. at 582-83, 336 S.E.2d at 467 (adopting California's negligent infliction of emotional distress cause of action and citing approvingly *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968)); *see also Doe v. Greenville Cty. Sch. Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307 (2007) ("South Carolina courts have limited the recognition of negligent infliction of emotional distress claims . . . to bystander liability . . . ."); *Toney v. LaSalle Bank Nat'l Ass'n*, 896 F. Supp. 2d 455, 478-79 (D.S.C. 2012) ("South Carolina courts have allowed

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App. 2014) (same). While there are five recognized exceptions to this general rule, Ms Weaver fails to allege facts supporting that any of these exceptions apply. *See Doe 2*, 421 S.C. at 146, 805 S.E.2d at 581. Furthermore, as a matter of law, foreseeability of a potential injury (*i.e.*, here, the alleged foreseeability that Ms. Weaver may find Ms. Walker's remains) does not alone give rise to any duty owed to Ms. Weaver. *See Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 391-92, 701 S.E.2d 776, 781 (Ct. App. 2010) ("Foreseeability of injury, in and of itself, does *not* give rise to a duty. . . . A plaintiff must identify a duty that the defendant has to protect her from a particular harm to merit consideration of her claim by a jury." (internal quotation marks and citation omitted)).

claims for negligent infliction of emotion [sic] distress which are limited to claims of bystander liability."), *aff'd*, 512 F. App'x 363 (4th Cir. 2013).

To prove a claim for bystander liability, Ms. Weaver must show (a) Brookdale's negligence caused the death of Ms. Walker; (b) Ms. Weaver was in close proximity to the accident causing Ms. Walker's death; (c) Ms. Weaver is closely related to Ms. Walker; (d) Ms. Weaver contemporaneously perceived Ms. Walker's accident; and (e) Ms. Weaver's emotional distress manifests itself by physical symptoms capable of objective diagnosis established by expert testimony. *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 154, 533 S.E.2d 597, 603 (Ct. App. 2000) (citing *Kinard*, 286 S.C. at 582-83, 336 S.E.2d at 467). Close proximity and contemporaneous perception are essential elements of the claim. *See Doe,* 375 S.C. at 67, 651 S.E.2d at 307 (no valid claim for emotional distress for parents who did not witness abuse of daughter); *Kinard*, 286 S.C. at 580, 336 S.E.2d at 466 (a mother who herself was injured in an accident could recover damages for emotional distress incurred as a result of her witnessing severe injury to her daughter in the same accident); *Stewart*, 341 S.C. at 154-55, 533 S.E.2d at 603 (rejecting bystander liability claim because "Wife was not a bystander in close proximity to the accident in which Husband was involved and did not contemporaneously perceive the accident").

As a matter of law, Ms. Weaver's bystander liability claim fails because she has not and cannot allege that she was in close proximity to the alligator attack on Ms. Walker or that she contemporaneously perceived the attack or Ms. Walker's death. In Ms. Weaver's opposition to Brookdale's motion to dismiss, she appeared to recognize this material flaw in her claim. In the opposition brief, Ms. Weaver acknowledged the bystander requirement for sustaining a claim for negligent infliction of emotional distress but went on to argue that the basis for her claim is the

discovery of Ms. Walker's remains, rather than the witnessing of the attack itself. (Pl.'s Opp. 6, R. p. 56.) Putting aside that this was not actually alleged in her complaint, this rationale wholly ignores the elements required to sustain a claim of bystander liability, which include a showing of close proximity to and contemporaneous perception of the death or serious bodily injury of another. Those elements have not been pleaded here. Accordingly, Ms. Walker cannot state a valid claim for bystander liability, which is the only form of negligent infliction of emotional distress claim that South Carolina law recognizes, and her claim must be dismissed.[4]

iv. The intentional infliction of emotional distress claim also fails because the complaint does not allege any facts supporting that Brookdale engaged in conduct directed at Ms. Weaver with the intent to cause her emotional distress.

The trial court erred in failing to dismiss Ms. Weaver's claim for intentional infliction of emotional distress because the complaint is devoid of any facts that could support a finding that Brookdale engaged in any intentional conduct, let alone that any such conduct was directed specifically at Ms. Weaver.[5] Under South Carolina law, to recover for intentional infliction of emotional distress, sometimes referred to as "outrage," the plaintiff must establish "(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

[4] Based on Ms. Weaver's explanation regarding the nature of her negligent infliction of emotional distress claim, it appears that she is attempting to circumvent the need to prove the elements of bystander liability by claiming that she can recover for emotional distress inflicted on her by a defendant's wrongful conduct toward another. This rationale was expressly rejected in *Strickland v. Madden*, 323 S.C. 63, 67, 448 S.E.2d 581, 583 (Ct. App. 1994), where this Court confirmed that, since the *Kinard* ruling, recovery for emotional trauma is limited solely to bystander recovery.

[5] In fact, in the complaint, several paragraphs under the count for intentional infliction of emotional distress expressly refer to "negligent or grossly negligent" conduct. (*See* Pl.'s Compl., ¶¶ 55-56, R. p. 13.)

caused the plaintiff's emotional distress; and (4) the emotional distressed [sic] suffered by the plaintiff was 'severe' so that 'no reasonable man could be expected to endure it.'" *Toney*, 896 F. Supp. 2d at 478-79 (applying South Carolina law and citing *Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981)); *see also Williams v. Lancaster Cty. Sch. Dist.*, 369 S.C. 293, 305, 631 S.E.2d 286, 293 (Ct. App. 2006) (listing the elements of intentional infliction of emotional distress).

"It 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. N.Y. Times Co.*, 314 S.C. 531, 536, 431 S.E.2d 558, 561 (1993); *see also Roberts v. Simmons*, No. 2:14-2252, 2014 WL 7005250, at *6 (D.S.C. Dec. 11, 2014) (granting defendant's motion to dismiss because the alleged conduct was not extreme and outrageous but also noting "it is not clear that Defendant's alleged conduct was directed at the Plaintiff"); *Fulghum v. Wise Seats, Inc.*, No. 4:10-02112, 2012 WL 1032594, at *4 (D.S.C. Mar. 27, 2012) (applying South Carolina law and concluding that a plaintiff's claims that his employers used vulgar and racist language in his presence and asked him to participate in unlawful treatment of black employees "is not tortious conduct that was specifically directed towards Plaintiff"); *Doe 2 v. Citadel*, 421 S.C. 140, 153, 805 S.E.2d 578, 585 (Ct. App. 2017) (noting that while the defendant's failure to notify law enforcement of prior child abuse at its camp program by a camper's father was "highly lamentable," the plaintiff—another camper and victim of the father's abuse—failed to establish the defendant "directed any tortious conduct specifically toward him"); *Doe v. Rojas*, No. 2007-UP-195, 2007 WL 8327520, at *4 (Ct. App. Apr. 26, 2007) (a school district's failure to take preemptive action to prevent sexual abuse of students was not sufficient to infer conduct was targeted to or directed at the plaintiff students). Significantly, where a plaintiff fails to allege

facts that the tortious conduct was specifically directed towards her, the "harm allegedly suffered by Plaintiff arose indirectly from Defendants' actions" and cannot support a claim for intentional infliction of emotional distress. *Settle v. Slager*, No. 2:15-1802, 2015 WL 12865194, at *3 (D.S.C. May 20, 2015) (applying South Carolina law and dismissing a claim for intentional infliction of emotional distress because the complaint failed to allege conduct directed specifically towards the plaintiff).

Even viewing the facts and inferences from the complaint in the light most favorable to Ms. Weaver, the complaint fails to state a cause of action for intentional infliction of emotional distress because there are no factual allegations supporting critical elements of the claim – "extreme or outrageous" conduct directed specifically at Ms. Weaver. *See, e.g., Upchurch*, 314 S.C. at 536, 431 S.E.2d at 561 (conduct that is intentional and outrageous is not actionable unless specifically directed at the plaintiff); *Doe 2,* 421 S.C. at 153, 805 S.E.2d at 585 (failure to report child abuse not actionable where defendant did not direct tortious conduct specifically at plaintiff).

There are no allegations that Brookdale intentionally exposed Ms. Walker to a dangerous condition. To the contrary, in support of her claim for intentional infliction of emotional distress, Ms. Weaver alleges that Brookdale mishandled or failed to safeguard Ms. Walker's remains and failed to take proper steps during its search for Ms. Walker. Those allegations amount at most to negligence. But even assuming that they could be categorized as intentional, and as extreme and outrageous, there are no allegations whatsoever that these acts were specifically directed at Ms. Weaver. *See Rojas*, 2007 WL 8327520, at *5 (a school district's actions after discovering teacher's sexual misconduct was not "directed towards" the plaintiff victims). There simply are no allegations anywhere in Ms. Weaver's complaint that Brookdale "targeted [Ms. Weaver] to be

harmed by [its] allegedly tortious acts." *Upchurch*, 314 S.C. at 536, 431 S.E.2d at 561. Accordingly, Ms. Weaver has failed to plead the elements necessary to state a claim for intentional infliction of emotional distress, and Brookdale's motion to dismiss should be granted. *See Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 401, 596 S.E.2d 42, 48-49 (2004) (affirming trial court's grant of defendant's motion to dismiss because the plaintiff failed to state the elements necessary to sustain a claim for intentional infliction of emotional distress).

II. The trial court erred in denying Brookdale's alternative motion to compel arbitration, because the broadly-worded Arbitration Provision in the Residency Agreement applies to Ms. Weaver's claims.

Ms. Weaver's claims should be dismissed for the reasons stated above. Alternatively, however, the trial court erred in not requiring arbitration of those claims pursuant to the broad Arbitration Provision of the Residency Agreement.

A. This Court reviews *de novo* the trial court's denial of Brookdale's motion to compel arbitration.

Arbitrability determinations present issues of law and thus are subject to *de novo* review. That said, "[h]owever, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Dean*, 408 S.C. at 379, 759 S.E.2d at 731; *see also Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015); *Buice v. WMA Sec., Inc.*, 380 S.C. 149, 154, 668 S.E.2d 430, 433 (Ct. App. 2008). Significantly, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall*, 413 S.C. at 271, 776 S.E.2d at 94 (quoting *Dean*, 408 S.C. at 379, 759 S.E.2d at 731) (internal quotation marks omitted).

B. The Residency Agreement's Arbitration Provision is governed by the Federal Arbitration Act and subject to its liberal rules of enforcement.

As an initial matter, the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (the "FAA") governs the enforceability of the Arbitration Provision. As set forth in the FAA, "[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." FAA, 9 U.S.C. § 2. Thus, "[u]nless the parties have contracted to the contrary, the [FAA] applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012) (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (quotation marks omitted)). Moreover, the United States Supreme Court has confirmed that the phrase "involving commerce," is to be interpreted broadly, essentially as the equivalent of the phrase "affecting commerce." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995). Significantly, South Carolina law establishes that nursing home contracts, such as the Residency Agreement, are contracts that involve interstate commerce and are governed by the FAA. *See Dean*, 408 S.C. at 381, 759 S.E.2d at 732 ("We . . . find the terms of the residency agreement implicate interstate commerce and, thus, the FAA."). The express terms of the Residency Agreement likewise confirm that it is governed by the FAA. (*See* Residency Agreement, Section V.A.2., R. p. 31.)

The FAA evinces a strong public policy favoring arbitration of disputes, and the United States Supreme Court has confirmed that any doubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23, 24 (1983). Indeed, a court "has no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview." *Nat'l Home Ins. Co. v. Bridges*, 142 F. Supp. 3d 425, 433 (D.S.C. 2015) (quoting

Adkins v. Labor Ready, Inc., 303 F.3d 496, 500 (4th Cir. 2002)). Both the South Carolina Supreme Court and this Court recently echoed this sentiment. *See Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) ("There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." (quoting *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012) (quotation marks omitted))); *Wilson v. Willis*, 416 S.C. 395, 413, 786 S.E.2d 571, 580 (Ct. App. 2016) ("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." (quoting *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013))); *see also Bridges*, 142 F. Supp. 3d at 429 (stating in light of efficiencies of arbitration over litigation, "due regard must be given to the federal policy favoring arbitration" (quoting *Adkins*, 303 F.3d at 500) (internal quotation marks omitted)).

C. Ms. Weaver's claims are subject to mandatory arbitration because, by its express terms, the Arbitration Provision broadly applies to claims in any way related to Ms. Walker's stay at Brookdale, and extends to claims by third-party family members, including Ms. Weaver.

The breadth of the Arbitration Provision confirms its applicability to Ms. Weaver's claims:

> [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 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.

(Residency Agreement, Section V.A.1., R. pp. 30-31.) Here, Ms. Weaver alleges that Brookdale "failed to exercise due care in monitoring, supervising, and otherwise providing services required to keep [Ms. Walker] safe" during her stay at Brookdale, which she claims resulted in Ms. Walker's death. (Pl.'s Compl. ¶ 22, R. p. 8.) Thus, Ms. Weaver's claims fall squarely within the Residency Agreement's arbitration mandate, as they clearly are "arising out of, or in any way relating to" Ms. Walker's stay at Brookdale.

Moreover, the Arbitration Provision applies to these claims by Ms. Walker's granddaughter after Ms. Walker's death. First, the Arbitration Provision confirms that it survives Ms. Walker's death. (*See* Residency Agreement, Section V.A.16., R. p. 32.) Second, by its express terms, the Arbitration Provision binds third-party nonsignatories to the Residency Agreement, including Ms. Walker's family members, regardless of whether claims are asserted in a representative *or* a personal capacity:

> 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.

(*Id.*, Section V.A.14., R. p. 32.)

Accordingly, the clear terms of the Arbitration Provision require Ms. Weaver to arbitrate her claims against Brookdale.

D. As a matter of law, the fact that Ms. Weaver is a non-signatory to the Residency Agreement does not preclude the Arbitration Provision from governing her claims.

The trial court held that Ms. Weaver could not be bound by the Arbitration Provision because she did not sign the Residency Agreement, and there were no facts to support any theory under which Ms. Weaver could be bound by the Agreement's terms. This holding was in error.

Non-signatories to a contract can be bound by a contract's arbitration provision. As this Court aptly explained in *Pearson*, "[w]hile a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, '[i]t does not follow . . . that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.'" 400 S.C. at 288, 733 S.E.2d at 600 (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000)). To the contrary, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can . . . be bound by[] an arbitration provision within a contract executed by other parties." *Id.* (quoting *Int'l Paper Co.*, 206 F.3d at 416-17) (internal quotation marks omitted); *see also United States ex rel. Coastal Roofing Co., Inc. v. P. Browne & Assocs., Inc.*, 585 F. Supp. 2d 708, 714 (D.S.C. 2007). Recently, in *Wilson*, this Court expressly rejected the trial court's refusal to compel arbitration where it was based solely on the fact that the parties seeking to avoid arbitration were non-signatories to the agreement containing the arbitration clause. 416 S.C. at 416, 786 S.E.2d at 582.

Under established South Carolina law, a non-signatory to an arbitration agreement can be compelled to arbitrate where "its conduct falls within one of the accepted principles of agency or contract law that permit doing so." *Pearson*, 400 S.C. at 294, 733 S.E.2d at 603 (quoting *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001) (internal quotation marks omitted)). In particular, under a theory of equitable

estoppel, a non-party to a contract may be subject to the contract's arbitration clause where the non-party seeks to benefit from other contractual terms. *Id.* ("Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract." (quoting *E.I. DuPont de Nemours & Co.*, 269 F.3d at 200 (quotation marks omitted))); *see also Int'l Paper Co.*, 206 F.3d at 416-17 (compelling a parent company to arbitrate under a theory of equitable estoppel despite the fact that only the subsidiary was a party to the agreement).

In *Wilson,* this Court cogently explained:

> In the arbitration context, the [equitable estoppel] doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.

416 S.C. at 417, 786 S.E.2d at 582. Indeed, "[t]o allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA]." *Id.* (quoting *Avila Grp., Inc. v. Norma J. of Cal.*, 426 F. Supp. 537, 542 (S.D.N.Y.1977)); *Int'l Paper Co.*, 206 F.3d at 418; *see also Thompson v. Pruitt Corp.*, 416 S.C. 43, 57, 784 S.E.2d 679, 687 (Ct. App. 2016) (third-party beneficiary to an arbitration agreement can be required to arbitrate where the third party is attempting to enforce the contract containing the arbitration agreement).

A party need not invoke the contract expressly in order to be bound by its arbitration mandate. To the contrary, "[a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a "direct benefit" from a contract containing an arbitration clause.'" *Wilson,* 416 S.C. at 417, 786 S.E.2d at 582 (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)) (quotation marks omitted). As this

Court has recognized, one way a non-party may "directly benefit" from another's contract is where the non-party asserts tort claims against the other based on alleged breaches of duty that "directly arose out of and touched upon the provisions of the [contract]." *Id.* at 415, 786 S.E.2d at 581.

E. Ms. Weaver is estopped from rejecting the Residency Agreement's Arbitration Provision because she seeks to enforce and benefit from duties purportedly owed under that Agreement.

In her complaint, Ms. Weaver asserts that Brookdale was negligent in failing to monitor and supervise Ms. Walker at all times, which allowed her to wander from her residence, resulting in her accidental death. (Pl.'s Compl. ¶¶ 30-32, 35, R. pp. 8-10.) But this Court has explained:

> A nursing home is not the insurer of the safety of its patients. The nursing home does have a duty to provide a reasonable standard of care, taking into consideration the patient's mental and physical condition. This duty owed does *not* include having a nurse or attendant following the patient around at all times . . . .

Flinn v. Crittenden, 287 S.C. 427, 430, 339 S.E.2d 138, 139 (Ct. App. 1985) (quoting with approval *Murphy v. Allstate Ins. Co.*, 295 So.2d 29, 34 (La. Ct. App. 1974) (emphasis added)). This Court further confirmed that "[a] nursing home is not liable for injury caused by an untoward event unless it has breached a contractual agreement to furnish special care beyond that usually furnished which relates to the injury giving rise to the cause sued on." *Id.* (quoting with approval *Murphy*, 295 So.2d at 34).[6]

This case law establishes that any duty of Brookdale to monitor Ms. Walker continually, and to ensure that she did not wander from her residence, arises from the terms of the Residency Agreement itself, not any tort principles. *See id.* at 429, 339 S.E.2d at 139. Indeed, the Residency Agreement sets forth in comprehensive detail the services that Brookdale agreed (and

[6] Any limitation on a duty by a nursing home applies *a fortiori* here to Brookdale, an assisted living facility, since residents of a nursing home require more supervision than those still able to live in assisted living.

did not agree) to provide to Ms. Walker, including with respect to her supervision. (*See* Residency Agreement, Section I.A-D., R. pp. 24-25.) Accordingly, Ms. Weaver's claims, which at their core arise out of Brookdale's alleged failure to supervise Ms. Walker at all times, "necessarily depend upon the terms, authority, and duties created and imposed by [the Residency Agreement]." *Wilson*, 416 S.C. at 417, 786 S.E.2d at 582.

Ms. Weaver therefore seeks to benefit directly from certain terms of the Residency Agreement – those provisions compelling Brookdale to provide services to Ms. Walker – but simultaneously seeks to avoid other terms she does not like – the Arbitration Provision. Ms. Weaver cannot have it both ways: she cannot rely on the Residency Agreement to support allegations that Brookdale breached its obligations to Ms. Walker (and her family members) in an attempt to hold Brookdale liable in connection with Ms. Walker's death, while at the same time claiming that she is not bound by the Arbitration Provision because she didn't sign the Residency Agreement. *See id.* at 417-18, 786 S.E.2d at 582-83; Residency Agreement, Section I.A-D, R. pp. 24-25.

It is irrelevant that Ms. Weaver does not assert a "breach of contract" claim under the Residency Agreement, or otherwise expressly rely on the terms of the Residency Agreement in articulating her tort claims, or that Ms. Weaver attempts to characterize her claims as deriving from harm she personally suffered. As explained in *Wilson*, "[t]he rule in the Fourth Circuit is that 'a broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained.'" 416 S.C. at 417, 786 S.E.2d at 582. It is sufficient that Ms. Weaver would not be able to reach Brookdale but for the Residency Agreement creating a relationship between Brookdale and Ms. Walker, and thus would receive a direct benefit from

the Agreement if she prevails on her claims. *See id.* at 417-18, 786 S.E.2d at 582-83 (nonsignatory insureds were subject to an agency agreement's arbitration clause because, although the insureds did not expressly rely on the agreement to make their claims, they would not have been able to reach the insurers in the absence of that agreement creating a relationship between the insurer and signatories).

For these reasons, under principles of equitable estoppel, Ms. Weaver is bound by the Residency Agreement's Arbitration Provision, and is compelled to arbitrate any claims she may have against Brookdale regarding Ms. Walker's death. This conclusion directly comports with the FAA's mandate that arbitration provisions be construed broadly in favor of arbitration and aligns directly with the strong South Carolina and federal public policy favoring arbitration of disputes. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 119 (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." (citing *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993))); *Wilson,* 416 S.C. at 413, 786 S.E.2d at 580 (Ultimately, "[t]he 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." (quoting *Landers*, 402 S.C. at 109, 739 S.E.2d at 213)); *Pearson*, 400 S.C. at 289-90, 733 S.E.2d at 601 ("Because the determination of whether a nonsignatory is bound by a contract presents no state law question of contract formation or validity, the court looks to the federal substantive law of arbitrability to resolve the question.").

CONCLUSION

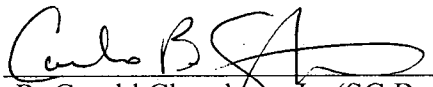
This Court should reverse the decision of the trial court on all issues. Ms. Weaver fails to state a legally cognizable claim of negligence because her sole remedy is found in the wrongful

death statute, and the wrongful death claim arising from Ms. Walker's death has already been asserted and settled. Ms. Weaver fails to allege facts showing that Brookdale owed her any independent legal duty. Ms. Weaver's negligent and intentional infliction of emotional distress claims likewise fail. Ms. Weaver cannot allege the elements necessary for bystander liability, the sole form of negligent infliction of emotional distress that South Carolina law recognizes. Likewise, Ms. Weaver alleges no facts suggesting that Brookdale engaged in any intentional and outrageous conduct and, in any event, she alleges no facts suggesting that Brookdale specifically directed any conduct toward her with the intent of causing her emotional distress. Accordingly, this Court should grant Brookdale's motion to dismiss the complaint pursuant to Rule 12(b)(6), SCRCP.

Alternatively, Ms. Weaver's claims must be arbitrated pursuant to the Arbitration Provision in the Residency Agreement. Ms. Weaver seeks to benefit directly from the terms of the Residency Agreement by relying on Brookdale's obligations under that agreement to further her claims. Therefore, Ms. Weaver is equitably estopped from rejecting the Residency Agreement's Arbitration Provision and must comply with its mandate.

(Signature page to follow.)

Respectfully submitted,

August 7, 2018 By: 

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

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

Stephanie Walker Weaver,.....Respondent,

v.

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

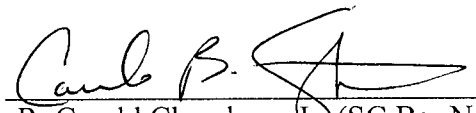
Of whom Brookdale Senior Living, Inc., HBP LeaseCo, LLC
d/b/a Brookdale Charleston, and Terri Robinson are the ..... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the BRIEF OF APPELLANTS and the REPLY BRIEF OF APPELLANTS comply with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's Order dated April 15, 2014.

(Signature page to follow.)

August 7, 2018

By: 

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