THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stillwell, Circuit Court Judge

Appellate Case No. 2019-000887

Estate of Mozana Clinkscales by and through the appointed Personal Representative Charlie E. Clinkscales, Individually, and on behalf of Statutory Beneficiaries, ... Respondent

v.

Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia-Place Greenville, ... Appellants.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the circuit court correctly concluded a proposed nursing home arbitration contract was invalid when the contract demands an inscrutable process for arbitrator selection, provides no guidance for conducting arbitration proceedings, and effectively ensures Respondent may not access key evidence before the arbitration hearing.
2. Whether the circuit court correctly found the Arbitration Agreement does not bind Mother's uconsenting beneficiaries identified by statute to recover under South Carolina's distinct, independent wrongful death claim.

STATEMENT OF THE CASE

Charlie Clinkscales ("Son") brought this civil action on behalf of the estate of his mother Mozana Clinkscales ("Mother") for alleged torts resulting in Mother's death while a resident of a Magnolia Place-Greenville ("the Facility"), a Greenville nursing home owned or operated by Appellants. See generally Compl., filed Oct. 4, 2018. Mother was first admitted to the Facility in January 2011 with Son signing the required admission contracts pursuant to authority granted by a power of attorney filed with the Greenville County Register of Deeds that same month. (Power of Attorney of Mozana Clinkscales; Hearing Tr. (Dec. 18, 2018) at 19). Notably, Son was not presented with any contracts related to arbitration for this first admission. More than two years later, Mother was discharged from the Facility to receive more extensive medical care and later returned to the Facility for a second admission on August 30, 2013. (Admission Agreement, Aug. 30, 2013). Once again, Son signed admission paperwork and this time was presented with a document entitled "Facility-Resident/Representative Arbitration Agreement" ("Arbitration Agreement").

The Arbitration Agreement purports to require arbitration for all claims related to Mother's stay at the Facility. (Arbitration Agreement). The Arbitration Agreement's parties are unclear from its language. "Magnolia Place-Greenville" is identified as one of its parties and the other is either Mother as "Resident" *or* Son as "Resident's Durable Power of Attorney for Health Care/Resident's Legal Guardian/Resident's Responsible Party." Id. Son signed the Arbitration Agreement on a line designated for "Resident/Representative." Id. The Arbitration Agreement also purports to bind not only its parties but also "their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of" Mother. Id.

During her second admission at the Facility, Mother was the victim of falls, assaults, and harassment. (Compl. ¶ 49). In August through October 2015, Mother was harassed by a male resident with a known history of intimidating behavior. (Compl. ¶ 50). Mother voiced her fear of the resident to the Facility's staff but nothing was done to address the matter. (Compl. ¶¶ 51-53). Also in October 2015, Mother suffered a broken hip in a fall from her bed that could have been prevented had staff members responded to her call bell. (Compl. ¶¶ 55-56). Mother was hospitalized and underwent hip surgery but suffered complications leading to her death. (Compl. ¶¶ 57-61).

Son filed suit on October 4, 2018, alleging claims for negligence, corporate negligence, neglect of a vulnerable adult, and wrongful death. (Compl. ¶¶ 283-322). The Complaint alleged a joint venture and other vicarious liability claims against the Facility as well as Appellant Fundamental Clinical and Operational Services, LLC ("FCOS") and Fundamental Administrative Services, LLC ("FAS") on the theory that FCOS and FAS exercise direct financial and operational control over the Facility in ways that contributed to Mother's injury. (Compl. ¶¶ 296-303).[1] FCOS and FAS answered on November 8, 2018. (FCOS and FAS Answers). On November 12, 2018, the Facility filed a motion to dismiss, compel arbitration, and stay proceedings. FCOS and FAS filed motions that same day asking the circuit court to stay all proceedings involving them pending the outcome of the Facility's arbitration motion.

The Honorable Robin B. Stillwell heard the motions on December 18, 2019, and entered an order on February 5, 2019, denying the Facility's motion to dismiss, compel arbitration, and stay proceedings. (Hearing Tr. Dec. 18, 2018; Order, dated Feb. 5, 2019). On February 14, 2019,

[1] The Complaint also named Rusty Flathmann as a defendant but he was dismissed by stipulation on Dec. 28, 2018.

the Facility filed a motion pursuant to Rule 59(e), SCRCP, asking the court to reconsider its order. FCOS and FAS also filed 59(e) motions, arguing the order failed to specifically rule on their motions to stay. Judge Stillwell held a hearing on these motions on April 22, 2019. (Hearing Tr. Apr. 22, 2019). In a May 11, 2019 Form 4 Order, Judge Stillwell "denie[d] the Motions to Compel Arbitration as to 'Survival Action' and the 'Wrongful Death Action.'" (Form 4 Order, dated May 11, 2019). He also denied FCOS and FAS' motions to stay. Id. Appellants served a timely notice of appeal on May 28, 2019.

STANDARD OF REVIEW

A circuit court's order denying arbitration is immediately appealable. Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 121, 747 S.E.2d 461, 464 (2013). Arbitrability determinations are subject to *de novo* review. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014) (citing Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)). However, the circuit court's factual findings may not be reversed on appeal if "any evidence reasonably supports the findings." Id. While both federal and South Carolina policy favors arbitration of disputes, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000). Ultimately, arbitration "is a matter of consent, not coercion." Volt Information Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

ARGUMENT

1. The Arbitration Agreement is Unenforceable Because it Lacks Material Terms and is Unconscionable.

Arbitration is a matter of contract and, since the Facility seeks to compel arbitration, it bears the burden of proving the Arbitration Agreement is a valid, enforceable contract. Fici v.

Koon, 372 S.C. 341, 642 S.E.2d 602, 604 (2007). This burden is not eased and the substantive requirements of South Carolina contract law are not lessened simply because state law maintains a pro-arbitration policy and the Federal Arbitration Act ("FAA") imposes an equal treatment principle for arbitration contracts. See 9 U.S.C. § 2 (stating that arbitration contracts governed by FAA are subject to many of same state-law defenses applicable to other contracts). The Arbitration Agreement did not form a valid contract under South Carolina law because there was no meeting of the minds on its material terms. The Arbitration Agreement includes an inscrutably vague arbitrator selection process and no guidance on how, when, or under what rules arbitration proceedings will be conducted. Moreover, the Arbitration Agreement is unenforceable because it was presented under circumstances that presented Son with no meaningful choice and its one-sided terms effectively force him to walk into the arbitration hearing without any hope of obtaining the evidence needed to prove his claims.

a. Several Material Terms are Absent or Too Vague to Form a Valid Contract.

The Arbitration Agreement purports to be a dispute resolution contract but it provides no useful guidance on who will be tasked with resolving Son's claims or how the accompanying proceedings will be conducted. Parties cannot form a valid contract without forming "a meeting of the minds . . . with regard to all essential and material terms." Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) (citing Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989)). Even if a contract mentions a material term, the contract fails if the term is defined or described in vague terms. Reed v. Boykin, 282 S.C. 614, 320 S.E.2d 68 (Ct. App. 1984) (quoting 1 Corbin on Contracts § 95 (1963) ("Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract")). These are contract formation

requirements, and Appellants bear the burden of proving both that the Arbitration Agreement contains all material provisions and that it describes them in definite terms. Allegro, Inc. v. Scully, 418 S.C. 24, 791 S.E.2d 140 (2016) ("Part of proving that some enforceable contract exists is being able to identify the terms thereof").

Arbitrator selection and the rules governing arbitration proceedings are material terms of an arbitration contract. To determine whether a term is material, South Carolina courts consider the "essence of the agreement" Grant, 383 S.C. at 131, 678 S.E.2d at 439 (citing Ex Parte Warren, 718 So.2d 45, 49 (Ala. 1998)). For example, in a lease contract, essential terms include a description of the boundaries of the leased premises, the lease term, as well as the time and manner of payment. Player, 299 S.C. at 105, 382 S.E.2d at 894. For commercial sales contracts, price, time, and place are all indispensable terms. Ross Electric, Inc. v. Cooler Erectors of Atlanta, Inc., 418 S.C. 424, 429, 794 S.E.2d 382, 385 (Ct. App. 2016) (quoting McPeters v. Yeargin Constr. Co, Inc., 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986)). Similarly, for service contracts, essential terms include the scope of the work to be performed and the amount of compensation. Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014).

Grant identified some essential provisions in a nursing home arbitration contract by recognizing a contract provision stating an exclusive arbitral forum was "integral" to the agreement such that its unavailability rendered the whole contract invalid. 383 S.C. at 131-32, 678 S.E.2d at 438-39. While the Arbitration Agreement does not have an exclusive arbitral forum provision, Grant helps define what constitutes a material term in a nursing home arbitration contract. Grant found a term is "integral" where it has "wide-ranging substantive implications" on the outcome of arbitration proceedings. Id. at 132, 678 S.E.2d at 439 (quoting Singleton v. Grade A Market, Inc.,

607 F. Supp. 2d 333, 339 (D. Conn. 2009)). Grant found that arbitrator selection met this standard because it would affect "the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration." Id. Thus, provisions going to the heart of the substantive law applied and the procedures used during the arbitration process are material because they "may substantially affect the substantive outcome of the resolution" of the dispute. Id. at 132, 678 S.E.2d at 439.[2]

Deeming these absent terms material is also consistent with the practical understanding of the "essence" of an arbitration contract—i.e. opting out of civil litigation in favor of a different dispute resolution process. While arbitration is intended to be different and less thorough than litigation, its "essence" includes the same parameters litigation parties would encounter. In litigation, the general parameters of proceedings include commencement of an action (Rules 3-6, SCRCP), motions and other pre-trial proceedings (Rules 7-16, SCRCP), discovery and other opportunities for parties to develop their claims/defenses (Rules 26-36, SCRCP), and trial matters (Rules 38-52, SCRCP). Respondent is not suggesting arbitration much match or imitate the South Carolina Rules of Civil Procedure, but an arbitration contract that does not clearly address *any* of these matters fails in its essence of describing a recognizable dispute resolution process.

Here, the Arbitration Agreement lacks any valid terms on arbitration procedures. There is no guidance on the timetable for arbitration proceedings and no designation of rules to govern procedure or evidence. When confronted with this gap in the Arbitration Agreement during

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[2] Respondent acknowledges York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 83, 749 S.E.2d 139, 147 (Ct. App. 2013) held that an arbitration contract's lack of rules on discovery, arbitration costs, and arbitration initiation procedures were not material terms. However, while York attributes this holding to Grant, the Supreme Court never suggested in Grant that a complete lack of guidance on procedure and evidence is an ancillary matter. Instead, the court strongly implied "the law, procedure, and rules" of arbitration are all matters "that may substantially affect the substantive outcome" of arbitration proceedings. 383 S.C. at 132, 678 S.E.2d at 439.

proceedings below, Appellants argued the gap was filled by the Arbitration Agreement's reference to the South Carolina Alternative Dispute Resolution/Mediation Rules. (Hearing Tr. Dec. 18, 2018 at 8). But, the only substantive evidentiary and procedural provisions in those rules for arbitration proceedings is Rule 12 which, by its terms, "applies only to non-binding arbitrations." Rule 12(a), SCADR. The Arbitration Agreement states that proceedings under its terms "shall be binding on all parties." (Arbitration Agreement). Moreover, it would not save the Arbitration Agreement for Appellants to argue the parties can negotiate the applicable procedural and evidentiary rules later. Ellis v. Taylor, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1994) ("A contract leaving material terms open for future agreement is void for indefiniteness").

Similarly, the Arbitration Agreement's arbitrator selection process is too vague to permit enforcement. The process must begin with the parties collaborating on a choice of arbitrator culled from "a panel having experience and knowledge of the health care industry." (Arbitration Agreement). The origin, identity, and composition of this "panel" is not identified in the Arbitration Agreement and is in any no inferable from its language. It is not clear if this panel currently exists or whether the parties must form it. It is not clear how many individuals comprise the panel or how they are chosen. It is not clear whether the "experience and knowledge" requirement requires a medical education or whether it could include attorneys, judges, insurance adjustors, or individuals from other industries. Appellants argued to the circuit court the arbitrator selection process is sufficiently definite because it is "very detailed." (Hearing Tr. Dec. 18, 2018 at 8, line 21). The "panel" process may be detailed but, without any guidance on its composition, it is impossible to implement.[3] Ultimately, when a contract is indefinite on an important term, the

[3] Appellants may also argue the vagueness of the "panel" is immaterial because both the Arbitration Agreement and the FAA provide an alternative mechanism for arbitrator selection. (Arbitration Agreement) (providing for selection by court); 9 U.S.C. § 5. But, by its terms, this

proper judicial response is not to imply or infer a term but rather to refuse enforcement. Ebert v. Ebert, 320 S.C. 331, 339, 465 S.E.2d 121, 126 (Ct. App. 1995) (citing 17A Am. Jur. 2d Contracts § 192 (1991)).

b. The Arbitration Agreement is Unconscionable.

If Son is required to proceed under the Arbitration Agreement, he will be forced to walk into an arbitration proceeding without the key documents needed to prove his case and with no way to know what testimony key fact witnesses will provide. Appellants, on the other hand, have the relevant documents in their exclusive possession, have an opportunity to learn what the crucial witnesses know, and have even been granted a sneak peek at Son's expert witness testimony. In essence, the Arbitration Agreement tilts the process in Appellants' favor and places Son at a competitive disadvantage not permitted under South Carolina law.

The Arbitration Agreement does not permit Son any right to discovery before an arbitration hearing. Since the Arbitration Agreement is governed by the FAA and is silent on discovery, the practical result is that there will be no discovery unless Appellants choose to allow it. COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 275 (4th Cir. 1999). If this case is removed from the litigation process, there is no mechanism (before an arbitrator or court) for Son to compel the production of important information from Appellants, their agents, or third parties. The FAA permits an arbitrator to compel a witness's attendance at the arbitration hearing but "[n]owhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the

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alternative mechanism may not be implemented unless the "panel" process fails. (Arbitration Agreement) (allowing judicial selection only if "the parties cannot reach a mutual decision on the selection" through the "panel" process). The "panel" process cannot fail (or even commence) because its parameters lack the clarity required to be attempted. See also Grant, 383 S.C. at 131, 678 S.E.2d at 438 (finding "great merit" in the rulings of other courts that deem 9 U.S.C. § 5 inapplicable when an arbitration contract designates an unavailable arbitration forum).

authority to demand that non-parties provide the litigating parties with documents during pre-hearing discovery." Id.

A contract that purports to compel arbitration in a nursing home negligence case without the possibility of discovery is unconscionable. Under South Carolina law, unconscionability is "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007) (quoting Carolina Care Plan, Inc. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). The "absence of meaningful choice" requirement "speaks to the fundamental fairness of the bargaining process." Simpson, 3873 S.C. at 25, 664 S.E.2d at 669. The key factors on this element include (1) the nature of the injuries suffered by the plaintiff; (2) whether the plaintiff is a substantial business concern; (3) the relative disparity in the parties' bargaining power; (4) the parties' relative sophistication; (5) whether there is an element of surprise in the inclusion of the challenged clause; and (6) the conspicuousness of the arbitration clause. Id. (citing Carlson v. Gen. Motors Corp., 883 F.2d 287, 293 (4th Cir. 1989)).

Applying these factors to the Arbitration Agreement shows the fundamental unfairness of the bargaining process. Initially, the Arbitration Agreement is an adhesion contract in that it was printed on a standardized form, offered to Mother (through Son as power of attorney) on a take-it-or-leave-it basis, and did not offer Mother any chance to negotiate. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Adhesion contracts are not per se unconscionable but identifying a document as an adhesion contract is a starting point for analyzing the substantive factors. Simpson, 373 S.C. at 27, 644 S.E.2d at 669. The first factor favors

Respondent because Mother's injuries were personal and substantial. Appellants' alleged negligence led to a broken hip, major surgery, and her premature death.

The other factors also favor Respondent. Son was not a substantial business concern. He was acting only as his Mother's representative with the aim of obtaining the nursing care she urgently needed. In contrast, Appellants are sophisticated business entities evidenced in many ways including the complex organization structure they have built to manage the Facility's operations. See Compl. ¶¶ 8-12. The disparity in bargaining power is considerable. Appellants operate nursing homes in nearly twenty states and report annual revenues exceeding $ 1 billion. (Compl. ¶¶ 5, 13). Mother, on the other hand, was an elderly woman in poor health in need of care to continue from day to day. Finally, the key language of the Arbitration Agreement was not conspicuous relative to any of the other admission paperwork the Facility presented to Son. Plus, the lack of conspicuousness and surprise elements relate not only to how prominently an arbitration provision is featured in a contract but also consider whether the way in which the arbitration provision is drafted imposes substantive limitations that would not be immediately apparent to an unsophisticated person. E.g. Simpson, 373 S.C. at 27-28, 644 S.E.2d at 670 (finding arbitration provision "inconspicuous . . . in light of its consequences" including the deprivation of statutory remedies). Finally, Son likely did find the Arbitration Agreement surprising since Appellants chose not to propose one during Mother's earlier admission to the Facility.

The Arbitration Agreement's discovery bar also meets the second unconscionability requirement because it terms are decidedly oppressive and unfair to Respondent. This Court has signaled its refusal to tolerate arbitration contracts with such extensive discovery restrictions. In Lucey v. Meyer, 401 S.C. 122, 143, 736 S.E.2d 274, 285 (Ct. App. 2012), the court found an employment arbitration contract was not unconscionable, rejecting the "oppressive terms" factor

only after finding the contract "places no apparent restrictions on the introduction of depositions of witnesses into arbitration proceedings." The restrictions lacking there are present here. The inescapable reality of the Arbitration Agreement is that Respondent will have no opportunity to conduct depositions. South Carolina's federal district court has found an arbitration contract unconscionable because of "severe discovery limitations." Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582, 614 (D.S.C. 1998). In Hooters of America, the employer went too far when it limited its employee to noticing one deposition unless the arbitrator found a "substantial need" for more. Id. at 601. The Arbitration Agreement poses a far more restrictive view of discovery by excluding all depositions. Several rulings from other jurisdictions have likewise refused to allow nursing homes to shut their former residents out of discovery.[4]

Appellants may argue a zero-discovery process is acceptable because it applies with equal force to Appellants. This argument fails for multiple reasons. First, an arbitration proceeding amounting to trial by ambush is hardly consistent with the South Carolina Rules of Alternative Dispute Resolution the Arbitration Agreement purports to incorporate. See Rule 1, SCADR (stating that arbitration "shall be construed to secure the *just*, speedy, inexpensive *and collaborative* resolution" of disputes) (emphasis added). Second, while a zero-discovery rule may seem like an equal burden for both sides, its effects are unequally detrimental to a plaintiff in a nursing home case. Nursing home negligence occurs almost exclusively on the nursing home's

[4] See e.g. Estate of Ruszala v. Brookdale Living Communities, Inc., 1 A.3d 806, 821 (N.J. Super. App. 2010) (limiting plaintiff to expert depositions is "palpably egregious" and "clearly intended to thwart' plaintiffs' ability to prosecute a case involving resident abuse"); Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538, 540, 545 (E.D. Pa. 2006) (discovery limitations were unconscionable when they allowed expert depositions but barred deposition of NH employees or other fact witnesses); Prieto v. Healthcare & Retirement Corp. of Am., 919 So.2d 531, 533 (Fla. App. 2005) (reversing order compelling arbitration since contract included unconscionable discovery restrictions).

property, recorded in documents within the home's exclusive control, and performed or witnessed by individuals in the home's employ. If Appellants want to visit the scene, review video of an incident, or speak to the allegedly at-fault individual, they can do so without limitation.

But, without the ability to send a request for production or notice of deposition, Son's counsel will have none of this information when the arbitration hearing begins. Appellants have no duty to provide documents or to permit inspections. Even attempting to speak with Appellants' employees would present a potential ethical violation. See Rule 4.2, RPC, Rule 407, SCACR. This case shows just how vast the information disparity can be and what a hurdle it poses to a plaintiff's efforts to investigate his claim. Son claims part of Appellants' wrongdoing was in failing to protect Mother from an abusive resident and in failing to respond to either previous incidents between the two or Mother's repeated complaints about the resident's conduct. (Compl. ¶¶ 49-51). The Complaint further alleges this is more than negligence because Appellants were on notice of these issues but did nothing to address them. (Compl. ¶¶ 52-54).

To further investigate and prosecute this claim, Son needs the Facility's records showing Mother's complaints as well as records from the abusive resident's file. Hearing Tr. Dec. 18, 2018 at 29, lines 5-16. By drafting a contract that prevents discovery, Appellants have made sure Son's counsel will have no access to this information and made it far less likely Appellants could face the prospect of punitive damages for alleged reckless misconduct. Finally, the disparity in pre-hearing information is exacerbated further by how South Carolina law required Respondent to initiate the current claims. Pursuant to S.C. Code Ann. § 15-79-125, these claims began not with a Summons and Complaint but rather a Notice of Intent to File Suit which required Respondent to provide an expert affidavit at the earliest possible stage. Thus, Appellants knew the identity of Respondent's expert and an outline of her opinions before the Complaint was even filed. If the

Arbitration Agreement is enforced, Respondent will enter the final arbitration hearing known nearly nothing about Appellant's expert witnesses.

In sum, the Arbitration Agreement was an adhesion contract offered to an elderly woman in desperate need of nursing home services under circumstances that deprived her of any meaningful choice. Moreover, the Arbitration Agreement imposes severe discovery restrictions that tilt the arbitration process and outcome dramatically in Appellants' favor. As several other courts have held, contracts like the Arbitration Agreement are unconscionable.

2. Mother's Purported Consent to Arbitration Does Not Extend to the Wrongful Death Claim Covering Her Family Members' Losses.

The circuit court correctly concluded the Arbitration Agreement did not cover Plaintiff's wrongful death claim. Appellants now insist Ms. Clinkscales (through the agent appointed in her power of attorney) had the power to waive the right to a jury trial on a claim that did not exist when the Arbitration Agreement was presented, would never belong to her, would not accrue for years, and covered injuries suffered exclusively by other people. No South Carolina authority supports these propositions. In fact, even if Ms. Clinkscales could agree to arbitrate her own claims, the history and structure of South Carolina's wrongful death and survival statutes show wrongful death is a distinct, independent claim she could not force to arbitration because it solely benefits family members who never agreed to forego a jury trial.

a. South Carolina Law does not Allow a Nursing Home Arbitration Contract to be Enforced Against Unconsenting Non-Parties.

None of Ms. Clinkscales' wrongful death beneficiaries were parties to the Arbitration Agreement and none assented to its terms. Thus, Appellants may not rely on the Arbitration Agreement to dismiss the wrongful death claim without overcoming the presumption that a contract may be enforced only by its parties. Touchberry v. City of Florence, 295 S.C. 47, 48-49,

367 S.E.2d 149, 150 (1988). A South Carolina contract may be enforced against a non-party only with proof of (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; or (5) estoppel. Wilson v. Willis, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (citing Malloy v. Thompson, 409 S.C. 57, 561-62, 762 S.E.2d 690, 692 (2014)). Since Appellants do not attempt to apply any of these theories, the Arbitration Agreement does not apply to the wrongful death claim.

Appellants may later argue the Arbitration Agreement applies because Ms. Clinkscales' family members are third-party beneficiaries, but that argument is flawed for multiple reasons. First, Appellants cannot meet the requirements to show Ms. Clinkscales' family members qualify as third-party beneficiaries. Appellants must show the Arbitration Agreement was "made for the benefit of" the family members and the Arbitration Agreement's terms were intended to provide a "direct, rather than an incidental or consequential" benefit to them. Fabian v. Lindsay, 410 S.C. 475, 765 S.E.2d 132 (2014) (quoting Windsor Green Owners Ass'n v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004)). The only supposed benefit Appellants suggest the family members receive is the promise that the Facility's legal claims will also be subject to arbitration. Appellants' Br. at 8. But, Appellants have not identified any legal claims the Facility could ever have against the family members. As detailed below, any legal claims the Facility had against Ms. Clinkscales at her death could only be asserted against her estate, not the statutory beneficiaries for her wrongful death claim. S.C. Code Ann. § 15-5-90 (providing that, at a person's death, legal claims "survive both to and against" the decedent's personal representative). Since there is not even the possibility of a legal claim by the Facility against the wrongful death beneficiaries, there is no "direct benefit" to support a third-party beneficiary argument.

Second, the South Carolina Supreme Court's latest ruling in this area is ambivalent at best as to whether a third-party beneficiary theory can ever be used to force arbitration on unconsenting non-parties. Willis, 426 S.C. at 338 n. 7, 827 S.E.2d at 174 n. 7 (citing Comer v. Micor, Inc., 436 F.3d 1098, 1102 (9th Cir. 2006) (finding third-party may be able to enforce a contract but "certainly cannot be bound to a contract it did not sign or otherwise assent to")). This Court has rejected third-party beneficiary arguments to enforce nursing home arbitration contracts on multiple occasions. Thompson v. Pruitt Corp., 416 S.C. 43, 57, 784 S.E.2d 679, 687 (Ct. App. 2016) (quoting Dickerson v. Longoria, 995 A.2d 721, 742 (Md. 2010) ("a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement")); see also Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 574, 813 S.E.2d 292, 308 (Ct. App. 2018) (nursing home conceded Thompson foreclosed third-party beneficiary argument).

b. South Carolina Courts Define Wrongful Death as a Distinct, Independent Claim that is Not Derivative of Claims Held by a Decedent at her Death.

Unable to claim Ms. Clinkscales' family members are parties and unable to prove they are third-party beneficiaries, Appellants are left to argue the wrongful death claim actually belongs to Ms. Clinkscales' estate rather than the statutorily designated beneficiaries. However, this argument incorrectly lumps together the wrongful death claim and the survival of tort claims Ms. Clinkscales had against Appellants at the time of her death. The history and development of South Carolina's wrongful death claim and survival statute show wrongful death is something entirely different than tort claims surviving a person's death for the benefit of her estate. South Carolina courts have long recognized these are two very different theories of liability with distinct origins, purposes, and results. Even in more modern cases, their distinct nature is evidenced in how the claims are litigated and how juries resolve them.

The differences begin with the statutes themselves. The wrongful death statute, originally known as Lord Campbell's Act, is now codified beginning at S.C. Code Ann. § 15-51-10 and it creates a cause of action for tortious conduct causing death. A wrongful death claim covers losses and awards damages exclusively to statutorily-defined beneficiaries consisting of the decedent's children, parents, or heirs. S.C. Code Ann. § 15-51-20. Damages are paid to these beneficiaries because a wrongful death claim is directed at their losses suffered as a result of the decedent's absence. Scott v. Porter, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (citing F. P. Hubbard & R. L. Felix, The South Carolina Law of Torts 610 (2d ed 1997) and Mishoe v. Atl. Coast Line R.R., 186 S.C. 402, 197 S.E. 97 (1938) (holding that wrongful death damages consist of (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use and comfort of the decedent's society, experience, knowledge, and judgment).

In contrast, the legislature positioned the survival statute in a completely different code chapter. Both wrongful death and survival relate to "civil remedies and procedures" (Title 15) but, while wrongful death is a distinct claim warranting its own designation (Chapter 51), the survival statute is classified within an existing chapter (Chapter 5) identifying the proper "parties" for pursuing legal claims. A plaintiff may cite the survival statute to support a suit for any number of legal claims. When that claim is based on the decedent's personal injury, the available damages include "medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." Scott, 340 S.C. at 170, 530 S.E.2d at 395 (citing Gowan v. Thomas, 237 S.C. 223, 225, 116 S.E.2d 761, 762 (1960)). Thus, while courts and parties often refer to a "survival claim," this term is a misnomer because the survival statute does not create a claim, it only corrects a misguided common-law rule that assumed a person's existing legal claims died with her. Bemis v. Waters,

170 S.C. 432, 170 S.E. 475, 476 (1933) (holding that survival statute exists as a "correct[ion]" to common-law rule); see also Johnson v. Baptist Three Rivers Hosp., 984 S.W.2d 593, 596 (Tenn. 1999) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 127, at 945 (5th ed. 1984) (noting error of common-law rule was that it made it "cheaper for the defendant to kill the plaintiff than to injure him")). The statutory scheme alone shows wrongful death and survival are distinct claims accruing at different times and governed by different statutes of limitation. S.C. Code Ann. § 15-3-560(6) (measuring three-year limitations period for wrongful death claims from date of death).

The statutes' history also shows their distinctiveness and independence. In Grainger v. Greenville, S. & A. Railway Co., the South Carolina Supreme Court traced the divergent tracks wrongful death and survival claims have taken over their development. 101 S.C. 399, 85 S.E. 968 (1915). In that case, the trial court had dismissed a survival action because the decedent's administrator (equivalent to the modern "personal representative") had previously recovered on a wrongful death claim. Id. at 968. The wrongful death statute in place then was nearly identical to current section 15-51-10 and it provided a claim "in favor of the beneficiaries" but nothing for "the deceased or his estate." Id. at 969. When the legislature recognized this abnormality, it responded by creating the predecessor to the modern survival statute. Id. (citing 1912 Code section 3693). Grainger held this legislative history conclusively established wrongful death and survival claims are distinct and independent. Id.; Complete Auto Transit, Inc. v. Bass, 229 S.C. 607, 611, 93 S.E.2d 912, 914 (1956) (reading Grainger to hold "judgment in an action for wrongful death did not bar a subsequent action for pain and suffering of the decedent"). The claims are distinct because "[t]he beneficiaries, the cause of action, the measure of damages, are all different." Grainger, 85 S.E. at 969.

Building on Grainger and other similar cases, Bass further highlighted the claims' distinctiveness by holding judgment in a wrongful death claim does not have claim preclusive effect on survival claims. 229 S.C. at 611-12, 93 S.E.2d at 914; see also Gleaton v. Southern Ry. Co., 212 S.C. 186, 192, 46 S.E.2d 879 (1948) ("verdict and judgment for defendant in an action under the survival statute will not estop the personal representative of the deceased in an action under Lord Campbell's Act subsequently tried"). Bass also addressed a reason why wrongful death claims are often erroneously perceived as derivative of survival claims. In both, the decedent's personal representative is the named plaintiff. 229 S.C. at 612, 93 S.E.2d at 914. But this fact alone is not determinative because, when asserting wrongful death and survival claims, a personal representative "function[s] under two separate and distinct trusteeships having no relationship to each other beyond the fact that their origin is referable to the death of the same person." Id. In other words, while it is the personal representative's name in the caption for a wrongful death claim, "it is clear . . . the real parties to the action were the beneficiaries." Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539, 541 (1928) (finding personal representative "only in the capacity of a trustee in bringing [wrongful death] suit for the real parties in interest").

In light of the history and structure of wrongful death and survival claims, a number of other reported opinions have rejected the notion that the former is derivative of the latter. As early as 1907, the South Carolina Supreme Court recognized a wrongful death action is not the survival of an action which the deceased had in his lifetime, but is a "new cause of action." Osteen v. Sothern Ry., Carolina Division, 76 S.C. 368, 57 S.E. 196, 200 (1907). Claussen held that a wrongful death claim is "not a continuation" of any claim the decedent had before her death. 145 S.E. at 540. A wrongful death claim is "independent" of claims the decedent had during her life and "wholly different" than any other claim available at her death. Wellman v. Bethea, 243 F. 222

(E.D.S.C. 1917); In re Mayo's Estate, 60 S.C. 401, 38 S.E. 634, 638 (1901). Wrongful death and survival claims are "separable and distinct." Keel v. Seaboard Air Line Ry., 122 S.C. 17, 114 S.E. 761, 762 (1922); see also Wilson v. Massengill, 124 F.2d 666, 669 (6th Cir. 1942) (describing South Carolina's wrongful death and survival claims as "separate and distinct"). In sum, Appellants err in asking the Court to find wrongful death is derivative of survival claims because "[t]he object, scope, and measure of damages" is different for the two claims. In re Mayo's Estate, 38 S.E. at 638.

These distinctions remain valid even in more modern cases. This Court continues to recognize the wrongful death statute created a new cause of action that did not exist at common law, accrues only at the decedent's death, and which is subject to its own statute of limitation. Weaver v. Lentz, 348 S.C. 672, 678, 561 S.E.2d 360, 363 (Ct. App. 2002). Accordingly, wrongful death actions and survival claims consider the losses related to a person's death from completely different perspectives. Boyle v. U.S., 948 F. Supp. 2d 577, 580 (D.S.C. 2012); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) ("In a wrongful death case, the issue of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death"). Their distinctiveness is even plainer in practice. Since they compensate different groups for different losses, wrongful death and survival claims can result in dramatically different verdicts. For example, in Scott, the jury awarded $ 600,000 in actual damages on a medical malpractice claim alleged under the survival statute and $ 1.5 million in punitive damages for the same claim. 340 S.C. at 162, 530 S.E.2d at 391. On a wrongful death claim in the same action, the jury awarded $ 1.5 million in actual damages and $ 2 million in punitive damages. Id. Since these two claims addressed such different losses by different people, the disparate awards were not inconsistent, and this Court affirmed the verdict in its entirety. Id.

at 169-71, 530 S.E.2d at 394-96; see also Welch, 342 S.C. at 303-05, 536 S.E.2d at 420-21 (affirming verdict of less than $29,000 for survival claim and $ 3 million for wrongful death claim).

In sum, extensive South Carolina precedent rejects Appellants' contention that wrongful death claims are derivative of claims a person holds at the time of her death. In multiple cases dating back over a hundred years, South Carolina's appellate courts have held wrongful death claims are "distinct," "independent," "separate," "wholly different," and "not a continuation" of claims a decedent could have filed during her lifetime. These cases, along with the history and structure of the relevant statutes, show Ms. Clinkscales did not bind her wrongful death beneficiaries to arbitration.[5] Those beneficiaries are the "real parties" to the wrongful death claim and they did not sign the Arbitration Agreement or otherwise consent to waive their right to a jury trial.

c. None of the South Carolina Authority Appellants Cite Supports Arbitration in this Case.

Appellants do not address any of this extensive South Carolina case law showing wrongful death is a distinct, independent claim. Instead, Appellants cite an indiscriminate collection of case law, federal district court orders, and secondary sources to suggest South Carolina courts have already ruled wrongful death is a derivative claim and a nursing home resident can agree to

[5] The Court should also reject Appellants' alternative argument that at least Son's portion of the wrongful death claim should be forced to arbitration. Appellants' Br. at 14. Son asserted the wrongful death claim in his role as Mother's personal representative for her statutory beneficiaries which included himself and four siblings. Compl. ¶ 1. Appellants suggest Son's signature on the Arbitration Agreement was both as personal representative and as wrongful death beneficiary. However, Son signed the contract on the "Resident/Representative" signature line and is identified in the opening paragraph as "Resident's Durable Power of Attorney for Health Care/Resident's Legal Guardian/Resident's Responsible Party." There is no reasonable reading of these provisions to suggest Son was a party to the Arbitration Agreement in his individual capacity. Cf. Thompson, 416 S.C. at 57, 784 S.E.2d at 687 (holding that even if nursing home resident's daughter did sign arbitration contract in her individual capacity, the contract was unenforceable unless the resident's estate was attempting to enforce the contract).

arbitrate this claim even though it benefits different people for their own particularized damages. None of the authorities Appellants cite support that conclusion and none squarely address the question now before the Court. Instead, it is the precedent cited in Argument 2(b) that is most helpful for showing the true nature of a wrongful death claim under South Carolina law.

Appellants claim the South Carolina Supreme Court addressed the arbitrability of wrongful death claims in Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014). However, Dean addressed a very different issue related to forum selection clauses and a contractually-designated arbitral forum no longer willing to arbitrate the legal claims in question. Id. at 382, 759 S.E.2d at 733 (finding "outcome of this appeal turns" on effect of arbitral forum provision). Plus, Dean did not even compel arbitration in the case before it. The Supreme Court rejected a few reasons cited for invalidating a nursing home arbitration contract but remanded the matter to the circuit court to address two others. Id. at 387, 759 S.E.2d at 736. Appellants rely on a sentence in one of Dean's footnote but read far too much into that sentence. Id. at 378 n. 3, 759 S.E.2d at 731 n. 3 ("We note that courts may not refuse to compel arbitration simply because a wrongful death claim is involved").

This footnote addressed an overly broad pronouncement in the appealed order suggesting wrongful death claims are categorically excluded from arbitration. Id. (citing circuit court order statement stating that "wrongful death actions are not something that's arbitrated"). That type of rule would violate the FAA's equal-treatment principle. Id. (citing Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532-33 (2012)); see also Kindred Nursing Ctrs., Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017). However, that is not the argument Respondent makes here. A wrongful death claim may be arbitrable in instances where the statutory beneficiaries agree to do so. Son simply argues an individual's consent to arbitrate may not be grafted into a wrongful death claim

that pays different people for different losses. Dean does not reject that argument or even consider it.

Moreover, Appellants err in arguing the circuit court's order violates the equal-treatment principle. Appellants' Br. at 7-8, 14. Several other courts have held that rejecting arbitration for wrongful death claims in similar cases does not violate Marmet or any other Supreme Court precedent on the equal-treatment principle.[6] Refusing to compel arbitration here does not mean wrongful death claims can never be arbitrated. Instead, as other courts have recognized, it simply means the nursing home failed to get consent for arbitration from the proper people. Finally, reading Dean's footnote to have any bearing on the parties' dispute does not adequately account for either side's arguments on the key issue. As discussed in Argument 2(d) below, the interaction of wrongful death and survival claims for arbitrability purposes requires a careful analysis of statutory language and history as well as case law interpreting the two claims. Dean had no reason to undertake this analysis and has nothing to offer the Court in resolving this appeal.

Appellants then argue "courts" read Dean to hold that a nursing home resident's arbitration contract applies to wrongful death claims. Appellants' Br. at 14 n. 15. But, Appellants cite just one unreported federal district court order. Id. (citing THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, Civil Action No. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015)). The

[6] See Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 360 (Ill. 2012) (unlike Marmet, Illinois was not applying a categorical anti-arbitration rule but was rather applying "common law principles governing all contracts"); Vickers v. Canal Pointe Nursing Home & Rehab Ctr., 2016 Ohio 3244, 2016 WL 3080329 (Ohio App. June 1, 2016) (finding that Ohio Supreme Court precedent preventing arbitration of wrongful death claims did not create categorical ban Marmet bars because it applied generally applicable contract law rule against enforcing contract against person who had not assented); Life Care Ctrs. of Am., Inc. v. Neblett, Civil Action No. 5:14-cv-00124-TBR, 2014 WL 7179652, at * 2 and n. 1 (W.D. Ky. Dec. 17, 2014) (finding Kentucky law did not eliminate a category of claims from arbitration but rather simply "defines to whom a wrongful death claim accrues").

soundness of Gilbert's reasoning and the continued viability of its conclusions are questionable. The district court ordered arbitration but did not feel the need to squarely address the issue raised here because the court concluded the plaintiff "ha[d] not brought a wrongful death action . . . for the benefit of individual heirs." Id. at * 3. The court's meaning is unclear, but the court was mistaken if it was implying the proceeds of a wrongful death claim do not flow to individuals identified as statutory beneficiaries. S.C. Code Ann. § 15-51-40; see also Claussen, 145 S.E. at 541 (finding beneficiaries are the "real parties" to a wrongful death claim). Additionally, Gilbert was never more than persuasive authority and is likely now bad law. Gilbert applied equitable estoppel and third-party beneficiary theories to compel arbitration, but this court has since rejected those theories twice in nursing home cases. 2015 WL 1268185, at * 2; see also Hodge, 422 S.C. at 556-58, 574-75, 813 S.E.2d at 299-300, 308; Thompson, 416 S.C. at 57-62, 784 S.E.2d at 687-89.

Appellants also ask the Court to declare wrongful death a "derivative" claim based on one sentence in *South Carolina Jurisprudence*. Appellants' Br. at 12-13. However, Appellants fail to direct the Court to the most pertinent entry. In a chapter devoted to wrongful death claims, this secondary source includes a section entitled "[s]eparate, independent cause of action" which notes the existence of two claims at the tortious death of a person and, crucially, "***the wrongful death action and the survival action involve different, independent claims.***" 28 S.C. Jur. Wrongful Death § 5 (emphasis added). Finally, Appellants contend that, since section 15-51-10 permits wrongful death claims only when the decedent would have had a claim if she survived, South Carolina law intends to give an individual control over a wrongful death claim which includes the right to determine the method by which it will be resolved. Appellants' Br. at 12-13 (citing Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988)); see also Estate of Stokes ex

rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E.2d 143 (2010) (citing Quattlebaum). But, Quattlebaum (and Stokes) did not address arbitration at all. Instead, they simply held that if an individual allows the statute of limitations on a personal injury claim to lapse during her life, then a wrongful death claim may not be used after her death to "revive" the stale claim. Stokes, 389 S.C. at 349, 699 S.E.2d at 146.

The statute of limitations is not at issue here and Quattlebaum/Stokes have never been cited as justification for binding non-parties to an arbitration contract. Plus, the legal provisions holding that an individual may prevent a wrongful death claim by ignoring or settling a personal injury suit during her life do not mean the individual may control the manner in which the wrongful death claim will be resolved *should she choose to leave it intact.* Several courts have made this distinction explicitly. Oklahoma, like South Carolina, bars a wrongful death suit if the decedent ended a personal injury claim during her lifetime based on the same wrongdoing. Boler v. Sec. Health Care, LLC, 336 P.3d 468, 477 (Okla. 2014) (citing Haws v. Luethje, 503 P.2d 871 (Okla. 1972)). Even so, Boler refused to apply a nursing home resident's arbitration contract to a wrongful death claim because doing so would violate contract principles on mutual assent. Id. at 471 and n. 5.

Pennsylvania also bars wrongful death claims if the decedent allowed her personal injury claim to lapse. Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 657 (Pa. Super. 2013) (citing Moyer v. Rubright, 651 A.2d 1139 (Pa. Super. 1994)). Yet, just like Oklahoma, Pennsylvania does not extrapolate from that rule the notion that an individual can bind her wrongful death beneficiaries to arbitration. Pisano, 77 A.3d at 657, 662 (refusing to find wrongful death beneficiaries lost jury trial right "where they did not waive it of their own accord"). Thus, Quattlebaum/Stokes and their interpretation of section 15-51-10 do not require arbitration in this

case. Had Mother settled her claims against Appellants before her death, Son could not bring a wrongful death claim on behalf of the statutory beneficiaries. But it does not follow that Mother had the ability to direct the wrongful death claim to arbitration. Since Mother had a viable dispute with Appellants when she died, a proposed arbitration of the wrongful death claim must consider whether the wrongful death beneficiaries agreed to waive a jury trial.

In short, none of the South Carolina authority Appellants cite support arbitration in this case. The cases in Argument 2(b) are more apt precedent showing South Carolina recognizes wrongful death is a distinct, independent, and non-derivative legal claim.

d. Many Other Jurisdictions Have Refused to Compel Arbitration of Wrongful Death Claims Based on a Decedent's Arbitration Contract.

In light of the historical and structural differences between South Carolina's wrongful death and survival statutes, as well as substantial case law defining and treating the resulting claims distinctly, the Court should reject Appellants' attempt to use Ms. Clinkscales' purported assent to the Arbitration Agreement to force arbitration on a wrongful death claim. At least a dozen other jurisdictions have rejected Appellants' argument.[7] Four different state supreme courts have done

[7] FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191, 209-10, 213 (Md. App. 2016); Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490, 494 and n. 1 (Pa. 2016) (citing Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 660 (Pa. Super. 2013)); Boler v. Sec. Health Care, LLC, 336 P.3d 468, 477 (Okla. 2014); Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., 316 P.3d 607, 614 (Ariz. Ct. App. 2014); Daniels v. Sunrise Sr. Living, Inc., 212 Cal. App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); Carter v. SSC Odin Operating Co, LLC, 976 N.E.2d 344, 355-58 (Ill. 2012); Ping v. Beverly Enters., Inc., 376 S.W.3d 581 (Ky. 2012); Woodall v. Avalon Care Center-Federal Way, LLC, 231 P.3d 1252 (Wash. App. 2010); Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009); Bybee v. Abdulla, 189 P.3d 40 (Utah 2008); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007); Chapman v. Cardiac Pacemakers, Inc., 673 P.2d 385 (Idaho 1983); see also Strickholm v. Evangelical Lutheran Good Samaritan Soc'y, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

so over just the last ten years. While some jurisdictions have taken a contrary view[8], South Carolina's statutory language and case law discussed above are more in line with the states that refuse to compel arbitration under similar circumstances. In the aggregate, to the extent the Court looks beyond South Carolina law, persuasive authority supports the circuit court's order.

The en banc Missouri Supreme Court addressed a similar case in Lawrence v. Beverly Manor. There, an elderly woman was admitted to a nursing home with the assistance of her daughter. 273 S.W.3d at 526. During the admission process, the daughter signed an arbitration contract on her mother's behalf pursuant to a power of attorney that had been in place for several years. Id. Similar to the Arbitration Agreement, the contract in Lawrence purported to bind both the mother and "all persons whose claim is derived through or on behalf" of the mother including family members, legal representatives, and heirs. Id. Shortly after admission, the nursing home's staff members allegedly dropped the mother and caused fatal injuries. Id. Just like this case, the family filed wrongful death and other legal claims, the nursing home cited the contract in an effort to compel arbitration, and the trial court denied the motion. Id. at 526-27.

The Missouri Supreme Court affirmed, finding wrongful death is not derived from any claim the mother may have had at or before her death. Id. at 529. All of the key components cited in Lawrence to show a wrongful death is not derivative are also present under South Carolina law. Lawrence started by reviewing the wrongful death statute's language. Id. at 527 (quoting Mo. Rev. Stat. § 537.080). Missouri's statute is substantially similar to its South Carolina counterpart with both creating a claim for torts causing fatal injuries and both indicating a wrongful death claim arises if the decedent would have been able to pursue a claim had she survived. Id.; see also S.C.

[8] E.g. Laizure v. Avante at Leesburg, Inc., 109 So.3d 752 (Fla. 2013); In re Labatt Food Serv., L.P., 279 S.W.3d 640 (Tex. 2009); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004); Ballard v. Southwest Detroit Hosp., 327 N.W.2d 370 (Mich. App. 1982).

Code Ann. § 15-51-10. Missouri courts interpreted that language to create a new cause of action that is distinct from survival claims and not a transmitted right from a decedent to her family members. Lawrence, 273 S.W.3d at 527 (citing O'Grady v. Brown, 654 S.W.2d 904, 910 (Mo. 1983)). South Carolina precedent makes these same points. Weaver, 348 S.C. at 678, 561 S.E.2d at 363 ("[t]he wrongful death statute . . . created a new cause of action"); Claussen, 145 S.E. at 540 (wrongful death is "not a continuation" of an existing claim); Keel, 114 S.E. at 762 (wrongful death and survival claims are "separable and distinct"). Considering both the statutory language and precedent, Lawrence concluded a wrongful death claim is "separate and distinct." 273 S.W.3d at 528. Its holding was buttressed by the fact that Missouri wrongful death claims compensate different people for different losses. Id. at 528-29. The South Carolina Supreme Court has cited the same factors to highlight a wrongful death claim's independence. Scott, 340 S.C. at 168-70, 530 S.E.2d at 394-95 (listing available damages in wrongful death and survival claims); In re Mayo's Estate, 38 S.E. at 638 (finding "object, scope, and measure of damages" in wrongful death claims is "wholly different").

Lawrence followed and was soon joined by a number of other states in rejecting the notion that a nursing home resident could contract away a jury trial on a wrongful death claim compensating her family members or heirs for their unique damages. These cases often point to a common set of factors to show a wrongful death claim is not derivative of the decedent's claims. First, a wrongful death claim is likely not derivative when wrongful death and survival are expressly distinguished in the statutes. Pisano, 77 A.3d at 656 (reading statutes to mean "two separate and distinct causes of action arise from a single injury" resulting in death); see also Woodall v. Avalon Care Center-Federal Way, LLC, 231 P.3d 1252 (Wash. App. 2010) (describing wrongful death and survival as "conceptually different"). Second, the two claims should be viewed

as separate when they are brought by different people to compensate different individuals for different losses. In Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., an Arizona appellate cited the different claimants, different beneficiaries, and different damages as definitive proof a wrongful death statute "confers and original and distinct claim" and is neither "derived from nor is it a continuation of claims which formally existed in a decedent." 316 P.3d 607, 613 (Ariz. Ct. App. 2014) (quoting Huebner v. Deuchle, 514 P.2d 470, 470-71 (Ariz. 1973)); see also FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191, 203 (Md. App. 2016) (holding that survival and WD claims are distinct because they are "by different persons, the damages go into different channels, and are recovered upon different grounds"); Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 599 (Ky. 2012) (concluding wrongful death is independent claim in part because it belongs to the beneficiaries and is "meant to compensate them for their own pecuniary loss").[9]

Third, many of these opinions find wrongful death to be a non-derivative claim because it accrues at a different time than a survival claim. In Carter v. SSC Odin Operating Co, LLC, the Illinois Supreme Court concluded wrongful death is independent because it "does not accrue until death" while the state's survival statute "simply allows a representative . . . to maintain those . . . actions that had already accrued." 976 N.E.2d 344, 354 (Ill. 2012); see also Boler, 336 P.3d at 477; Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007) (employee could not agree to arbitrate wrongful death claims "because he held no right to those claims; they accrued

[9] Kentucky law is somewhat different than South Carolina in that its wrongful death claim is guaranteed by the state's constitution. Ping, 376 S.W.3d at 598. A couple of other states have constitutional guarantees and noted them in rejecting arbitration. Boler v. Sec. Health Care, LLC, 336 P.3d 468, 476 (Okla. 2014); Bybee v. Abdulla, 189 P.3d 40, 44-45 (Utah 2008). However, these cases are still relevant precedent because none of them relied exclusively on wrongful death's constitutional status to reject the argument Appellants raise here. See e.g. Ping, 376 S.W.3d at 598 (noting constitutional provision but concluding "we need not invoke the Constitution" to find wrongful death is a distinct, independent claim).

independently to his beneficiaries for the injuries they personally suffered"). In other words, a wrongful death claim does not accrue or, as one court put it, "vest" in the statutory beneficiaries until the decedent's death. Strickholm v. Evangelical Lutheran Good Samaritan Soc'y, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

Finally, these cases show the error in Appellants' interpretation of a "derivative" claim. The Arbitration Agreement purports to extend to "any person deriving their claim through" Ms. Clinkscales. Appellants seem to argue wrongful death is sufficiently derivative because S.C. Code Ann. § 15-51-10 permits a wrongful death claim only if the decedent could have brought a claim for the same harm before she died. Appellants' Br. at 12. Many of the cases from other states cited above found wrongful death was not a derivative claim despite statutes like section 15-51-10. Boler, 336 P.3d at 472-77; Carter, 976 N.E.2d at 358-59; Woodall, 231 P.3d at 1259 ("characterizing the wrongful death claims as 'derivative' does not support the proposition that the heirs must arbitrate their claims for wrongful death"). By arguing that a statute like section 15-51-10 was enough to force a wrongful death claim to arbitration, Carter found parties like Appellants "overstate[] the significance of the derivative nature of a wrongful-death action" especially where, here as in Carter, there is extensive case law and structural differences demonstrating wrongful death is an independent claim. Similarly, Boler held that while a statute like 15-51-10 might make wrongful death "partially derivative" in a limited sense, it would still be improper to compel arbitration since wrongful death accrues separately and compensates statutory beneficiaries directly for their personal losses. 336 P. 3d at 472, 477 (finding a resident's signature could not compel arbitration on wrongful death claim unless that claim was "wholly derivative"); see also Pisano, 77 A.3d at 659-60 (providing detailed discussion of definition for "derivative" and

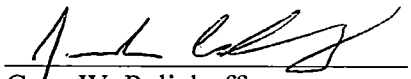
rejecting arbitration because while wrongful death claims are inherently "derivative of the decedent's injuries," they "are not derivative of decedent's rights").

In sum, persuasive authority does not support Appellants' argument that South Carolina's wrongful death claim is "derivative" such that a nursing home resident's agreement to arbitrate applies to a wrongful death claim. A dozen states have considered statutes similar to section 15-51-10 and found wrongful death is a distinct, independent claim.

CONCLUSION

Based on the arguments stated above, Respondent respectfully requests the Court affirm the circuit court's ruling. The Arbitration Agreement, purportedly a dispute resolution contract, lacks essential terms on how and by whom the parties' disputes will be resolved. Moreover, by depriving Respondent access to any information in Appellants' possession, the Arbitration Agreement imposes unconscionable discovery restrictions that would place Respondent at a significant disadvantage if forced to arbitrate. Alternatively, Appellants cannot compel arbitration on the wrongful death claim because Mother's wrongful death beneficiaries never agreed to waive their right to a jury trial. South Carolina law expressly holds that wrongful death is a "separate," "distinct," and "independent" claim for which the beneficiaries are the "real parties" in interest. Without the beneficiaries' consent, forcing arbitration on the wrongful death claim violates core South Carolina contract law principles.

Respectfully submitted,



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Rock Hill, SC
March 10, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stillwell, Circuit Court Judge

Appellate Case No. 2019-000887

Estate of Mozana Clinkscales
By and through the appointed
Personal Representative Charlie
E. Clinkscales, Individually, and
On the behalf of Statutory Beneficiaries ..... Respondent

v.

Fundamental Clinical and Operational
Services, LLC; Fundamental Administrative
Services, LLC; and THI of South Carolina
At Magnolia Place at Greenville, LLC d/b/a
Magnolia-Place Greenville ..... Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of March, 2020, she served counsel for the Appellants with a copy of the Respondent's Initial Brief in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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PO Box 993
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Honorable Jenny Abbott Kitchings
SC Court of Appeals Clerk of Court
1220 Senate Street
Columbia, SC 29201

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Paralegal to Jordan Calloway

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March 10, 2020

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

Re: Estate of Mozana Clinkscales, et al. v. Fundamental Clinical and Operational Services, LLC, et al.
Appellate Case No. 2019-000887

Dear Mrs. Kitchings:

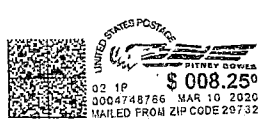
Please find enclosed for filing one (1) original and one (1) copy of the Respondent's Initial Brief and Respondent's Designation of Matter To Be Included in the Record on Appeal in the above-referenced matter. Return the filed copies in the enclosed envelope.

If you have any questions, feel free to contact our office.

Sincerely,

Jordan C. Calloway

JCC/ksj
cc: Stephen Brown, Esquire
Donald J. Davis, Jr., Esquire
John J. Owens, Esquire
Russell G. Hines



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