STATE OF SOUTH CAROLINA COUNTY SPARTANBURG	)	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
White Oak Manor of Spartanburg, Plaintiff, vs. Paulette Smith-Young, Defendant, AND Paulette Smith-Young, Individually and as The Personal Representative of the Estate of Genobia Smith, Deceased, Third-Party Plaintiff, v. White Oak Manor-Spartanburg, Inc., d/b/a White Oak of Spartanburg, and White Oak Management, Inc., Third-Party Defendants.	)	CIVIL ACTION NO.: 2018-CP-42-04174 **Order Regarding Third-Party Defendant White Oak Management Inc.'s Motion to Compel Arbitration**

Hearing Date:	December 18th, 2019, at 9:30 a.m.
Hearing Judge:	Grace Gilchrist Knie
Counsel 3rd-Pty Defendant:	Chad M. Graham
Counsel 3rd-Pty Plaintiff:	Raymond Paul Mullman, Jr., GaryW. Poliakoff, & Edward John Waelde
Court Reporter:	Michael R. Watts

This matter was before the Court on Wednesday, December 18th, 2019, at 9:30 a.m., in Spartanburg County, SC, the Seventh Judicial Circuit upon Third-Party Defendant White Oak Management, Inc.'s Motion to Compel Arbitration. Attorney Chad M. Graham of The Ward Law

Firm, PA was present and representing the interests of the Third-Party Defendant. Attorneys Raymond Paul Mullman, Jr., Gary W. Poliakoff, and Edward John Waelde of Poliakoff & Associates, P.A. were present representing the interests of the Third-Party Plaintiff. Michael R. Watts was the Court Reporter.

PROCEDURAL BACKGROUND:

This action began with the filing of a Summons and Complaint in Magistrate Court, Case Action Number 2018-CV-42-10106803. A Consent Order to Transfer the Case to Spartanburg County Court of Common Pleas was signed by the Honorable James D. Willingham, II, Magistrate Judge, on November 20th, 2018, and filed December 3rd, 2018. Plaintiff and Third-Party Defendants filed a Motion to Dismiss the counterclaim and Third-Party Complaint on June 9th, 2019. Defendant and Third-Party Plaintiff filed a Motion to Compel on July 9th, 2019. Defendant filed a Motion for Summary Judgment on August 5th, 2019. Plaintiff and Third-Party Defendants filed a Motion to Compel Arbitration on September 13th, 2019. A Consent Order concerning the Agreements of Counsel was signed by Honorable Judge Grace Gilchrist Knie on September 20th, 2019 and filed the same day. The Consent Order stated the following:

> "Defendant Paulette Smith-Young's Motion for Summary Judgment is granted as to the collection action by Plaintiff White Oak Manor-Spartanburg against her in her individual capacity. Third-Party Plaintiff Paulette Smith-Young, individually, and as the Personal Representative of the Estate of Genobia Smith's Motion to Compel against Third-Party Defendant White Oak Manor-Spartanburg is moot. Third-Party Plaintiff Paulette Smith-Young's Motion to Compel against Third-Party Defendant White Oak Management, Inc. is withdrawn without prejudice. Third-Party Defendants' Motion to Dismiss all claims against White Oak Manor Spartanburg, Inc., d/b/a White Oak of Spartanburg, Inc. is granted without prejudice. Third-Party Defendants' Motion to Dismiss all claims against White Oak Management, Inc. is withdrawn without prejudice."

Following the consent order, the only remaining claim in the action is the Third-Party Plaintiff's action against Third-Party Defendant White Oak Management, Inc. The Third-Party

Plaintiff filed a Second Motion to Compel Discovery on October 14th, 2019. The parties were before the Court to take up the Third-Party Defendant's Motion to Compel Arbitration on December 18th, 2019.

FACTUAL BACKGROUND:

This survival and wrongful death action comes as a result of the alleged corporate negligence and nursing home neglect by Third-Party Defendant White Oak Management, Inc. of Genobia Smith. Paulette Smith-Young is the daughter of and had power of attorney over Genobia Smith, who was admitted into White Oak Manor-Spartanburg, Inc., d/b/a White Oak of Spartanburg (WOM) on March 22, 2016. The Counterclaim, filed by Third-Party Plaintiff in the Spartanburg Court of Common Pleas on August 21, 2018, in response to Third-Party Defendants' original suit, filed in Spartanburg Magistrate's Court on July 23, 2018, alleges custodial neglect and corporate negligence.

The only White Oak entity presently before the Court is WOMMgt. The present claims are brought against WOMMgt as owner and operator of the facility. Third-Party Plaintiffs allege that while the corporate Third-Party Defendant did not provide direct care to Genobia Smith, it exerted significant control over the management, administration, and operation of the nursing home and is, therefore, an indispensable party and proper Third-Party Defendant in this matter because its control over the Facility directly affected the quality of care received by the residents of the facility.

The Arbitration Agreement at issue in the current matter was entered into by Genobia Smith's Attorney in Fact, Paulette Smith-Young, on March 22, 2016. The Arbitration Agreement is a separate document from the Admission Agreement. The Arbitration Agreement contains its own cover page to distinguish it from the Admission Agreement, and uses its own pagination as opposed to being included with the pagination of the Admission Agreement. Additionally, the

Arbitration Agreement requires a separate signature from the signature used to bind the resident to the Admission Agreement. There is also an "opt out" provision provided in paragraph 16 of the Arbitration Agreement, which allows the resident to opt out of solely the Arbitration Agreement. Following the "opt out provision" the Arbitration Agreement follows with a merger clause stating that, "The within Arbitration Agreement constitutes the entire agreement by and between the parties hereto..." in paragraph 21. Accordingly, the contracts do not merge and are separate contracts. No consideration was given for the Arbitration Agreement. The Arbitration Agreement purportedly provides for alternative dispute resolution for any claim a party may bring against another arising out of Genobia Smith's care at the Facility.

LEGAL ANALYSIS:

The Facility seeks to compel arbitration. Third-Party Defendant WOMMgt carries the burden to prove that a valid and enforceable arbitration agreement exists. The party seeking to establish contractual waiver of jury trial bears the burden of proof to establish that the waiver was signed in a "knowing, voluntary and intentional" capacity.[1] In interpreting a jury trial waiver narrowly, some courts have also emphasized "the basic principle that ambiguities in a contract are construed against the drafting party."[2] While there is a presumption in favor of arbitration agreements, this presumption only applies after the Court finds there is a valid enforceable arbitration agreement.[3] Not all arbitration clauses are enforceable. This is evident from the FAA provisions: "The court shall make an order directing the parties to proceed to arbitration" but only

[1] Wachovia Bank, National Association v. Blackburn, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014).
[2] National Acceptance Co. v. Myca Products, Inc., 381 F.Supp. 269, 270 (W.D. Penn. 1974).
[3] EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764 (2002); Toler's Cove Homeowners Association, Inc. v. Trident Construction Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003).

"upon being satisfied that the making of the agreement...is not in issue." 9 U.S.C. § 4. The FAA looks to state law to decide the threshold questions of contract formation.[4]

Whether the parties agreed to arbitrate is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

The U.S. Supreme Court has held that the FAA's savings provision allows for denial of enforcement of agreements susceptible to the general contract defenses of fraud, duress, and unconscionability.[5] Other contract defenses such as lack of consideration, lack of mutuality, and vagueness and indefiniteness, may also be considered in denying enforcement. Id.

Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.[6] The judicial inquiry may include an examination of contractual defects, such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.[7] The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement.[8]

a. *White Oak Management, Inc. waived arbitration by participating in the litigation process.*

The right to enforce an arbitration clause may be waived. Davis v. KB Homes of South Carolina, Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011). South Carolina law plainly holds that a party may waive any right it may have to pursue arbitration if it first chooses to litigate in a

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[4] Munoz v. Green Tree Financial Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").

[5] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); 9 U.S.C. § 2.

[6] Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010); Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

[7] See Sydnor v. Conseco Financial Servicing Corp., 252 F.3d. 302, 306 (4th Cir. 2001).

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

way that would render a shift to arbitration prejudicial to its opponent. Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 513, 788 S.E.2d 216, 218 (2016); Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 388, 759 S.E.2d 727, 736 (2014). The point at which a party delves too deeply into litigation to assert a right to arbitrate varies because the "analysis is heavily fact driven." Johnson, 416 S.C. at 513, 788 S.E.2d at 219 (citing Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)). Courts generally consider the following factors "when determining whether a party has waived their rights to compel arbitration:"

1. Whether a substantial length of time transpired between commencement of the action and the commencement of a motion to compel arbitration;
2. Whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and
3. Whether the non-moving party was prejudiced by the delay in seeking arbitration. Davis, 394 S.C. at 131, 713 S.E.2d at 807, citing Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

The facts here show that through its conduct, WOMMgmt waived any right it potentially had to compel arbitration in this matter. WOMMgmt on numerous occasions asked for and relied on the power of this Court during the litigation process. On July 23, 2018, WOMMgmt filed the original Summons and Complaint in Magistrate's Court against Ms. Smith-Young, which began this action. On November 20, 2018, both parties consented to transferring the case to the Court of Common Pleas. On June 10, 2019, Third-Party Defendants answered discovery requests in this matter. On October 15, 2019, after having filed the Motion to Compel Arbitration, WOMMmgt issued three subpoenas for documents under the authority of this Court. This action is also

inconsistent with the Arbitration Agreement, which does not allow for the issuances of subpoenas in the arbitration process. The issuance of subpoenas for documents constitutes a deliberate action demonstrating a utilization of authority of the Court process, and it is contrary to its own purported arbitration agreement. Further, this Court notes that WOMMgt waited nearly fifteen (15) months to file its Motion to Compel Arbitration after having filed the case in Magistrate's Court. Additionally, it then issued the aforementioned subpoenas thereafter.

The facts of this matter align with the factors laid out in Davis. The litigation, initiated by WOMMgmt, commenced on July 23, 2018, and it did not file a motion to compel arbitration until October 15, 2019, approximately fourteen (14) months later. WOMMgmt has participated in discovery by the issuance of subpoenas in this matter, asking for voluminous medical records of the Defendant/Third-Party Plaintiff. Finally, to grant arbitration now would irreparably prejudice the Defendant/Third-Party Plaintiff after they have willingly participated in the litigation process for over a year. With traditional litigation comes expenses that the Defendant/Third-Party Plaintiff has accrued over the course of this matter. These expenses would not have been necessary had the arbitration process started at the outset. Given the substantial delay and participation in discovery and litigation process, the Third-Party Defendant waived and abandoned their right to compel arbitration.

b. ***The Arbitration Agreement is not enforceable as to the parties presently before the Court, as WOMMgt is not a signatory.***

This Court notes that the purported Arbitration Agreement advanced by WOMMgt is signed by the facility and by Ms. Smith-Young. The party seeking to arbitrate, WOMMgt, is not a party to this purported Arbitration Agreement.

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

The Arbitration Agreement provided by Third-Party Defendant was signed March 22, 2016. "The necessary elements of a contract are an offer, acceptance, and valuable consideration."[9] "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."[10] Where a contract lacks valuable consideration, the contract is unenforceable. No adequate consideration exists in this case. Third-Party Defendant claims that the mutual promise to arbitrate is sufficient consideration for an arbitration agreement. The contract itself cannot be the consideration for the contract. Where there is an alleged mutual promise to arbitrate, there must be additional consideration. In this case, the mutual promise to arbitrate is illusory and of no benefit to Third-Party Plaintiff. The mutual promise to arbitrate if the amount in controversy reaches or exceed twenty five thousand dollars ($25,000.00) is at best illusory. However, in determining whether adequate consideration exists in a contract or an arbitration agreement under the FAA guided by principles of contract law, we must examine and stay within the confines of the four corners of the instrument.[11] Therefore, we must assess whether the arbitration agreement itself contains sufficient benefit in the form of a mutual exchange of promises to arbitrate.

The agreement is silent as to any consideration to support the agreement. There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the

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[9] Sauner v. Pub. Service Authority of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003).

[10] Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)).

[11] State Accident Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., et al., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)).

admission agreement. Admission can be the "direct benefit" that might force Third-Party Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. Based on recent decisions by the South Carolina Supreme Court, the Admission Agreement and Arbitration Agreement in this case are separate contracts that do not merge.[12] Thompson and Hodge applied Coleman and provided further examples of factors demonstrating "separateness" and preventing merger that apply to the facts of this case.[13]

An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. "this [Admission] Agreement or in the Arbitration Agreement." Coleman, 407 S.C. at 355, 755 S.E.2d at 455. In fact, when the Arbitration and Admission Agreements have different pagination with different signature pages, and the arbitration contract has a separate cover page stating "Arbitration Agreement," these factors further indicate the parties' intent for the Arbitration Agreement to stand by itself as an independent contract. Thompson, 416 S.C. at 52-53, 784 S.E.2d at 684-685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. Thompson, 416 S.C. at 52-53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

The "Admission Agreement" presented to the attorney in fact and typically used by this chain and facility contains an "Entire Agreement" provision, stating "this-Agreement represents

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[12] See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014) (Coleman refused to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455.

[13] See Thompson, 416 S.C. at 52, 784 S.E.2d at 684; Hodge, 422 S.C. at 563, 813 S.E.2d at 302.

the entire agreement" related to admission to the Facility. Thus, "Agreement" is a defined term in this contract and, as stated in the contract's opening paragraph, is limited to the "Admission Agreement," not the separate Arbitration Agreement. As in Hodge, the separate contracts have separate signature pages and separate pagination—i.e. the Arbitration Agreement is enumerated as pages one through four (1-4), while the Admission Agreement is enumerated as pages one through nineteen (1-19). As in Thompson, the Arbitration Agreement states its independence with its "Arbitration Agreement" title. To the extent there are any ambiguities in this contract language, they must be resolved against the drafter of the contracts, and therefore, against merger. Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 52-53, 784 S.E.2d at 684-685 (citing Coleman). The Facility was in sole control of the language chosen for these form contracts of adhesion, and it was its responsibility to make merger clear if it so desired. In sum, the Facility cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit.

There exists a lack of mutuality, making the Arbitration Agreement unenforceable. A lack of mutuality also makes the agreement unconscionable. An agreement may lack mutuality where it permits one party to seek relief through the courts, but does not allow the same relief for the other party. Third-Party Defendant argues that the Agreement requires both sides to be bound by arbitration. The problem is that the only party that is going to bring a dispute over care is the patient. It is virtually inconceivable that the Third-Party Defendant would sue its patient regarding a dispute over care. Since admission is unavailable as a "direct benefit" to support estoppel, Third-Party Defendant would be required to point to some benefit Genobia Smith received from the Arbitration Agreement alone. Any such attempt to find a benefit would have been futile given the Court of Appeals' unambiguous ruling in Thompson, which held that "any possible benefit

emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial." Thompson, 416 S.C. at 60, 784 S.E.2d at 688.

The mutuality of the agreement is prominently called into question by Third-Party Defendant's own actions leading up to this motion. Third-Party Defendant originally sued Third-Party Plaintiff in Magistrate's Court in Spartanburg County. Before filing the action against Third-Party Plaintiff, Third-Party Defendant made no attempt to arbitrate or discuss that option with Third-Party Plaintiff. Additionally, the Third-Party Defendant has already asked for the Court's assistance when it issued subpoenas for Third-Party Plaintiff's records from Spartanburg Regional Healthcare System, Mary Black Memorial Hospital, and Piedmont Internal Medicine. Meanwhile, the Arbitration Agreement, which White Oak wrote, does not allow for any discovery.

d. The Arbitration Agreement is missing material terms and lacks definiteness, and cannot be enforced without the Court providing material omitted terms, which would violate the Federal Arbitration Act and applicable case law.

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement."[14] The forum chosen for the arbitration to take place is just that, essential and material. Contracts may be rescinded based upon an omission of "some material element affecting the subject matter or terms and stipulations of the contract."[15] "An agreement that omits material terms may be determined unenforceable for indefiniteness."[16] "Ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not

[14] Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (citing Hughes v. Edwards, 265 S.C. 529, 220 S.E.2d 231 (1975)).
[15] Truck South, Inc. v. Patel, 339 S.C. 40, 50, 528 S.E.2d 424, 429 (2000) (citing King v. Oxford, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984)).
[16] Lindsay v. Lindsay, 328 S.C. 329, 337-338, 491 S.E.2d 583, 588 (Ct. App. 1997) (citing Ellis v. Taylor, 316 S.C. 245, 449 S.E.2d 487 (1994)).

agree to essential terms will simply not be enforced."[17] In this particular case, even if the contract was validly executed, there was no "meeting of the minds" as to the terms of arbitration, or as to the rules for arbitration, including any rules of evidence or allowance of pre-hearing discovery.

The agreement does not mention any rules that will govern a binding arbitration. The South Carolina ADR Rules do not state how the arbitration should be governed, and Rule 12 only applies to non-binding arbitration agreements. The South Carolina ADR Rules do not contain exacting details on the rules of evidence, use of subpoenas, and how to proceed with arbitration. There was no meeting of the minds as to rules governing the arbitration, or as to prohibition of discovery or rules of evidence at the arbitration hearing.

The choice of arbitral forum also dictates the rules of arbitration and the rights of the parties including, but not limited to, presentation of evidence, discovery issues, costs, expenses, and appeals. None of these terms were negotiated or discussed by the parties. No agreement or meeting of the minds as to material terms exists.

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

Even if there is a valid and enforceable arbitration agreement, it should not include the wrongful death cause of action because no one with legal authority could enter into an agreement that waives the right to a jury trial on behalf of the statutory beneficiaries. No person, other than the court-appointed personal representative, can waive the rights of the statutory beneficiaries. The wrongful death claims are separate claims. According to South Carolina's Wrongful Death Act:

> "Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages..." S.C. Code Ann. §15-51-10.

[17] Lindsay, 328 S.C. at 343, 491 S.E.2d at 591, quoting Ebert v. Ebert, 320 S.C. 331, 339, 465 S.E.2d 121, 126 (Ct. App. 1995).

The wrongful death beneficiaries are as follows:

> "Every such action shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none such, then for the benefit of the heirs of the person whose death shall have been so caused..." S.C. Code Ann. § 15-51-20.

As decided in Young v. NHC C.A. No. 2014-CP-23-00878, the wrongful death cause of action should not be included in the arbitration proceeding if a valid and enforceable arbitration agreement is found by the Court for the Survival cause of action:

> It appears that the question of whether a wrongful death action is subject to mandatory arbitration pursuant to the terms of a contract is one of first impression in South Carolina. Case law across many jurisdictions within the United States is split as to whether an arbitration agreement covers a wrongful death claim brought by the statutory beneficiaries who were not a party to the contract. [cite omitted]
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> This Court finds persuasive the reasoning of those jurisdictions that have held that an arbitration agreement executed by a signatory cannot bind the statutory beneficiaries who were not parties to the agreement. South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries, and that such claims are distinct and separate claims from those that are brought under the survival statute. *See* Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914).
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> However, this Court agrees with the Supreme Court of Kentucky which said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises, "[A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. It is something else entirely, however, to say that incidental beneficiaries of a contract-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants." Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (Ky. 2012).

A similar analysis and holding can be found in Wilson v. NHC C.A. No. 2018-CP-23-00119 & 2018-CP-23-00120, which held:

> [T]the Arbitration Agreement is unenforceable against the wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries.
>
> South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement by its own terms is an agreement between "Kenneth Wilson ('patient')" and "NHC Healthcare/Mauldin, LLC ('center')". While at some point during admission to the facility, he might have had the authority to bind himself and his claims to arbitration but was never given the chance. However, even if Ms. Owens had agreed to arbitration, he did not have the legal authority to bind his statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are Daughter and NHC Healthcare/Mauldin, LLC. No other persons are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims.
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> However, even if the Arbitration Agreement did contemplate the wrongful death statutory beneficiaries' claims, Daughter had no authority to waive the statutory beneficiaries' claims. Daughter signed the Arbitration Agreement in her *individual capacity*. However, as the Hodge court noted, actions taken by Daughter in her *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors.
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> Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, 944 F.Supp.2d 577 (D.S.C. 2012). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

CONCLUSION:

The Court acknowledges and appreciates the amount of research and preparation for the hearing by all counsel, as well as, the professionalism of all counsel in their presentations to the Court. After consideration of the record, arguments of counsel, memoranda of counsel, and the applicable law, the Court finds that:

This matter came before the Court on Defendant White Oak Management, Inc.'s (WOMMgt) Motion to Dismiss and Compel Arbitration. After reviewing the parties' submissions and arguments, the Court finds no valid arbitration contract between Ms. Smith-Young and WOMMgt because: (1) WOMMgt waived the Arbitration Agreement by starting and participating in the civil litigation process; (2) WOMMgt is not a signatory to the Arbitration Agreement; (3) there is a lack of consideration and mutuality under the circumstances; (4) material terms are missing and the Arbitration Agreement lacks definiteness; and (5) the Arbitration Agreement does not govern the wrongful death claim. For the foregoing reasons, White Oak Management, Inc.'s Motion to Dismiss and Compel Arbitration is denied.

IT IS SO ORDERED.

/s/Grace Gilchrist Knie
Honorable Grace Gilchrist Knie
Presiding Judge, Seventh Judicial Circuit

January 10th, 2020
Spartanburg, South Carolina

Spartanburg Common Pleas

Case Caption: White Oak Manor Of Spartanburg VS Paulette Smith-Young

Case Number: 2018CP4204174

Type: Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760