

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2020-000371

RECEIVED

May 22 2020

SC Court of Appeals

Estate of Jack Patterson by and
through his Personal Representative,
Jeanette Patterson, Individually and
on behalf of the Statutory Beneficiaries, ... Appellants,

v.

White Oak Manor, Inc., and White
Oak Management, Inc., ... Respondents.

INITIAL BRIEF OF APPELLANTS

Gary W. Poliakoff
Raymond P. Mullman, Jr.
John E. Waelde
Poliakoff & Associates, PA
215 Magnolia Street
Spartanburg, SC 29306
(864) 582-5472

Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
jcalloway@mcgowanhood.com

Attorneys for Appellant

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the circuit court erred in altering its earlier order and granting Respondents' motion to dismiss in the absence of a timely Rule 59(e), SCRCP motion.
2. Whether Rule 12(b)(8), SCRCP was incorrectly applied to a completed arbitration proceeding against a different party for distinct claims.
3. Whether a pre-injury exculpatory contract provision attempting to immunize a related management company and home office from liability for negligent and reckless misconduct violates South Carolina law.

STATEMENT OF THE CASE

Appellant Jeannette Patterson filed this tort action as the personal representative of the estate of her husband Jack Patterson who was a resident at White Oak Manor—Kings Mountain (“the Facility”) in 2017 for nursing home care. (Compl. ¶ 1). Mr. Patterson suffered a fractured hip and died from related complications. (Compl. ¶ 78). Ms. Patterson believes her husband’s hip injury and fatal complications were preventable and the product of two distinct forms of tortious conduct. On one level, Mr. Patterson’s needless injury and wrongful death were the product of a caregiver at the Facility failing to follow professional standards while providing nursing and custodial care.

But, tragic outcomes from poor quality nursing home care are often not just the result an individual caregiver’s error. Nursing homes are often owned, managed, or operated by separate entities that *directly* affect the quality of resident care and services through mismanagement of funds, supplies, and staff. (Compl. ¶¶ 4-5; 37-69). The Facility’s budget, training, policies, procedures and staffing are controlled by White Oak Manor, Inc. and White Oak Management, Inc. (collectively, “Respondents”). *Id.* Because Respondents’ distinct misconduct caused Mr. Patterson’s wrongful death, Ms. Patterson pursued separate claims against the Facility *and* Respondents.

Ms. Patterson had to pursue claims against the Facility through arbitration in North Carolina because, when Mr. Patterson was admitted to the Facility on February 28, 2017, Ms. Patterson signed an “Arbitration Agreement” on her husband’s behalf pursuant to a valid durable power of attorney. (See generally Arbitration Agreement). The Arbitration Agreement expressly limited its parties to the Facility and Mr. Patterson and only the “parties” were required to arbitrate their disputes. (Arbitration Agreement at 1, Introductory Paragraph, ¶¶ 1-2). Pursuant to

the Arbitration Agreement, Ms. Patterson submitted a demand for arbitration to the Facility's registered agent on December 6, 2018. (Demand for Arbitration, dated Dec. 6, 2018). The demand referenced "negligent acts or omissions" related to Mr. Patterson's death but made certain to list the Facility as sole defendant in the caption. Id. The Facility used that caption without dispute during the arbitration proceedings, and the arbitration panel likewise listed the Facility as sole defendant when entering an award in Ms. Patterson's favor on November 6, 2019. (Pla. Mem. in Opp. to Defs.' Mot. to Dismiss, Exh. 5; Pla. Mem. in Supp. of Mot. to Reconsider, Exh. 1). Correspondence between the arbitration parties made certain Respondents were not involved in those proceedings. (Pla. Mem. in Opp. to Defs.' Mot. to Dismiss, Exh. 3-4).

Since Respondents were not parties to the Arbitration Agreement, Ms. Patterson's claims against them were initiated through the standard litigation process. Ms. Patterson filed the current action on January 11, 2019, alleging negligence/gross negligence/recklessness, wrongful death, breach of fiduciary duty, and corporate negligence claims. (See generally Complaint). The common thread for each claim was Respondents' negligent management including alleged underfunding and understaffing of the Facility to a degree that there were not enough properly trained providers available to assist Mr. Patterson when he needed it most. (Compl. ¶¶ 37-69). Ms. Patterson's complaint sought compensatory and punitive damages. Id. at 19.

Respondents first filed a motion to dismiss on March 19, 2019, arguing the circuit court lacked personal and subject-matter jurisdiction and that Ms. Patterson's complaint should be dismissed pursuant to Rule 12(b)(8), SCRCp. (Defs.' Mot. to Dismiss). Alternatively, Respondents cited the Arbitration Agreement and asked the circuit court to compel the parties to this litigation into arbitration. Id. Respondents refused to participate in discovery while their motions were pending, prompting Ms. Patterson to file a motion to compel on July 10, 2019.

(Pla.'s Mot. to Compel). The circuit court heard the parties' motions on August 22, 2019, considered memoranda filed before and after the hearing, and entered an order on December 31, 2019. (Form 4 Order, dated Dec. 31, 2019, at 1). Mistakenly citing the recently concluded arbitration proceedings between Ms. Patterson and the Facility, the circuit court denied all motions "pending a final determination of the related action pending in a foreign jurisdiction." Id.

Pursuant to Rule 59(e), SCRCF, Ms. Patterson filed a motion to reconsider the circuit court's ruling on her discovery motion on January 9, 2020. (Pla.'s Mot. to Reconsider). Respondents did not file a Rule 59(e), SCRCF motion regarding the denial of their motions to dismiss. Respondents did, however, file a second motion to dismiss on February 25, 2020, raising the same arguments as their earlier motion. (Defs. 2nd Mot. to Dismiss). Since Respondents' earlier motion to dismiss the complaint had been denied and Defendants failed to answer, Ms. Patterson moved for an entry of default on February 26, 2020. (Pla.'s Mot. for Entry of Default; Aff. of Default). That same day, the circuit court held a second motion hearing. On February 27th, Respondents filed a motion to set aside default along with an answer contradicting their motion by demanding a jury trial on all claims. (Defs.' Mot. for Relief from Entry of Default; Answer at 1).

On April 14, 2020, the circuit court entered an order finding it had personal and subject-matter jurisdiction in the matter but finding Respondents were entitled to dismissal pursuant to Rule 12(b)(8) based on the arbitration proceedings between Ms. Patterson and the Facility that ended nearly six months earlier. (Order, dated Apr. 13, 2020 at 6-9). The court also found it lacked "actual jurisdiction" in the case. Id. at 10. The circuit court further found its ruling on the Rule 12(b)(8) motion mooted Respondents' alternative request to compel arbitration and Ms.

Patterson’s motion to reconsider the circuit court’s earlier discovery ruling. Id. at 11. Ms. Patterson filed a timely notice of appeal on April 24, 2020.

STANDARD OF REVIEW

A defending party may assert in its answer or in a pre-answer motion defenses stated in Rule 12(b), SCRCF. To prevail on a Rule 12(b)(8), SCRCF motion, the burden is on the moving party to establish all requirements imposed by the rule. Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 322, 701 S.E.2d 39, 44 (Ct. App. 2010). The same standard used by the circuit court applies to an appeal of an order applying Rule (12)(b)(8). Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). However, each of the rule’s requirements present questions of law for which an appellate court may conduct a *de novo* review. Id. (citing Miami Sand & Gravel, LLC v. Nance, 849 N.E.2d 671, 676 (Ind. Ct. App. 2006)).

ARGUMENT

Jack Patterson died from complications related to a broken hip suffered while a resident of the Facility. (Compl. ¶ 78). Ms. Patterson, his wife and the personal representative of his estate, set out to obtain compensation for Mr. Patterson’s injuries and the losses his untimely death caused his statutory beneficiaries. Ms. Patterson’s pursuit was bounded by two important considerations. First, her initial investigation revealed the tortious conduct causing Mr. Patterson’s injury and death went beyond the Facility to include Respondents—i.e. entities controlling the Facility’s budget, staffing levels, and employee training. Second, Mr. Patterson and the Facility were parties to an Arbitration Agreement requiring nearly all claims between them alone to be resolved without litigation.

Constrained by these two considerations, Ms. Patterson was forced to pursue the losses related to Mr. Patterson's death in two proceedings. As required by the Arbitration Agreement, Ms. Patterson served the Facility with a demand for arbitration in December 2018 and later won an arbitration award from the Facility on November 6, 2019. (Pla. Mem. in Supp. of Mot. to Reconsider, Exh. 1-2). Since Respondents were not parties to the Arbitration Agreement, Ms. Patterson was required to pursue her claims against them through litigation, and she filed the current action on January 11, 2019. Moreover, Respondents' role in Mr. Patterson's death centered on their mismanagement of the Facility's finances which left the Facility so understaffed that there was little chance Mr. Patterson could get the care he needed. Accordingly, the current complaint focused not on Respondents' vicarious liability for the Facility's negligent nursing care but on Respondents' *direct* liability to Mr. Patterson as the entities controlling the Facility's training, staffing, policy and procedures, and finances. (Compl. ¶¶ 37-69). As recognized by the South Carolina Supreme Court five years ago, this "corporate negligence" theory of liability is a distinct claim from any causes of action a resident may have against the Facility. Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 773 S.E.2d 144 (2015).

Yet, the circuit court dismissed Ms. Patterson's complaint on two grounds, first finding the *completed* arbitration proceeding was another "pending" action pursuant to Rule 12(b)(8), SCRCF, and then concluding Respondents' liability was included in the arbitration award even though Respondents had no arbitration contract with Mr. Patterson and were not parties to the arbitration proceeding. Both rulings are at odds with South Carolina law and should be reversed for the reasons stated below.

1. Respondents' Motion to Dismiss was not Properly Before the Circuit Court.

There was no timely motion from Respondents before the circuit court when the court entered its April 13, 2020, order dismissing Ms. Patterson's complaint. Respondents failed to follow the required steps for responding to the circuit court's initial order and lost any right to renew its arguments under Rule 12(b)(2) and Rule 12(b)(8), SCRCP.

Respondents initially moved to dismiss Ms. Patterson's complaint on March 19, 2019, citing Rules 12(b)(1), (2), and (8), SCRCP. (Defs.' Mot. to Dismiss, dated Mar. 19, 2019). That motion was briefed and heard along with Ms. Patterson's discovery motion on August 22, 2019. While awaiting a ruling on these motions, the arbitration proceeding between Ms. Patterson and the Facility fully ran its course. The arbitration hearing was conducted in late October, the arbitration panel entered an award on November 6th, and the Facility paid the award. (Pla. Mem. in Supp. of Mot. to Reconsider, Exh. 1). The circuit court then entered its order on December 31, 2019, denying Respondents' motion to dismiss and Ms. Patterson's motion to compel discovery "pending a final determination" of the arbitration proceedings. (Form 4 Order, dated Dec. 31, 2019).

In essence, the circuit court was unaware the arbitration proceeding had fully resolved between the time when the motions were heard and when the court entered its order. Through no fault of its own, the circuit court's order made the factual error of presuming the arbitration proceeding was ongoing. The procedural mechanism for correcting this error was a Rule 59(e), SCRCP motion to alter or amend judgment. Norris v. Heyward, 312 S.C. 67, 69, 439 S.E.2d 264, 265 (1993) (finding Rule 59(e) is the "only procedure" for a party to amend a judgment); Doe v. Doe, 324 S.C. 492, 502, 478 S.E.2d 854, 859 (Ct. App. 1996) ("the proper procedure for correcting factual errors in an order is to file a Motion to Alter or Amend"). By rule, a motion to

alter or amend judgment must be served within 10 days of receipt of written notice of the entry of the order. Rule 59(e), SCRCP.

Seeking to alter or amend the circuit court's judgment on her discovery motion, Ms. Patterson complied with Rule 59(e) by filing by serving a motion on January 9, 2020. (Pla.'s Mot. to Reconsider). Ms. Patterson's motion notified the circuit court of the arbitration proceeding's resolution and attached the arbitration panel's award. Id. and Exh. 1. If Respondents wanted further consideration of its personal jurisdiction or Rule 12(b)(8) arguments, they were required to file a motion to alter or amend judgment by January 10, 2020, notifying the circuit court that its order erroneously assumed the arbitration was ongoing and asking the court to reconsider its arguments for dismissal. Since Respondents failed to file a timely motion, an order amending judgment to dismiss Ms. Patterson's complaint was improper and the circuit court's order should be reversed. Overland, Inc. v. Nance, 423 S.C. 253, 256 815 S.E.2d 431, 433 (2018) ("A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served"); Ness v. Eckerd Corp., 350 S.C. 399, 402-03, 566 S.E.2d 193, 195 (Ct. App. 2002) (finding circuit court lacked jurisdiction to modify its order after 10 days and in the absence of a timely 59(e) motion).¹

2. A Completed Arbitration Proceeding Involving Different Parties and Claims Does Not Support Dismissal Pursuant to Rule 12(b)(8), SCRCP.

Rule 12(b)(8), SCRCP allows a court to dismiss a complaint when "another action is pending between the same parties for the same claim." The rule is a modern form of historic common-law and statutory rules regarding "abatement" of an action. Capital City, 382 S.C. at 105-06 and n. 8, 674 S.E.2d at 531 and n. 8 (citing 1962 S.C. Code § 10-642(3)); McConnell v.

¹ Respondents' successive motion to dismiss served on February 25, 2020, was also not properly before the court during the February 26, 2020 hearing. See Rule 6(d), SCRCP (requiring most motions to be served at least 10 days prior to a hearing).

Williams, 252 S.C. 573, 578, 167 S.E.2d 429, 432 (1969) (holding that courts only invoke abatement rule when the two actions have “identity of parties, causes of action, issues, and relief”). Rule 12(b)(8)’s text imposes three distinct requirements: (1) another action must be “pending”; (2) the other action must be between the “same parties”; and (3) the other action must allege the “same claim.” See also Cricket Cove, 390 S.C. at 321, 701 S.E.2d at 44. Throughout its development, courts have held the rule must be construed and applied “narrowly.” Freemantle v. Preston, 398 S.C. 186, 196, 728 S.E.2d 40, 45 (2012) (citing Capital City, 382 S.C. at 105-06, 674 S.E.2d at 531-32). The circuit court failed to properly apply that principle as none of the Rule 12(b)(8) requirements are met here.²

a. The Arbitration Proceedings Between Ms. Patterson and the Facility was not “Another Action Pending.”

The arbitration proceeding between Ms. Patterson and the Facility ending in late 2019 does not meet Rule 12(b)(8)’s “same parties” and “same claim” requirements. See Argument 2(b)-(c). But, even if those requirements were met, the circuit court erred in deeming the earlier arbitration proceeding a “pending” action because it was fully resolved before the circuit court’s ruling.

Before Ms. Patterson’s complaint could be dismissed, “[t]he pendency of the [other] action must be shown, and where there is no such showing a motion for abatement will be properly denied.” 1 C.J.S. Abatement & Revival § 32 and n. 6. (citing Mayer v. Master Feed & Grain Co., 250 S.C. 275, 157 S.E.2d 413 (1967)). By its plain meaning, “pending” refers only to

² Beyond the express textual requirements, the South Carolina Supreme Court has also suggested the rule applies only if both actions are pursued in South Carolina courts. Coe v. Burrell, 136 S.C. 410, 134 S.E. 373, 375 (1926) (finding abatement rule only applies where first suit was “*in the same jurisdiction* between the same parties for the same cause of action and relief”) (emphasis added). This requirement cannot be met here. Ms. Patterson’s North Carolina arbitration proceeding against the Facility is not in the same jurisdiction as her current South Carolina state court action against Respondents.

a proceeding that is “in continuance” or “not yet decided.” Carey v. Saffold, 536 U.S. 214, 219 (2002) (quoting Webster’s Third International Dictionary 1669 (1993)). The term applies only “until the completion of” the process it is used to describe and, therefore, cannot apply to a legal proceeding that has concluded. Carey, 536 U.S. at 219-20.

Applying this unambiguous definition of “pending,” a number of jurisdictions have found rules equivalent to Rule 12(b)(8), SCRCP do not apply when the other action has ended. See e.g., Luongo Constr. & Dev., LLC v. MacFarlane, 170 A.3d 57, 68 (Conn. App. 2017) (“once a second action has been withdrawn, there is no action pending to implicate the prior pending action doctrine”); Trapnell v. Hunter, 785 S.W.2d 427, 428 (Tex. App. 1990) (“An action is no longer ‘pending’ for purposes of abatement if it has been effectively dismissed, discontinued or otherwise terminated”); Colvig v. RKO General, Inc., 232 Cal App. 2d 56, 71, 42 Cal. Rptr. 473, 483 (Cal. App. 1965) (“a demurrer on the ground of another action pending will not be sustained if the former action is no longer pending”). Since the rule considers only whether the other action is “pending,” the reason for its end is irrelevant. Whether the other action was dismissed on procedural grounds or was fully adjudicated on the merits, it simply is no longer “pending” once it is over. Allstate Ins. Co. v. Redman Homes, Inc., 789 S.W.2d 454, 456 (Ark. 1990) (“dismissal of the first suit before the trial court determined the sufficiency of [party’s] motion to dismiss the second suit precluded the application of rule 12(b)(8) to this case because there is no other action pending”); Salem Park, Inc. v. Town of Salem, 176 A.2d 571, 573 (Conn. 1961) (finding earlier action was not “pending” because it had “gone to judgment”).

Here, there should be no dispute Ms. Patterson’s arbitration proceeding against the Facility was not “pending” when the circuit court dismissed her complaint against Respondents. The arbitration panel reached its conclusion and entered an award on November 6, 2019, more

than five months before the circuit court's order. (Pla. Mot. to Reconsider Exh. 1). Even the circuit court recognized the arbitration proceedings had "concluded" and reached "final resolution" before the court applied Rule 12(b)(8). (Order, dated April 13, 2020 at 2). In light of these undisputed facts and the plain rule language, the circuit court erred in applying Rule 12(b)(8) because there was no other action "pending" when Ms. Patterson's complaint against Respondents was dismissed.

b. Ms. Patterson's Current Action and Her Arbitration Proceeding Against the Facility were not "Between the Same Parties."

Like all of Rule 12(b)(8)'s components, the "same parties" requirement has been read narrowly. As the captions demonstrate, the parties to Ms. Patterson's complaint and the arbitration proceedings are not the same. Ms. Patterson's demand for arbitration named only the Facility as defendant and the arbitration panel's award likewise shows only the Facility was a defendant in those proceedings. (Pla. Mot. to Reconsider Exh. 1-2). In contrast, Ms. Patterson's complaint named only Respondents, which are distinct legal entities from the Facility. Each of these entities were formed separately with different articles of incorporation and in different states.³

White Oak Management, Inc. has management contracts with skilled nursing facilities in White Oak Manor's chain. It provides management services that include administrative services (General Ledger, Accounts Payable, Accounts Receivable and Billing, Information and Technology Support, Clinical Software Support, Payroll Processing) and management services related to training, development of policy and procedures, and controlling supplies, vendors, and staffing. (Compl. ¶ 5, 63-64). White Oak Management, Inc. also controls finances for

³ The Facility is a North Carolina corporation and Respondents are both incorporated under South Carolina law. (Compl. ¶¶ 2, 4; Answer ¶¶ 2, 4).

reimbursement issues and cost report preparation. White Oak Management, Inc. signs contracts on behalf of the facilities for items like liability and health insurance, employee benefits, regulatory compliance, and dictates capital expenditures and purchasing to control the use and costs of these items. (Compl. ¶ 10).

The circuit court found the “same parties” requirement was met because the complaint alleges an agency relationship among Respondents and the Facility. (Order dated April 13, 2020 at 8). However, Ms. Patterson’s complaint alleges a principal-agent relationship between White Oak Manor, Inc and White Oak Management, Inc., and between White Oak Management and its own employees and agents *not* between either Respondent and the Facility’s employees. While this may not make Respondents and the Facility precisely the same party, the circuit court reasoned, they were “substantially and functionally the same.” *Id.* at 9. However, the circuit court relied on persuasive authority in applying such a lenient standard. *Id.* at 6 (adopting “substantially or functionally” language from LG Elec. Inc. v. InterDigital Comm’ns, Inc., 98 A.3d 135, 146 (Del. Ch. 2014)). South Carolina law does not construe Rule 12(b)(8), SCRCF’s “same parties” requirement so broadly. Our appellate courts require not that the parties are “functionally” similar but instead demands “identity of parties.” Cricket Cove, 390 S.C. at 323, 701 S.E.2d at 45 (quoting Capital City, 382 S.C. at 105-06, 674 S.E.2d at 531-32); McConnell, 252 S.C. at 578, 167 S.E.2d at 432 (“Normally, an abatement of an action will be ordered only where there is an identity of parties . . .”).

For example, in Cricket Cove, the “same parties” requirement was not met even when the same individuals were parties to both actions because they were sued in their individual capacities in one action and in their official capacities in the other. 390 S.C. at 322, 701 S.E.2d at 44 (citing 1 C.J.S. Abatement and Revival § 54 (2005) (requiring “actions in question are

between the same parties in their same capacities”)). Similarly, in Collins v. Johnson, the Supreme Court rejected the notion that the “same parties” requirement is met whenever litigants in two actions have an agency relationship. 242 S.C. 112, 115-16, 130 S.E.2d 185, 187 (1963). In Collins, the first action included as a party the company that owned a vehicle involved in a collision. Id. at 123, 130 S.E.2d at 191. The second action named the company’s employee who was driving the vehicle when the collision occurred. Id. Despite the agency relationship between the company and employee, the court found the second action was not abated by the pendency of the first. Id.

Therefore, the circuit court erred in finding Rule 12(b)(8)’s “same parties” requirement was satisfied in this case. The arbitration proceeding included only the Facility, and Ms. Patterson’s complaint named only Respondents. These parties are distinct entities, and the circuit court’s construction of the “same parties” requirement does not meet the strict standard imposed in previous cases.⁴

c. Respondents’ Alleged Corporate Negligence was not the “Same Claim” as the Negligent Nursing Care Ms. Patterson Alleged Against the Facility in Arbitration.

Finally, Rule 12(b)(8) does not apply because Ms. Patterson does not allege the “same claim” in this litigation as she alleged against the Facility in arbitration. As with the “same

⁴ The circuit court devotes most of its analysis on this requirement to the proposition that Respondents are entitled to enforce the Arbitration Agreement between Mr. Patterson and the Facility. (Order dated April 13, 2020 at 7-9). That conclusion is misguided for the reasons stated in Argument 3 below. But, even if the circuit court was correct on that point, Respondents would not be entitled to a dismissal based on Rule 12(b)(8). In other words, even if Respondents actually were third-party beneficiaries to the Arbitration Agreement with enforcement rights, that would not make them parties to the arbitration proceedings Ms. Patterson already completed against the Facility and, as a result, would not support the “same parties” requirement Rule 12(b)(8) imposes.

parties” element discussed above, the “same claim” requirement is narrowly applied by South Carolina courts, and the circuit court’s application is out of step with precedent.

Cricket Cove showed how narrowly the “same claim” requirement must be applied. 390 S.C. at 323, 701 S.E.2d at 45. Traditionally, this requirement is met only if there is “identity of . . . causes of action and relief,” which means “the claim must be precisely or substantially the same in both proceedings.” Id. (quoting Capital City, 382 S.C. at 105-06, 674 S.E.2d at 531-32). This standard is not met if the claim in the second action was not covered in the first or if the two claims have different statutory origins. Cricket Cove, 390 S.C. at 323, 701 S.E.2d at 45; Conn. Nat’l Bank v. Wilson, 284 S.C. 415, 326 S.E.2d 657 (1985) (reversing grant of 12(b)(8) motion where claim in one action was to recover on promissory note and other action alleged federal statutory and common-law tort claims); see also Desoto Gathering Co. v. Hill, 541 S.W.3d 415, 418 (Ark. 2018) (reversing grant of 12(b)(8) motion where claims in two actions were “governed by separate statutory procedures and encompassed different issues”). Moreover, the South Carolina Supreme Court recognizes two actions do not always assert the “same claim” even if they seek the same ultimate relief. Freemantle, 398 S.C. at 195-96 n. 4, 728 S.E.2d at 45 n. 4.

Cricket Cove found a circuit court erred in equating “same claim” with causes of action that are merely “based upon the same facts and circumstances.” 390 S.C. at 322-23, 701 S.E.2d at 45. The circuit court made the same mistake here, concluding Ms. Patterson’s claims against the Facility and Respondents were the same because all arose out of Mr. Patterson’s 2017 nursing home admission and all sought damages related to Mr. Patterson’s broken hip and death. (Order dated April 13, 2020 at 9). The claims may have some common facts but they are distinct under South Carolina law. The bulk of Ms. Patterson’s complaint against Respondents centers on two distinct failures. First, Respondents allegedly violated industry standards and federal Center

for Medicare and Medicaid Services guidelines by providing too few nurses and nursing assistants to meet residents' needs. (Compl. ¶¶ 37-57). Second, Respondents allegedly extracted funds from the Facility that were intended for resident services and pocketed them as profits. (Compl. ¶¶ 58-69).

Respondents' alleged "understaffing" and "underfunding" of the Facility is the basis for Ms. Patterson's negligence/gross negligence/recklessness, wrongful death, and corporate negligence claims. (Compl. ¶¶ 76(A)-(E), 79-80, 98-106). In Morrow, the South Carolina Supreme Court recognized both the viability and distinctiveness of a nursing home corporate negligence claim. Like Mr. Patterson, the nursing home resident in Morrow suffered severe injuries that could have been prevented by a more robust, better trained nursing home staff and by a more diligent approach by the few staff members who were present when the injury occurred. 412 S.C. at 536, 773 S.E.2d at 145. For the errors of the nursing assistants who were with the resident when he fell, there was a negligence claim against the facility. Id. at 538, 773 S.E.2d at 146. Additionally, for the understaffing that contributed to the injuries, the plaintiff could pursue a corporate negligence claim against the separate entities (like Respondents) influenced the nursing home's operations by controlling its budget. Id.

Morrow shows a negligence cause of action against the Facility and a corporate negligence cause of action against Respondents are not the "same claim." Id. at 539, 773 S.E.2d at 146 (recognizing corporate negligence is grounded in "independent, albeit interconnected, duties owed by corporate entity to nursing home resident"); see also Manor Care, Inc. v. Douglas, 763 S.E.2d 73, 90-91 (W. Va. 2014) (finding corporate negligence claim based on "failure to allocate a proper budget" to nursing home leading to understaffing was distinct from claim based on negligent resident care decisions). Plus, contrary to the circuit court's ruling

(Order dated April 13, 2020 at 8), corporate negligence is distinct from Respondents' vicarious liability for torts of the Facility's employees under the doctrine of respondeat superior. *Id.* at 538, 773 S.E.2d at 146 (citing Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contract Physicians*, 47 S.C. L. Rev. 431 (1996) ("the theory of vicarious liability is different than the theory of direct corporate liability"))).

In fact, Ms. Patterson's claims against the Facility and Respondents must be distinct because corporate negligence can only be performed by entities like Respondents and never by the Facility itself. *Morrow*, 412 at 538, 773 S.E.2d at 146 (holding that vicarious liability and direct corporate liability are distinct because "a finding of one does not necessarily preclude a finding of another").⁵ And, to fully address and deter egregious underfunding and understaffing, punitive damages must be available against entities like Respondents to address their distinct torts.⁶

In sum, Ms. Patterson's arbitration claims against the Facility and her litigation claims against Respondents do not meet Rule 12(b)(8)'s "same claim" requirement. While the claims have some of the same baseline facts, South Carolina law recognizes corporate negligence as a distinct claim that only Respondents could commit based on a duty Respondents owed directly to Mr. Patterson and for which damages should be paid by Respondents rather than the Facility.

⁵ See also *McWilliams et al.*, 47 S.C. L. Rev. at 463 (stating that the failure in a medical facility's duty to create and enforce safety rules "can be employed either cumulatively *or as a substitute*" for a claim against a negligent medical provider) (emphasis added).

⁶ E.g. *Breslin v. Mountain View Nursing Home, Inc.*, 171 A.3d 818, 830 (Pa. Super. 2017) (finding complaint alleging intentional understaffing to increase profits stated claim for punitive damages); *Wilson v. Americare Sys., Inc.*, No. M2013-00690-COA-RM-CV, 2014 WL 791936 (Tenn. App. Feb. 25, 2014) (affirming \$ 5 million punitive damage award against management company for assisted living facility based on evidence of reckless understaffing of facility); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 363 (Ark. 2003) (finding evidence of egregious understaffing supported a \$ 21 million punitive damages award)

Since none of Rule 12(b)(8)'s requirements are met in this case, the Court should reverse the circuit court's order dismissing Ms. Patterson's complaint.

3. Reading the Arbitration Agreement to Include Ms. Patterson's Claims Against Respondents and Finding the Arbitration Proceedings Actually Resolved Respondents' Liability is Inaccurate and Inequitable.

While correctly denying Respondents' motions to dismiss for lack of personal and subject-matter jurisdiction (Order dated April 13, 2020 at 4-6), the circuit court concluded it still lacked "actual jurisdiction" in the matter (*Id.* at 10), grounding its ruling in assertions that are either unsupported by the record or that would prove grossly inequitable to any party in Ms. Patterson's position. The record does not support the circuit court's findings that the Arbitration Agreement "encompassed" Ms. Patterson's claims against Respondents or that those claims were "made, heard" and "resolved" in the arbitration proceedings. (Order dated April 13, 2020 at 10). Moreover, the circuit court's view that Arbitration Agreement paragraph 14 bars Ms. Patterson's claims, or estops her from asserting them, overlooks all the ways paragraph 14 is unenforceable and the unwarranted immunity the circuit court's order grants Respondents. In short, Ms. Patterson followed the Arbitration Agreement to the letter and filed her distinct claims against two sets of wrongdoers in two forums because that was the only way she was legally permitted to pursue them.

a. Ms. Patterson's Claims are not Encompassed in the Arbitration Agreement.

The circuit court found Ms. Patterson's claims against Respondents "are subject to and encompassed by" the Arbitration Agreement. (Order dated April 13, 2020 at 10). However, the Arbitration Agreement's plain language rejects this conclusion.

Arbitration is a matter of contract with an arbitration contract's language determining both the parties who must submit to arbitration and the scope of claims that may be included in

arbitration proceedings. Simpson v. World Financial Corp. of S.C., 367 S.C. 184, 188, 623 S.E.2d 877, 879 (Ct. App. 2005) (quoting Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 492, 593 S.E.2d 480, 484 (Ct. App. 2004)). While state and federal law recognizes a presumption in favor of arbitration, it does not apply to questions regarding the existence of an agreement to arbitrate or to “the identity of the parties who may be bound to such an agreement.” Wilson v. Willis, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019) (quoting Carr v. Main Carr Dev., LLC, 337 S.W.3d 489, 496 (Tex. App. 2011)). Those are the two crucial issues here. The parties dispute the existence of an arbitration contract between Mr. Patterson and Respondents, or stated differently, they disagree on the identity of the parties bound by the Arbitration Agreement. (Defs.’ Mot. to Dismiss, dated Mar. 19, 2019 at ¶ 4; Pla.’s Mem. in Opp. to Defs.’ Mot. to Dismiss at 2-3).

The Arbitration Agreement’s plain language answers these questions by imposing unambiguous limitations on its parties and the arbitrable claims. The Arbitration Agreement identifies its two parties in its opening sentence as only the Facility (“White Oak of KM”) and “Jack Patterson.” (Arbitration Agreement at 1). These were the only two individuals/entities that consented to the Arbitration Agreement’s terms with Ms. Patterson (pursuant to a power of attorney) signing on behalf of her husband and the Facility’s assenting through the signature of its agent. (Arbitration Agreement at 4). The Arbitration Agreement is just as specific and restrictive in defining the scope of arbitrable claims in its opening three paragraphs:

- Introductory paragraph: “the parties . . . AGREE TO ARBITRATE ALL MONETARY CLAIMS that may arise *between them*” (Arbitration Agreement at 1) (italics added).
- Arbitration Agreement ¶ 1: “All monetary claims *between the parties* . . . will be resolved by arbitration and will be subject to the terms and provisions of this Agreement” (emphasis added).

- Arbitration Agreement ¶ 2: “If one party to the Admission Agreement *between the parties hereto*” has a claim, that party must follow notice provisions and “then the parties will proceed as subsequently set forth herein” (emphasis added).

Allowing non-parties to enforce the Arbitration Agreement would also present practical problems during arbitration proceedings as only the Arbitration Agreement’s “parties” get to participate in pre-hearing discovery. Arbitration Agreement at 2 ¶ 9 (requiring each “party” to produce documents); ¶ 10 (permitting depositions to be taken only by the Arbitration Agreement’s “parties”).

Even if the Court were to venture beyond the Arbitration Agreement’s plain language, the evidence shows its parties were intended to be defined narrowly. Admission Agreement at 19 ¶ 21 (stating that arbitration is required for “all monetary claims arising between *the Facility and resident/authorized representative*”) (emphasis added); see also Admission Agreement at 1 (defining “Facility” as “WO-KM”). In total, the Arbitration Agreement’s unambiguous terms restrictively define its “parties” to include only Mr. Patterson and the Facility and then repeatedly states only the parties’ disputes must be arbitrated. Given these clear textual restrictions, allowing non-parties to enforce the Arbitration Agreement required the circuit court to effectively rewrite the contract—something South Carolina courts may not do even in the arbitration context. See e.g., Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 382, 759 S.E.2d 727, 733 (2014) (quoting Meskill v. GGNSC Stillwater Greeley, LLC, 862 F. Supp. 2d 966, 975 (D. Minn. 2012) (when an arbitration contract is specific on arbitral forum, “courts should not rewrite the[] agreement” to order arbitration elsewhere)).

Despite this preclusive contract language, the circuit court found Respondents may enforce the Arbitration Agreement as nonsignatories using equitable estoppel principles. Order at

8, 10, 11.⁷ Citing Respondents’ corporate bonds with the Facility, the circuit court concluded Ms. Patterson’s arbitration and litigation claims are “intertwined” and “inherently inseparable.” Order at 8 (quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988) and Sunkist v. Sunkist, 10 F.3d 753 (11th Cir. 1993)). However, while the circuit court was correct in recognizing some courts allow nonsignatories (like Respondents) to bind a signatory (like Ms. Patterson) to a contract with an arbitration provision using equitable estoppel, the circuit court did not acknowledge this principle’s limited application or properly apply the test established by precedent. Pearson v. Hilton Head Hosp., 400 S.C. 281, 293, 733 S.E.2d 597, 601-02 (Ct. App. 2012).

Largely developed by federal courts in the Eleventh Circuit, most courts apply the “intertwined claims” test. Pearson, 400 S.C. at 289, 295, 733 S.E.2d at 601, 604 (quoting Sunkist and MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999)); see also Brantley v. Republic Mortg. Ins. Co., 424 F.3d 392, 396 (4th Cir. 2005) (applying “intertwined claims” test and affirming denial of arbitration of claims related to South Carolina mortgage). This test is meant as a high bar to equitable estoppel because it allows a party outside a contract to enforce

⁷ The circuit court made one reference to the notion of non-party contract enforcement under a third-party beneficiary theory. Order dated April 13, 2020 at 7 (citing Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994) and Cothran v. Rock Hill, 211 S.C. 17, 43 S.E.2d 615 (1947)). However, the order does not apply that theory to Respondents and Ms. Patterson’s claims. Even if it had, the circuit court would be in error for two reasons. First, South Carolina has not definitively held that this theory is even available in the arbitration context. Wilson, 426 S.C. at 338 n. 7, 827 S.E.2d at 174 and n. 7 (noting only that “some” federal courts recognize theory in arbitration context). Second, a third-party beneficiary must be clearly intended by the contract’s parties based exclusively on the contract’s language. Pearson v. Hilton Head Hosp., 400 S.C. 281, 292, 733 S.E.2d 597, 602 (Ct. App. 2012) (quoting E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediaries, S.A.S., 269 F.3d 187, 200 n. 7 (3d Cir. 2001) (“Under the third party beneficiary theory, a court must look to the intention of the parties at the time the contract was executed”)); Brantley v. Republic Mortg. Ins. Co., 424 F.3d 392, 396 (4th Cir. 2005) (requiring intent to be derived from four corners of contract). As discussed above, the Arbitration Agreement definitively and repeatedly defines its parties narrowly and unambiguously limits arbitration to those narrowly defined parties.

its terms. See Wachovia Bank, Nat'l Ass'n v. Schmidt, 445 F.3d 762, 771 (4th Cir. 2006) (finding “fact that a signatory receives benefits from a contract” is “insufficient, in and of itself, to estop it from asserting that a nonsignatory is not entitled to invoke the contract’s arbitration clause”). Thus, equitable estoppel only applies in this context in two circumstances. First, a signatory may be equitably estopped from opposing arbitration with a nonsignatory when the signatory’s claims against that nonsignatory “must rely on the terms of” the contract containing the arbitration provision. Pearson, 400 S.C. at 295, 733 S.E.2d at 604 (quoting Goer v. Jasco Indus., Inc., 395 F. Supp. 2d 308, 314 n. 9 (D.S.C. 2005) (additional citations omitted)). Second, equitable estoppel may apply when the signatory alleges “substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.” Id.

Neither of these circumstances are present here. The first only applies if Ms. Patterson’s claims against Respondents “make[] reference to” or “presume[] the existence of” the Arbitration Agreement. Brantley, 424 F.3d at 396 (quoting MS Dealer, 177 F.3d at 947). It is not enough that claims against the nonsignatory relate to the same underlying incident as the claims against a signatory, they must also rely on the terms of the contract containing an arbitration provision. Weber v. Lewis, Civil Action No. 4:18-cv-00239-RBH, 2018 WL 5885511, at * 3 (D.S.C. Nov. 9, 2018); see also Hill v. G.E. Power Sys., Inc., 254 Fed. Appx. 426, 431-32 (5th Cir. 2007) (finding no basis for equitable estoppel “unless the plaintiff relies on the agreement to establish its cause of action”). Ms. Paterson’s corporate negligence-based claims make no reference to the Arbitration Agreement. Respondents’ duty to provide proper funding and staffing arise from their control of the Facility, not any contractual obligation.

The second circumstance described in Pearson is also absent in this case. This test is only met when a nonsignatory alleges “concerted misconduct” by a nonsignatory and signatory. E.g. Griggs v. Evans, 43 A.3d 1081, 1094 (Md. App. 2012) (applying equitable estoppel where plaintiff alleged civil conspiracy). Ms. Patterson would have to plead some form of conspiracy or “collusion” between Respondents and the Facility to support equitable estoppel. Brantley, 424 F.3d at 396. But, her complaint alleges distinct corporate negligence-based claims against Respondents arising from an independent duty owed directly from Respondents to Mr. Patterson. Morrow further rejects the notion Ms. Patterson’s claims against the Facility and Respondents are “intertwined” because, while nursing negligence and corporate negligence in the nursing home setting may relate to the same resident’s injuries, “a finding of one does not necessarily preclude the other.” 412 S.C. at 538, 773 S.E.2d at 146 (citations omitted).

Ultimately, for either test, equitable estoppel cannot apply unless there is a substantial connection between Ms. Patterson’s specific claim against Respondents and the operative terms of her Arbitration Agreement with the Facility. South Carolina’s federal district court holds that the “essential question” is “whether Plaintiffs would have an independent right to recover against the non-signatory Defendants even if the contract containing the arbitration clause were void.” Goer, 395 F. Supp. 2d at 315 (quoting Miron v. BDO Seidman, LLP, 342 F. Supp. 2d 324, 333 (E.D. Pa. 2004)). Proving Ms. Patterson’s corporate negligence-based claims depends on the Arbitration Agreement is “always the sine qua non of an appropriate situation for applying equitable estoppel” Id. (quoting In re Humana Inc. Managed Care Litig., 285 F.3d 971, 976 (11th Cir. 2002) (rev’d on other grounds, PacifiCare Health Sys. v. Book, 538 U.S. 401 (2003))). Respondents cannot make this showing. Neither the corporate negligence-based claims against Respondents nor the nursing negligence claims against the Facility were dependent on the

Arbitration Agreement which was separate from the Admission Agreement and covered only dispute resolution rather than any substantive aspects of Mr. Patterson's care. See Thompson v. Pruitt Corp., 416 S.C. 43, 60, 784 S.E.2d 679, 688 (Ct. App. 2017) (refusing to apply equitable estoppel to force arbitration based on alleged benefits of nursing home admission where admission and arbitration were governed by separate contracts).

In sum, the circuit court erred in finding Ms. Patterson's claims against Respondents were encompassed in the Arbitration Agreement because its unambiguous terms do not support that construction. Moreover, without the sine qua non for equitable estoppel, the circuit court erred in finding Ms. Patterson's claims against Respondents were "intertwined" with the arbitration proceedings against the Facility.

b. Ms. Patterson's Claims Against Respondents were not "Made, Heard" or "Resolved" in Arbitration Proceedings Against the Facility.

The circuit court also misconstrued the record by concluding Ms. Patterson presented her corporate negligence-based claims against Respondents to the arbitration panel and finding those claims accounted for a portion of the award granted by the panel against the Facility. (Order dated Apr. 13, 2020 at 10). Documents filed when the arbitration process began, while it was underway, and as it concluded all show the Facility alone was Ms. Patterson's opponent in the arbitration hearing. (Pla. Mem. in Opp. to Defs.' Mot. to Dismiss, Exh. 3-5; Pla. Mem. in Supp. of Mot. to Reconsider, Exh. 1). Plus, pursuant to Morrow, it simply was not possible for Ms. Patterson to make corporate negligence-based claims against the Facility as the duty underlying those claims is owed by Respondents alone.

Citing Ms. Patterson's demand for arbitration, the circuit court concluded her claims against Respondents were made, heard, and resolved in arbitration. (Order dated Apr. 13, 2020 at 9). But, that is not a fair reading of the demand which proposed a caption for the arbitration

proceeding naming only the Facility as defendant. (Demand for Arbitration, dated Dec. 6, 2018). The circuit court found the demand had a broad scope but that broad scope related only to the Facility's actions since the demand was directed to the Facility's registered agent alone. Id.⁸ Respondents' counsel (who also represents the Facility) accepted that proposed caption, using it in correspondence and discovery requests made during the arbitration process. (Pl. Mem. in Opp. to Defs.' Mot. to Dismiss Exh. 5). The arbitration panel itself accepted the caption and used it when publishing its award against the Facility alone. (Award of the Arbitration Panel, Pl. Mem. to Reconsider Exh. 1). In earlier litigation, Respondents even admitted on the record that their standard arbitration contract "deals with the facility only." (Pl. Mem. in Opp. to Defs.' Mot. to Dismiss Exh. 6, at 19, lines 1-11).

Along with these official acknowledgements that Respondents were not part of the arbitration process, other communications to Respondents and their counsel show they cannot credibly claim to have believed Respondents' liability was at issue or resolved during the arbitration proceedings. In two October 2018 emails from Ms. Patterson's attorneys, Respondents' counsel was placed on notice the arbitration proceeding would not include Respondents because they were not parties to the Arbitration Agreement. (Pl. Mem. in Opp. to Defs.' Mot. to Dismiss Exh. 4) (noting Ms. Patterson will file lawsuit against Respondents "while we discuss or negotiate arbitration with the facility"). Once the arbitration proceedings began in earnest in February 2019, Ms. Patterson's counsel reiterated the limited scope of her arbitration demand, telling Respondents and the arbitration panel a separate lawsuit had been

⁸ If the demand intended to include Respondents, then it would have also been served on their registered agent at the designated Spartanburg, South Carolina address in addition to the Kings Mountain, North Carolina address designated for the Facility's registered agent.

filed against Respondents because they were not parties to the Arbitration Agreement. (Pla. Mem. in Opp. to Defs.’ Mot. to Dismiss Exh. 3, at 2).

Practically speaking, there was no way Ms. Patterson could have made corporate negligence-based claims against Respondents in a proceeding where only the Facility was present, represented, and participating in limited discovery. The Facility’s agents and employees had a duty to provide reasonably competent and professional nursing care for Mr. Patterson, but the duty to adequately fund and to provide adequate and well-trained staff for the Facility belonged to Respondents alone because they alone controlled the Facility’s training, supplies, staffing, and other budgetary considerations. And, while Respondents may face vicarious liability for the Facility’s errors, Respondents alone can answer for its own financial decisions that left the Facility so ill-equipped to provide the care its residents required. Morrow, 412 S.C. at 538, 773 S.E.2d at 146 (“the theory of vicarious liability is different than the theory of direct corporate liability”). Thus, the circuit court was incorrect in finding Ms. Patterson alleged the “same tort” in arbitration that she alleges here. (Order dated Apr. 13, 2020 at 11).

The circuit court also erred in implying that, by recovering from the Facility under a broadly-worded arbitration demand, Ms. Patterson has no more damages left to collect. Id. at 10-11. Regardless of what Ms. Patterson collected from the Facility, a jury may provide additional actual damages in this case for which Respondents could seek a set off from what previously collected. Ms. Patterson’s complaint also seeks punitive damages from Respondents for egregiously diverting resources from the Facility to pocket as profits. (Compl. ¶¶ 65, 69; Compl. P. 19). Other courts have awarded punitive damages against nursing homes for corporate negligence liability. See supra at P. 15 and n. 5. Punitive damages are intended to deter the wrongdoer and others from repeating past misconduct. James v. Horace Mann Ins. Co., 371 S.C.

187, 638 S.E.2d 667 (2006) (quoting Laird v. Nationwide Ins. Co., 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964)). No amount of damages against the Facility could accomplish this important goal of South Carolina public policy.⁹

In sum, the arbitration panel did not hear or resolve Ms. Patterson's claims against Respondents. Ms. Patterson's arbitration demand, the Facility's arbitration filings, communications between Ms. Patterson and the Facility during the arbitration proceedings, and the arbitration panel's award all show Respondents were not included in those proceedings. Plus, Respondents have even acknowledged in earlier litigation that they should be treated differently than the Facility when it comes to arbitration. (Pla. Mem. in Opp. to Defs.' Mot. to Dismiss Exh. 6, at 19, lines 1-11). Finally, due to the distinct nature of a corporate negligence claim, there was no practical way Ms. Patterson could pursue Respondents' liability in an arbitration proceeding against the Facility.

c. Respondents' Reading of the Arbitration Agreement's Purported Release Provision is Illogical and Unconscionable.

The only time the Arbitration Agreement even references Respondents is in a purported release provision Respondents claim is the key to resolving this case in their favor. Respondents argue this provision somehow requires arbitration for claims against them but its plain language does not support that conclusion. Respondents' alternative position seems to be that, even if this provision does not allow them to compel arbitration, it does allow them to use arbitration

⁹ Additionally, to hold Ms. Patterson had to pursue the Facility and Respondents in a single arbitration proceeding violates an important pleading principle. When two or more entities combine to cause harm, the injured party may sue either or both in a single or separate action. Collins v. Johnson, 242 S.C. at 123, 130 S.E.2d at 190. Thus, while Ms. Patterson is entitled to only one satisfaction for her losses, she gets to choose how she structures her lawsuits. Id. Following a potential verdict in Ms. Patterson's favor, Respondents could ask the circuit court to invoke its equitable power to order a set-off. Church v. McGee, 391 S.C. 334, 705 S.E.2d 481 (Ct. App. 2011).

proceedings that did not include them as cover to avoid liability altogether. South Carolina law and fundamental notions of fairness must reject this argument.

First, the Court should refuse Respondents' misguided contention that the Arbitration Agreement "specifically provides" that it covers claims against them. (Defs.' Mot. to Dismiss, dated Mar. 19, 2019, at 2 ¶ 4). The disputed provision stated in full:

An award against the Facility will be paid within thirty (30) days after the arbitrators make their decision and notify the Facility in writing of that decision. Upon payment, the Facility, as well as other 'White Oak' facilities, including specifically White Oak Manor, Inc. and White Oak Management, Inc., and their respective shareholders, directors, officers, and employees, will deemed [sic] to be released and forever discharged from any and all other claims arising prior to the date of the hearing.

Arbitration Agreement at 3 ¶ 14. Nothing in this language drafted by the Facility purports to make Respondents parties to the Arbitration Agreement or to require Ms. Patterson to arbitrate her claims against Respondents.

Second, the Court should reject enforcement of paragraph 14's "release" language as contrary to South Carolina law. While this paragraph does not advance Respondents' assertion that claims against them are arbitrable, it does purport to grant them immunity should Ms. Patterson recover from the Facility. Applying this language as written places Ms. Patterson in an untenable position. Since arbitration is solely a matter of contract and the Arbitration Agreement does not permit arbitration against Respondents, Ms. Patterson could not pursue her corporate negligence-based claims in arbitration. But, Respondents' reading of paragraph 14 would grant them the power to use an arbitration award against the Facility to block Ms. Patterson's pursuit of recovery from Respondents in the only forum available to her.

i. Paragraph 14 is an Attempted Exculpatory Provision that Violates Public Policy.

As Ms. Patterson argued to the circuit court, enforcing paragraph 14's attempted release would violate South Carolina law in multiple ways. (Hearing Tr. Aug. 22, 2019 at 11-12). As Respondents read it, paragraph 14 goes far beyond changing the forum or rules for dispute resolution and becomes a pre-injury waiver of liability for Respondents against future claims relating to their own negligent, grossly negligent, or reckless misconduct. South Carolina law strongly disfavors this form of contract. Maybank v. BB&T Corp., 416 S.C. 541, 574, 787 S.E.2d 498, 515 (2016); Cooke v. Allstate Mgmt. Corp., 741 F. Supp. 1205, 1208 (D.S.C. 1990) (noting "extremes to which the South Carolina courts have gone to avoid a broad reading of an exculpatory clause"). In fact, a pre-injury exculpatory provision is void as a matter of law if it violates public policy or is unconscionable. Maybank, 416 S.C. at 574, 787 S.E.2d at 515 (citing Pride v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 138 S.E.2d 155 (1964)).

Allowing a medical services provider to compel a sick patient to waive any future legal claims arising from poorly-provided nursing home care is contrary to South Carolina public policy. The South Carolina Supreme Court holds that public policy bars contract provisions purporting to waive liability for a duty of public service, when a public duty is owed, when public interests are involved, when the public interest requires the performance of a private duty, or when the parties are not on roughly equal bargaining terms. Pride, 244 S.C. at 619-20, 138 S.E.2d at 157. Additionally, it is against public policy to attempt a pre-injury immunity provision when the duty arises independently of the contract purporting to confer immunity. Murray v. Texas Co., 172 S.C. 399, 174 S.E. 231, 232 (1934) ("a person cannot by contract relieve himself from a duty which he owes to the public independently of the contract").

Using similar principles, a number of jurisdictions have found public policy bars medical providers from attempting pre-injury liability releases. See e.g. Olson v. Molzen, 558 S.W.2d 429, 432 (Tenn. 1977) (“A professional person should not be permitted to hide behind the protective shield of an exculpatory contract and insist that he or she is not answerable for his or her own negligence”); Tunkl v. Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963) (finding “release from liability for future negligence imposed as a condition for admission” to a hospital violated state public policy). Public policy includes a variety of factors including (1) societal expectations for the relationship; (2) education, sophistication, and financial disparities between the parties; (3) subject matter of the contract; and (4) the nature of the contract’s formation including any evidence the contract was one of adhesion—i.e. presented on a take-it-or-leave-it basis. Copeland v. Healthsouth/Methodist Rehab. Hosp., LP, 565 S.W.3d 260, 272 (Tenn. 2018) (quoting 8 Williston on Contracts § 19.22 (4th ed. 1993)).

While there is some variance among the states on the specific subject matters implicating public policy, there is a consensus that the relationship between medical provider and patient is among them. Vinson v. Fitness & Sports Clubs, LLC, 187 A.3d 253 (Pa. Super. 2018) (finding exculpatory contracts violate public policy when they involve a matter of interest to the public or state including “employer-employee relationship, public service, public utilities, common carriers, and hospitals”); ADT Sec. Servs., Inc. v. Swenson, 276 F.R.D. 278 (D. Minn. 2011) (referencing “common carriers, hospitals and doctors, common carriers, public utilities, innkeepers,” etc.); Myers v. Lutsen Mountains Corp., 587 F.3d 891, 895 (8th Cir. 2009); Shields v. Sta-Fit, Inc., 903 P.3d 525, 589 (Wash. App. 1995) (citing “hospitals, housing, public utilities, and public education”). Thus as the Tennessee Supreme Court recently held, when a patient seeks out a service provider because of a “medical necessity,” the resulting relationship

implicates the public interest and the provider's attempt to preemptively disclaim liability is unenforceable. Copeland, 565 S.W.3d at 278 (considering contract drafted by medical transport company).

Similarly, Georgia public policy recognizes an exculpatory provision in a contract related to professional medical services is “peculiarly obnoxious.” Emory Univ. v. Porubiansky, 282 S.E.2d 903, 905 (Ga. 1981) (quoting 15 Williston, Contracts 1751 (3d ed. 1972)). There is also persuasive authority disavowing exculpatory contracts in relationships similar to the one between Respondents and Mr. Patterson. Kentucky's Supreme Court has held an exculpatory clause invalid in a contract between a patient and rehabilitation center in a case alleging the center's employee provided negligent care resulting in the patient's broken hip. Meiman v. Rehab. Ctr., 444 S.W.2d 78, 79-80 (Ky. 1969). Georgia courts will not permit exculpatory provisions when the party to be immunized is only a negligent provider's employer rather than the provider herself. Stockbridge Dental Group, P.C. v. Freeman, 728 S.E.2d 871, 873 (Ga. App. 2012). Mississippi law does not permit exculpatory provisions in contracts involving companies providing management services in medical facilities. Natchez Reg'l Med. Ctr. v. Quorum Health Resources, LLC, 879 F. Supp. 2d 556, 568 (S.D. Miss. 2012).

Accordingly, the Court should find paragraph 14's “release” language unenforceable because it violates South Carolina public policy. Alternatively, the circuit court erred in dismissing Ms. Patterson's complaint in full because, in addition to ordinary negligence claims, she also alleges Respondents' underfunding and understaffing the Facility were grossly negligent or reckless misconduct. (Compl. ¶¶ 70-78). An even wider consensus of states hold that public policy will not allow a party to disclaim liability for recklessness. Copeland, 565 S.W.3d at 270; Tayar v. Camelback Ski Corp., Inc., 47 A.3d 1190, 1201-02 (Pa. 2012) (surveying states and

finding “near unanimity across jurisdictions” as 26 of 28 states to consider issue have determined a release purporting to exclude liability for reckless conduct violates public policy); see also Restatement (Second) of Contracts § 195(1) (1981). Courts have reached a similar conclusion for attempts to disclaim liability for gross negligence. Copeland, 565 S.W.3d at 270; Sewell v. Dixie Region Sports Car Club of Am., Inc., 451 S.E.2d 489, 490 n. 2 (Ga. App. 1994). In sum, Paragraph 14 is fully unenforceable as contrary to public policy or, at the very least, as applied to Ms. Patterson’s gross negligence and recklessness claims against Respondents.

ii. Respondents May Not Enforce Paragraph 14 Because it is Not Supported by Consideration.

The Arbitration Agreement presents paragraph 14 as a “release.” Like any contract, a release must meet all contract formation requirements including bargained-for consideration. Ecclesiastical Production Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007). The consideration required to support a release must include mutual concessions by the parties. Bean v. S.C. Central R. Co., Inc., 392 S.C. 532, 557-58, 709 S.E.2d 99, 112 (Ct. App. 2011) (quoting Maynard v. Durham & S. Ry., 365 U.S. 160, 163 (1961)). A release is not supported by sufficient consideration “unless something of value is received to which the creditor had no previous right.” Id. Here, Respondents made no concessions and provided nothing in exchange for the benefit of avoiding liability upon the conclusion of Ms. Patterson’s arbitration hearing with the Facility. Since Respondents cannot prove the foundational requirements for contract formation, they may not enforce paragraph 14 to dismiss Ms. Patterson’s claims.

iii. Paragraph 14 is Unconscionable.

The circuit court also erred in rejecting Ms. Patterson’s argument that paragraph 14 is unconscionable. This provision, buried in a form contract of adhesion, is fundamentally unfair to

Ms. Patterson as it denies her the opportunity to pursue and recover on claims Respondents' profit-driven misconduct led to her husband's death. It should be severed from the Agreement.

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, 373 S.C. at 24-25, 644 S.E.2d at 668 (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, 373 S.C. at 25, 644 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 Ms. Patterson on a take-it-or-leave-it basis, and did not offer her 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 Ms. Patterson because her injuries were personal and substantial. Appellants' alleged negligence led to a broken hip and his premature death.

The other factors also favor Ms. Patterson who was not a substantial business concern. She was acting only as her husband's representative with the aim of obtaining the nursing care he urgently needed. In contrast, Respondents are sophisticated business entities evidenced in many ways including the complex organization structure they have built to manage the Facility's operations. See Compl. ¶¶ 33-36. The disparity in bargaining power is considerable. Respondents operate more than a dozen nursing homes in North and South Carolina. Mr. Patterson, on the other hand, was an elderly man 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 Ms. Patterson. A provision purporting to immunize Respondents from liability is buried three-quarters of the way through a four-page contract and not distinguished from the surrounding text in anyway. (Arbitration Agreement at 3). 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).

Paragraph 14 also meets the second unconscionability requirement because its terms are decidedly oppressive and unfair to Ms. Patterson. As discussed above, paragraph 14 is an oppressively one-sided term as written because it effectively denies Ms. Patterson any forum in which she can pursue claims against Respondents. As Respondents have admitted in earlier litigation, arbitration is not an available forum for Ms. Patterson because the Arbitration Agreement does not apply to Respondents. (Pla. Mem. in Opp. to Defs.' Mot. to Dismiss Exh. 6,

at 19, lines 1-11). This current action is not, as Respondents have suggested, clever lawyering seeking redundant damages and procedural benefits unavailable in arbitration. (Defs.’ Mem. in Supp. of Mot. to Dismiss at 6). Litigation is the only way Ms. Patterson can recover for damages caused by Respondents’ corporate negligence, and Respondents see paragraph 14 as a means to deny Ms. Patterson the opportunity to have these claims heard on the merits.

Finally, the Court should consider one final point on how the circuit court uses paragraph 14 to support dismissal. The order concludes equitable estoppel bars Ms. Patterson’s claims because she embraced the Arbitration Agreement in proceedings against the Facility and cannot later repudiate paragraph 14. (Order dated Apr. 13, 2020 at 11). However, equitable estoppel does not require Ms. Patterson to accede to a contract provision that is unenforceable because it either lacks consideration or violates public policy. The Arbitration Agreement has a severance provision that shows its legitimate and unenforceable components are not an all-or-nothing proposition. (Arbitration Agreement at 4 ¶ 20). Plus, applying equitable estoppel here overlooks a crucial point recently highlighted by the South Carolina Supreme Court. Equitable estoppel is “a theory designed to prevent injustice.” Wilson, 426 S.C. at 345, 827 S.E.2d at 177. Throwing out Ms. Patterson’s suit against Respondents based on an arbitration result for distinct claims against the Facility would not prevent injustice, it would only assure it. There is no escaping the fact that paragraph 14 represents the Facility’s attempt to preemptively grant non-parties immunity in a non-descript paragraph buried three-quarters of the way through a form contract of adhesion the Facility crafted entirely on its own to present to an elderly nursing home resident’s wife on a take-it-or-leave-it basis. Equitable estoppel “should be used sparingly,” and the equities of this case do not support it. Id.

CONCLUSION

Based on the arguments stated above, Ms. Patterson respectfully requests the Court reverse the circuit court's order dismissing Ms. Patterson's complaint. Respondents failed to make a timely response to the circuit court's December 31, 2019, order denying their motion to dismiss. Additionally, the circuit court erred in applying Rule 12(b)(8), SCRCF because there was no pending action involving the same parties and claims when the circuit court ruled. Moreover, Ms. Patterson's arbitration award against the Facility does not support dismissal because her claims against Respondents could not be and were not litigated there. Respondents reliance on Arbitration Agreement paragraph 14, an attempted pre-injury release of liability for its own negligent and reckless misconduct, is unconscionable, unsupported by consideration, and violates South Carolina public policy. Finally, in light of the Arbitration Agreement's facially limited scope and paragraph 14's legal insufficiencies, the Court should also deny Respondent's alternative request to compel arbitration that the circuit court deemed moot and remand Ms. Patterson's discovery motion for further consideration.

Respectfully submitted,

/s/ Jordan C. Calloway
Gary W. Poliakoff
Raymond P. Mullman, Jr.
John E. Waelde
Poliakoff & Associates, PA
215 Magnolia Street
Spartanburg, SC 29306
(864) 582-5472

Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
jcalloway@mcgowanhood.com

Attorneys for Appellant

May 22, 2020
Rock Hill, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2020-000371

RECEIVED
May 22 2020
SC Court of Appeals

Estate of Jack Patterson by and
through his Personal Representative,
Jeanette Patterson, Individually and
on behalf of the Statutory Beneficiaries,

.....

Appellants,

v.

White Oak Manor, Inc., and White
Oak Management, Inc.,

.....

Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on May 22, 2020, he served Respondents' counsel with Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal at the e-mail addresses listed below pursuant to Section (g)(3) of the South Carolina Supreme Court's March 20, 2020 order (Order No. 2020-03-20-01):

jrogers@wardfirm.com
cgraham@wardfirm.com

/s/ Jordan C. Calloway
Jordan C. Calloway
Attorney for Respondent

J. Patterson v. White Oak Manor, Inc. (App. Case No. 2020-000371)--Appellant's Initial Brief

Jordan Calloway <jordan@mcgowanhood.com>

Fri 5/22/2020 9:07 AM

To: John Rogers <JRogers@wardfirm.com>; 'Chad Graham' <CGraham@wardfirm.com>

Cc: Ray Mullman <rmullmanjr@gmail.com>; Boss Poliakoff <atty@gpoliakoff.com>; John Waelde <JWaelde@gpoliakoff.com>

 3 attachments (417 KB)

J. Patterson--Initial Brief of Appellant FINAL PDF.pdf; J. Patterson--Initial Brief and Designation CoS FINAL PDF.pdf; J. Patterson--Appellants' Designation of Matter (Appellant's Br.) FINAL PDF.pdf;

John & Chad:

I am attaching the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal that are being electronically filed today with the Court of Appeals. Pursuant to Section (g)(3) of the South Carolina Supreme Court's March 20, 2020, order (Order No. 2020-03-20-01), please consider this email as service for both documents.

Thanks,

Jordan Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800

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May 22 2020
SC Court of Appeals