THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stillwell, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2019-001955

Estate of Patricia Royston, by and through the appointed personal representative, Marianne McCoig, individually and on behalf on the statutory beneficiaries, …………….. Respondent

v.

Hunt Valley Holdings, LLC, a/k/a Fundamental Long-Term Care Holdings, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville, ……………… Appellants.

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TABLE OF CONTENTS

Table of Authorities …………………………………………………………….. iii

Counterstatement of the Issues on Appeal ……………………………………… x

Statement of the Case ………………………………………………………… 1

Standard of Review …………………………………………………………… 4

Argument

1. The Facility Did Not Prove Mutual Assent to the Arbitration Agreement by Signature or Any Other Means………………………………………... 6

2. As an Additional Sustaining Ground, the Arbitration Agreement is Unenforceable Because it Lacks Material Terms and is Unconscionable…... 13

    a. Several Material Terms are Absent or Too Vague to Form a Valid Contract…………………………………………………….. 14

    b. The Arbitration Agreement is Unconscionable……………………... 17

3. As an Additional Sustaining Ground, Ms. Royston's Purported Consent to Arbitration Does Not Extend to the Wrongful Death Claim Covering Her Family Members' Losses……………………………... 22

    a. South Carolina Law does not Allow a Nursing Home Arbitration Contract to be Enforced Against Unconsenting Non-Parties……….. 22

    b. South Carolina Courts Define Wrongful Death as a Distinct, Independent Claim that is Not Derivative of Claims Held by a Decedent at her Death………………………………………………. 23

    c. None of the South Carolina Authority Appellants Cite Supports Arbitration in this Case…………………………………………… 27

    d. Many Other Jurisdictions Have Refused to Compel Arbitration of Wrongful Death Claims Based on a Decedent's Arbitration Contract………………………………………………………… 31

Conclusion………………………………………………………………… 35

TABLE OF AUTHORITIES

Cases

South Carolina

Aiken v. World Finance Corp. of South Carolina 373 S.C. 144, 644 S.E.2d 705 (2007)………………………………………………………………………….. 4

Allegro, Inc. v. Scully, 418 S.C. 24, 791 S.E.2d 140 (2016)………………………. 14

Bemis v. Waters, 170 S.C. 432, 170 S.E. 475 (1933)……………………………… 24

Bishop Realty & Rentals, Inc. v. Perk, Inc., 292 S.C. 182, 355 S.E.2d 298 (Ct. App. 1987)……………………………………………………………………... 9

Carolina Care Plan, Inc. v. United HealthCare Services, Inc., 361 S.C. 544, 606 S.E.2d 752 (2004)…………………………………………………………… 18

Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928)…………………………….. 25, 29

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014)……... 7

Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 301, 609 S.E.2d 838 (Ct. App. 2005)……………………………………………………………………. 4, 6

Coves Darden, LLC v. Ibanez, Op. No. 2016-UP-402, 2016 WL 4379419 (S.C. Ct. App. 2016)………………………………………………………………. 9

Dean v. Dean, 229 S.C. 430, 93 S.E.2d 206 (1956)………………………………… 6-8

Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014)…………………………………………………………………………... 27, 28

Ebert v. Ebert, 320 S.C. 331, 465 S.E.2d 121 (Ct. App. 1995)…………………….. 17

Edens v. Laurel Hill, Inc., 271 S.C. 360, 247 S.E.2d 434 (1978)…………………... 7

Ellis v. Taylor, 316 S.C. 245, 449 S.E.2d 487 (1994)……………………………… 16

Gladden v. Keistler, 141 S.C. 524, 140 S.E. 161 (1927)…………………………… 8

Gleaton v. Southern Railway Co., 212 S.C. 186, 46 S.E.2d 879 (1948)…………… 25

Grainger v. Greenville, S. & A. Railway Co., 101 S.C. 399, 85 S.E. 968 (1915)…... 24, 25

Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009)……………………………………………………………………………….. 14, 15, 17

HHHunt Corp. v. Town of Lexington, 389 S.C. 623, 699 S.E.2d 699 (Ct. App. 2010)………………………………………………………………………. 6

Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018)…………………………………………………. 29

In re Mayo's Estate, 60 S.C. 401, 38 S.E. 634 (1901)……………………………… 26, 32

Jaffe v. Gibbons, 290 S.C. 468, 351 S.E.2d 343 (Ct. App. 1986)…………………... 4, 10

Keel v. Seaboard Air Line Railway, 122 S.C. 17, 114 S.E. 761 (1922)……………. 26, 32

Kitchens v. Lee, 221 S.C. 59, 69 S.E.2d 67 (1952)…………………………………. 7

Laser Supply & Services, Inc. v. Orchard Park Associates, 382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009)………………………………………………….. 7

Lucey v. Meyer, 401 S.C. 122, 736 S.E.2d 274 (Ct. App. 2012)…………………… 20

Malloy v. Thompson, 409 S.C. 57, 762 S.E.2d 690 (2014)………………………… 22

McPeters v. Yeargin Construction Co, Inc., 290 S.C. 327, 350 S.E.2d 208 (Ct. App. 1986)………………………………………………………………………. 15

Munoz v. Green Tree Finance Corp., 343 S.C. 531, 542 S.E.2d 360 (2001)………. 19

Osteen v. Sothern Railway, Carolina Division, 76 S.C. 368, 57 S.E. 196 (1907)….. 25

Peddler, Inc. v. Rikard, 266 S.C. 28, 221 S.E.2d 115 (1975)………………………. 5-10, 13

Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989)………………………….. 9, 14

Reed v. Boykin, 282 S.C. 614, 320 S.E.2d 68 (Ct. App. 1984)…………………….. 14

Rodarte v. University of South Carolina., 419 S.C. 592, 799 S.E.2d 912 (2017)…... 7

Ross Electric, Inc. v. Cooler Erectors of Atlanta, Inc., 418 S.C. 424, 794 S.E.2d 382 (Ct. App. 2016)…………………………………………………………………. 15

Scott v. Porter, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000)…………………….. 23, 24, 26, 32

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007)……... 18, 19

Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia, 409 S.C. 568, 762 S.E.2d 696 (2014)………….. 15

Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016)…………… 29

Touchberry v. City of Florence, 295 S.C. 47, 367 S.E.2d 149 (1988)……………….. 22

Weaver v. Lentz, 348 S.C. 672, 561 S.E.2d 360 (Ct. App. 2002)………………….. 26, 32

Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000)…………………. 26

Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019)……………………………. 4, 5, 22

York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013)………… 15

Other Jurisdictions

Abdiana Properties, Inc. v. Bengtson, 575 S.W.3d 754 (Mo. App. 2019)………… 7

Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002)………………………... 4

Angelou v. African Overseas Union, 33 S.W.3d 269 (Tex. App. 2000)…………… 12

Bair v. Manor Care of Elizabethtown, PA, LLC, 108 A.3d 94 (Pa. Super. 2015)….. 12

Ballard v. Southwest Detroit Hospital, 327 N.W.2d 370 (Mich. App. 1982)………. 31

Boler v. Security Health Care, LLC, 336 P.3d 468 (Okla. 2014)…………………... 30, 31, 33, 34

Boyle v. U.S., 948 F. Supp. 2d 577 (D.S.C. 2012)…………………………………. 26

Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004)…………….. 31

Bybee v. Abdulla, 189 P.3d 40 (Utah 2008)………………………………………… 31

Byrd v. Simmons, 5 So.3d 384 (Miss. 2009)……………………………………….. 11, 12

Caldwell v. SSC Lebanon Operating Co., LLC, Civil Action No. 3:16-cv-0036, 2016 WL 3905670 (M.D. Tenn. July 19, 2016)……………………..... 11, 13

Carlson v. General Motors Corp., 883 F.2d 287 (4th Cir. 1989)……………………. 19

Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344 (Ill. 2012)………………. 31, 33, 34

Chapman v. Cardiac Pacemakers, Inc., 673 P.2d 385 (Idaho 1983)………………… 31

COMSAT Corp. v. National Science Foundation, 190 F.3d 269 (4th Cir. 1999)…… 18

Dan Ryan Builders W. Va., LLC v. Main St. America Assurance Co.,
___ F. Supp. 3d ___, 2020 WL 1663411 (D.S.C. Apr. 3, 2020)…………………….. 9

Daniels v. Sunrise Senior Living, Inc., 212 Cal. App. 4th 674, 151
Cal. Rptr. 3d 273 (2013)…………………………………………………………… 31

Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.,
316 P.3d 607 (Ariz. Ct. App. 2014)………………………………………………... 31, 33

Estate of Ruszala v. Brookdale Living Communities, Inc., 1 A.3d 806
(N.J. Super. App. 2010)……………………………………………………………. 20

Ex Parte Warren, 718 So.2d 45 (Ala. 1998)………………………………………. 14

Flanary v. Carl Gregory Dodge of Johnson City, LLC, No.
E2004-00620-COA-R3-CV, 2005 WL 1277850 (Tenn. App. May 31, 2005)………. 13

FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191 (Md. App. 2016)……………. 31, 33

Haws v. Luethje, 503 P.2d 871 (Okla. 1972)……………………………………… 30

Hooters of America, Inc. v. Phillips, 39 F. Supp. 2d 582 (D.S.C. 1998)…………….. 20

In re Labatt Food Service, L.P., 279 S.W.3d 640 (Tex. 2009)……………………….. 31

Kindred Nursing Centers, Limited Partnership v. Clark, 137 S. Ct. 1421 (2017)…… 28

Laizure v. Avante at Leesburg, Inc., 109 So.3d 752 (Fla. 2013)…………………….. 31

Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009)………………………….. 31, 32

Marmet Health Care Center, Inc. v. Brown, 565 U.S. 530 (2012)…………………...... 28

Minnieland Private Day School, Inc. v. Applied Underwriters Captive Risk
Assurance Co., 867 F.3d 449 (4th Cir. 2017)……………………………………...... 4

Moyer v. Rubright, 651 A.2d 1139 (Pa. Super. 1994)……………………………….. 30

Nugent v. Myles, 829 S.E.2d 623 (Ga. App. 2019)…………………………………...... 11

Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538 (E.D. Pa. 2006)………….. 20

Pacific Cascade Corp. v. Nimmer, 608 P.2d 266 (Wash. App. 1980)……………….. 11

Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258 (Ohio 2007)…………… 31, 34

Pine Hills Health & Rehabilitation, LLC v. Matthews, 431 S.W.3d 910
(Ark. 2014)………………………………………………………………………….. 12

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581 (Ky. 2012)…………………….. 31, 33

Pisano v. Extendicare Homes, Inc., 77 A.3d 651 (Pa. Super. 2013)………………...30, 31, 33, 34

Prieto v. Healthcare & Retirement Corp. of America, 919 So.2d 531
(Fla. App. 2005)……………………………………………………………….. 20

Robinson Nursing & Rehabilitation Center, LLC v. Phillips, 586 S.W.3d 624
(Ark. 2019)………………………………………………………………………….. 11, 12

Singleton v. Grade A Market, Inc., 607 F. Supp. 2d 333 (D. Conn. 2009)…………. 15

Strickholm v. Evangelical Lutheran Good Samaritan Society,
Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011)….. 31, 34

Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490 (Pa. 2016)…………... 31

THI of South Carolina at Magnolia Manor-Inman, LLC v. Gilbert,
Civil Action No. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015)…... 28, 29

Wellman v. Bethea, 243 F. 222 (E.D.S.C. 1917)…………………………………... 26

Woodall v. Avalon Care Center-Federal Way, LLC, 231 P.3d 1252
(Wash. App. 2010)………………………………………………………………. 31, 33, 34

Statutes

9 U.S.C. § 5………………………………………………………………………….. 17

S.C. Code Ann. § 15-51-10………………………………………………23, 23, 29, 30, 31, 34

S.C. Code Ann. § 15-79-125………………………………………………………… 21

Court Rules

Rule 1, SCADR…………………………………………………………………... 21

Rule 4.2, RPC, Rule 407, SCACR………………………………………………….. 21

Rule 12(a), SCADR………………………………………………………………. 15

Secondary Sources

1 Corbin on Contracts § 95 (1963)………………………………………………… 14

17 C.J.S., Contracts § 62………………………………………………………… 8

17A Am. Jur. 2d Contracts § 192 (1991)……………………………………….... 17

28 S.C. Jur. Wrongful Death § 5…………………………………………………. 26

F. P. Hubbard & R. L. Felix, The South Carolina Law of Torts 610 (2d ed 1997)… 23

COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court correctly found a nursing home failed to prove the formation of a valid arbitration contract when the nursing home did not execute or "hold" the proposed Arbitration Agreement as required by the Agreement's terms and South Carolina law.

2. As an additional sustaining ground, whether the Arbitration Agreement is invalid because it demands an inscrutable process for arbitrator selection, provides no guidance for conducting arbitration proceedings, and effectively ensures Respondent may not access key evidence before the arbitration hearing.

3. As an additional sustaining ground, whether the Arbitration Agreement can bind nonsignatory claimants from recovering under South Carolina's distinct, independent wrongful death statute.

STATEMENT OF THE CASE

Respondent Marianne McCoig alleges neglect and medication mismanagement including morphine intoxication during her mother Patricia Royston's ten-day residency at THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville ("the Facility") in December 2016 that proximately caused Ms. Royston's wrongful death. Respondent first stated these claims in a Notice of Intent to File Suit filed on September 21, 2018. (Notice of Intent to File Suit, dated Sept. 21, 2018).

Patricia Royston was 68 years old when admitted to the Facility. Previously, Patricia lived independently while residing at Brookdale Easley. A recent fall at home with a minor knee injury was the reason for her transfer to the Facility. Her stay was to be short-term with the expectation that she would return to independent living at Brookdale. (Pla. Mem. in Opp. to Facility's Mot. to Compel Arbitration at 2-3). Instead, Patricia died on December 31, 2016 from acute morphine intoxication. (See generally Notice of Intent & A. Holmes Aff.). At the hospital, Patricia was noted with vomit on her face and bleeding from the ears. She also had other classic signs and symptoms of neglect – low albumin, low sodium, signs of dehydration, signs of pneumonia, and an infection in her lungs. (Compl. ¶ 50).

In addition to the Facility's medication administration errors, Respondent alleged corporate negligence and other claims against Appellants Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Care Holdings, LLC ("HVH"), Fundamental Clinical and Operational Services, LLC ("FCOS"), and Fundamental Administrative Services, LLC ("FAS") based on these entities' alleged control over the Facility's budget, staffing, and training which directly affected the quality of care Ms. Royston received. (Compl. ¶ 40).

The litigation initially proceeded normally with Appellants making an appearance and participating in an unsuccessful pre-suit mediation on January 8, 2019. Respondent filed her complaint on January 30, 2019, and each Appellant answered separately on March 9, 2019. (Complaint; Facility Answer; HVH Answer; FCOS Answer; FAS Answer). The Facility's answer vaguely referenced arbitration in one paragraph but did not cite an arbitration contract or raise arbitration as an affirmative defense. (Facility Answer at 1).

Respondent then began discovery by serving HVH with requests for production and requests to admit on February 1, 2019. (Pla. Mot. to Compel to HVH Exh. 1). HVH partially participated in discovery by answering the requests to admit on March 21, 2019, but refusing to respond to the requests for production. (Pla. Mot. to Compel to HVH Exh. 2). Respondent also sought document production from the Facility on May 1, 2019, but the Facility failed to respond. (Pla. Mot. to Compel to the Facility Exh. 1). Respondent filed motions to compel against HVH and the Facility on May 20 and June 19, 2019, respectively. (Pla. Mot. to Compel to HVH; Pla. Mot. to Compel to the Facility).

On July 26, 2019, nearly ten months after Respondent's Notice of Intent, seven months from participating in the pre-suit mediation and nearly six months after her Complaint, the Facility filed a motion to dismiss, compel arbitration, and for a stay. (Facility's Mot. to Dismiss).[1] Attached to the Facility's motion was a copy of a document entitled "Arbitration Agreement" purportedly signed by Ms. Royston. Id. at Exh. A. This signature was undated and, though the Arbitration Agreement included a signature line for the Facility's "Authorized Agent," no one associated with

[1] On August 7, 2019, HVH, FCOS, and FAS individually filed motions to stay pending final resolution of the circuit court's ruling on the Facility's motion to dismiss. The circuit court's order did not specifically address these motions, but the parties agreed the circuit court's ruling on the Facility's motion would effectively resolve them all. (Hearing Tr. at 34, lines 12-25).

the Facility ever signed it. Id. Moreover, this Arbitration Agreement was not culled from the Facility's file on Ms. Royston's residency but was instead provided by Respondent's attorney during discovery. Respondent opposed the Facility's motion arguing (1) the Facility failed to demonstrate the mutual assent required to form a valid contract; (2) the entity listed in the Arbitration Agreement was different than the Facility; and (3) even if the Facility could prove mutual assent, the Arbitration Agreement was invalid because it was unconscionable, lacked consideration and mutuality of obligation, and failed to include material terms. (Pla. Mem. in Opp. to the Facility's Mot. to Dismiss).

At the August 29, 2019, motion hearing, the Facility admitted it never located the original Arbitration Agreement and could offer no substantive evidence to either authenticate Ms. Royston's signature or to show she delivered the Arbitration Agreement to the Facility. Hearing Tr. at 29, lines 13-15. In place of evidence to prove contract formation, the Facility's counsel offered the circuit court his "hypothesis" and the "only inference I can come up with" on whether, when, and how the proposed parties assented to the Arbitration Agreement's proposed terms. (Hearing Tr. at 31, lines 17-18; 32, line 6). When asked by the circuit court whether the Facility's failure to retain the Arbitration Agreement could mean Ms. Royston intentionally chose not to deliver it, the Facility deemed the possibility a "worthy point" for which he could offer only inferences, not evidence, to rebut. (Hearing Tr. at 31, lines 7-20).

The circuit court entered its order on October 9, 2019. First, the circuit court made two key factual findings: (1) "There is no evidence the Arbitration Agreement was signed by Patricia Royston during the admission process and provided to [the Facility]"; and (2) Appellants "acknowledge the copy [of the Arbitration Agreement] at issue was not signed by any Facility representative." (Order at 2). In light of these findings, the circuit court concluded the Facility

failed to meet its burden to prove the mutual assent required to form a valid contract. (Order at 5). The circuit court also noted a discrepancy between the Facility and the Arbitration Agreement's text, which referenced only Ms. Royston and an entity identified only as "Magnolia Place of Greenville." (Order at 6-7). Appellants filed a motion to reconsider on October 21, 2019, which was denied on October 23, 2019. (Facility's Mot. to Alter or Amend; Order, dated Oct. 23, 2019). Appellants filed a timely notice of appeal on November 20, 2019.

STANDARD OF REVIEW

As the party seeking to enforce a proposed arbitration contract governed by the Federal Arbitration Act ("FAA"), the Facility bore the burden to prove all contract formation requirements. Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assur. Co., 867 F.3d 449, 456 (4th Cir. 2017) (citing Adkins v. Labor Ready, Inc., 303 F.3d 496, 500-01 (4th Cir. 2002) ("a defendant who seeks to compel arbitration under the Federal Arbitration Act bears the burden of establishing the existence of a binding contract to arbitrate the dispute"). Under South Carolina law, whether parties mutually assented or reached the required "meeting of the minds" for a proposed contract is a question of fact. Jaffe v. Gibbons, 290 S.C. 468, 471, 351 S.E.2d 343, 345 (Ct. App. 1986). While de novo review applies to a ruling on a motion to compel arbitration, "a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." Wilson v. Willis, 426 S.C. 326, 335, 827 S.E.2d 167 (2019) (citing Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007)). When a proposed agreement is found not to form a binding contract, "the trial court's factual findings will not be disturbed on appeal unless those findings are wholly unsupported by the evidence or controlled by error of law." Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 301, 305, 609 S.E.2d 838, 841 (Ct. App. 2005). Finally, while both state and federal law recognize a pro-arbitration policy, that policy does

not apply to the only question at issue here—i.e. whether the parties formed a valid arbitration contract. Wilson, 426 S.C. at 337, 827 S.E.2d at 173 (finding presumption in favor of arbitration "does not apply to the existence of such an agreement or the identity of the parties who may be bound to such an agreement").

ARGUMENT

Since the Facility wanted to resolve Respondent's tort claims through arbitration rather than litigation, it was the Facility's burden to show it formed a valid arbitration contract with Ms. Royston. But, the Facility's files contained no written contract with Ms. Royston to offer the circuit court as evidence nor could the Facility offer testimony from the staff member who supposedly presented a contract to Ms. Royston. Hearing Tr. at 29, lines 13-15 ("it's absolutely true . . . that we don't have a copy of" the Arbitration Agreement); Appellants' Br. at 7 ("the Facility has been unable to locate the Arbitration Agreement . . ."). The Facility did not provide any affidavit or other document as evidence. The Facility has no evidence a contract was even presented to Ms. Royston *before* the alleged wrongdoing underlying Respondent's claims. Instead, the Facility relied exclusively on an undated Arbitration Agreement copy in Ms. Royston's files that the Facility never signed, did not possess, and seemingly did not know existed until months after this lawsuit was filed.

The Facility's appeal depends on the notion that a party can sometimes assent to a contract even without signing it. While that is true as a general statement of law, it does not apply here. The key South Carolina case on non-signature assent (Peddler, Inc. v. Rikard, 266 S.C. 28, 221 S.E.2d 115 (1975)) imposes requirements the Facility admits it cannot meet. A party who fails to sign the contract it drafted (and specifically chose to include a line for its signature) does not assent unless it "held" and "acted upon" the contract. The Facility cannot meet the "holding" requirement

because it admits it did not maintain a copy of the Arbitration Agreement in its records. The circuit court's factual findings on the Facility's inability to prove assent are in keeping with this concession and should not be disturbed under the deferential standard of review. Conway, 363 S.C. at 305, 609 S.E.2d at 841. Alternatively, the Court should affirm based on multiple additional sustaining grounds directed at the Arbitration Agreement's terms which lack the specificity, mutuality, and fairness required to form a valid contract under South Carolina law.[2]

1. The Facility Did Not Prove Mutual Assent to the Arbitration Agreement by Signature or Any Other Means.

There is no disputing the Facility did not sign any arbitration contract with Ms. Royston and did not retain a copy of any document Ms. Royston signed. Yet, the Facility argues it was "absurd" for the circuit court to find the Facility failed to prove the mutual assent required to enforce the Arbitration Agreement. Appellants Br. at 11. The Facility's argument should be rejected based on two key provisions of South Carolina contract law. First, when a proposed contract designates the parties' signature as the means by which assent is to be manifested, *any* party's failure to sign means there is no contract to enforce. Dean v. Dean, 229 S.C. 430, 436, 93 S.E.2d 206, 209 (1956). Second, while there are instances where a non-signing party may assent by alternative means, the Facility effectively admits it cannot meet the requirements for this alternative path because it did not hold or act on the contract to which it purportedly assented. See e.g., Peddler, Inc. v. Rikard, 266 S.C. 28, 221 S.E.2d 115 (1975).

[2] Appellants' second argument contends the circuit court's order made factual findings regarding the Facility relationship with HVH, FAS, and FCOS. Appellants' Br. at 15-18. A fairer reading of the order is that the circuit court found Respondent *alleged* the challenged relationship among Appellants. When the Facility chose to file a Rule 12(b)(6), SCRCP motion, the circuit court was required to presume as true the allegations in Respondent's complaint for the sake of addressing the legal issues surrounding the disputed arbitration contract. HHHunt Corp. v. Town of Lexington, 389 S.C. 623, 632, 699 S.E.2d 699, 703 (Ct. App. 2010). Regardless, Respondent acknowledges rulings on 12(b)(6) motions do not establish facts.

Contract formation demands the mutual assent of the proposed parties. Edens v. Laurel Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978) (citing Kitchens v. Lee, 221 S.C. 59, 69 S.E.2d 67 (1952)). The Arbitration Agreement, drafted exclusively by the Facility, designates the method by which its parties demonstrate assent to its terms. Unlike employee handbooks or other documents where the non-drafting party alone is asked to sign, the Facility chose to require both parties' signatures by placing signature blocks for itself and Ms. Royston at the bottom of the Arbitration Agreement. (Arbitration Agreement). The Facility's drafting choice should be construed to require the Facility's signature for two reasons. First, the mutual assent requirement is based on a party's objective manifestations. Rodarte v. Univ. of S.C., 419 S.C. 592, 603, 799 S.E.2d 912, 917-18 (2017) (quoting Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009)). Given the Facility's choice to place a signature block for itself in the Arbitration Agreement, it was reasonable for Ms. Royston to conclude the proposed contract was not binding without the Facility objectively manifesting assent through its signature. See also Abdiana Props., Inc. v. Bengtson, 575 S.W.3d 754, 761 (Mo. App. 2019) (finding it "reasonable to conclude" drafting party intended inclusion of signature line for itself to make its signature a condition of mutual assent). Second, to the extent the dual signature blocks create an ambiguity regarding the Arbitration Agreement's designated method of assent, it must be construed against the Facility because it alone chose the Arbitration Agreement's format and language. See Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 355-56, 755 S.E.2d 450, 455 (2014) (holding ambiguity in nursing home arbitration agreement must be construed against drafter).

Under long-standing South Carolina law, when a contract demands all parties' signatures, it is ineffective until all parties have signed. Dean, 229 S.C. at 436, 93 S.E.2d at 208. In Dean, the

South Carolina Supreme Court affirmed a circuit court's refusal to enforce a proposed contract that demanded five parties' signature but included only four. Id. As Dean explained

> The reason for holding the instrument void is it was intended that all the parties should execute it and that each executes it on the implied condition that it is to be executed by the others, and, therefore, that until executed by all, it is inchoate and incomplete and never takes effect as a valid contract.

Id. (quoting 17 C.J.S., Contracts § 62 at 412). The same principle applies here. Since the Facility chose dual signatures as the designated means by which the Arbitration Agreement was to be executed, the Facility's failure to sign renders the Arbitration Agreement "inchoate and incomplete" such that the circuit court was correct to find it "never takes effect as a valid contract."

Even if the Court accepted the Facility's argument that the Arbitration Agreement itself did not demand its signature to be valid, the Facility still failed to prove a binding contract. Because while the Facility is correct South Carolina allows a party to assent by means other than a signature (Appellants' Br. at 9-10), the Facility effectively admits it cannot provide the evidence to prove a non-signature assent. The limited circumstances where a party can assent without signing the written agreement it drafted and the evidentiary requirements to prove a non-signature assent are stated in Peddler. Peddler recognized "it is not always necessary" for both parties to sign a contract but a non-signing party assents only if it has "**accepted, held, and acted upon**" the agreement. Id. at 32, 221 S.E.2d at 117 (quoting Gladden v. Keistler, 141 S.C. 524, 140 S.E. 161, 164 (1927)) (emphasis added). Peddler later speaks of acceptance by "acquiesce[nce]," again defined to include "assenting to [the contract's] terms, holding it, and acting upon it." 266 S.C. at 32, 221 S.E.2d at 117 (quoting 17 Am. Jur. 2d Contracts § 70 at 408); see also Gladden, 140 S.E. at 164 (quoting 6

R.C.L. at 641) (finding that a non-signing party can assent to contract by "acquiescence"—i.e. "assenting to its terms, holding it, and acting upon it").[3]

Here, the Facility admits it did not "hold" the Arbitration Agreement. Both at the circuit court hearing and in its brief, the Facility acknowledges it cannot produce the original Arbitration Agreement and that the Facility has never located even a copy in its own records. Hearing Tr. at 29, lines 13-15 ("it's absolutely true . . . that we don't have a copy of" the Arbitration Agreement); Appellants' Br. at 7 ("the Facility has been unable to locate the Arbitration Agreement . . ."). The "holding" requirement from Peddler demands at the very least that the party seeking enforcement maintained a copy of the purported contract. Bishop Realty & Rentals, Inc. v. Perk, Inc., 292 S.C. 182, 185, 355 S.E.2d 298, 300 (Ct. App. 1987) (applying Peddler rule only because evidence showed the party seeking enforcement "retained a copy of the signed instrument for its files"). This is essential because, without holding a copy of the Arbitration Agreement, the Facility cannot prove its assent. Moreover, the Facility's inability to show it ever possessed the Arbitration Agreement suggests it cannot even show Ms. Royston manifested her assent by delivering to the Facility the version with her signature.[4] The Facility can offer nothing to negate the possibility that it has no copy because Ms. Royston changed her mind after signing and consciously chose not to deliver it. The Facility now dismisses this possibility as "patently improbable and wholly

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[3] Courts applying South Carolina law continue to apply the Peddler rule even in more recent cases. See Dan Ryan Builders W. Va., LLC v. Main St. Am. Assur. Co., ___ F. Supp. 3d ___, 2020 WL 1663411, at * 6 (D.S.C. Apr. 3, 2020) (citing Peddler and holding that "[a]cceptance of a contract by assenting to its terms, holding it and acting upon it, may be equivalent to a formal execution by one who did not sign it"); Coves Darden, LLC v. Ibanez, Op. No. 2016-UP-402, 2016 WL 4379419, at * 2 (S.C. Ct. App. 2016).

[4] Delivery is a crucial component of contract execution because mutual assent is based on objective manifestations of intent. It is not enough that a party had a "secret purpose or intention" to assent, the Facility must show Ms. Royston's purported assent was "made known" to the Facility through delivery of the Arbitration Agreement. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989).

speculative" (Appellants' Br. at 8) but admitted it was a "worthy point for sure" when questioned by the circuit court. Hearing Tr. at 31, lines 13-14.

The Facility also cannot meet the Peddler requirements that it "assented" to and "acted upon" the Arbitration Agreement. The Facility argues it assented just by drafting and presenting the Arbitration Agreement to Ms. Royston. Appellants' Br. at 10. No South Carolina law supports the notion that merely drafting a contract equals the objective manifestation of assent or reliance necessary to create a binding agreement, especially when the proposed contract calls for a signature the Facility admits it did not provide. The Facility relies heavily (Appellants' Br. at 9-10) on a statement in Jaffe v. Gibbons noting the general rule that there are instances where a party may assent without a signature. 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct. App. 1986). The Facility does not, however, explore what is required to prove assent when a party has not signed. In fact, what Appellants notably omit is that the Jaffe quote they showcase relies primarily on Peddler where the South Carolina Supreme Court recognized non-signature assent but expressly limited it to parties assenting to, holding, and acting on the proposed contract. Jaffe, 290 S.C. at 473, 351 S.E.2d at 346 (citing Peddler). Jaffe is also odd precedent for the Facility to rely on since that case involved a contract both parties signed. 290 S.C. at 470-71, 351 S.E.2d at 345.

At the circuit court, the Facility cited additional means by which it supposedly "acted upon" the Arbitration Agreement. Facility's Mem. in Supp. of Mot. to Dismiss at 10. Since those arguments are not included in the Facility's brief, they have been abandoned. Should the Facility attempt to revive these arguments on reply, they should be rejected on the merits. The Facility argued Ms. Royston's admission and the Facility's provision of nursing home services during her residency counted as action upon the Arbitration Agreement. Id. However, the Facility admits the Admission Agreement and Arbitration Agreement are separate and independent contracts. Hearing

Tr. 7, line 25 – 8, line 1 (admitting that agreeing to Arbitration Agreement "is not a precondition to admission"). Thus, none of the nursing services the Facility provided could support the formation of an arbitration contract[5] The Facility then argued it acted on the Arbitration Agreement by filing its motion to compel arbitration and even suggested it could sign the Arbitration Agreement now and enforce its terms against Respondent. Facility's Mem. in Supp. of Mot. to Dismiss at 10-11 n. 3 (suggesting "retroactive" application of its signature); Hearing Tr. at 15, lines 15-17.

But, the Facility's reaction to Respondent's Complaint was not that of a party that accepted, held, and acted upon an arbitration contract. Rather than immediately asking the circuit court to dismiss and compel arbitration, the Facility answered. That answer, while vaguely reserving the right to assert arbitration later (Answer at 1), did not demand arbitration or raise it as a defense to Respondents' claims. The Facility's first effort to pursue arbitration did not come until nearly six months after litigation began. Also, there is no legal basis for Respondents' claim that it could sign the Arbitration Agreement today and enforce it. The mutual assent required to make the Arbitration Agreement valid means the Facility and Ms. Royston must agree at the "**same time**, upon the same subject matter, and in the same sense." Nugent v. Myles, 829 S.E.2d 623, 627 (Ga. App. 2019).[6]

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[5] Several other jurisdictions have recognized admission and nursing home services are not sufficient to demonstrate a nursing home's assent to a separate and independent arbitration contract the home failed to sign. Robinson Nursing & Rehab. Ctr., LLC v. Phillips, 586 S.W.3d 624, 635-36 (Ark. 2019) ("the arbitration agreement was a separate contract from the admission agreement"); Byrd v. Simmons, 5 So.3d 384, 389-90 (Miss. 2009); see also Caldwell v. SSC Lebanon Operating Co., LLC, Civil Action No. 3:16-cv-0036, 2016 WL 3905670, at * 5 (M.D. Tenn. July 19, 2016) (finding nursing services indicated assent to admission agreement but not to arbitration contract).

[6] See also Pac. Cascade Corp. v. Nimmer, 608 P.2d 266, 268 (Wash. App. 1980) (finding the key consideration is whether the parties manifested to each other their mutual assent to the same bargain at the same time); I & R Mech., Inc. v. Hazelton Mfg. Co., 817 N.E.2d 799, 802 (Mass. App. 2004) (a meeting of the minds is required "on the same proposition on the same terms at the

Even if Ms. Royston once assented to arbitration on some unknown date, her objective manifestations now (i.e. the time when the Facility suggests it may assent by signature) show she no longer assents. Respondent's acts of filing a complaint rather than an arbitration demand and her opposition to the Facility's motion to dismiss show the parties cannot form the required meeting of the minds at this late date. See Byrd v. Simmons, 5 So.3d 384, 389-90 (Miss. 2009) (finding nursing home could not assent by signature to arbitration contract after resident filed lawsuit and thereby signaled an "outright rejection" of the proposed arbitration agreement).

Finally, as Byrd indicates, several courts have rejected a nursing home's efforts to compel arbitration based on a proposed contract the home failed to sign. Just last year, the Arkansas Supreme Court ruled a nursing home's failure to sign a series of arbitration contracts on the line designated for its signature "is fatal to the validity of these agreements." Robinson Nursing & Rehab. Ctr., LLC v. Phillips, 586 S.W.3d 624, 635 (Ark. 2019). Without the signature the contracts called for, the home could not meet its burden to demonstrate an objective manifestation of intent. Id. at 635-36; see also Pine Hills Health & Rehab., LLC v. Matthews, 431 S.W.3d 910, 915 (Ark. 2014) (holding that, while there are ways to prove assent other than a signature, a nursing home failed to prove its assent to an unsigned arbitration contract). In 2015, a Pennsylvania court held a nursing home that drafted an arbitration contract calling for its signature but failed to sign did not assent merely by presenting the proposed contract to a prospective nursing home resident. Bair v. Manor Care of Elizabethtown, PA, LLC, 108 A.3d 94, 98 (Pa. Super. 2015) ("By failing to affix its signature, [the nursing home] did not consent to arbitrate"). Similarly, a Tennessee federal district court rejected a nursing home's attempt to compel arbitration when it failed to sign a

same time"); Angelou v. African Overseas Union, 33 S.W.3d 269, 279 (Tex. App. 2000) ("The parties must agree to the same thing, in the same sense, at the same time").

proposed arbitration agreement even though the nursing home offered an affidavit from its general manager claiming the absent signature did not indicate a lack of assent. Caldwell v. SSC Lebanon Operating Co., LLC, Civil Action No. 3:16-cv-0036, 2016 WL 3905670 (M.D. Tenn. July 19, 2016) (quoting Flanary v. Carl Gregory Dodge of Johnson City, LLC, No. E2004-00620-COA-R3-CV, 2005 WL 1277850, at * 9 (Tenn. App. May 31, 2005) (rejecting affidavit as "nothing more than a post-commencement of litigation statement" insufficient to make objective manifestation of assent).

In sum, the circuit court correctly refused to compel arbitration because the Facility failed in its duty to prove the parties formed a valid arbitration contract. The circuit court did not abuse its discretion in finding as a matter of fact that the Facility failed to prove Ms. Royston ever delivered the Arbitration Agreement to the Facility because the Facility admits it does not have either the original or a copy. In light of this admission, the Facility cannot show it "held" the proposed contract as required by Peddler to prove a non-signature assent. Finally, the circuit court's refusal to permit a nursing home to enforce an arbitration agreement it did not sign is consistent with substantial persuasive authority and should be affirmed.

2. As an Additional Sustaining Ground, the Arbitration Agreement is Unenforceable Because it Lacks Material Terms and is Unconscionable.

As discussed above, the Arbitration Agreement did not form a valid contract under South Carolina law because there was no meeting of the minds on its material terms. Moreover, as Respondent argued to the circuit court, the Arbitration Agreement includes an inscrutably vague arbitrator selection process and no guidance on how, when, or under what rules arbitration proceedings will be conducted. Pla. Mem. In Opp. to Def.'s Mot. to Dismiss at 14-16. Moreover, the Arbitration Agreement is unenforceable because it was presented under circumstances that presented Ms. Royston with no meaningful choice and its one-sided terms effectively force

Respondent to walk into the arbitration hearing without any hope of obtaining the evidence needed to prove her claims. Id. at 22-29.

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

The Arbitration Agreement purports to be a dispute resolution contract but it provides no useful guidance on who will be tasked with resolving Respondent's claims or how the accompanying proceedings will be conducted. Parties cannot form a valid contract without forming "a meeting of the minds . . . with regard to all essential and material terms." Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) (citing Player, 299 S.C. at 105, 382 S.E.2d at 894). Even if a contract mentions a material term, the contract fails if the term is defined or described in vague terms. Reed v. Boykin, 282 S.C. 614, 320 S.E.2d 68 (Ct. App. 1984) (quoting 1 Corbin on Contracts § 95 (1963) ("Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract")). These are contract formation requirements, and Appellants bear the burden of proving both that the Arbitration Agreement contains all material provisions and that it describes them in definite terms. Allegro, Inc. v. Scully, 418 S.C. 24, 791 S.E.2d 140 (2016) ("Part of proving that some enforceable contract exists is being able to identify the terms thereof").

Arbitrator selection and the rules governing arbitration proceedings are material terms of an arbitration contract. To determine whether a term is material, South Carolina courts consider the "essence of the agreement" Grant, 383 S.C. at 131, 678 S.E.2d at 439 (citing Ex Parte Warren, 718 So.2d 45, 49 (Ala. 1998)). For example, in a lease contract, essential terms include a description of the boundaries of the leased premises, the lease term, as well as the time and manner of payment. Player, 299 S.C. at 105, 382 S.E.2d at 894. For commercial sales contracts, price,

time, and place are all indispensable terms. Ross Electric, Inc. v. Cooler Erectors of Atlanta, Inc., 418 S.C. 424, 429, 794 S.E.2d 382, 385 (Ct. App. 2016) (quoting McPeters v. Yeargin Constr. Co, Inc., 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986)). Similarly, for service contracts, essential terms include the scope of the work to be performed and the amount of compensation. Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014).

Grant identified some essential provisions in a nursing home arbitration contract by recognizing a contract provision stating an exclusive arbitral forum was "integral" to the agreement such that its unavailability rendered the whole contract invalid. 383 S.C. at 131-32, 678 S.E.2d at 438-39. While the Arbitration Agreement does not have an exclusive arbitral forum provision, Grant helps define what constitutes a material term in a nursing home arbitration contract. Grant found a term is "integral" where it has "wide-ranging substantive implications" on the outcome of arbitration proceedings. Id. at 132, 678 S.E.2d at 439 (quoting Singleton v. Grade A Market, Inc., 607 F. Supp. 2d 333, 339 (D. Conn. 2009)). Grant found arbitrator selection met this standard because it would affect "the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration." Id. Thus, provisions going to the heart of the substantive law applied and the procedures used during the arbitration process are material because they "may substantially affect the substantive outcome of the resolution" of the dispute. Id. at 132, 678 S.E.2d at 439.[7]

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

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

Here, the Arbitration Agreement lacks any valid terms on arbitration procedures. There is no guidance on the timetable for arbitration proceedings and no designation of rules to govern procedure or evidence. Appellants may argue the gap was filled by the Arbitration Agreement's reference to the South Carolina Alternative Dispute Resolution/Mediation Rules. But, the only substantive evidentiary and procedural provisions in those rules for arbitration proceedings is Rule 12 which, by its terms, "applies only to non-binding arbitrations." Rule 12(a), SCADR. The Arbitration Agreement states that proceedings under its terms "shall be binding on all parties." (Arbitration Agreement). Moreover, it would not save the Arbitration Agreement for Appellants to argue the parties can negotiate the applicable procedural and evidentiary rules later. Ellis v. Taylor, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1994) ("A contract leaving material terms open for future agreement is void for indefiniteness").

Similarly, the Arbitration Agreement's arbitrator selection process is too vague to permit enforcement. The process must begin with the parties collaborating on a choice of arbitrator culled

from "a panel having experience and knowledge of the health care industry." (Arbitration Agreement). The origin, identity, and composition of this "panel" is not identified in the Arbitration Agreement and is in any no inferable from its language. It is not clear if this panel currently exists or whether the parties must form it. It is not clear how many individuals comprise the panel or how they are chosen. It is not clear whether the "experience and knowledge" requirement demands a medical education or whether it could include attorneys, judges, insurance adjustors, or individuals from other industries. The panel process would prove impossible to implement without any guidance from the contract language.[8] Ultimately, when a contract is indefinite on an important term, the proper judicial response is not to imply or infer a term but rather to refuse enforcement. Ebert v. Ebert, 320 S.C. 331, 339, 465 S.E.2d 121, 126 (Ct. App. 1995) (citing 17A Am. Jur. 2d Contracts § 192 (1991)).

b. The Arbitration Agreement is Unconscionable.

If Respondent is required to proceed under the Arbitration Agreement, she will be forced to walk into an arbitration hearing without the key documents needed to prove her case and with no way to know what testimony key fact witnesses will provide. Appellants, on the other hand, have the relevant documents in their exclusive possession and have an opportunity to learn what the crucial witnesses know. In essence, the Arbitration Agreement tilts the process in Appellants'

[8] Appellants may also argue the vagueness of the "panel" is immaterial because both the Arbitration Agreement and the FAA provide an alternative mechanism for arbitrator selection. (Arbitration Agreement) (providing for selection by court); 9 U.S.C. § 5. But, by its terms, this alternative mechanism may not be implemented unless the "panel" process fails. (Arbitration Agreement) (allowing judicial selection only if "the parties cannot reach a mutual decision on the selection" through the "panel" process). The "panel" process cannot fail (or even commence) because its parameters lack the clarity required to be attempted. See also Grant, 383 S.C. at 131, 678 S.E.2d at 438 (finding "great merit" in the rulings of other courts that deem 9 U.S.C. § 5 inapplicable when an arbitration contract designates an unavailable arbitration forum).

favor and places Respondent at a competitive disadvantage not permitted under South Carolina law.

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

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

is an element of surprise in the inclusion of the challenged clause; and (6) the conspicuousness of the arbitration clause. Id. (citing Carlson v. Gen. Motors Corp., 883 F.2d 287, 293 (4th Cir. 1989)).

Applying these factors to the Arbitration Agreement shows the fundamental unfairness of the bargaining process. Initially, the Arbitration Agreement is an adhesion contract in that it was printed on a standardized form, offered to Ms. Royston on a take-it-or-leave-it basis, and did not offer any chance to negotiate. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Adhesion contracts are not per se unconscionable but identifying a document as an adhesion contract is a starting point for analyzing the substantive factors. Simpson, 373 S.C. at 27, 644 S.E.2d at 669. The first factor favors Respondent because Ms. Royston's injuries were personal and substantial. Appellants' alleged negligence caused her to be overmedicated and substantially contributed to her premature death. (Compl. ¶ 52).

The other factors also favor Respondent. Ms. Royston was not a substantial business concern. In contrast, Appellants are sophisticated business entities evidenced in many ways including the complex organization structure they have built to manage the Facility's operations. See Compl. ¶¶ 13-24. The disparity in bargaining power is considerable. Appellants operate nursing homes in nearly twenty states and report annual revenues exceeding $ 1 billion. (Compl. ¶¶ 10, 25). Ms. Royston, on the other hand, was an elderly woman in poor health in need of care to continue from day to day. Finally, the key language of the Arbitration Agreement was not conspicuous relative to any of the other paperwork the Facility presented to Ms. Royston. 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).

The Arbitration Agreement's discovery bar also meets the second unconscionability requirement because its terms are decidedly oppressive and unfair to Respondent. This Court has signaled its refusal to tolerate arbitration contracts with such extensive discovery restrictions. In Lucey v. Meyer, 401 S.C. 122, 143, 736 S.E.2d 274, 285 (Ct. App. 2012), the court found an employment arbitration contract was not unconscionable, rejecting the "oppressive terms" factor only after finding the contract "places no apparent restrictions on the introduction of depositions of witnesses into arbitration proceedings." The restrictions lacking there are present here. The inescapable reality of the Arbitration Agreement is that Respondent will have no opportunity to conduct depositions. South Carolina's federal district court has found an arbitration contract unconscionable because of "severe discovery limitations." Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582, 614 (D.S.C. 1998). In Hooters of America, the employer went too far when it limited its employee to noticing one deposition unless the arbitrator found a "substantial need" for more. Id. at 601. The Arbitration Agreement poses a far more restrictive view of discovery by excluding all depositions. Several rulings from other jurisdictions have likewise refused to allow nursing homes to shut their former residents out of discovery.[9]

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

Appellants may argue a zero-discovery process is acceptable because it applies with equal force to Appellants. This argument fails for multiple reasons. First, an arbitration proceeding amounting to trial by ambush is hardly consistent with the South Carolina Rules of Alternative Dispute Resolution the Arbitration Agreement purports to incorporate. See Rule 1, SCADR (stating that arbitration "shall be construed to secure the *just*, speedy, inexpensive *and collaborative* resolution" of disputes) (emphasis added). Second, while a zero-discovery rule may seem like an equal burden for both sides, its effects are unequally detrimental to a plaintiff in a nursing home case. Nursing home negligence occurs almost exclusively on the nursing home's property, recorded in documents within the home's exclusive control, and performed or witnessed by individuals in the home's employ. If Appellants want to visit the scene, review video of an incident, or speak to the allegedly at-fault individual, they can do so without limitation.

But, without the ability to send a request for production or notice of deposition, Respondent's counsel will have none of this information when the arbitration hearing begins. Appellants have no duty to provide documents or to permit inspections. Even attempting to speak with Appellants' employees would present a potential ethical violation. See Rule 4.2, RPC, Rule 407, SCACR. Finally, the disparity in pre-hearing information is exacerbated further by how South Carolina law required Respondent to initiate the current claims. Pursuant to S.C. Code Ann. § 15-79-125, these claims began not with a Summons and Complaint but rather a Notice of Intent to File Suit which required Respondent to provide an expert affidavit at the earliest possible stage. Thus, Appellants knew the identity of Respondent's expert and an outline of her opinions before the Complaint was even filed. If the Arbitration Agreement is enforced, Respondent will enter the final arbitration hearing known nearly nothing about Appellant's expert witnesses.

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

3. **As an Additional Sustaining Ground, Ms. Royston's Purported Consent to Arbitration Does Not Extend to the Wrongful Death Claim Covering Her Family Members' Losses.**

As an additional sustaining ground, the Court should hold the Arbitration Agreement did not cover Respondent's wrongful death claim. Appellants insist Ms. Royston had the power to waive the right to a jury trial on a claim that did not exist when the Arbitration Agreement was presented, would never belong to her, and covered injuries suffered exclusively by other people. No South Carolina authority supports these propositions. In fact, even if Ms. Royston could agree to arbitrate her own claims, the history and structure of South Carolina's wrongful death and survival statutes show wrongful death is a distinct, independent claim she could not force to arbitration because it solely benefits family members who never agreed to forego a jury trial.

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

The group of Ms. Royston's wrongful death beneficiaries were not parties to the Arbitration Agreement, and Appellants may not rely on this contract to dismiss the wrongful death claim without overcoming the presumption that a contract may be enforced only by its parties. Touchberry v. City of Florence, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988). A South Carolina contract may be enforced against a non-party only with proof of (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; or (5) estoppel. Wilson, 426 S.C. at 338, 827 S.E.2d at 174 (citing Malloy v. Thompson, 409 S.C. 57, 561-62, 762 S.E.2d 690, 692 (2014)).

Since Appellants do not attempt to apply any of these theories, the Arbitration Agreement does not apply to the wrongful death claim.

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

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

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

In contrast, the legislature positioned the survival statute in a completely different code chapter. Both wrongful death and survival relate to "civil remedies and procedures" (Title 15) but, while wrongful death is a distinct claim warranting its own designation (Chapter 51), the survival statute is classified within an existing chapter (Chapter 5) identifying the proper "parties" for pursuing legal claims. A plaintiff may cite the survival statute to support a suit for any number of legal claims. When that claim is based on the decedent's personal injury, the available damages include "medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." Scott, 340 S.C. at 170, 530 S.E.2d at 395. Thus, while courts and parties often refer to a "survival claim," this term is a misnomer because the survival statute does not create a claim, it only corrects a misguided common-law rule that assumed a person's existing legal claims died with her. Bemis v. Waters, 170 S.C. 432, 170 S.E. 475, 476 (1933) (holding that survival statute exists as a "correct[ion]" to common-law rule). The statutory scheme alone shows wrongful death and survival are distinct claims accruing at different times and governed by different statutes of limitation. S.C. Code Ann. § 15-3-560(6) (measuring three-year limitations period for wrongful death claims from date of death).

The statutes' history also shows their independence. In Grainger v. Greenville, S. & A. Railway Co., the South Carolina Supreme Court traced the divergent tracks wrongful death and survival claims have taken over their development. 101 S.C. 399, 85 S.E. 968 (1915). In that case, the trial court had dismissed a survival action because the decedent's administrator (equivalent to the modern "personal representative") had previously recovered on a wrongful death claim. Id. at 968. The wrongful death statute in place then was nearly identical to current section 15-51-10 and it provided a claim "in favor of the beneficiaries" but nothing for "the deceased or his estate." Id. at 969. When the legislature recognized this abnormality, it responded by creating the predecessor

to the modern survival statute. Id. (citing 1912 Code section 3693). Grainger held this legislative history conclusively established wrongful death and survival claims are distinct and independent. Id. The claims are distinct because "[t]he beneficiaries, the cause of action, the measure of damages, are all different." Grainger, 85 S.E. at 969.

Building on Grainger and other similar cases, Bass further highlighted the claims' distinctiveness by holding judgment in a wrongful death claim does not have claim preclusive effect on survival claims. 229 S.C. at 611-12, 93 S.E.2d at 914; see also Gleaton v. Southern Ry. Co., 212 S.C. 186, 192, 46 S.E.2d 879 (1948) ("verdict and judgment for defendant in an action under the survival statute will not estop the personal representative of the deceased in an action under Lord Campbell's Act"). Bass also addressed a reason why wrongful death claims are often erroneously perceived as derivative of survival claims. In both, the decedent's personal representative is the named plaintiff. 229 S.C. at 612, 93 S.E.2d at 914. But this fact alone is not determinative because, when asserting wrongful death and survival claims, a personal representative "function[s] under two separate and distinct trusteeships." Id. In other words, while it is the personal representative's name in the caption for a wrongful death claim, "it is clear . . . the real parties to the action were the beneficiaries." Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539, 541 (1928).

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

540. A wrongful death claim is "independent" of claims the decedent had during her life and "wholly different" than any other claim available at her death. Wellman v. Bethea, 243 F. 222 (E.D.S.C. 1917); In re Mayo's Estate, 60 S.C. 401, 38 S.E. 634, 638 (1901). Wrongful death and survival claims are "separable and distinct." Keel v. Seaboard Air Line Ry., 122 S.C. 17, 114 S.E. 761, 762 (1922). In sum, Appellants err in asking the Court to find wrongful death is derivative of survival claims because "[t]he object, scope, and measure of damages" is different for the two claims. In re Mayo's Estate, 38 S.E. at 638.

These distinctions remain valid even in more modern cases. This Court continues to recognize the wrongful death statute created a new cause of action that did not exist at common law, accrues only at the decedent's death, and which is subject to its own statute of limitation. Weaver v. Lentz, 348 S.C. 672, 678, 561 S.E.2d 360, 363 (Ct. App. 2002). Accordingly, wrongful death actions and survival claims consider the losses related to a person's death from completely different perspectives. Boyle v. U.S., 948 F. Supp. 2d 577, 580 (D.S.C. 2012); 28 S.C. Jur. Wrongful Death § 5 ("***the wrongful death action and the survival action involve different, independent claims***") (emphasis added). Their distinctiveness is even plainer in practice. Since they compensate different groups for different losses, wrongful death and survival claims can result in dramatically different verdicts. For example, in Scott, the jury awarded $ 600,000 in actual damages on a medical malpractice claim alleged under the survival statute and $ 1.5 million in punitive damages for the same claim. 340 S.C. at 162, 530 S.E.2d at 391. On a wrongful death claim in the same action, the jury awarded $ 1.5 million in actual damages and $ 2 million in punitive damages. Id. Since these two claims addressed such different losses by different people, the disparate awards were not inconsistent, and this Court affirmed the verdict in its entirety. Id. at 169-71, 530 S.E.2d at 394-96; see also Welch v. Epstein, 342 S.C. 279, 303-05, 536 S.E.2d 408,

420-21 (Ct. App. 2000) (affirming verdict of less than $29,000 for survival claim and $ 3 million for wrongful death claim).

In sum, extensive South Carolina precedent rejects Appellants' contention that wrongful death claims are derivative of claims a person holds at the time of her death. South Carolina's appellate courts have held wrongful death claims are "distinct," "independent," "separate," "wholly different," and "not a continuation" of claims a decedent could have filed during her lifetime. Even assuming Ms. Royston was bound by the Arbitration Agreement, these cases show Ms. Royston did not bind her wrongful death beneficiaries to arbitration. Those beneficiaries are the "real parties" to the wrongful death claim, and they did not sign the Arbitration Agreement or otherwise consent to waive their right to a jury trial.

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

Appellants cite an indiscriminate collection of case law, federal district court orders, and secondary sources to suggest South Carolina courts have already ruled wrongful death is a derivative claim. Facility's Mem. In Supp. of Mot. to Dismiss at 17-20. None of the authorities Appellants cite support that conclusion and none squarely address the question now before the Court. Instead, it is the precedent cited in Argument 3(b) that is most helpful for showing the true nature of a wrongful death claim under South Carolina law.

Appellants claim the South Carolina Supreme Court addressed the arbitrability of wrongful death claims in Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014). However, Dean addressed a very different issue related to forum selection clauses. Id. at 382, 759 S.E.2d at 733 (finding "outcome of this appeal turns" on effect of arbitral forum provision). Plus, Dean did not even compel arbitration in the case before it. The Supreme Court rejected a few reasons cited for invalidating a nursing home arbitration contract but remanded the

matter to the circuit court to address two others. Id. at 387, 759 S.E.2d at 736. Appellants rely on a sentence in one of Dean's footnote but read far too much into that sentence. Id. at 378 n. 3, 759 S.E.2d at 731 n. 3 ("We note that courts may not refuse to compel arbitration simply because a wrongful death claim is involved").

This footnote addressed an overly broad pronouncement in the appealed order suggesting wrongful death claims are categorically excluded from arbitration. Id. (citing circuit court order statement stating that "wrongful death actions are not something that's arbitrated"). That type of rule would violate the FAA's equal-treatment principle. Id. (citing Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532-33 (2012)); see also Kindred Nursing Ctrs., Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017). However, that is not the argument Respondent makes here. A wrongful death claim may be arbitrable in instances where the statutory beneficiaries agree to do so. Respondent simply argues an individual's consent to arbitrate may not be grafted into a wrongful death claim that pays different people for different losses. Dean does not reject that argument or even consider it. Finally, reading Dean's footnote to have any bearing on the parties' dispute does not adequately account for either side's arguments on the key issue. As discussed in Argument 3(d) below, the interaction of wrongful death and survival claims for arbitrability purposes requires a careful analysis of statutory language and history as well as case law interpreting the two claims. Dean had no reason to undertake this analysis and has nothing to offer the Court in resolving this appeal.

Appellants also rely on one unreported federal district court order. Facility's Mem. In Supp. of Mot. to Dismiss at 17 (citing THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, Civil Action No. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015)). The soundness of Gilbert's reasoning and the continued viability of its conclusions are questionable. The district

court ordered arbitration but did not feel the need to squarely address the issue raised here because the court concluded the plaintiff "ha[d] not brought a wrongful death action . . . for the benefit of individual heirs." Id. at * 3. The court's meaning is unclear, but the court was mistaken if it was implying the proceeds of a wrongful death claim do not flow to individuals identified as statutory beneficiaries. S.C. Code Ann. § 15-51-40; see also Claussen, 145 S.E. at 541 (finding beneficiaries are the "real parties" to a wrongful death claim). Additionally, Gilbert was never more than persuasive authority and is now bad law. Gilbert applied equitable estoppel and third-party beneficiary theories to compel arbitration, but this court has since rejected those theories twice in nursing home cases. 2015 WL 1268185, at * 2; see also Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 556-58, 574-75, 813 S.E.2d 292, 299-300, 308 (Ct. App. 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 57-62, 784 S.E.2d 679, 687-89 (Ct. App. 2016).

Finally, Appellants contend that, since section 15-51-10 permits wrongful death claims only when the decedent would have had a claim if she survived, South Carolina law intends to give an individual control over a wrongful death claim which includes the right to determine the method by which it will be resolved. Facility's Mem. In Supp. of Mot. to Dismiss at 18-19 (citing Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988)); see also Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E.2d 143 (2010) (citing Quattlebaum). But, Quattlebaum (and Stokes) did not address arbitration at all. Instead, they simply held that if an individual allows the statute of limitations on a personal injury claim to lapse during her life, then a wrongful death claim may not be used after her death to "revive" the stale claim. Stokes, 389 S.C. at 349, 699 S.E.2d at 146.

The statute of limitations is not at issue here and Quattlebaum/Stokes have never been cited as justification for binding non-parties to an arbitration contract. Plus, the legal provisions holding

that an individual may prevent a wrongful death claim by ignoring or settling a personal injury suit during her life do not mean the individual may control the manner in which the wrongful death claim will be resolved *should she choose to leave it intact*. Several courts have made this distinction explicitly. Oklahoma, like South Carolina, bars a wrongful death suit if the decedent ended a personal injury claim during her lifetime based on the same wrongdoing. Boler v. Sec. Health Care, LLC, 336 P.3d 468, 477 (Okla. 2014) (citing Haws v. Luethje, 503 P.2d 871 (Okla. 1972)). Even so, Boler refused to apply a nursing home resident's arbitration contract to a wrongful death claim because doing so would violate contract principles on mutual assent. Id. at 471 and n. 5.

Pennsylvania also bars wrongful death claims if the decedent allowed her personal injury claim to lapse. Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 657 (Pa. Super. 2013) (citing Moyer v. Rubright, 651 A.2d 1139 (Pa. Super. 1994)). Yet, just like Oklahoma, Pennsylvania does not extrapolate from that rule the notion that an individual can bind her wrongful death beneficiaries to arbitration. Pisano, 77 A.3d at 657, 662 (refusing to find wrongful death beneficiaries lost jury trial right "where they did not waive it of their own accord"). Thus, Quattlebaum/Stokes and their interpretation of section 15-51-10 do not require arbitration in this case. Had Ms. Royston settled her claims against Appellants before her death, Respondent could not bring a wrongful death claim on behalf of the statutory beneficiaries. But it does not follow that Ms. Royston had the ability to direct the wrongful death claim to arbitration. Since Ms. Royston had a viable dispute with Appellants when she died, a proposed arbitration of the wrongful death claim must consider whether the beneficiaries agreed to waive a jury trial.

In short, none of the South Carolina authority Appellants cite support arbitration in this case. The cases in Argument 3(b) are more apt precedent showing South Carolina recognizes wrongful death is a distinct, independent, and non-derivative legal claim.

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

In light of the historical and structural differences between South Carolina's wrongful death and survival statutes, as well as substantial case law defining and treating the resulting claims distinctly, the Court should reject Appellants' attempt to use Ms. Royston's purported assent to the Arbitration Agreement to force arbitration on a wrongful death claim. At least a dozen other jurisdictions have rejected Appellants' argument.[10] Four different state supreme courts have done so over just the last ten years. While some jurisdictions have taken a contrary view[11], South Carolina's statutory language and case law discussed above are more in line with the states that refuse to compel arbitration under similar circumstances. In the aggregate, to the extent the Court looks beyond South Carolina law, persuasive authority supports the circuit court's order.

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

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

The en banc Missouri Supreme Court addressed a similar case in Lawrence v. Beverly Manor., 273 S.W.3d 525 (Mo. 2009). Similar to the Arbitration Agreement, the contract in Lawrence purported to bind both a nursing home resident and "all persons whose claim is derived through or on behalf" of the resident including family members, legal representatives, and heirs. Id. Shortly after admission, the nursing home's staff members allegedly dropped the mother and caused fatal injuries. Id. Just like this case, the family filed wrongful death and other legal claims, the nursing home cited the contract in an effort to compel arbitration, and the trial court denied the motion. Id. at 526-27.

The Missouri Supreme Court affirmed, finding wrongful death is not derived from any claim the resident may have had at or before her death. Id. at 529. All of the key components cited in Lawrence to show a wrongful death is not derivative are also present under South Carolina law. Lawrence started by reviewing the wrongful death statute's language. Id. at 527 (quoting Mo. Rev. Stat. § 537.080). Missouri's statute is substantially similar to its South Carolina counterpart, and Lawrence interpreted that language to create a new cause of action that is distinct from survival claims and not a transmitted right from a decedent to her family members. Lawrence, 273 S.W.3d at 527. South Carolina precedent makes these same points. Weaver, 348 S.C. at 678, 561 S.E.2d at 363 ("[t]he wrongful death statute . . . created a new cause of action"); Keel, 114 S.E. at 762 (wrongful death and survival claims are "separable and distinct"). Considering both the statutory language and precedent, Lawrence concluded a wrongful death claim is "separate and distinct." 273 S.W.3d at 528. Its holding was buttressed by the fact that Missouri wrongful death claims compensate different people for different losses. Id. at 528-29. South Carolina cites the same factors to highlight a wrongful death claim's independence. Scott, 340 S.C. at 168-70, 530 S.E.2d at 394-95 (listing available damages in wrongful death and survival claims); In re Mayo's Estate,

38 S.E. at 638 (finding "object, scope, and measure of damages" in wrongful death claims is "wholly different").

Lawrence followed and was soon joined by a number of other states in rejecting the notion that a nursing home resident could contract away a jury trial on a wrongful death claim compensating her family members or heirs for their unique damages. These cases often point to a common set of factors to show a wrongful death claim is not derivative of the decedent's claims. First, a wrongful death claim is likely not derivative when wrongful death and survival are expressly distinguished in the statutes. Pisano, 77 A.3d at 656 (reading statutes to mean "two separate and distinct causes of action arise from a single injury" resulting in death); see also Woodall v. Avalon Care Center-Federal Way, LLC, 231 P.3d 1252 (Wash. App. 2010) (describing wrongful death and survival as "conceptually different"). Second, the two claims should be viewed as separate when they are brought by different people to compensate different individuals for different losses. In Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., an Arizona appellate cited the different claimants, different beneficiaries, and different damages as definitive proof a wrongful death statute "confers an original and distinct claim" and is neither "derived from nor is it a continuation of claims which formerly existed in a decedent." 316 P.3d 607, 613 (Ariz. Ct. App. 2014); see also FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191, 203 (Md. App. 2016) (holding that survival and wrongful death claims are distinct because they are "by different persons, the damages go into different channels, and are recovered upon different grounds"); Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 599 (Ky. 2012) (concluding wrongful death is independent claim in part because it belongs to the beneficiaries and is "meant to compensate them for their own pecuniary loss").

Third, many of these opinions find wrongful death to be a non-derivative claim because it accrues at a different time than a survival claim. In Carter v. SSC Odin Operating Co, LLC, the Illinois Supreme Court concluded wrongful death is independent because it "does not accrue until death" while the state's survival statute "simply allows a representative . . . to maintain those . . . actions that had already accrued." 976 N.E.2d 344, 354 (Ill. 2012); see also Boler, 336 P.3d at 477; Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007) (finding decedent's wrongful death claim "accrued independently to his beneficiaries for the injuries they personally suffered"). In other words, a wrongful death claim does not accrue or, as one court put it, "vest" in the statutory beneficiaries until the decedent's death. Strickholm v. Evangelical Lutheran Good Samaritan Soc'y, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

Finally, these cases show the error in Appellants' interpretation of a "derivative" claim. The Arbitration Agreement purports to extend to people deriving their claim through Ms. Royston. Appellants seem to argue wrongful death is sufficiently derivative because S.C. Code Ann. § 15-51-10 permits a wrongful death claim only if the decedent could have brought a claim for the same harm before she died. Many cases from other states cited above found wrongful death was not a derivative claim despite statutes like section 15-51-10. Boler, 336 P.3d at 472-77; Carter, 976 N.E.2d at 358-59; Woodall, 231 P.3d at 1259 ("characterizing the wrongful death claims as 'derivative' does not support the proposition that the heirs must arbitrate their claims for wrongful death"). By arguing that a statute like section 15-51-10 was enough to force a wrongful death claim to arbitration, Carter found parties like Appellants "overstate[] the significance of the derivative nature of a wrongful-death action" especially where, here as in Carter, there is extensive case law and structural differences demonstrating wrongful death is an independent claim. Similarly, Boler held that while a statute like 15-51-10 might make wrongful death "partially derivative" in a

limited sense, it would still be improper to compel arbitration since wrongful death accrues separately and compensates statutory beneficiaries directly for their personal losses. 336 P. 3d at 472, 477 (finding a resident's signature could not compel arbitration on wrongful death claim unless that claim was "wholly derivative"); see also Pisano, 77 A.3d at 659-60 (providing detailed discussion of definition for "derivative" and rejecting arbitration because while wrongful death claims are inherently "derivative of the decedent's injuries," they "are not derivative of decedent's rights").

In sum, persuasive authority does not support Appellants' argument that South Carolina's wrongful death claim is "derivative" such that a nursing home resident's agreement to arbitrate applies to a wrongful death claim. A dozen states have considered statutes similar to section 15-51-10 and found wrongful death is a distinct, independent claim. Thus, as an additional sustaining ground, the Court should reject arbitration on Respondent's wrongful death claim even if the Court finds the Arbitration Agreement was properly formed and valid as to the survival claim.

CONCLUSION

Based on the arguments stated above, Respondent respectfully requests the Court affirm the circuit court's order denying the Facility's mostion to dismiss and to compel arbitration. The Facility failed to meet its burden to prove the formation of a valid arbitration contract because it acknowledges that it neither signed nor "held" the Arbitration Agreement as required by South Carolina law. Since the circuit court's ruling on the Facility's motion was proper, the circuit court was also correct in suggesting the remaining Appellants' motions to stay are moot. Alternatively, the Court should affirm the circuit court's order because the Arbitration Agreement lacks material terms on arbitrator selection and is unconscionable in its refusal to permit any pre-hearing discovery. Finally, at the very least, the Court should hold Respondent's wrongful death claim is

not subject to arbitration because it is a separate and independent claim from the survival claim and none of Ms. Royston's wrongful death beneficiaries consented to arbitration.

Respectfully submitted,

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June 30, 2020
Rock Hill, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stillwell, Circuit Court Judge

Appellate Case No. 2019-001955

RECEIVED
Jun 30 2020
SC Court of Appeals

Estate of Patricia Royston, by and through the appointed personal representative, Marianne McCoig, individually and on behalf on the statutory beneficiaries, …………….. Respondent

v.

Hunt Valley Holdings, LLC, a/k/a Fundamental Long-Term Care Holdings, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville, ……………… Appellants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 30, 2020, he served Appellants' counsel with Respondent'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):

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Estate of Patricia Royston v. Hunt Valley Holdings, LLC et al. (Appellate Case No. 2019-001955)

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P. Royston--Designation of Matter (Respondent's Br.) PDF.pdf; P. Royston--Initial Brief of Respondent PDF 2.pdf;

Counsel:

I am attaching the Initial Brief of Respondent and Respondent'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,

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