THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2020-000473

White Oak Manor of Spartanburg	…….	Plaintiff,
v.		
Paulette Smith-Young	…..…..	Defendant,
AND		
Paulette Smith-Young, Individually and as the Personal Representative of the Estate of Genobia Smith, Deceased,	…….	Third-Party Plaintiff,
v.		
White Oak Manor of Spartanburg, Inc. d/b/a White Oak Manor of Spartanburg, and White Oak Management, Inc.,	…….	Third-Party Defendants,
Of which, White Oak Management, Inc. is	…….	Appellant,
and Paulette Smith-Young, Individually and as the Personal Representative of the Estate of Genobia Smith, Deceased, is	……	Respondent.

INITIAL BRIEF OF RESPONDENT

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2. Whether White Oak Management waived any perceived right to seek arbitration by waiting more than a year, repeatedly requesting the circuit court's help to dismiss Ms. Smith-Young's claims on the merits, and pursuing through discovery information to which it would not be entitled in arbitration.

3. Whether the circuit court was correct in concluding the Arbitration Agreement cannot bind Ms. Smith's uconsenting beneficiaries identified by statute to recover under South Carolina's distinct, independent wrongful death claim.

4. As an additional sustaining ground, whether an Arbitration Agreement provision purporting to "release" a non-party from liability violates South Carolina contract law and public policy.

STATEMENT OF THE CASE

Nearly two years after Genobia Smith died at White Oak Manor of Spartanburg, Inc. d/b/a White Oak Manor of Spartanburg ("the Facility"), the Facility sued Ms. Smith's daughter (Respondent Paulette Smith-Young) for nursing home expenses allegedly incurred in June-August 2016. (Magistrate Court Compl.) The hand-written complaint was filed in Spartanburg County Magistrate Court on July 23, 2018, under the caption "White Oak of Spartanburg" v. Ms. Smith-Young and sought $ 2,330. Id. As she explained in her August 21, 2018 answer, and as a matter of law, Ms. Smith-Young never incurred expenses at the Facility and could not be held personally liable for expenses related to Ms. Smith's residency even though she signed certain documents related to Ms. Smith's admission. (Answer, Counterclaim, and Third-Party Complaint ¶¶ 4-11).

Ms. Smith-Young's Answer also asserted counterclaims and third-party claims related to Ms. Smith's death. Id. at ¶¶ 18-104. In her capacity as personal representative of Ms. Smith's estate, Ms. Smith-Young alleged the Facility's substandard nursing care caused Ms. Smith to suffer severe weight loss, dehydration, and urinary tract infections which developed into urosepsis.

Ms. Smith-Young asserted survival and wrongful death claims on behalf of Ms. Smith's estate and Ms. Smith's statutorily-defined wrongful death beneficiaries. Id. at ¶¶ 68, 78, 92.

Ms. Smith-Young also asserted a corporate negligence and mismanagement claim against Appellant White Oak Management, Inc., a related entity that oversees and manages the Facility, for its administrative decisions that left the Facility underfunded and understaffed. Id. at ¶ 25. White Oak Management/the Facility responded in magistrate court with a motion to dismiss, arguing all of Ms. Smith-Young's claims were subject to, and failed to comply with, statutory pre-filing requirements for medical malpractice actions. (Consent Order, dated Nov. 20, 2018, at 2). The Motion to Dismiss did not raise the issue of arbitration. Since Ms. Smith-Young's claims sought damages in excess of the magistrate court's jurisdictional limit, she moved to transfer the case to circuit court on September 26, 2018. (Motion to Transfer Case). The Facility and White Oak Management consented so long as their pending motion to dismiss remained viable after the transfer. (Consent Order at 2-3). The magistrate court entered a consent order for the transfer on November 20, 2018. Id.

The parties then litigated their claims uninterrupted for the next nearly seven months. Ms. Smith-Young filed an offer of judgment for her claim against the facility on February 13, 2019. On March 26th, she served discovery requests on the Facility and White Oak Management. Appellant's counsel, representing both the Facility and White Oak Management, asked for extensions but White Oak Management provided no responses, prompting Ms. Smith-Young to file a motion to compel.[1] (Mot. to Compel to the Facility; Motion to Compel to White Oak Management, dated July 7, 2019). Ms. Smith-Young has since filed two additional motions to

[1] The Facility responded to Ms. Smith-Young's requests for admission but provided no response to her other written discovery requests.

compel. (Motions to Compel to White Oak Management, dated Oct. 14, 2019 and Feb. 26, 2020). White Oak Management embraced the discovery process by serving several subpoenas to Ms. Smith's medical providers on October 14, 2019. (Medical Record Subpoenas, dated Oct. 14, 2019).

The Facility/White Oak Management filed a second motion to dismiss on July 9, 2019, again alleging Ms. Smith-Young was required to comply with the statutory requirements for medical malpractice claims. (Mot. to Dismiss, dated July 9, 2019). The second motion to dismiss, which also failed to assert arbitration, specifically requested Ms. Smith-Young's claims be dismissed and the Facility's claim remain in litigation. Id. at 3. The next day, Ms. Smith-Young attempted to address any concerns raised in the Facility's motion to dismiss by serving on the Facility a Notice of Intent to File Suit and related documents.[2]

The Facility/White Oak Management then filed a memorandum on September 6, 2019, opposing Ms. Smith-Young's motions to compel discovery and supporting their motion to dismiss. (Mem. in Supp. of Mot. to Dismiss). The memo suggests that if the motion to dismiss is granted, Ms. Smith-Young could pursue all of her claims through the notice of intent process that could later result in "the filing of a lawsuit and exchange of discovery therein." Id. at 7. Also on September 6, 2019, the Honorable Grace Gilchrist Knie held a hearing on a number of the parties' pending motions and later entered a September 20, 2019, consent order formalizing the parties' agreement to resolve many of their disputes. (Consent Order, dated Sept. 20, 2019). Key portions of that order include (1) the dismissal of the Facility's collection action against Ms. Smith-Young; (2) the withdrawal or mooting of Ms. Smith-Young's initial motions to compel discovery from the

[2] After an unsuccessful pre-suit mediation, Ms. Smith-Young filed a complaint of behalf of Ms. Smith's estate against the Facility and other unaffiliated medical providers. (Civil Action No. 2019-CP-42-04347). White Oak Management was included in the Complaint because the case was consolidated with the previously filed against White Oak Management.

Facility and White Oak Management; and (3) the dismissal without prejudice of Ms. Smith-Young's claims against the Facility since those claims had since been included in a separate action initiated with a notice of intent. Id. at 2. The only remaining claim in the current action is Ms. Smith-Young's claim against White Oak Management, which the circuit court ordered to be consolidated in 60 days with Ms. Smith-Young's other action against the Facility—i.e. Civil Action No. 2019-CP-42-04347 referenced above. Id.

In the midst of these proceedings (on September 13, 2019), White Oak Management alone filed a motion to compel arbitration. (Motion to Compel Arb.). This motion was filed nearly 13 months after Ms. Smith-Young first asserted its claims against White Oak Management. White Oak Management's arbitration motion cited two documents purportedly supporting an agreement to arbitrate Ms. Smith-Young's claims. The first was the "Resident and Facility Admission Agreement" ("Admission Agreement"). Id. at 2 ¶ 2. The Admission Agreement references arbitration once but requires it only for "claims arising between the Facility and resident." (Admission Agreement at 19 ¶ 21). The Admission Agreement does not appear to make any reference to White Oak Management. White Oak Management also relied on the Arbitration Agreement (Motion to Compel Arb. at 2 ¶ 2), which again specifically limited arbitration to "claims between the parties" and identified its "parties" as the Facility and Ms. Smith/Ms. Smith Young. (Arbitration Agreement at 1 and ¶ 1). The Arbitration Agreement references White Oak Management once much later in the agreement. (Arbitration Agreement at 3 ¶ 14). However, Paragraph 14 does not purport to make White Oak Management a party to the Arbitration Agreement or to otherwise grant it power to compel Ms. Smith-Young to arbitrate her claims. Instead, it only purports to "release" White Oak Management should Ms. Smith-Young pursue and prevail in an arbitration proceeding against the Facility. Id.

After a December 18, 2019 hearing, the Honorable Grace Gilchrist Knie denied White Oak Management's motion to compel arbitration on January 13, 2020. (Order, dated Jan. 13, 2020). Judge Knie found White Oak Management failed to prove it had an arbitration contract with Ms. Smith or Ms. Smith-Young because it was not a party to either the Admission Agreement or the Arbitration Agreement. Id. at 7. The circuit court also found White Oak Management waived any right to seek arbitration because of the length of time it waited before filing its motion and its litigation conduct which would make a shift to arbitration prejudicial to Ms. Smith-Young. Id. at 5-7. The circuit court further concluded the Arbitration Agreement was unenforceable under various contract doctrines and, alternatively, could not apply to the wrongful death claim because Ms. Smith-Young's wrongful death beneficiaries never consented to its terms. Id. at 8-14. White Oak Management filed a timely Rule 59(e), SCRCP, motion on January 23, 2020, which was denied on February 14, 2020. (Order Denying Mot. to Reconsider). White Oak Management filed a notice of appeal on March 13, 2020.

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 [FAA] 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 primary 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

White Oak Management has no inherent right to demand Ms. Smith-Young forego a jury trial and resolve her dispute with it through arbitration. When Ms. Smith-Young chose litigation instead, White Oak Management could not ask the circuit court to dismiss her suit without pointing to a contract where Ms. Smith/Ms. Smith-Young voluntarily agreed to arbitrate claims *against White Oak Management*. The circuit court correctly concluded White Oak Management did not meet this burden. Neither of the contracts White Oak Management cites name it as a party or grant it the right to enforce the contracts' terms. To accept White Oak Management's alternative suggestion that arbitration should be presumed would upend contract law and the whole premise of how arbitration contracts are formed.

Moreover, any claim White Oak Management believed it had to arbitration was waived when it waited over a year to pursue it and, in the interim, substantially engaged in the litigation

process. Also, beyond the textual and timing problems with its argument, White Oak Management's interpretation of the Arbitration Agreement cannot be accepted because it renders that contract invalid under several South Carolina contract law rules. Finally, and in the alternative, the circuit court was correct to find the Arbitration Agreement can under no circumstances be enforced against Ms. Smith's wrongful death beneficiaries because none of them consented to its terms.

1. White Oak Management Cannot Compel Arbitration because it Lacks Authority to Enforce the Arbitration Agreement.

As White Oak Management admits, arbitration is a matter of contract and only applies if a valid contract requires it. (Appellant's Br. at 8). White Oak Management has no arbitration contract with Ms. Smith or Ms. Smith-Young. White Oak Management cannot enforce the Arbitration Agreement cited in its brief because it was not a party to that contract, did not assent to its terms, and does not otherwise have the authority to enforce its provisions. White Oak Management argues the Arbitration Agreement "expressly" includes it and that, if its inclusion is not clear, precedent requires the Court to presume White Oak Management may enforce it. The first argument misrepresents the Arbitration Agreement's language and the second misstates South Carolina law.

Arbitration is referenced in both the Admission Agreement and the Arbitration Agreement but both carefully and specifically limit arbitration to their parties—the Facility and Ms. Smith/Ms. Smith-Young. For example, White Oak Management cites Admission Agreement Paragraph 21 which requires arbitration only for "claims arising between the Facility and Resident/Authorized Representative." White Oak Management does not fall within either category. "Facility" is narrowly defined in the Admission Agreement as "White Oak of Spartanburg." (Admission Agreement at 1). "Resident" includes only Ms. Smith, and Ms. Smith-Young signed as "Authorized Representative." Id. at 1 and 19. The Arbitration Agreement is just as narrow. Only

"monetary claims between the parties . . . will be resolved by arbitration and will be subject to the terms and provisions of" the Arbitration Agreement. (Arbitration Agreement at 1 ¶ 1).[3] The Arbitration Agreement's parties are defined in its opening sentence as "the Facility" (i.e. "White Oak of Spartanburg") and Ms. Smith/Ms. Smith-Young identified as "the Resident." (Arbitration Agreement at 1).

White Oak Management is referenced just once in the Arbitration Agreement (Arbitration Agreement at 3 ¶ 14) and now argues that reference "expressly" permits it to compel arbitration. Appellant's Br. at 10, 15. As discussed below, whether Paragraph 14 could ever be enforced is dubious, but, even assuming it could, the language simply does not support the notion that White Oak Management is either an Arbitration Agreement party or otherwise entitled to compel arbitration on claims against it. 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. Paragraph 14 says nothing about expanding the Arbitration Agreement's earlier definition of "parties" to include White Oak Management. The whole paragraph has nothing to do with either the parties bound to arbitrate their claims or the scope of claims between them that must be arbitrated. Those issues are addressed in Paragraphs 1-2 as described above. All Paragraph 14 purports to do is expand the effect of the Facility making timely payment of an arbitration award against it. White Oak Management points to no language in this

[3] The very next paragraph confirms that the process leading to arbitration only applies to any "party to the Admission Agreement." (Arbitration Agreement at 1 ¶ 2). The Admission Agreement's parties are only the Facility and the Resident—i.e. Ms. Smith. (Admission Agreement at 1).

paragraph stating, or suggesting it may compel Ms. Smith-Young to arbitrate claims related to Ms. Smith's death.

Plus, there are a number of conditions precedent to White Oak Management gaining any rights in this paragraph. The opening clause ("An award against the Facility . . .") specifies that this paragraph only applies if Ms. Smith/Ms. Smith-Young have already initiated an arbitration action against the Facility, completed the arbitration hearing, and successfully obtained an award. Additionally, White Oak Management gains nothing from Paragraph 14 unless the Facility has paid this hypothetical award ("Upon payment . . .") and done so within 30 days of when it was entered. White Oak Management offered the circuit court no evidence that any of these conditions were met, and the circuit correctly held White Oak Management was not entitled to enforce the Arbitration Agreement. (Order, dated Jan. 10, 2020, at 7).

Rather than parse this language to offer any interpretation that would allow enforcement, White Oak Management seems to argue the Court must presume Paragraph 14 empowers it to compel arbitration. Appellant's Br. at 7-9. On this point, however, White Oak Management overlooks recent South Carolina Supreme Court precedent. The state and federal pro-arbitration policy cannot be stretched to create an arbitration contract where there is none. Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019). In Wilson, individuals who were not parties or signatories to an arbitration contract similarly argued courts must presume a right to enforce the contract. Id. at 335-36, 827 S.E.2d at 172. However, the Supreme Court held "the presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement *or to the identity of the parties who may be bound* to such an agreement." Id. at 338, 827 S.E.2d at 173 (quoting Carr v. Main Carr Dev., LLC, 337 S.W.3d 489, 494 (Tex. App. 2011) (emphasis in Wilson)).

Wilson went a step further, holding that, when the issue is whether a non-signatory may enforce an arbitration contract, the presumption is *against* arbitration. 426 S.C. at 337-38, 827 S.E.2d at 173. Since arbitration is a creature of contract, South Carolina courts will presume only the parties intended to arbitrate unless the contract language clearly indicates otherwise. Id. ("arbitration . . . exists solely by agreement of the parties"). Thus, since White Oak Management is not a party to the Arbitration Agreement, the Court should reject its claim that there is a presumption White Oak Management should be permitted to enforce it. To accept White Oak Management's argument also effectively asks the Court to accept a legal fiction about Ms. Smith-Young's intentions when the Arbitration Agreement was presented to her. Arbitration amounts to a waiver of a party's constitutionally-guaranteed jury trial right, and waiver must be an intentional and knowing act. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 566-67, 813 S.E.2d 292, 304 (Ct. App. 2018); Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 496-97, 685 S.E.2d 600, 607 (2009). White Oak Management must show Ms. Smith-Young knew her right to pursue litigation against White Oak Management was abandoned when she signed the Arbitration Agreement. Sanford, 385 S.C. at 496-97, 685 S.E.2d at 607. Neither Paragraph 14 nor any other Arbitration Agreement term provided such notice.

Finally, White Oak Management cites a couple cases for the notion that there are instances where a non-signatory may enforce an arbitration contract. Appellant's Br. at 15 (citing Pearson v. Hilton Head Hosp., 400 S.C. 281, 289, 733 S.E.2d 597, 601 (Ct. App. 2012) and Int'l Paper Co. v. Scwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000)). However, White Oak Management does not identify any legal theory of non-signatory enforcement it seeks to apply here and makes no effort to apply any such theory. One line in White Oak Management's motion to reconsider suggested Ms. Smith-Young is equitably estopped from opposing arbitration.

(Mot. to Reconsider at 3). However, since White Oak Management does not even mention estoppel in its brief, the argument has been abandoned. Additionally, under South Carolina law, White Oak Management would be required to prove six elements to prove equitable estoppel.[4] Even under the federal common law iteration of equitable estoppel, the doctrine only applies if Ms. Smith-Young has "consistently maintained that other provisions of the same contract should be enforced to benefit" her. Wilson, 426 S.C. at 340, 827 S.E.2d at 175 (quoting Pearson, 400 S.C. at 290, 733 S.E.2d at 601). This requirement is also not met here as Ms. Smith-Young's common-law negligence and corporate negligence claims are not based on the Arbitration Agreement or the Admission Agreement but rather the financial, training, and staffing decisions White Oak Management undertook when managing and administering the Facility. (Answer, Counterclaim, and Third-Party Complaint ¶ 25).

In sum, the pursuit of arbitration in this case must fail at its initial hurdle because White Oak Management cannot show it formed an arbitration contract with Ms. Smith-Young. White Oak Management is not a party to the Arbitration Agreement, which is explicit in limiting arbitration to its specifically-defined parties. Moreover, Paragraph 14 does not support arbitration because it does not purport to grant White Oak Management the power to compel arbitration and contains several unmet conditions precedent to the rights it does purport to confer.

[4] Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; (3) make a prejudicial change in position in reliance on conduct of party estopped. Id. As the party asserting estoppel, Defendants bear the burden of demonstrating all six of these elements. Kelly v. Logan, Jolley & Smith, L.L.P., 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009).

2. White Oak Management's Year-Long Delay and Conduct in Discovery Waived any Purported Right to Arbitration.

White Oak Management provided no indication it intended to pursue its misguided arbitration argument until over a year after it became a party to this litigation. In the interim, White Oak Management sought the courts' assistance on multiple occasions through potentially dispositive motions and sought through discovery information to which it would not be entitled in an arbitration proceeding. Moreover, before moving to compel arbitration (and even after), White Oak Management suggested it intended to litigate, not arbitrate, the tort claims asserted against it. As a result, Ms. Smith-Young and her counsel have expended unnecessary resources and would be at an unfair disadvantage should White Oak Management be permitted to now opt out of litigation. Accordingly, the circuit court correctly concluded that, in addition to the errors in its contractual argument, White Oak Management waived any possible right to assert arbitration at such a late date.

South Carolina law holds that a party may waive any right it had to pursue arbitration if it first chooses to litigate in a way that would render a shift to arbitration prejudicial to its opponent. Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 513, 788 S.E.2d 216, 218 (2016); Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 388, 759 S.E.2d 727, 736 (2014). The point at which a party delves too deeply into litigation to assert a right to arbitrate varies based on the circumstances. Johnson, 416 S.C. at 513, 788 S.E.2d at 219 (citing Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)). However, this Court will not reverse a circuit court's factual findings relating to waiver if any evidence reasonably supports them. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007); Liberty Builders, 336 S.C. at 661, 521 S.E.2d at 751 (holding that "the circuit judge's factual findings should be given some deference"). White Oak Management argues this case is governed by the

FAA (Mot. to Compel Arb. at 2 ¶ 4) but it too applies waiver when a party "so substantially utiliz[es] the litigation machinery that to subsequently permit arbitration would prejudice" its opponent. Iraq Middle Market Dev. Found. v. Harmoosh, 947 F.3d 234, 237 (4th Cir. 2020) (quoting Forrester v. Penn Lyon Homes, Inc., 553 F.3d 340, 343 (4th Cir. 2009)).

The fact-specific waiver analysis imposed by South Carolina law considers three factors: (1) whether a significant length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 127, 647 S.E.2d 249, 251-52 (Ct. App. 2007). Similarly, for cases governed by the FAA, prejudice is determined by considering the amount of the delay before a motion to compel arbitration was pursued and the extent of the moving party's trial-oriented activity. Degidio v. Crazy Horse Saloon and Restaurant, Inc., 880 F.3d 135, 140 (4th Cir. 2018) (citing Stedor Enters., Ltd. v. Armtex, Inc., 947 F.2d 727, 730 (4th Cir. 1991)).

Taken together, these state and federal standards require courts to consider whether arbitration was asserted immediately, what benefits an asserting party derived from litigation before seeking arbitration, and what harms an opposing party suffered during the delay. White Oak Management first became a party to this litigation when Ms. Smith-Young asserted a third-party claim against it on August 21, 2018. (Answer, Counterclaim, and Third-Party Complaint). A timely arbitration assertion would have come in White Oak Management's responsive pleading. However, White Oak Management's motion to compel arbitration was not filed until September 13, 2019—a nearly 13-month delay. In the interim, White Oak Management embraced the

litigation process, utilized the litigation machinery on multiple occasions, and took steps to obtain information unavailable in arbitration.

White Oak Management's first response was a motion to dismiss Ms. Smith-Young's claim through which White Oak Management sought the magistrate court's intervention to end the claim on the merits. (Consent Order, dated Nov. 20, 2018, at 2). Nothing in that motion suggested Ms. Smith-Young's claim might be subject to arbitration. White Oak Management then consented to transfer the action from magistrate to circuit court. Id. at 1-2. Once there, White Oak Management waited another eight months and then filed a second motion to dismiss. (Pla./Third-Party Def. Mot. to Dismiss, dated June 9, 2019). This second motion relied on an alleged procedural defect in Ms. Smith-Young's pleading but again made no reference to arbitration. Id. In fact, White Oak Management specifically embraced litigation as the parties' dispute resolution method by asking that the circuit court "allow the case to proceed on White Oak's[5] original contract action." Id. at 3. In a September 6, 2019, memorandum supporting this motion, White Oak Management argued that, if successful on its argument that Ms. Smith-Young's claim had a procedural defect, the claim could be refiled and the "parties can proceed" with "the filing of a lawsuit and exchange of discovery therein." (Pla./Third-Party Def. Mem. in Supp. of Mot. to Dismiss at 7).

While White Oak Management was making these pro-litigation statements in its filings and seeking the circuit court's intervention on Ms. Smith-Young's claims, it was also pursuing information about those claims that would not be available in arbitration. Rather than directly seeking arbitration, White Oak Management's two motions to dismiss asked the magistrate and circuit courts to dismiss the claims for failure to comply with the statutory pre-filing requirements

[5] For purposes of this motion, "White Oak" was defined to include both White Oak Management and the Facility. (Pla./Third-Party Def. Mot. to Dismiss, dated June 9, 2019, at 1).

for "medical malpractice" claims. See S.C. Code Ann. § 15-79-125; § 15-36-100.[6] White Oak Management's goal was to have Ms. Smith-Young refile her claims through the notice of intent process outlined in section 15-79-125 that would yield significant discovery information to White Oak Management including Ms. Smith-Young's witness list, a summary of the witnesses' anticipated testimony, an expert affidavit, and an itemization of damages. S.C. Code Ann. § 15-79-125(A) (requiring notice of intent to include responses to standard interrogatories); Rule 33(b)(1)-(7), SCRCP (listing standard interrogatories). Through the notice of intent process, White Oak Management also learned the identity and opinions of one of Ms. Smith-Young's expert witnesses. (Notice of Intent, Affidavit of S. Kaminski). Even after filing its motion to compel arbitration, White Oak Management continued to use the circuit court's authority to seek information it believed helpful for defending against Ms. Smith-Young's claims. On October 15, 2019, White Oak Management served multiple medical record subpoenas to Ms. Smith's health care providers. Appellant's Br. at 13.

Little of this information would be available to White Oak Management in arbitration. The Arbitration Agreement does not authorize any traditional written discovery. There are no provisions permitting the service of interrogatories or requests for production. Instead of the Rule 26, SCRCP approach of permitting discovery on potentially relevant matters, the Arbitration

[6] This argument was flawed on the merits because Ms. Smith-Young's corporate negligence claim against White Oak Management focused on its administrative failures to properly fund and staff the Facility. (Answer, Counterclaim, and Third-Party Complaint at ¶¶ 62-68); see also Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015). Not all torts occurring within or related to a medical or nursing home facility meet the statutory definition of "medical malpractice," and the South Carolina Supreme Court has specifically excluded administrative errors from the definition. Dawkins v. Union Hosp. Dist., 408 S.C. 171, 178, 758 S.E.2d 501, 504 (2014) ("The statutory definition of medical malpractice found in section 15-79-110(6) does not impact medical providers' ordinary obligation to reasonably care for patients with respect to nonmedical, administrative, ministerial, or routine care").

Agreement requires only that each party provide its opponent with copies of documents the party intends to offer at the arbitration hearing at least ten days before the hearing begins. Arbitration Agreement at 2 ¶ 9. White Oak Management's maneuvers in this case would allow it to partially avoid the Arbitration Agreement's discovery limitations while holding Ms. Smith-Young to its strictures. In bypassing the arbitration argument in its motions to dismiss and focusing on the alleged failure to file a notice of intent, White Oak Management could secure the discovery responses referenced in section 15-79-125 and then immediately move for arbitration without responding to the long-overdue discovery requests it first received from Ms. Smith-Young many months earlier. See Smith-Young's Mot. to Compel and Exh. A (indicating White Oak Management was first served with requests for production on Mar. 26, 2019).

Similarly, a subpoena is another discovery device that is almost always permitted in litigation and almost never allowed in arbitration. 9 U.S.C. § 7 (allowing subpoenas in arbitration only when issued by arbitration panel and only for appearances at the arbitration hearing); Comsat Corp. v. Nat'l Sci. Found., 190 F.3d 269, 278 (4th Cir. 1999) (finding no authority for subpoena "for pre-hearing discovery, absent a showing of special need or hardship").[7] White Oak Management would have no mechanism for subpoenaing Ms. Smith's medical records in arbitration and, strictly complying with the Arbitration Agreement it asks the Court to enforce, would likely never see them in the course of an arbitration proceeding. Thus, White Oak Management's approach to discovery in this case has not been to adhere to the Arbitration

[7] See also Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004); CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 708 (9th Cir. 2017) ("we reject the proposition that section 7 [of the FAA] grants arbitrators implicit powers to order document discovery from third parties prior to a hearing"); Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 212 (2d Cir. 2008) (citing Hay Group and finding FAA "does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding").

Agreement's requirements but rather to use that contract's terms as a shield from Ms. Smith-Young's requests while at the same time taking a different approach to gain information and give itself a leg up in proceedings. Crucially, White Oak Management used the litigation machinery and the circuit court's authority in pursuit of this goal.

South Carolina's appellate courts have found waiver under similar circumstances, including in a nursing home case. Johnson, 416 S.C. at 513, 788 S.E.2d at 218; Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 127, 647 S.E.2d 249, 251-52 (Ct. App. 2007); Evans v. Accent Mfd. Homes, Inc., 352 S.C. 544, 551, 575 S.E.2d 74, 77 (Ct. App. 2003).[8] These cases recognized prejudice similar to what Ms. Smith-Young has suffered as a result of White Oak Management's delay in pursuing arbitration. For example, in Evans, this Court made two important observations about how a party's approach to discovery before seeking arbitration can prejudice its opponent. First, prejudice is likely if the party now seeking arbitration has gained through discovery information unavailable in arbitration. Evans, 352 S.C. at 551, 575 S.E.2d at 77 (holding that defendant "availed itself of discovery tools unavailable in arbitration, thereby prejudicing [plaintiff] by obtaining information from her it might not have been able to otherwise obtain"). Federal cases applying the FAA also consider the advantage gained through information available solely through litigation as substantial evidence of prejudice. Baja, Inc. v. Auto. Testing & Dev. Serv., Inc., Civil Action No. 8:13-cv-02057-GRA, 2014 WL 2719261, at * 9 (D.S.C. June

[8] See also In re Estate of Cortez, 245 P.3d 892, 896 (Ariz. App. 2010) (finding nursing home waived right to assert arbitration where it failed to assert arbitration in its initial pleading and waited nearly a year before filing motion to compel arbitration); Orlanis v. Oakwood Terrace Skilled Nursing & Rehab. Ctr., 971 So.2d 811, 812 (Fla. App. 2007) (finding nursing home waived right to assert arbitration where it engaged in discovery by serving interrogatories, requests for production, and "notices to produce to non-parties"); Estate of Williams ex rel. Williams v. Manor Care of Dunedin, Inc., 923 So.2d 615, 617 (Fla. App. 2006) (finding nursing home's answer waived arbitration by demanding a jury trial and failing to demand arbitration).

16, 2014) (finding defendant waived right to assert arbitration in part because it engaged in discovery to which it would not be entitled under the applicable arbitration rules); see also Messina v. N. Cent. Distrib., Inc., 821 F.3d 1047, 1051 (8th Cir. 2016) (finding prejudice may arise where "parties use discovery not available in arbitration"). White Oak Management obtained information through the notice of intent process and pursued information through its medical records subpoenas that prejudice Ms. Smith-Young because White Oak Management ignored all discovery requests and the Arbitration Agreement prevents Ms. Smith-Young from pursuing reciprocal requests in arbitration.

Second, Ms. Smith-Young was prejudiced because White Oak Management's delay caused her to expend substantial resources in addressing White Oak Management's motions[9] and in pursuing discovery White Oak Management had no intention of answering. Evans notes White Oak Management had an obligation in how it addressed the receipt of discovery requests if it intended to seek arbitration. Rather than ignoring Ms. Smith-Young's attempt to obtain basic discovery documents, White Oak Management "bore the onus to halt discovery by seeking the court's protection" while the circuit court evaluated its arbitration request. Evans, 352 S.C. at 551, 575 S.E.2d at 77 (citing Rule 26(c)(1), SCRCP)). Ms. Smith-Young was forced to file three motions to compel—one before and two after the arbitration motion—because White Oak Management largely ignored Ms. Smith-Young's requests rather than asking for the circuit court to issue a protective order. (Motions to Compel dated July 9, 2019, Oct. 14, 2019, and Feb. 26, 2020).

[9] Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc., 683 F.3d 577, 587 (4th Cir. 2012) (noting actual prejudice may include instances where a party is "forced to respond to a number of potentially damaging motions").

Requiring these motions would not be superfluous as White Oak Management offered inconsistent signals on its arbitration stance. One week before its motion to compel arbitration, White Oak Management told the circuit court that, if it dismissed Ms. Smith-Young's claims, she could refile and the parties could proceed "with the exchange of discovery." (Pla./Third-Party Def. Mem. in Supp. of Mot. to Dismiss at 7). Even after the notice of intent process was later concluded, White Oak Management's position on arbitration and discovery was unclear as it answered Ms. Smith-Young's claims by demanding a jury trial. Having made that demand, White Oak Management may not withdraw it without first acquiring Ms. Smith-Young's consent. Rule 38(d), SCRCP ("A demand for a trial by jury made as herein provided may not be withdrawn without the consent of the parties . . .").

Finally, the Court should reject White Oak Management's reliance on Dean. Appellant's Br. at 13. The nursing home in Dean waited just four months before seeking arbitration. White Oak Management's delay was more than three times as long. 408 S.C. at 388, 759 S.E.2d at 736. Additionally, Dean focused on the fact that the nursing home and related companies "moved to compel arbitration at their first opportunity." Id. White Oak Management cannot make a similar claim as it chose not to assert arbitration in its initial response to Ms. Smith-Young's claim or to raise the specter of arbitration in the consent transfer order or either of its motions to dismiss. It was only after more than a year of litigation and seeking otherwise unavailable information through discovery that White Oak Management sought arbitration. The circuit court properly found the resulting prejudice to Ms. Smith-Young supported a finding that White Oak Management waived any claim it had under the Arbitration Agreement.

3. Ms. Smith's Purported Consent to Arbitration Does Not Extend to the Wrongful Death Claim Covering Her Family Members' Losses.

The circuit court correctly concluded the Arbitration Agreement did not cover the wrongful death claim. (Order at 12-14). White Oak Management insist Ms. Smith (represented by Ms. Smith-Young's signature) 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. Smith 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. Smith's wrongful death beneficiaries were not parties to the Arbitration Agreement, and White Oak Management 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 White Oak Management 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. Smith's family members are parties, White Oak Management is left to argue the wrongful death claim actually belongs to Ms. Smith'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. Smith had against White Oak Management 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, White Oak Management 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 White Oak Management's 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. Smith was bound by the Arbitration Agreement, these cases show Ms. Smith 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. The South Carolina Authority White Oak Management Cites Does Not Support Arbitration in this Case.

White Oak Management cites two cases to suggest South Carolina courts have already ruled wrongful death is a derivative claim. Appellant's Br at 17-18. Neither of these cases support that conclusion or 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.

White Oak Management claim the South Carolina Supreme Court addressed the arbitrability of wrongful death claims in Dean. 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. White Oak Management 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 Ms. Smith-Young makes here. A wrongful death claim may be arbitrable in instances where the statutory beneficiaries agree to do so. Ms. Smith-Young 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.

White Oak Management also rely on one unreported federal district court order. Appellant's Br. 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, 422 S.C. at 556-58, 574-75, 813 S.E.2d at 299-300, 308; Thompson v. Pruitt Corp., 416 S.C. 43, 57-62, 784 S.E.2d 679, 687-89 (Ct. App. 2016).

In short, the cases White Oak Management cite do not support arbitration. 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 White Oak Management's attempt to use Ms. Smith's purported assent to the Arbitration Agreement to force arbitration on a wrongful death claim. At least a dozen other jurisdictions have rejected that argument.[10] Four different state supreme courts have done so

[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).

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.

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

[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).

(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 White Oak Management's interpretation of a "derivative" claim. White Oak Management seems 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 White Oak Management "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. 976 N.E.2d at 359. 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 White Oak Management's 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, the circuit court correctly rejected 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.

4. As an Additional Sustaining Ground, White Oak Management May Not Rely on Arbitration Agreement Paragraph 14 Because it is Invalid under South Carolina Law.

Finally, the Court should reject White Oak Management's reliance on Arbitration Agreement Paragraph 14 because its "release" language is contrary to South Carolina law. While this paragraph does not advance White Oak Management's assertion that claims against it are arbitrable, it does purport to grant White Oak Management immunity should Ms. Smith-Young

recover from the Facility. Validating this language by allowing White Oak Management to use it to force arbitration would place Ms. Smith-Young in an untenable position. Since arbitration is solely a matter of contract and the Arbitration Agreement does not permit arbitration against White Oak Management, Ms. Smith-Young could not pursue her corporate negligence-based claims in arbitration. But, White Oak Management's reading of paragraph 14 would grant it the power to use an arbitration award against the Facility to block Ms. Smith-Young's pursuit of recovery from White Oak Management in the only forum available to her.

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

Allowing White Oak Management to rely on Arbitration Agreement paragraph 14 would violate South Carolina law in multiple ways. Paragraph 14 goes far beyond changing the forum or rules for dispute resolution and becomes a pre-injury waiver of liability for White Oak Management against claims relating to its 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)). 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 unenforceable because it violates South Carolina public policy. This is especially true for Ms. Smith-Young's claim alleging White Oak Management's underfunding and understaffing the Facility were "conscious indifference" and grossly negligent misconduct. (Answer, Counterclaim, and Third-Party Complaint at ¶¶ 94-97). 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, White Oak Management should not be permitted to rely on Paragraph 14 in seeking arbitration because it is unenforceable as contrary to public policy.

b. White Oak Management May Not Rely on 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, White Oak Management made no concessions and provided nothing in exchange for the benefit of avoiding liability under the conditions outline in Paragraph 14. Since White Oak Management cannot prove the foundational requirements for contract formation, it may not rely on paragraph 14 to support its arbitration argument.

c. Paragraph 14 is Unconscionable.

As Ms. Smith-Young argued to the circuit court, paragraph 14 is unconscionable. (Mem. in Opp. to Mot. to Compel Arb. at 15-21). This provision, buried in a form contract of adhesion,

is fundamentally unfair to Ms. Smith-Young as it denies her the opportunity to pursue and recover on claims White Oak Management's misconduct led to her mother's wrongful death.

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, 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)). Even if an arbitration clause is technically conspicuous, it may be improper if it is "sprung on [a consumer] along with a flurry of other" documents during a hasty transaction. Doe v. TCSC, LLC, ___ S.E.2d ___, 2020 WL 3551780, at * 5 (S.C. Ct. App. July 1, 2020). Any unconscionable arbitration provision cannot form a valid contract for FAA purposes. Id.

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. Smith-Young 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. Smith-Young because Ms. Smith's injuries were personal and substantial. White Oak Management and the Facility's alleged negligence led to a severe weight loss, dehydration, urinary tract infections which developed into urosepsis and ultimately caused Ms. Smith's death. (Answer, Counterclaim, and Third-Party Complaint at ¶ 56).

The other factors also favor Ms. Smith-Young who was not a substantial business concern. She was acting only as her mother's representative with the aim of obtaining the nursing care she urgently needed. In contrast, White Oak Management are sophisticated business entities evidenced in many ways including the complex organization structure they have built to manage the Facility's operations. See (Answer, Counterclaim, and Third-Party Complaint at ¶ 25). The disparity in bargaining power is considerable. White Oak Management operates numerous nursing homes in North and South Carolina. Ms. Smith, on the other hand, was an elderly woman in poor health in need of care to continue from day to day. Finally, the key language of the Arbitration Agreement was not conspicuous relative to any of the other admission paperwork the Facility presented to Ms. Smith-Young. A provision purporting to immunize White Oak Management 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. Smith-Young. As discussed above, paragraph 14 is an oppressively one-sided term as written because it effectively denies Ms. Smith-Young any forum in which she can pursue claims against White Oak Management. Since Paragraph 14 does not allow arbitration against White Oak Management, litigation is the only way Ms. Smith-Young can recover for damages caused by White Oak Management's corporate negligence. Paragraph 14 purports to deny Ms. Smith-Young the right to litigate against White Oak Management should she choose to arbitrate against the Facility. As written, Paragraph 14 denies Ms. Smith-Young any available forum to recover from White Oak Management for losses related to Ms. Smith's injuries and death.

In sum, the Arbitration Agreement's Paragraph 14 is invalid because it is unconscionable and violates South Carolina public policy. White Oak Management should not be permitted to rely on this invalid provision to compel arbitration.

CONCLUSION

Based on the arguments stated above, Ms. Smith-Young respectfully requests the Court affirm the circuit court's order. White Oak Management has no arbitration contract with Ms. Smith-Young and courts will not presume arbitration applies without a contract requiring it. Not only do the contracts White Oak Management cites not include it, they are also unenforceable based on their unfair terms and the circumstances in which they were presented for Ms. Smith-Young's signature. Finally, to the extent White Oak Management had a colorable claim to arbitration, it was waived by White Oak Management's delay and litigation conduct designed to give itself an advantage in arbitration. The circuit court correctly denied White Oak Management's

motion to compel arbitration, and Ms. Smith-Young should be permitted to continue her claims through litigation.

Respectfully submitted,

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