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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable Courtney Clyburn Pope, Circuit Court Judge

Appellate Case No. 2020-001441

Thelma Rudd, as Personal Representative of the Estate of Charles S. Rudd., Respondent,

v.

Pepper Hill Nursing & Rehab Center, LLC d/b/a Pepper Hill Nursing & Rehab Center, The Place at Pepper Hill, LLC, Pepper Hill Senior Properties, LLC, n/k/a The Place at Pepper Hill, LLC, and Shiloh Management Company, Inc., Defendants,

of which Shiloh Management Company, Inc., Pepper Hill Nursing & Rehab Center, LLC d/b/a Pepper Hill Nursing & Rehab Center are the Appellants.

APPELLANTS' FINAL REPLY BRIEF

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I. Pepper Hill Presented Evidence Demonstrating a Valid Arbitration Agreement.

1. The AHCCA applied to Mr. Rudd's Admission and Authorized Thelma Rudd's Execution of the Arbitration Agreement on Mr. Rudd's Behalf.

Thelma Rudd had authority under the Adult Health Care Consent Act ("AHCCA") to make health care decisions on Mr. Rudd's behalf, and Appellants presented ample evidence to this effect below. While Respondent's brief contends that Appellants' "glossed over" whether Ms. Rudd had authority under the AHCCA, this is not the case at all. To the contrary, Appellants consistently maintained below—in both briefings and at the trial court's hearing—that Ms. Rudd had authority to make health care decisions under the AHCCA. At the hearing, Appellants discussed this very issue at three different points in the hearing, indicating that Appellants believed Ms. Rudd's authority to make health care decisions was uncontested. (*See, e.g.,* R. pp. 207 lines 22-24, 234 lines 5-8, 236 lines 12-14).

Further, as set forth in detail in Appellants' initial brief, substantial evidence supported Ms. Rudd's authority to make healthcare decisions under the AHCCA. This included but was not limited to Respondent's own concessions that Mr. Rudd was admitted as a "vulnerable adult" suffering cognitive decline. Moreover, Ms. Rudd represented in writing to Pepper Hill that she was Mr. Rudd's representative, including for health care decisions. Mr. Rudd was admitted to Pepper Hill because he was unable to make his own health care decisions.

Not only did Appellant specifically and extensively address this issue below, but it was uncontested—if not conceded—by Respondent below. Respondent specifically conceded in briefing to the trial court that Ms. Rudd may have been Mr. Rudd's agent for making health care decisions under the AHCCA. (*See, e.g.,* R. p. 133). Further, Respondent argued not that Ms. Rudd lacked the ability to make health care decisions, but instead that her ability to make health

care decisions did not give her authority to waive jury trial. *Id.* at 7. Respondent then discussed *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353-54, 755 S.E.2d 450, 454 (2014), which Respondent stated was "directly on point with the facts of the case at hand," including because while the family member in *Coleman* had authority under the AHCCA, that authority did not extend to non-healthcare decisions. *Id.* Again, Respondent did not argue that Ms. Rudd lacked authority under the AHCCA; rather, she argued that her authority under the Act did not extend to her execution of the arbitration contract. *Id.* at 7-8. Again, Appellants raised Ms. Rudd's authority under the AHCCA and indicated it was not a contested issue at least three different times during the May 5, 2020 hearing. (*See, e.g.,* R. pp. 207 lines 22-24, 234 lines 5-8, 236 lines 12-14). Respondents never disagreed. *See id.*

Respondent's new arguments challenging Ms. Rudd's authority under the AHCCA are inconsistent with her decision to concede and/or not contest this issue below. Further, these new arguments are inconsistent with the evidence as set forth above.

Finally, Respondent's arguments that physician certification is necessary for a surrogate to have AHCCA authority are also without merit. "Unable to consent" under the AHCCA means "unable to appreciate the nature and implication of the patient's condition and proposed health care, to make a reasons decision concerning the proposed health care, or to communicate that decision in an unambiguous manner." S.C. Code Ann. Section 44-66-20(8). "Where a patient is unable to consent [i.e. "unable to appreciate the nature and implication of the patient's condition and proposed health care, to make a reasons decision concerning the proposed health care, or to communicate that decision in an unambiguous manner"], decisions concerning his health care may be made by the following persons in order of priority… (3) a spouse of the patient…". S.C. Code Ann. Section 44-66-30. Appellants provided ample evidence that Mr. Rudd was unable to

consent. In addition, Ms. Rudd signed in writing through the Admissions Agreement that she was Mr. Rudd's health care representative. Moreover, and the issue was entirely uncontested, if not conceded, by Respondent below. Last, while the statute provides for certification of a patient's inability to consent, certification is not a part of the definition of "unable to consent." *See* S.C. Code Ann. Section 44-66-20(8) (stating what "Unable to consent" "means" and providing later in the subsection for certification). Certification provides official documentation of the "unable to consent" status; it does not confer the status itself.

For these reasons, the record below contains ample evidence that Ms. Rudd had authority to act under the AHCCA. This was uncontested, if not conceded, by the Respondent below. As a result, the trial court's order is in error and should be reversed.

a. The Admission Agreement's Arbitration Provision was a Health Care Decision under South Carolina Law.

Appellants' Initial Brief discussed South Carolina's case law analyzing the scope of a surrogate's authority to bind a resident to an arbitration agreement. While the scope of discussion of the AHCCA varies from case to case, the distinction between the two lines of cases is straightforward. Where the arbitration provision is part of the admissions agreement, arbitration has been enforced. *See, e.g.*, *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185, at *2 (D.S.C. Mar. 19, 2015); *THI of S.C. at Columbia, LLC v. Wiggins*, No. CA 3:11-888-CMC, 2011 WL 4089435, at *1 (D.S.C. Sept. 13, 2011); *Abrams v. Fundamental Long-Term Care Holdings*, LLC, No. 2010-CP-42-6861, 2019 WL 10984312, at *9 (S.C.Com.Pl. Aug. 28, 2019). Where the arbitration agreement is separate and independent from the admissions agreement, courts have found that the arbitration agreement fell outside the surrogate's authority under the AHCCA. *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014); *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679,

(Ct. App. 2016); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

To the extent Respondent cites to *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 563, 813 S.E.2d 292, 302 (Ct. App. 2018) and *Thompson v. Pruitt Corp.*, 416 S.C. 43, 52, 784 S.E.2d 679, 684 (Ct. App. 2016) as holding that an AHCCA surrogate lacks authority to execute an agreement containing an arbitration provision, such a reading is plainly contrary to the holdings in those cases. Both *Coleman* and *Thompson* discuss in detail whether the admissions agreement contained or was separate from the arbitration agreement. Specifically, *Thompson* conditions its holding on the grounds that the arbitration agreement "was separate from the Admission Agreement." *Thompson*, 416 S.C. at 52, 784 S.E.2d at 684. Likewise, the *Hodge* court went to lengths to analyze whether the arbitration and admissions agreement were separate documents. *Hodge*, 422 S.C. at 556-563, 813 S.E.2d at 299- 302. The court ultimately declined to enforce arbitration because the arbitration agreement and admissions agreement were separate documents. *See id.* The significance of separate versus combined admissions and arbitration agreements is directly related to the AHCCA: where the agreements are combined, the surrogate's authority under the AHCCA to make health care decisions extends to peripheral decisions related to the admission.

To the extent Respondent argues that the arbitration agreement should be treated as a voluntary agreement or as separate from the admissions agreement, Respondent's arguments are also without merit. For example, every single page of the Admissions Agreement states, in all-caps font that is in bold and underlined, that "THIS AGREEMENT" is subject to mandatory arbitration. (R. pp. 244-257). Further, the arbitration agreement itself does not contain a separate signature block, but simply a section for the signatories to initial. *See id.* at p. 14. This is a simple

method to show that the arbitration provision was brought to the attention of the signatories; it by no means creates a separate contract. A comparison of this section with the Admission Agreement's actual signature block—which requires a full signature and date, and which further refers to a single "Admissions Agreement"—is illustrative. (R. p. 257). That the arbitration provision is not a separate agreement is also demonstrated by the absence of any provision providing the option to opt-in or opt-out. *Id.* In sum, the Admissions Agreement at issue here contained and was not separate from the arbitration agreement.

Far too much ink has been spilled analyzing whether an arbitration agreement was part of or separate from the admissions agreement for the distinction to be meaningless. To the contrary, Appellants are not aware of a single case holding that a surrogate's authority under the AHCCA does not extend to an arbitration provision where the provision is part of an admissions agreement. On the other hand, where the arbitration agreement is part of or merged into the admissions agreement, arbitration has been enforced, whether under the AHCCA, on estoppel grounds, or otherwise.

b. The Evidence Establishes that Ms. Rudd was Mr. Rudd's Agent.

Regarding the issue of agency, Appellants primarily rely on their initial brief and the arguments presented therein, including that Ms. Rudd had actual authority under the AHCCA to execute the admissions agreement and the arbitration provisions contained therein.

However, to the extent Respondents now contest whether Mr. Rudd lacked competency—which Respondents did not raise below—actions taken by both Ms. Rudd and Mr. Rudd establish an agency relationship.

As to Mr. Rudd, his acts showing evidence of an agency relationship include but are not limited to his conduct in allowing Mrs. Rudd to sign the paperwork, and his actions in accepting

the benefits of admission. These actions would reasonably suggest to third parties that Mr. Rudd provided Mrs. Rudd had the authority to act in executing the admissions agreement and its attendant terms. In addition, after admission, Mr. Rudd remained at Pepper Hill for over four months, accepting and retaining services including room accommodations, food services, professional nursing services, therapy, housekeeping, and others. (*See* R. p. 245). As a result, had Mr. Rudd been competent, these actions would show active and passive permission and ratification by Mr. Rudd.

In addition, Mr. Rudd's actions do not exist in a vacuum. Mrs. Rudd's actions in bringing Mr. Rudd to Pepper Hill to admit him for care, and her actions in executing the agreement, representing herself as Mr. Rudd's health care representative, and maintaining contact with Pepper Hill regarding Mr. Rudd's medical condition (including as set forth in the affidavit submitted by Respondent), all further demonstrate the agency relationship between Mr. Rudd and Mrs. Rudd. (*See e.g.,* R. p. 250; R. pp. 49-50 ¶¶ 3, 4, 6).

Further, the fact that Ms. Rudd now appears as Mr. Rudd's representative in this litigation further demonstrates the relationship between Mr. Rudd and Mrs. Rudd, and while not itself determinative, certainly lends credence to the likelihood that Ms. Rudd was acting as Mr. Rudd's agent at the time of admission to Pepper Hill.

In sum, Mr. Rudd's actions and Ms. Rudd's actions, taken together, reasonably presented an agency relationship and further provide ample evidence from which agency may be implied, inferred, and circumstantially proved.

2. The Estate is Estopped from Opposing the Arbitration Provision.

Appellants also primarily rely on their initial brief and the arguments presented therein regarding the grounds for estoppel in this matter. In addition, Appellants write separately here to

address Respondent's misplaced reliance on *Wilson v. Willis*, 426 S.C. 326, 344, 827 S.E.2d 167, 177 (2019) and *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 227, 847 S.E.2d 268, 270 (Ct. App. 2020). These cases do not alter the application of estoppel in the present matter.

Wilson (sometimes referred to in Respondent's brief as "*Willis*") was an appeal arising out of fourteen lawsuits brought by various plaintiffs against an insurance agent, an insurance broker, their insurance agency, and six insurance companies. *Wilson v. Willis, 426 S.C. 326, 331, 827 S.E.2d 167, 170 (2019)*. The plaintiffs were customers of the insurance agent and other competing agents. *See id.* Three insurers later filed motions to compel arbitration based on an arbitration agreement in an agency contract. While the plaintiffs were not parties to the contract, the insurers alleged plaintiffs were third-party beneficiaries. *Id.* at 333, 827 S.E.2d at 171. However, the plaintiffs pointed out that they were not even aware of the agency contract until the insurers sought to compel arbitration nearly a year into the litigation. *Id.* at 342, 827 S.E.2d at 176. The Supreme Court agreed, noting that the plaintiffs "did not embrace the Agency Agreement during the life of the contract" and then attempt to repudiate the arbitration clause during litigation. The Court also stated the following regarding the nature of the plaintiffs' claims:

> General principles of South Carolina law form the basis for most of Petitioners' claims. For example, Petitioners' allegation that Respondents possibly conspired with Willis and others to commit fraud is misconduct that does not arise from the contract. To hold otherwise would arguably allow Respondents to commit unfair trade practices and conspire to destroy the businesses of other insurance agencies while shielding themselves from the possibility of a jury trial with an arbitration clause agreed to only by the conspiring parties.

Wilson, 426 S.C. at 342, 827 S.E.2d at 176.

The present case differs from *Wilson* in many key respects. First, if in fact Mr. Rudd was competent to sign the admissions agreement[1], he embraced the contract by accepting and retaining the benefits of room, board, health care, and other contractual benefits under the admissions agreement. He thus stands in an entirely different posture than the third parties in *Wilson* who had no knowledge of a contract between two other unrelated entities and who received no obvious, tangible benefits of the purported contract between certain defendants. Also, the relationship between Ms. Rudd and Mr. Rudd, as husband and wife making healthcare decisions together, stands in stark contrast to the distinct professional entities apparently engaging in arms-length financial transactions in *Wilson*. Specifically, Ms. Rudd executed a contract on Mr. Rudd's behalf in order to provide him residency and care at Pepper Hill, and Mr. Rudd then accepted those very immediate and tangible benefits. *Wilson*, on the other hand, involved plaintiffs who had no reason whatsoever to know of any contract between any of the defendants. The *Wilson* plaintiffs were not receiving tangible and immediate benefits from the contract.

In sum, the equitable considerations and distinctions between these two factual scenarios are vast. In the present case, Mr. and Ms. Rudd acted in apparent concert to avail themselves of Mr. Rudd's admission to Pepper Hill, and Ms. Rudd, the plaintiff here, was a signatory to the contract on her husband's behalf. *Wilson*, on the other hand, involved plaintiffs who had no knowledge of and did not embrace the benefits of a contract between various defendants. Further, in the present case, as opposed to *Wilson*, the Court does not risk enabling collusive or

[1] Again, it has been uncontested previously that Ms. Rudd had authority under the AHCCA to make healthcare decisions for Mr. Rudd due to his vulnerable condition and cognitive decline. As a result, Appellants argues estoppel in the alternative given Respondent's apparent decision to now contest this issue on appeal.

fraudulent behavior between the signatories to the contract by upholding arbitration. Thus, for many reasons, *Wilson* does not control and is readily distinguishable.

Weaver too is readily distinguishable from the present case. *Weaver* involved a plaintiff who sued a residential care facility for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress after plaintiff's grandmother wandered from the facility and plaintiff later found her grandmother's body, which had been maimed and dismembered by an alligator. *Id.* at 227, 847 S.E.2d at 271. The plaintiff sued exclusively in her individual capacity and not on behalf of her grandmother's estate. *See id.* at 228, 847 S.E.2d at 271. The defendants moved to compel arbitration based on a provision in the residency agreement between the residential care facility and plaintiff's grandmother. *Id.* The court noted that plaintiff was not a party to the residency agreement, nor was she even was aware of it. *Id.* Further, the arbitration agreement bound "persons claiming through the Resident, or persons claiming through the Resident's estate, whether such third parties make a claim in a representative capacity or in a personal capacity. *Id.*

Unlike *Weaver*, the present case involved claims (including negligence, corporate negligence, neglect of a vulnerable adult, and wrongful death) brought by the resident's estate. The claims are for direct damages suffered by Mr. Rudd, the beneficiary of the Admissions Agreement. Moreover, the claims brought by Respondent relate directly to benefits provided under the Admissions Agreement, including Mr. Rudd's residency at and care provided by Pepper Hill. The plaintiff in *Weaver*, in contrast, sought to recover for emotional distress and other claims arising out of her finding her grandmother's body. Finally, while the plaintiff in *Weaver* had no reason to know of the residency contract, Ms. Rudd not only knew about it but

actually executed the Agreement, and Mr. Rudd accepted and retained the contract's benefits. Thus, *Weaver* does not control and is readily distinguishable.

Finally, to the extent Respondent attempts circumvent the arbitration agreement by arguing that her causes of action are separate from and do not arise from "exploitation" of the Admissions Agreement, Respondent's arguments are without merit. Respondent alleges causes of action for negligence/recklessness, "Corporate Negligence", "Joint Venture", "Alter Ego/Piercing the Corporate Veil," "Neglect of a Vulnerable Adult," and Wrongful Death. The factual allegations Respondent alleges in support of these causes of action arise out of Mr. Rudd's admission to and care provided by Pepper Hill, benefits explicitly provided for under the Admissions Agreement.

Moreover, Respondent appears to argue that the law permits a plaintiff to avoid an arbitration agreement by simply and artfully avoiding reference to the contract or labels like "breach of contract", or even by simply including a tort cause of action alongside a contract-based claim. As an initial matter, the Arbitration Provision at issue here explicitly extends its scope to claims arising from an alleged tort. (R. p. 256). Moreover, by taking Respondent's arguments to their natural end, a plaintiff who otherwise agreed to arbitrate claims could automatically avoid the arbitration provision by simply alleging a negligence cause of action, even where the relationship between the parties exists solely by virtue of the contract, the nature of the alleged injuries relate to contractual duties (couched artfully to avoid reference to the contract), and the plaintiff obtained benefits under the contract. This is not the law. Were it the law, this would effectively subject enforcement of arbitration agreements to the whims of the plaintiff. Other parties who bargained for the arbitration agreement would receive protection under the agreement only where a plaintiff wished them to have that protection.

For these reasons, estoppel would apply to bind Respondent to the arbitration agreement.

3. Mr. Rudd was a Third-Party Beneficiary of the Admission and Arbitration Contract.

Appellants' initial brief sets forth the grounds that would bind Respondent to the Admissions Agreement and Arbitration Provision as a third-party beneficiary, and Appellants reiterate those arguments here.

In addition, contrary to Respondent's arguments, South Carolina law has not effectively abolished the third-party beneficiary doctrine with regard to arbitration agreements. Not only does this argument misconstrue legal precedent, but further, such a result would violate the Federal Arbitration Act by placing arbitration agreements in a separate category from other contracts.

Respondent's argument relies on the decision in *Wilson/Willis* to argue that South Carolina law has raised "serious questions as to whether a nonsignatory can ever be forced to arbitration" under the third-party beneficiary doctrine. Respondent cites footnote 7 of the *Wilson v. Willis* decision in support. *See Wilson*, 426 S.C. at 338-39 n. 7, 827 S.E.2d at n. 7. However, footnote 7 specifically indicates that federal courts have recognized that a third-party beneficiary of a contract containing an arbitration clause may be compelled into arbitration as a nonsignatory. *Id.* These federal court decisions include those cited above applying South Carolina law: *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185, at *2 (D.S.C. Mar. 19, 2015) (finding that third-party beneficiary and equitable estoppel law was properly applied and that arbitration agreement was binding) and *THI of S.C. at Columbia, LLC v. Wiggins*, No. CA 3:11-888-CMC, 2011 WL 4089435, at *1 (D.S.C. Sept. 13, 2011) (holding resident was intended third-party beneficiary of admissions contract signed by immediate family member and that resident and his estate were therefore bound).

Moreover, the United States Supreme Court holds that the Federal Arbitration Act establishes an "equal-treatment principle" and preempts any state rule discriminating against arbitration. *See Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421, 1423 (2017). As noted in the admissions agreement, the Admissions Agreement and Arbitration Provision are explicitly subject to the Federal Arbitration Act. (R. pp. 244-257). As a result, any state rule treating arbitration agreements differently—including a rule barring application of a general state contract doctrine, such as the third-party beneficiary doctrine---would be preempted by federal law.

Thus, Respondent is bound as a third-party beneficiary of the Admissions Agreement, and the arbitration provision should be enforced.

II. The Admission Agreement is Enforceable and the Arbitration Agreement Applies to the Wrongful Death Claim.

1. The Admission Agreement Does Not Violate South Carolina Public Policy.

Respondent's arguments that the Admission Agreement is unconscionable based on provisions governing dispute resolution are without merit.

As an initial matter, the Admission Agreement's exculpatory clause—which is a separate provision in the Admission Agreement from the arbitration provision—is not at issue on this appeal. Appellants' Motion to Compel Arbitration does not raise or rely on this provision, and Respondent may argue against enforcement of the exculpatory provision if and when that provision is raised.

Further, while Appellants dispute Respondent's contentions that the exculpatory clause is unconscionable, even were it unenforceable, the Admissions Agreement contains a severability provision as follows:

SEVERABILITY

> If any provision of this agreement shall be invalid or unenforceable to any extent, the remainder of this agreement shall not be affected by such provision and shall be enforced to the greatest extent permitted by law.

(R. p. 255). Thus, even to the extent the Respondent's challenge to the exculpatory clause were before this Court, and even to the extent the clause or portions of the clause were properly subject to challenge under South Carolina law, the arbitration provision would remain unaffected.

2. Ms. Rudd's Consent to Arbitration Extends to the Wrongful Death Claim.

The Admissions Agreement and its Arbitration provision is enforceable against Ms. Rudd's wrongful death claim. By executing the Agreement, Ms. Rudd explicitly agreed to be bound by its terms: the Admissions Agreement provides that "[t]his agreement shall be binding upon Resident/Representative, Pepper Hill Nursing & Rehab Center, and each of their heirs, successors and assigns." (R. p. 255). Moreover, the Arbitration Provision provides that "responsible party hereby expressly waive[s] any right to trial by jury of any claim, demand, action or cause of action arising out of or relating to this agreement, including any claim based on or arising out of an alleged tort.

3. The Arbitration Agreement is Otherwise Binding on the Wrongful Death Claims.

In addition to the express terms of the Admissions Agreement set forth above, in South Carolina, an arbitration agreement is binding on a decedent's estate for a claim of wrongful death. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 378 n.3, 759 S.E.2d 727, 731 (2014) (relying on *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-04, 182 L. Ed. 2d 42 (2012) (per curiam) (invalidating West Virginia's policy refusing to refer wrongful death claims against a nursing home to arbitration)). As in *Dean*, to read here that Appellant's wrongful death claims are not subject to arbitration would be in direct conflict with the "strong

public policy in favor of arbitration." *Dean*, 408 S.C. at 284-385, 759 S.E.2d at 734. Respondent essentially argues in favor of blanket rule that would bar arbitration of wrongful death claims, which is the specific rule invalidated by the United States Supreme Court in *Marmet*.

South Carolina's wrongful death statute further belies Respondent's arguments. The wrongful death statute provides that:

> whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages.

S.C. Code Ann. § 15-51-10. The fact that the wrongful death claim must be brought by the estate of the deceased individual further delineates the distinction between a wrongful death claim and other causes of action for which an individual would ordinarily simply bring claims in their own name.

Courts in jurisdictions with statutes similar to South Carolina's wrongful death statute have held that wrongful death actions are derivative of the decedent's injury before death. *See Ballard v. Sw. Detroit Hosp.*, 119 Mich. App. 814, 817-18, 327 N.W.2d 370, 371 (1982) (finding that wrongful death is a derivative action where the wrongful death act establishes a cause of action where the defendant's negligence or wrongful act would "if death had not ensued, have entitled the party injured to maintain an action and recover damage," even where the statute allows personal representatives to recover damages as compensation for loss of society and companionship of the deceased); *see also In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 644 (Tex. 2009) (holding that the wrongful death beneficiaries' right to maintain a wrongful death cause of action is entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death). Accordingly, a wrongful death beneficiary stands in the shoes of

the decedent and should be bound by the decedent's arbitration agreement. *See Ballard,* 119 Mich. App. at 817-18327 N.W.2d at 371 (enforcing arbitration on wrongful death beneficiaries because wrongful death is a derivative action where the wrongful death beneficiaries stand in the shoes of the decedent); *see also In re Labatt Food Serv., L.P.*, 279 S.W.3d at 644 (enforcing the provisions of an arbitration agreement on wrongful death beneficiaries just like any other contract because the wrongful death act is entirely derivative of the decedent's right to have sued for his own injuries prior to his death); *Graves v. BP Am. Inc.*, 568 F.3d 221, 224 (5th Cir. 2009) (binding the statutory beneficiaries of a wrongful death action by the decedent's arbitration agreement because the wrongful death action was entirely derivative of the decedent's rights and premised on the contract including the arbitration agreement); *Peltz v. Sears, Roebuck & Co.*, 367 F. Supp. 2d 711, 719 (E.D. Pa. 2005) (enforcing arbitration upon beneficiaries bringing a wrongful death action based on a theory of equitable estoppel because their wrongful death cause of action derived from the decedent's claims and incorporated by reference the agreement containing the arbitration provision).

For these reasons, the Arbitration Provision is binding on Mr. Rudd, his estate, and the wrongful death causes of action.

III. Conclusion

For the reasons set forth above, Appellants request that the Court reverse the trial court's Order and compel arbitration.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), SCACR, Appellants' counsel hereby certifies that Appellants' Final Brief and Final Reply Brief comply with Rule 211(b), SCACR.

October 18, 2021

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