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. 2021-000681

Terry Putman, Individually and as Personal Representative of the Estate of Margaret Hensley	……..	Respondent
v.		
White Oak Estates, Inc.; White Oak Management, Inc.; and White Oak Manor, Inc.	……	Appellants.

RESPONDENT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

South Carolina

Other Jurisdictions

Statutes and Regulations

Secondary Sources

COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court correctly applied the Federal Arbitration Act which requires enforcement of state law contract formation requirements for arbitration contracts regardless of federal and state pro-arbitration policies.

2. Whether an adhesion arbitration contract is unconscionable when its terms could shift a corporate party's costs to an indigent resident's family and is likely to produce a non-neutral arbitration panel.

3. Whether the circuit correctly determined Ms. Hensley's admission to the Facility was not adequate consideration to support the Arbitration Agreement or to support a duty for Respondent to arbitrate her claims against entities that are not even parties to the Arbitration Agreement.

4. Whether the circuit court correctly found the Arbitration Agreement does not bind Ms. Hensley's uconsenting beneficiaries identified by statute to recover under South Carolina's distinct, independent wrongful death claim.

5. Whether Appellants White Oak Management, Inc. and White Oak Manor, Inc. may enforce an Arbitration Agreement to which they are not parties and that specifically limits its scope to disputes between its parties.

STATEMENT OF THE CASE

Respondent Terry Putman, in her role as personal representative for the estate of her mother Margaret Hensley, filed a Summons and Complaint in the Spartanburg County Court of Common Pleas on November 2, 2020. (Summons and Complaint). The Complaint alleged medical negligence, ordinary negligence, negligence per se, and corporate negligence claims against Appellants White Oak Estates, Inc. ("Facility"), White Oak Management, Inc., and White Oak Manor, Inc. (Compl. ¶¶ 64-78). Appellants served an answer on February 19, 2021, and filed a motion to dismiss the same day seeking various additional relief including an order compelling arbitration, issuing a stay, and granting a protective order for pending and future discovery obligations. (Answer; Defs.' Mot. to Dismiss).

The Honorable Grace Gilchrist Knie heard oral arguments on Appellants' motion on March 17, 2021. (Hearing Transcript). On April 13, 2021, the circuit court entered an order denying the

motion. (Order, entered Apr. 9, 2021). The circuit court found the contract Appellants cited to support arbitration was unenforceable because it was unconscionable and lacked consideration. (Order at 9-17). The circuit court also determined in the alternative that the purported arbitration contract could not apply to Respondent's wrongful death claim and could not be enforced by Appellants White Oak Management, Inc. and White Oak Manor, Inc. (Order at 17-24).

Pursuant to Rule 59(e), SCRCP, Appellants moved for reconsideration on April 19, 2021, which the circuit court denied initially on May 12, 2021, and then in a final order on May 28, 2021. (Mot. to Alter or Amend Judgment; Order, entered May 12, 2021; Order, entered May 28, 2021). Appellants filed a notice of appeal on June 25, 2021.

STATEMENT OF THE FACTS

Ms. Hensley was admitted to the Facility on August 29, 2017 for short-term rehabilitation following hip surgery. (Compl. ¶ 44). At the time of her admission, Ms. Hensley wore a brace on her right leg and had a skin abrasion at the bottom edge of the brace. (Compl. ¶ 45). The Facility failed to create a care plan for this skin issue and did not properly monitor it during Ms. Hensley's admission. Id. Over the next several weeks, the abrasion worsened. (Compl. ¶ 47). Yet, the Facility continually failed to properly monitor Ms. Hensley's skin or to document the progression of her wound. Id. By September 12, 2017, Ms. Hensley's condition had deteriorated so much that her physician referred her for treatment at a wound care center and ordered more extensive wound care treatment at the Facility. (Compl. ¶ 49). Despite these orders, Ms. Hensley's wound became infected. (Compl. ¶ 54). She was transferred on September 23, 2017, from the Facility to Spartanburg Regional Medical Center for infection-based symptoms including altered mental status, tachycardia, hypoxia, difficulty breathing, and widespread pain. (Compl. ¶ 56). Ms.

Hensley's wound then became septic, and she passed away on September 25, 2017. (Compl. ¶¶ 57-59).

Five days before Ms. Hensley was admitted to the Facility (i.e. August 24, 2017), her daughter (Ms. Putman) was presented with a five-page "Arbitration Agreement," which Ms. Putman signed as Ms. Hensley's "Resident Representative" pursuant to a power of attorney. (Arbitration Agreement at 5; Durable Power of Attorney). The Arbitration Agreement included a number of unusual terms to govern the proposed arbitration process. For example, the Arbitration Agreement called for a three-member arbitration panel with each party unilaterally selecting one panel member. (Arbitration Agreement at 1-2 ¶¶ 4-5). The third member would be selected either by agreement of the parties' two appointees or, if an agreement could not be reached, unilaterally by the appointee who won a coin toss. (Arbitration Agreement at 2 ¶ 6). A majority vote of the arbitration panel would control discovery disputes, evidentiary rulings, and the final adjudication of substantive claims. (Arbitration Agreement at 2-3 ¶¶ 10-13). After the arbitration panel ruled, the non-prevailing party would be required to pay its opponents' costs and the third arbitrator's expenses. (Arbitration Agreement at 3 ¶ 14). These expenses—including multiple arbitrators' fees and Appellants' costs—are a potential barrier to Respondent pursuing arbitration as they are something that neither Ms. Hensley's estate nor Ms. Putman can afford. (T. Putman Aff. ¶¶ 10-11).

The Arbitration Agreement's scope was limited to "claims arising between the parties hereto" with "parties" defined to include only the Facility and Ms. Hensley. (Arbitration Agreement at 1, intro paragraph, ¶ 2). All of the Arbitration Agreement's procedural provisions speak in terms of these two "parties'" rights and obligations. (Arbitration Agreement at 1-3 ¶¶ 3-14). Arbitration was also referenced in the separate Resident and Facility Admission Agreement

("Admission Agreement") presented to Ms. Putman a full two days after she signed the Arbitration Agreement (i.e. August 26, 2017). The Admission Agreement stated that arbitration was required only for "CLAIMS ARISING BETWEEN THE FACILITY AND RESIDENT/RESIDENT REPRESENTATIVE." (Admission Agreement at 18-19 ¶ 21). The Facility led Ms. Putman to believe she had to sign the Arbitration Agreement to obtain Ms. Hensley's admission. (T. Putman Aff. ¶ 6). The Admission Agreement stated that, following an opt-out period, arbitration was "MANDATORY." (Admission Agreement at 18-19 ¶ 21). Desperate to secure nursing home services for Ms. Hensley, Ms. Putman signed the Arbitration Agreement, and Ms. Hensley was admitted to the Facility. (T. Putman Aff. ¶ 4). In light of these circumstances and the contractual language, the circuit court concluded the Arbitration Agreement was unconscionable. (Order, entered Apr. 9, 2021 at 9-15). Even if the Arbitration Agreement was valid, the circuit court further concluded it could not be enforced by Appellants White Oak Management, Inc. and White Oak Manor, Inc. (Order, entered Apr. 9, 2021 at 23-24). Finally, the circuit court ruled in the alternative that the Arbitration Agreement could not apply to Respondent's wrongful death claim, which was brought to recover losses sustained by Ms. Hensley's statutory beneficiaries. (Order, entered Apr. 9, 2021 at 17-22).

STANDARD OF REVIEW

Appellate courts apply a *de novo* review to a circuit court's ruling on which individuals or entities are bound to a purported arbitration contract. Wilson v. Willis, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) (citing Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) and Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012)). However, under a *de novo* review, the circuit court's factual findings will not be reversed so long as "any evidence reasonably supports those findings." Wilson, 426 S.C. at 335,

827 S.E.2d at 172. While the Federal Arbitration Act ("FAA") imposes a presumption favoring arbitration, the presumption does not apply to the "identity of the parties who may be bound to such an agreement." Id. at 337-38, 827 S.E.2d at 173. In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory. Id.

ARGUMENT

1. The FAA Does Not Require Arbitration Here and its Pro-Arbitration Policy Does Not Supplant South Carolina Contract Formation Requirements.

Appellants argue the circuit court overlooked FAA "interpretative mandates" that "required" an order granting their motion to compel arbitration. Appellants' Br. at 5-8. However, Appellants attempt to extend the federal/state pro-arbitration policy far beyond its recognized bounds. In the wake of judicial disdain for legitimately created arbitration contracts, the FAA was intended to raise the status of arbitration contracts **but only** to the level of contracts covering any other subject matter. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010) (finding that the FAA's savings clause—9 U.S.C. § 2—"places arbitration on equal footing with other contracts"); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 n. 12 (1967) (finding FAA's purpose was "to make arbitration agreements as enforceable as other contracts, but not more so").

Federal policy does not compel this Court to construe the Arbitration Agreement as valid or to extend it beyond its designated parties. Courts often note that doubts concerning arbitrability should be resolved in favor of arbitration. However, those cases are limited to questions regarding an arbitration agreement's scope, i.e. whether the parties' dispute is encompassed within an arbitration agreement's language. Landers v. Federal Deposit Ins. Corp., 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) ("doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118

(2001) (applying this principle to "the range of issues that can be arbitrated"). Here, the issue is more fundamental. Respondent does not dispute that her claims would be covered by the Arbitration Agreement's scope. Instead, Respondent's position is that no valid arbitration agreement exists between Ms. Hensley and any of the Appellants.

These are contract formation issues, and the FAA expressly reserves them to arbitration-neutral state contract law. 9 U.S.C. § 2 (arbitration agreement may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract"); Goldberg v. C.B. Richard Ellis, Inc., Civil Action No. 4:11-cv-02237, 2011 WL 6817908 *2 (D.S.C. Dec. 28, 2011) (finding FAA "does not displace state law on the general principles governing formation of the contract itself"); Lawrence v. Blue World Pools, Inc., C.A. No. 8:11-1099-JFA, 2011 WL 2491367 *2 (D.S.C. June 22, 2011) ("whether a party agreed to arbitrate a particular dispute is a question of state law governing contract formation").[1] The South Carolina Supreme Court has held that the presumption in favor of arbitration is limited to the scope of arbitrable issues and does not apply to either the existence of a valid arbitration agreement or the individuals or entities bound by an arbitration contract. Wilson, 426 S.C. at 337, 27 S.E.2d at 173 (quoting Carr v. Main Carr Dev., LLC, 337 S.W.3d 489, 496 (Tex. App. 2011)). In fact, when the party opposing arbitration is a non-signatory, there is a presumption against arbitration. Wilson, 426 S.C. at 337-38, 827 S.E.2d at 173 (citing Global Pac., LLC v. Kirkpatrick, 88 N.E.3d 431, 435 (Ohio App. 2017)). This Court also cautions against reflexive citations to FAA policy in contract formation disputes. Weaver v.

[1] Appellants are correct that the FAA applies to contract formation questions arising from disputed arbitration agreements. Appellants' Br. at 8 (citing Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S.Ct. 1421, 1428-29 (2017)). However, that does not mean courts presume a purported arbitration contract was properly formed. Kindred held only that states may not target arbitration with "rule[s] selectively finding arbitration contracts invalid." 137 S.Ct. at 1428. Generally applicable contract formation defenses remain fully available when the would-be contract concerns arbitration.

Brookdale Senior Living, Inc., 431 S.C. 223, 229, 847 S.E.2d 268, 271 (Ct. App. 2020) ("The [pro-arbitration] policy does not kick in until the court determines a valid agreement to arbitrate exists").

As the litigation parties seeking arbitration, Appellants bore the burden of proving they entered a valid arbitration contract with Ms. Hensley and her estate. Appellants were entitled to no presumptions on this point, and federal pro-arbitration policy does not decide the issue. The circuit court properly applied South Carolina contract formation law and precedent to deny Appellants' motion to compel arbitration.

2. The Circuit Court Correctly Determined the Arbitration Agreement is Unconscionable.

The circuit court found the circumstances surrounding the Arbitration Agreement's presentation and the inequities in its terms met South Carolina's two-pronged test to declare the contract unconscionable. (Order at 9-15). Appellants never cite this test and instead focus on two arguments. First, Appellants suggest the Arbitration Agreement was not an adhesion contract. (Appellants' Br. at 13, 15). Second, Appellants contend the Arbitration Agreement's terms are reasonable under federal law. (Appellants' Br. at 16).[2] Both of these arguments are mistaken, and the circuit court's ruling should be affirmed.

Under South Carolina law, unconscionability is "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007) (quoting Carolina Care Plan, Inc. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757

[2] Appellants cite 42 U.S.C. § 483, but, since there is no such section in the U.S. Code, it appears Appellants intended to reference provisions within the Center for Medicare & Medicaid Services regulation codified as 42 C.F.R. § 483.

(2004)). The "absence of meaningful choice" element "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)).

Identifying a document as an adhesion contract is a useful starting point for analyzing these substantive factors. Simpson, 373 S.C. at 27, 644 S.E.2d at 669. Contrary to Appellants' argument, the evidence shows the Arbitration Agreement is an adhesion contract. An adhesion contract has two defining characteristics: (1) it is presented in a standardized form; and (2) it is presented by a party with greater bargaining power to a party with lesser power on a "take-it-or-leave-it" basis—i.e. without that party's ability to negotiate terms. Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). The Arbitration Agreement bears all the markers of a standard form contract. On its face, it is evident the Arbitration Agreement was not only for the Facility's use but also for other nursing homes bearing the "White Oak" brand. The Facility's name is stamped into a blank at the top of the Arbitration Agreement's first page and the signature block. (Arbitration Agreement at 1, 5). Ms. Hensley's name was also handwritten into the document. (Arbitration Agreement at 1). The evidence further shows this form contract was effectively non-negotiable. As Ms. Putman explained, the Arbitration Agreement was part of a stack of documents presented to her near the time of Ms. Hensley's admission. (T. Putman Aff. ¶ 4). The employee who signed the Arbitration

Agreement in the Facility's name provided no indication Ms. Hensley or Ms. Putman were entitled to change the Arbitration Agreement's terms. (See generally K. Baker Aff.).

The Simpson factors also show the fundamental unfairness of the bargaining process. The first factor favors Respondent because Ms. Hensley's injuries were personal and substantial. Appellants' alleged negligence led to multiple skin breakdowns, the development of pressure ulcers, and her premature death. (Compl. ¶ 62). The other factors also favor Respondent. Ms. Putman was not a substantial business concern. She was acting only as Ms. Hensley's attorney-in-fact with the aim of obtaining the nursing care she urgently needed. In contrast, Appellants are sophisticated business entities evidenced in many ways including the complex organization structure they have built to manage the Facility's operations. See Compl. ¶¶ 5-43. The disparity in bargaining power is considerable. Appellants operate nursing homes in multiple states with annual expenses and revenues totaling millions of dollars. (Compl. ¶¶ 2-4, 36). Ms. Hensley, on the other hand, was an elderly woman in poor health in need of daily care. Finally, the key language of the Arbitration Agreement was not conspicuous relative to any of the other admission paperwork the Facility presented to Ms. Putman. Plus, the lack of conspicuousness and surprise elements relate not only to how prominently an arbitration provision is featured in a contract but also consider whether the way in which the arbitration provision is drafted imposes substantive limitations that would not be immediately apparent to an unsophisticated person. E.g. Simpson, 373 S.C. at 27-28, 644 S.E.2d at 670 (finding arbitration provision "inconspicuous . . . in light of its consequences" including the deprivation of statutory remedies).

The circuit court was also correct in finding the Arbitration Agreement contains oppressive terms. Appellants defend the Arbitration Agreement's provisions by arguing federal regulations permit pre-admission nursing home arbitration contracts. (Appellants' Br. at 16). While that is

true, the pertinent regulation also imposes strict requirements the Arbitration Agreement does not meet. 42 C.F.R. § 483.70(n) ("the facility must comply with all of the requirements" listed in the regulation). For example, the regulation required the Facility to ensure the Arbitration Agreement "provides for the selection of a neutral arbitrator agreed upon by both parties." 42 C.F.R. § 483.70(n)(2)(iii). The Arbitration Agreement fails to meet this requirement in at least two ways. First, the arbitrator selection process does not call for arbitrators "agreed upon by both parties." Instead, the Arbitration Agreement allows each party to appoint one arbitrator apiece with those two appointees selecting the third arbitrator. (Arbitration Agreement at 1-2 ¶¶ 4-6). Thus, rather than seeking the parties' agreement, the Arbitration Agreement makes it very likely the arbitration panel will include at least one arbitrator each party would rather not be part of the proceedings.

Second, the Arbitration Agreement fails to meet the regulatory requirement for "selection of a *neutral* arbitrator." By granting each party a unilateral arbitrator selection, the Arbitration Agreement encourages the parties to select an arbitrator they feel will favor their perspective on the disputed issues. The Arbitration Agreement does not even pretend this is a neutral process as it repeatedly refers to the arbitrators in non-neutral terms. (Arbitration Agreement at 2 ¶ 9; at 3 ¶ 14) (referring to each party's appointee as "his/her/its own" arbitrator). Notably, while the third, arbitrator-selected arbitrator is required to pledge fairness and impartiality (Arbitration Agreement at 2 ¶ 6), the Arbitration Agreement requires no similar affirmation by the parties' personally-selected arbitrators. Thus, in both of these ways, the Arbitration Agreement's arbitrator selection process is inconsistent with the federal regulation Appellants tout.

Moreover, plenty of persuasive authority supports the circuit court's finding that a biased arbitrator selection process can render an arbitration contract unenforceable. As the Fourth Circuit recognizes, even if a party consents to arbitration, she "do[es] not agree to forgo [her] right to have

[her] dispute fairly resolved by an impartial third party." Murray v. United Food & Commercial Workers Union, 289 F.3d 297, 303 (4th Cir. 2002). A flawed arbitrator selection process cannot be overlooked by courts or left for the arbitrators to address. Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 385 (6th Cir. 2005) (citing McMullen v. Meijer, Inc., 355 F.3d 485, 494 n. 7 (6th Cir. 2004) ("the general rule prohibiting pre-arbitration challenges to an allegedly biased arbitration panel does not extend to an allegation that the arbitrator-selection process itself is fundamentally unfair").

As the circuit court correctly determined, the Arbitration Agreement's designated process for selecting the third member of the arbitration panel is not just odd, it offers one party an advantage over the other on procedural and substantive matters. (Order at 11-12). Arbitration Agreement paragraph 6 states that, in the very likely event that the parties' hand-picked arbitrators cannot agree on a third panel member, the result of a coin toss will allow one or the other arbitrator to unilaterally select the third member. This means there is a 50% chance Respondent would enter the arbitration proceedings with a crucial two out of three arbitrators chosen unilaterally by either the Facility or the Facility's hand-picked arbitrator[3]. This is an especially grave disadvantage where the votes of those two arbitrators are sufficient to rule in the Facility's favor on everything from what discovery Respondent may conduct to what evidence she can present to who prevails

[3] The risk of a biased panel is heightened when the arbitration contract fails to impose minimum standards to ensure each party's appointee is qualified to rule on the dispute. Walker, 400 F.3d at 387 (finding bias in arbitrator selection process "is significantly enhanced by the lack of any criteria" for the individuals eligible to serve as arbitrators such as "minimum educational requirements" and "relevant experience as an adjudicator"). The Arbitration Agreement requires only the third panel member to have a minimum level of education and experience. (Arbitration Agreement at 2 ¶ 6) (requiring third arbitrator to be an attorney and certified mediator/arbitrator, with experience in nursing home disputes). The parties' arbitrator selections may include any non-witness without close connection to the appointing party even if the selected individual lacks any sort of relevant education or experience. (Arbitration Agreement at 1-2 ¶¶ 4-5).

on the merits of her claims. (Arbitration Agreement at 2 ¶ 10; at 3 ¶¶ 11-14). A three arbitrator selection process that is so likely to produce an unfair panel is enough to render an arbitration contract unenforceable. See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999).

The Arbitration Agreement also fails to meet an additional regulatory requirement. The Facility was required to draft the Arbitration Agreement to "explicitly state" Ms. Hensley and Ms. Putman were not required to sign the Arbitration Agreement to obtain Ms. Hensley's admission to the Facility. 42 C.F.R. § 483.70(n)(4). While the Arbitration Agreement suggests someone provided this crucial information to Ms. Putman (Arbitration Agreement at 5 ¶ 24(e)), the Arbitration Agreement itself does not make that explicit statement as the regulation requires. Moreover, the circuit court made a factual finding that Ms. Putman was "required to sign" documents to secure Ms. Hensley's admission and was not provided an explanation of the Arbitration Agreement's terms. (Order at 10). This finding of fact must stand so long as "any evidence" supports it. Wilson, 426 S.C. at 335, 827 S.E.2d at 172. Ms. Putman provided the required evidence in her affidavit. (T. Putman Aff. ¶ 6) ("I was advised and led to believe I was required to sign the alleged arbitration agreement for [Ms.] Hensley's admission" to the Facility). Ms. Putman's affidavit is further supported by the Admission Agreement's description of arbitration as "MANDATORY." (Admission Agreement at 18-19 ¶ 21). Therefore, in violation of 42 C.F.R. § 483.70(n)(4), the documents the Facility presented to Ms. Putman led her to believe the flawed Arbitration Agreement was a precondition to obtaining the nursing home care Ms. Hensley urgently needed. This undue pressure further supports the circuit court's finding that the Arbitration Agreement is unconscionable.

By mandating arbitration to obtain admission, the Facility violated another federal law. Since the Facility receives Medicare and Medicaid reimbursements as payment for resident services, it is bound by 42 U.S.C. § 1396r(C)(5)(a)(iii) which states that a nursing home must not

> charge, solicit, accept or receive, in addition to any amount otherwise required to be paid under the State plan . . . any gift, money, donation, or other consideration as a precondition to admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility.

In short, the Medicare/Medicaid payment the Facility received was the only thing it was allowed to collect or to even request as a precondition to Ms. Hensley's admission. Conditioning Ms. Hensley's admission on her agreement to the flawed Arbitration Agreement described above violates this federal statute. See also (Pla. Mem. in Opp. to Def. Mot. to Dismiss at 15-17). South Carolina courts will not enforce contracts calling for illegal conduct. Ward v. West Oil Co., 387 S.C. 268, 274-75 692 S.E.2d 516, 519-20 (2010). Therefore, as an additional sustaining ground, the Court should refuse to enforce the Admission Agreement/Arbitration Agreement's illegal arbitration terms.

Finally, the circuit court correctly noted unfairness in the Arbitration Agreement's cost-shifting and timing provisions. (Order, entered Apr. 9, 2021 at 12-13). As another court has held, "[i]t is unconscionable to have a provision in an arbitration clause that puts all fees for arbitration on the consumer." State ex rel. Vincent v. Schneider, 194 S.W.3d 853, 860 (Mo. 2006). The Arbitration Agreement requires the party who loses at the arbitration hearing to pay "all reasonable costs associated with the arbitration." (Arbitration Agreement at 3 ¶ 14). Excluding attorney fees, the chargeable expenses would include "any other costs associated with the hearing" including pricey expert witness expenses and medical record production costs. Id. The burden of that bill coming due would be much different for Appellants and Respondent. Nursing home companies with millions in revenue certainly would not like to be forced to pay its opponent's costs but, for

Respondent, the burden amounts to an existential threat. Ms. Hensley's estate does not have the resources to pay these expenses (T. Putman Aff. ¶¶ 10-11) and that makes the Arbitration Agreement's cost-shifting provision a burden that could preclude Respondent from pursuing claims on behalf of the estate. Courts have recognized the deterrent that arbitration cost-shifting provisions can be for an individual's pursuit of her legal claims. Delta Funding Corp. v. Harris, 912 A.2d 104, 112 (N.J. 2006). The potential to deter claims, and the likelihood that the deterrent effect motivated the cost-shifting provision's inclusion, ably supports the circuit court's finding that the Arbitration Agreement is unconscionable. See Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 661 (6th Cir. 2003) ("A cost-splitting provision should be held unenforceable whenever it would have the 'chilling effect' of deterring a substantial number of potential litigants from seeking to vindicate their statutory rights").

Taken together, these onerous provisions make the process inefficient, which undermines arbitration's primary benefit. Aiken, 373 S.C. at 152, 644 S.E.2d at 709-10. The Arbitration Agreement's timing provisions only exacerbate the inefficiency. The process for selecting arbitrators can take up to 210 days. (Arbitration Agreement at 1-2 ¶¶ 4-6). Thereafter, another 90 days could pass before the arbitration hearing even begins. (Arbitration Agreement at 2 ¶ 7). Appellants could even ask the arbitrators to add additional delays. (Arbitration Agreement at 3 ¶ 12). Thus, while arbitration is touted by corporations to consumers as a cheaper and more efficient dispute resolution process, the Arbitration Agreement is written in a way that makes neither benefit likely here.

In sum, the circuit court correctly ruled the Arbitration Agreement is unconscionable. Appellants err in claiming the Arbitration Agreement is not an adhesion contract as it was a pre-printed form agreement that offered Ms. Putnam no ability to negotiate terms. Moreover, the

Arbitration Agreement's terms were properly deemed oppressive as their provisions on arbitrator selection, cost-shifting, and timing are either inconsistent with federal law or impose unreasonable burdens that make it less likely for residents to pursue claims and less fair when they do so.

3. The Circuit Court Correctly Determined the Arbitration Agreement was not Supported by Adequate Consideration.

The Arbitration Agreement is also an invalid contract because it lacks adequate consideration to support the promise Appellants seek to enforce. A contract is formed only when one party makes an offer, the other manifests acceptance, and the contract's promises are supported by valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Consideration may include a right, interest, or benefit accruing to one party or a forbearance, detriment, or loss undertaken by the other party. Hennes v. Shaw, 397 S.C. 391, 399, 725 S.E.2d 501, 505 (Ct. App. 2012). Consideration must be both valuable and "adequate" to support the contract's promises. Campbell v. Carr, 361 S.C. 258, 264, 603 S.E.2d 625 (Ct. App. 2004) (referring to "grossly inadequate" consideration).

Appellants offer no suggestion of consideration to support any purported promise for Ms. Hensley to arbitrate claims against White Oak Management, Inc. and White Oak Manor, Inc., entities that were not parties to either the Admission Agreement or Arbitration Agreement. As for Respondent's claims against the Facility, Appellants mostly argue the consideration was Ms. Hensley's admission and the deficient nursing services Respondent challenges in this litigation. (Appellants' Br. at 9-10). However, that argument incorrectly assumes the Arbitration Agreement and Admission Agreement merged into a single contract. The circuit court correctly determined

merger does not apply here. (Order at 5) (citing three appellate court opinions[4] rejecting merger of a nursing home's arbitration and admission contracts).

Two contracts can only merge if they are formed between the same parties at the same time for the same purpose and in the course of the same transaction. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. The Admission Agreement (signed by Ms. Putman on August 26, 2017) and the Arbitration Agreement (signed on August 24, 2017) were not formed at the same time. (Admission Agreement at 19; Arbitration Agreement at 5). Nor were they signed for the same purpose. The Admission Agreement covers various aspects of Ms. Hensley's nursing care (Admission Agreement at 5) while the Arbitration Agreement is expressly limited to potential future dispute resolution procedures. (Arbitration Agreement at 1). Even if the Coleman requirements were met, merger still does not apply if the contracts contain "anything indicting a contrary intent" such as inconsistent termination provisions. Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Here, the contracts should not merge because, while the Admission Agreement may be cancelled by the resident at any time (with 3-day advance written notice), the Arbitration Agreement may not be cancelled at all once a thirty-day opt-out period expires. (Admission Agreement at 12-13 ¶ 10.1; Arbitration Agreement at 3-4 ¶ 17).

In sum, the circuit court correctly concluded the Arbitration Agreement is not supported by adequate consideration. Ms. Hensley's admission does not qualify as consideration because that argument presumes a merger of the Arbitration Agreement and Admission Agreement that has been rejected multiple times by South Carolina appellate courts.

[4] Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 576, 813 S.E.2d 292, 309 (Ct. App. 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 51, 784 S.E.2d 679, 684 (Ct. App. 2016).

4. Ms. Hensley'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 Respondent's wrongful death claim. Appellants now insist Ms. Hensley (through the agent appointed in her power of attorney) 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, would not accrue for years, and covered injuries suffered exclusively by other people. No South Carolina authority supports these propositions. In fact, even if Ms. Hensley 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.

None of Ms. Hensley's wrongful death beneficiaries were parties to the Arbitration Agreement and none assented to its terms. Thus, Appellants may not rely on the Arbitration Agreement to dismiss the wrongful death claim without overcoming the presumption that a contract may be enforced only by its parties. Touchberry v. City of Florence, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988). A South Carolina contract may be enforced against a non-party only with proof of (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; or (5) estoppel. Wilson, 426 S.C. at 338, 827 S.E.2d at 174 (citing Malloy v. Thompson, 409 S.C. 57, 561-62, 762 S.E.2d 690, 692 (2014)). Since Appellants do not attempt to apply any of these theories, the Arbitration Agreement does not apply to the wrongful death claim.

Appellants may later argue the Arbitration Agreement applies because Ms. Hensley's family members are third-party beneficiaries, but that argument is flawed for multiple reasons.

First, Appellants cannot meet the requirements to show Ms. Hensley's family members qualify as third-party beneficiaries. Appellants must show the Arbitration Agreement was "made for the benefit of" the family members and the Arbitration Agreement's terms were intended to provide a "direct, rather than an incidental or consequential" benefit to them. Fabian v. Lindsay, 410 S.C. 475, 765 S.E.2d 132 (2014) (quoting Windsor Green Owners Ass'n v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004)). The only supposed benefit Appellants could argue the family members receive is the promise that the Facility's legal claims will also be subject to arbitration. But, Appellants have not identified any legal claims the Facility could ever have against the family members. As detailed below, any legal claims the Facility had against Ms. Hensley at her death could only be asserted against her estate, not the statutory beneficiaries for her wrongful death claim. S.C. Code Ann. § 15-5-90 (providing that, at a person's death, legal claims "survive both to and against" the decedent's personal representative). Since there is not even the possibility of a legal claim by the Facility against the wrongful death beneficiaries, there is no "direct benefit" to support a third-party beneficiary argument.

Second, the South Carolina Supreme Court has been ambivalent at best as to whether a third-party beneficiary theory can ever be used to force arbitration on unconsenting non-parties. Wilson, 426 S.C. at 338 n. 7, 827 S.E.2d at 174 n. 7 (citing Comer v. Micor, Inc., 436 F.3d 1098, 1102 (9th Cir. 2006) (finding third-party may be able to enforce a contract but "certainly cannot be bound to a contract it did not sign or otherwise assent to")). This Court has rejected third-party beneficiary arguments to enforce nursing home arbitration contracts on multiple occasions. Thompson, 416 S.C. at 57, 784 S.E.2d at 687 (quoting Dickerson v. Longoria, 995 A.2d 721, 742 (Md. 2010) ("a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration

agreement")); see also Hodge, 422 S.C. at 574, 813 S.E.2d at 308 (nursing home conceded Thompson foreclosed third-party beneficiary argument).

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

Unable to claim Ms. Hensley's family members are parties and unable to prove they are third-party beneficiaries, Appellants are left to argue the wrongful death claim actually belongs to Ms. Hensley'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. Hensley had against Appellants at the time of her death. The history and development of South Carolina's wrongful death claim and survival statute show wrongful death is something entirely different than tort claims surviving a person's death for the benefit of her estate. 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) and Mishoe v. Atl. Coast Line R.R., 186 S.C. 402, 197 S.E. 97 (1938) (holding that 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 (citing Gowan v. Thomas, 237 S.C. 223, 225, 116 S.E.2d 761, 762 (1960)). 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); see also Johnson v. Baptist Three Rivers Hosp., 984 S.W.2d 593, 596 (Tenn. 1999) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 127, at 945 (5th ed. 1984) (noting error of common-law rule was that it made it "cheaper for the defendant to kill the plaintiff than to injure him")). 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 distinctiveness and 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.; Complete Auto Transit, Inc. v. Bass, 229 S.C. 607, 611, 93 S.E.2d 912, 914 (1956) (reading Grainger to hold "judgment in an action for wrongful death did not bar a subsequent action for pain and suffering of the decedent"). 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 subsequently tried"). Bass also addressed a reason why wrongful death claims are often erroneously perceived as dependent on 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 having no relationship to

each other beyond the fact that their origin is referable to the death of the same person." 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) (finding personal representative "only in the capacity of a trustee in bringing [wrongful death] suit for the real parties in interest").

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 dependent on 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 that 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); see also Wilson v. Massengill, 124 F.2d 666, 669 (6th Cir. 1942) (describing South Carolina's wrongful death and survival claims as "separate and distinct"). In sum, Appellants err in asking the Court to find wrongful death is dependent on 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; see also 28 S.C. Jur. Wrongful Death § 5 (describing two claims at the tortious death of a person and, crucially, that "***the wrongful death action and the survival action involve different, independent claims***.").

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); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) ("In a wrongful death case, the issue of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death"). 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, 342 S.C. at 303-05, 536 S.E.2d at 420-21 (affirming verdict of less than $29,000 for survival claim and $ 3 million for wrongful death claim).

In sum, extensive South Carolina precedent rejects Appellants' contention that wrongful death claims are dependent on claims a person holds at the time of her death. In multiple cases dating back over a hundred years, 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. These cases, along with the history and

structure of the relevant statutes, show Ms. Hensley did not bind her wrongful death beneficiaries to arbitration. Those beneficiaries are the "real parties" to the wrongful death claim and they did not sign the Arbitration Agreement or otherwise consent to waive their right to a jury trial.

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

Appellants do not address any of this extensive South Carolina case law showing wrongful death is a distinct, independent claim. Instead, Appellants cite an indiscriminate collection of case law and a federal district court order to suggest South Carolina courts have already ruled wrongful death is a derivative claim and a nursing home resident can agree to arbitrate this claim even though it benefits different people for their own particularized damages. None of the authorities Appellants cite support that conclusion and none squarely address the question now before the Court. Instead, it is the precedent cited in Argument 4(b) that is most helpful for showing the true nature of a wrongful death claim under South Carolina law.

Appellants claim the South Carolina Supreme Court addressed the arbitrability of wrongful death claims in Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014). However, Dean addressed a very different issue related to forum selection clauses and a contractually-designated arbitral forum no longer willing to arbitrate the legal claims in question. Id. at 382, 759 S.E.2d at 733 (finding "outcome of this appeal turns" on effect of arbitral forum provision). Plus, Dean did not even compel arbitration in the case before it. The Supreme Court rejected a few reasons cited for invalidating a nursing home arbitration contract but remanded the matter to the circuit court to address two others. Id. at 387, 759 S.E.2d at 736.

Appellants rely on a sentence in one of Dean's footnote but read far too much into that sentence. Id. at 378 n. 3, 759 S.E.2d at 731 n. 3 ("We note that courts may not refuse to compel arbitration simply because a wrongful death claim is involved"). This footnote addressed an overly

broad pronouncement in the appealed order suggesting wrongful death claims are categorically excluded from arbitration. Id. (citing circuit court order statement stating that "wrongful death actions are not something that's arbitrated"). That type of rule would violate the FAA's equal-treatment principle. Id. (citing Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532-33 (2012)); see also Kindred, 137 S. Ct. at 1426. However, that is not the argument Respondent makes here. A wrongful death claim may be arbitrable in instances where the statutory beneficiaries agree to do so. Respondent simply argues an individual's consent to arbitrate may not be grafted into a wrongful death claim that pays different people for different losses. Dean does not reject that argument or even consider it.

Moreover, the circuit court's ruling is fullly consistent with the equal-treatment principle. Several other courts have held that rejecting arbitration for wrongful death claims in similar cases does not violate Marmet or any other Supreme Court precedent on the equal-treatment principle.[5] Refusing to compel arbitration here does not mean wrongful death claims can never be arbitrated. Instead, as other courts have recognized, it simply means the nursing home failed to get consent for arbitration from the proper people. 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 2(d) below, the interaction of wrongful death and survival claims for

[5] See Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 360 (Ill. 2012) (unlike Marmet, Illinois was not applying a categorical anti-arbitration rule but was rather applying "common law principles governing all contracts"); Vickers v. Canal Pointe Nursing Home & Rehab Ctr., 2016 Ohio 3244, 2016 WL 3080329 (Ohio App. June 1, 2016) (finding that Ohio Supreme Court precedent preventing arbitration of wrongful death claims did not create categorical ban Marmet bars because it applied generally applicable contract law rule against enforcing contract against person who had not assented); Life Care Ctrs. of Am., Inc. v. Neblett, Civil Action No. 5:14-cv-00124-TBR, 2014 WL 7179652, at * 2 and n. 1 (W.D. Ky. Dec. 17, 2014) (finding Kentucky law did not eliminate a category of claims from arbitration but rather simply "defines to whom a wrongful death claim accrues").

arbitrability purposes requires a careful analysis of statutory language and history as well as case law interpreting the two claims. Dean had no reason to undertake this analysis and has nothing to offer the Court in resolving this appeal.

Appellants also reference one unreported federal district court order which cited the Dean footnote. Appellants' Br. at 15 (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 likely 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, 416 S.C. at 57-62, 784 S.E.2d at 687-89.

Finally, Appellants contend that, since section 15-51-10 permits wrongful death claims only when the decedent would have had a claim if she survived, South Carolina law intends to give an individual control over a wrongful death claim which includes the right to determine the method by which it will be resolved. Appellants' Br. at 18-19 (citing Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988)); see also Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E.2d 143 (2010) (citing Quattlebaum). But,

Quattlebaum (and Stokes) did not address arbitration at all. Instead, they simply held that if an individual allows the statute of limitations on a personal injury claim to lapse during her life, then a wrongful death claim may not be used after her death to "revive" the stale claim. Stokes, 389 S.C. at 349, 699 S.E.2d at 146.

The statute of limitations is not at issue here and Quattlebaum/Stokes have never been cited as justification for binding non-parties to an arbitration contract. Plus, the legal provisions holding that an individual may prevent a wrongful death claim by ignoring or settling a personal injury suit during her life do not mean the individual may control the manner in which the wrongful death claim will be resolved *should she choose to leave it intact*. Several courts have made this distinction explicitly. Oklahoma, like South Carolina, bars a wrongful death suit if the decedent ended a personal injury claim during her lifetime based on the same wrongdoing. Boler v. Sec. Health Care, LLC, 336 P.3d 468, 477 (Okla. 2014) (citing Haws v. Luethje, 503 P.2d 871 (Okla. 1972)). Even so, Boler refused to apply a nursing home resident's arbitration contract to a wrongful death claim because doing so would violate contract principles on mutual assent. Id. at 471 and n. 5.

Pennsylvania also bars wrongful death claims if the decedent allowed her personal injury claim to lapse. Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 657 (Pa. Super. 2013) (citing Moyer v. Rubright, 651 A.2d 1139 (Pa. Super. 1994)). Yet, just like Oklahoma, Pennsylvania does not extrapolate from that rule the notion that an individual can bind her wrongful death beneficiaries to arbitration. Pisano, 77 A.3d at 657, 662 (refusing to find wrongful death beneficiaries lost jury trial right "where they did not waive it of their own accord"). Thus, Quattlebaum/Stokes and their interpretation of section 15-51-10 do not require arbitration in this case. Had Ms. Hensley settled her claims against Appellants before her death, Ms. Putman could

not bring a wrongful death claim on behalf of the statutory beneficiaries. But it does not follow that Ms. Hensley had the ability to direct the wrongful death claim to arbitration. Since Ms. Hensley had a viable dispute with Appellants when she died, a proposed arbitration of the wrongful death claim must consider whether the wrongful death beneficiaries agreed to waive a jury trial.

In short, none of the South Carolina authority Appellants cite support arbitration in this case. The cases in Argument 2(b) are more apt precedent showing South Carolina recognizes wrongful death is a distinct, independent, and non-derivative legal claim.

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

In light of the historical and structural differences between South Carolina's wrongful death and survival statutes, as well as substantial case law defining and treating the resulting claims distinctly, the Court should reject Appellants' attempt to use Ms. Hensley's purported assent to the Arbitration Agreement to force arbitration on a wrongful death claim. At least a dozen other jurisdictions have rejected Appellants' argument.[6] Four different state supreme courts have done so over just the last ten years. While some jurisdictions have taken a contrary view[7], South

[6] 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).

[7] 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).

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. There, an elderly woman was admitted to a nursing home with the assistance of her daughter. 273 S.W.3d at 526. During the admission process, the daughter signed an arbitration contract on her mother's behalf pursuant to a power of attorney that had been in place for several years. Id. Similar to the Arbitration Agreement, the contract in Lawrence purported to bind both the mother and "all persons whose claim is derived through or on behalf" of the mother 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 mother 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 with both creating a claim for torts causing fatal injuries and both indicating a wrongful death claim arises if the decedent would have been able to pursue a claim had she survived. Id.; see also S.C. Code Ann. § 15-51-10. Missouri courts 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 (citing O'Grady v. Brown, 654 S.W.2d 904, 910 (Mo.

1983)). 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"); Claussen, 145 S.E. at 540 (wrongful death is "not a continuation" of an existing claim); Keel, 114 S.E. at 762 (wrongful death and survival claims are "separable and distinct"). Considering both the statutory language and precedent, Lawrence concluded a wrongful death claim is "separate and distinct." 273 S.W.3d at 528. Its holding was buttressed by the fact that Missouri wrongful death claims compensate different people for different losses. Id. at 528-29. The South Carolina Supreme Court has cited 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 dependent on the decedent's claims. First, a wrongful death claim is likely separate 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 and original and distinct claim" and is neither "derived from nor is it a continuation of claims which formally existed in a decedent." 316 P.3d 607, 613 (Ariz. Ct. App. 2014) (quoting Huebner v. Deuchle, 514 P.2d 470, 470-71 (Ariz. 1973)); 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").[8]

Third, many of these opinions find wrongful death to be a distinct 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) (employee could not agree to arbitrate wrongful death claims "because he held no right to those claims; they 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

[8] Kentucky law is somewhat different than South Carolina in that its wrongful death claim is guaranteed by the state's constitution. Ping, 376 S.W.3d at 598. A couple of other states have constitutional guarantees and noted them in rejecting arbitration. Boler v. Sec. Health Care, LLC, 336 P.3d 468, 476 (Okla. 2014); Bybee v. Abdulla, 189 P.3d 40, 44-45 (Utah 2008). However, these cases are still relevant precedent because none of them relied exclusively on wrongful death's constitutional status to reject the argument Appellants raise here. See e.g. Ping, 376 S.W.3d at 598 (noting constitutional provision but concluding "we need not invoke the Constitution" to find wrongful death is a distinct, independent claim).

until the decedent's death. Strickholm v. Evangelical Lutheran Good Samaritan Soc'y, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

Finally, these cases show the error in Appellants' interpretation of a "derivative" claim. The Arbitration Agreement purports to extend to Ms. Hensley's "heirs, personal representatives, successors, and assigns." (Arbitration Agreement at a ¶ 20). Appellants seem to argue wrongful death is sufficiently derivative because S.C. Code Ann. § 15-51-10 permits a wrongful death claim only if the decedent could have brought a claim for the same harm before she died. Many of the cases from other states cited above found wrongful death was not a derivative claim despite statutes like section 15-51-10. Boler, 336 P.3d at 472-77; Carter, 976 N.E.2d at 358-59; Woodall, 231 P.3d at 1259 ("characterizing the wrongful death claims as 'derivative' does not support the proposition that the heirs must arbitrate their claims for wrongful death"). By arguing that a statute like section 15-51-10 was enough to force a wrongful death claim to arbitration, Carter found parties like Appellants "overstate[] the significance of the derivative nature of a wrongful-death action" especially where, here as in Carter, there is extensive case law and structural differences demonstrating wrongful death is an independent claim. Similarly, Boler held that while a statute like 15-51-10 might make wrongful death "partially derivative" in a limited sense, it would still be improper to compel arbitration since wrongful death accrues separately and compensates statutory beneficiaries directly for their personal losses. 336 P. 3d at 472, 477 (finding a resident's signature could not compel arbitration on wrongful death claim unless that claim was "wholly derivative"); see also Pisano, 77 A.3d at 659-60 (providing detailed discussion of definition for "derivative" and rejecting arbitration because while wrongful death claims are inherently "derivative of the decedent's injuries," they "are not derivative of decedent's rights").

In sum, persuasive authority does not support Appellants' argument that South Carolina's wrongful death claim is "derivative" such that a nursing home resident's agreement to arbitrate applies to a wrongful death claim. A dozen states have considered statutes similar to section 15-51-10 and found wrongful death is a distinct, independent claim.

5. Appellants White Oak Management, Inc. and White Oak Manor, Inc. May not Enforce the Arbitration Agreement Because it is Limited to Claims Between its Narrowly-Defined Parties.

Appellants White Oak Management, Inc. and White Oak Manor, Inc. are entities involved with the Facility's operations (Compl. ¶¶ 3-4) but they are not parties to the Arbitration Agreement. South Carolina law presumes a contract's duties and benefits are exclusive to its parties, and the circuit court correctly determined Respondent's claims do not meet the limited circumstances when a non-party may enforce contract provisions. To grant these entities enforcement rights, the Arbitration Agreement would have to unambiguously extend its benefits to them and unambiguously subject to arbitration Respondent's claims against these entities. Since the Arbitration Agreement's language does not meet these requirements, the circuit court's ruling should be affirmed.

By its very nature, a contract is a voluntary agreement between (usually) two specifically identified parties. What separates contractual duties from their statutory or tort-based counterparts is that they are imposed only on parties that affirmatively manifest assent to them. Accordingly, South Carolina law presumes contracts may only be enforced by their parties. Touchberry, 295 S.C. at 48-49, 367 S.E.2d at 150. This presumption may be overcome only if the contract's language unambiguously extends its benefits to third parties. Thompson, 416 S.C. at 57, 784 S.E.2d at 687. Here, the Arbitration Agreement does not extend to third persons because it limits the scope of arbitrable claims to its narrowly defined "parties." As presented to Ms. Putman, the

Arbitration Agreement only extends to claims "now existing or hereafter arising **between the parties**." (Arbitration Agreement at 1 ¶ 2) (emphasis added).

Appellants argue the Arbitration Agreement actually extends arbitration to White Oak Management, Inc. and White Oak Manor, Inc. (Appellants' Br. at 22-23), but the language the Facility chose when drafting the document does not support that conclusion. Appellants focus on the phrase "all claims," which the Arbitration Agreement purports to include Ms. Hensley's claims against White Oak Management, Inc. and White Oak Manor, Inc. (Arbitration Agreement at 1 ¶ 1). However, Appellants overlook how that phrase is deployed in the Arbitration Agreement's scope provision. Paragraph 2 states that arbitration is only required for "[a]ll claims *arising between the parties hereto*." (Arbitration Agreement at 1 ¶ 2) (emphasis added). "Parties" is also a defined term in the Arbitration Agreement and it is limited to the Facility and Ms. Hensley as "Resident." (Arbitration Agreement at 1, intro paragraph). The Arbitration Agreement goes to some length to confirm it only has two "parties." See Arbitration Agreement at 1 ¶ 3 (referring to rights of "either" party); David A. v. Karen S., 213 A.3d 685, 701 (Md. App. 2019) (citing Merriam-Webster's Collegiate Dictionary 399 (11th ed. 2014) ("either" means "one or the other of two people or things")). The Arbitration Agreement never purports to make White Oak Management, Inc. or White Oak Manor, Inc. a "party," and the Arbitration Agreement unambiguously limits its scope to the contract's "parties."

Limiting arbitration to the Facility and Ms. Hensley is also consistent with the remainder of the documents presented to Ms. Putman at the time of Ms. Hensley's admission. The Admission Agreement's arbitration provision states in definite terms that potential arbitration applies only to

claims between "THE FACILITY[9] AND RESIDENT/RESIDENT REPRESENTATIVE." (Admission Agreement at 18-19 ¶ 21) (emphasis in original). Plus, if White Oak Management, Inc. and White Oak Manor, Inc. were permitted to compel arbitration, there would be no designated procedures for how the arbitration proceeding would operate. While the Arbitration Agreement includes several paragraphs on procedures, they all speak in specific terms about how each of the contract's narrowly-defined "parties" should proceed in initiating, investigating, and adjudicating an arbitration claim. E.g. Arbitration Agreement at 1 ¶ 3 (describing claim initiation procedures if "either party to this Agreement" believes it has a claim); at ¶ 4 (defining process for each "party" to select arbitrators); at 2 ¶ 8 (limiting how each "party" may be represented at arbitration hearing); at 2 ¶ 9 (requiring each "party" to pay one of the arbitrators). By choosing to define "party" so narrowly and then to affirmatively limit the contract's scope to "party" disputes, the Facility unambiguously excluded White Oak Management, Inc. and White Oak Manor, Inc. from enforcing the Arbitration Agreement.

Even if the Paragraph 1-2 language Appellants cite render the Arbitration Agreement ambiguous, arbitration should not be extended to White Oak Management, Inc. and White Oak Manor, Inc. because the ambiguity must be resolved against the contract's drafter. Coleman v. Mariner Health Care, Inc., 407 S.C. at 355-56, 755 S.E.2d at 455 (citing Davis v. KB Home of S.C., Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011)). Since the Facility chose to limit the Arbitration Agreement's scope to disputes between the "parties," allowing White Oak Management, Inc. and White Oak Manor, Inc. to force Respondent to arbitrate her claims would lead to a grossly unfair outcome at odds with core arbitration principles. Wilson, 426 S.C. at 337,

[9] "Facility" is defined by the Admission Agreement as "White Oak Estates." (Admission Agreement at 1).

827 S.E.2d at 173 (citing E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 294 (2002) (holding that arbitration "is a matter of consent, not coercion")).

Appellants also argue Respondent is equitably estopped from opposing White Oak Management, Inc. and White Oak Manor, Inc.'s attempts to compel arbitration. (Appellants' Br. at 23-26). Citing White Oak Management, Inc. and White Oak Manor, Inc.'s corporate bonds with the Facility, Appellants argue Respondents' claims against White Oak Management, Inc. and White Oak Manor, Inc. are "intertwined" with and "interdependent" on her claims against the Facility. Appellants' Br. at 25. However, while some courts allow nonsignatories to bind a signatory to a contract with an arbitration provision using equitable estoppel, this principle has a very limited application governed by a very strict legal standard. Pearson, 400 S.C. at 293, 733 S.E.2d at 601-02.

Largely developed by federal courts in the Eleventh Circuit, most courts apply the "intertwined claims" test. Pearson, 400 S.C. at 289, 295, 733 S.E.2d at 601, 604 (quoting Sunkist v. Sunkist, 10 F.3d 753 (11th Cir. 1993) and MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999)); see also Brantley v. Republic Mortg. Ins. Co., 424 F.3d 392, 396 (4th Cir. 2005) (applying "intertwined claims" test and affirming denial of arbitration of claims related to South Carolina mortgage). This test is meant as a high bar to equitable estoppel because it allows a party outside a contract to enforce its terms. See Wachovia Bank, Nat'l Ass'n v. Schmidt, 445 F.3d 762, 771 (4th Cir. 2006) (finding "fact that a signatory receives benefits from a contract" is "insufficient, in and of itself, to estop it from asserting that a nonsignatory is not entitled to invoke the contract's arbitration clause"). Thus, equitable estoppel only applies in this context in two circumstances. First, a signatory may be equitably estopped from opposing arbitration with a nonsignatory when the signatory's claims against that nonsignatory "must rely on the terms of"

the contract containing the arbitration provision. Pearson, 400 S.C. at 295, 733 S.E.2d at 604 (quoting Goer v. Jasco Indus., Inc., 395 F. Supp. 2d 308, 314 n. 9 (D.S.C. 2005) (additional citations omitted)). Second, equitable estoppel may apply when the signatory alleges "substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." Id.

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

This Court reached a similar conclusion in Weaver by holding that the equitable estoppel theory governing signatory-nonsignatory arbitration claims "is not implicated simply because a claim relates to or would not have arisen 'but for' a[n] [arbitration] contract's existence." 431 S.C. at 230-31, 847 S.E.2d at 272 (quoting Wilson, 426 S.C. at 343, 827 S.E.2d at 176). Weaver ultimately concluded that, when a nursing home resident alleges poor care led to injury or death, the resulting legal claims "rely on general tort duties" and not any provision of contracts the resident entered at her admission. 431 S.C. at 232, 847 S.E.2d at 273. Here, Respondent's corporate negligence-based claims make no reference to the Arbitration Agreement and White Oak

Management, Inc./White Oak Manor, Inc.'s duty to provide proper funding and staffing arise from their control of the Facility, not any contractual obligation.

The second circumstance described in Pearson is also absent in this case. This test is only met when a nonsignatory alleges "concerted misconduct" by a nonsignatory and signatory. E.g. Griggs v. Evans, 43 A.3d 1081, 1094 (Md. App. 2012) (applying equitable estoppel where plaintiff alleged civil conspiracy). Respondent would have to plead some form of conspiracy or "collusion" among White Oak Management, Inc., White Oak Manor, Inc., and the Facility to support equitable estoppel. Brantley, 424 F.3d at 396. But, Respondent's complaint alleges distinct corporate negligence-based claims against White Oak Management, Inc. and White Oak Manor, Inc. arising from an independent duty owed directly from White Oak Management, Inc. and White Oak Manor, Inc. to Ms. Hensley. South Carolina Supreme Court precedent further rejects the notion Ms. Hensley's claims against the Facility and Respondents are "intertwined" because, while nursing negligence and corporate negligence in the nursing home setting may relate to the same resident's injuries, "a finding of one does not necessarily preclude the other." Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015) (citations omitted).

Morrow shows how claims for negligent care by a nursing home are distinct from claims against the home's corporate relatives for corporate negligence. White Oak Management, Inc. and White Oak Manor, Inc.'s alleged "understaffing" and "underfunding" of the Facility are the basis for Ms. Hensley's negligence/gross negligence/recklessness, wrongful death, and corporate negligence claims. (Compl. ¶¶ 3-4, 24-26, 29, 41, 43). In Morrow, the South Carolina Supreme Court recognized both the viability and distinctiveness of a nursing home corporate negligence claim. Like Ms. Hensley, the nursing home resident in Morrow suffered severe injuries that could have been prevented by a more robust, better trained nursing home staff and by a more diligent

approach by the few staff members who were present when the injury occurred. 412 S.C. at 536, 773 S.E.2d at 145. For the errors of the nursing assistants who were with the resident when he fell, there was a negligence claim against the facility. Id. at 538, 773 S.E.2d at 146. Additionally, for the understaffing that contributed to the injuries, the plaintiff could purse a corporate negligence claim against the separate entities (like White Oak Management, Inc. and White Oak Manor, Inc.) influenced the nursing home's operations by controlling its budget. Id.

Morrow shows a negligence cause of action against the Facility and a corporate negligence cause of action against White Oak Management, Inc. and White Oak Manor, Inc.'s are not the same claim. Id. at 539, 773 S.E.2d at 146 (recognizing corporate negligence is grounded in "independent, albeit interconnected, duties owed by corporate entity to nursing home resident"); see also Manor Care, Inc. v. Douglas, 763 S.E.2d 73, 90-91 (W. Va. 2014) (finding corporate negligence claim based on "failure to allocate a proper budget" to nursing home leading to understaffing was distinct from claim based on negligent resident care decisions). Plus, corporate negligence is distinct from White Oak Management, Inc. and White Oak Manor, Inc.'s vicarious liability for torts of the Facility's employees under the doctrine of respondeat superior. Id. at 538, 773 S.E.2d at 146 (citing Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contract Physicians*, 47 S.C. L. Rev. 431 (1996) ("the theory of vicarious liability is different than the theory of direct corporate liability")).

In fact, Respondent's claims against the Facility and White Oak Management, Inc./White Oak Manor, Inc. must be distinct because corporate negligence can only be performed by the latter entities and never by the Facility itself. Morrow, 412 at 538, 773 S.E.2d at 146 (holding that

vicarious liability and direct corporate liability are distinct because "a finding of one does not necessarily preclude a finding of another").[10]

Ultimately, for either test, equitable estoppel cannot apply unless there is a substantial connection between Respondent's specific claim against White Oak Management, Inc. and White Oak Manor, Inc. and the operative terms of Ms. Hensley's purported Arbitration Agreement with the Facility. South Carolina's federal district court holds that the "essential question" is "whether Plaintiffs would have an independent right to recover against the non-signatory Defendants even if the contract containing the arbitration clause were void." Goer, 395 F. Supp. 2d at 315 (quoting Miron v. BDO Seidman, LLP, 342 F. Supp. 2d 324, 333 (E.D. Pa. 2004)). Proving Respondent's corporate negligence-based claims depends on the Arbitration Agreement is "always the *sine qua non* of an appropriate situation for applying equitable estoppel." Id. (quoting In re Humana Inc. Managed Care Litig., 285 F.3d 971, 976 (11th Cir. 2002) (rev'd on other grounds, PacifiCare Health Sys. v. Book, 538 U.S. 401 (2003)). Appellants cannot make this showing. The corporate negligence-based claims against White Oak Management, Inc. and White Oak Manor, Inc. and the nursing negligence claims against the Facility were not dependent on the Arbitration Agreement common law duties but instead grounded in distinct common law duties. See Weaver, 431 S.C. at 232, 847 S.E.2d at 273.

Finally, Appellants argue White Oak Management, Inc. and White Oak Manor, Inc. are granted the right to compel arbitration by a rule this Court adopted in South Carolina Public Service Authority v. Great Western Coal, 312 S.C. 559, 437 S.E.2d 22 (Ct. App. 1993). Appellants' Br. at 24-26. Culled from an out-of-circuit federal court opinion, the rule is designed to prevent an

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

arbitration contract's party from wholly avoiding arbitration by naming a non-party and proceeding in litigation rather than arbitration. Great W. Coal, 312 S.C. at 563, 437 S.E.2d at 25 (citing Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990) ("a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint . . . because this would nullify the rule requiring arbitration")).

But the Arnold rule has a crucial limit that makes it inapplicable here. The Arnold court only allowed a nonsignatory to force arbitration because language in the arbitration contract "indicates that the parties' basic intent was to provide a single arbitral forum to resolve all disputes arising" from their transaction ***even if those disputes involved non-parties***. 920 F.2d at 1282. Thus, the parties knew going into the transaction that they may be required to arbitrate with non-parties and each party's signature on the arbitration contract was express assent to that expansive view of the individuals who may force arbitration. When the arbitration contract does not extend its scope to non-parties, the Arnold rule does not apply. See e.g., McCarthy v. Azure, 22 F.3d 351, 357 (1st Cir. 1994) (finding the Arnold principle should not apply when "the arbitration clause fails to indicate the corporate signatory's intention to protect employees through arbitration"). This limitation on the rule assures that the contract parties' intent is upheld. Westmoreland v. Sadoux, 299 F.3d 462, 466 (5th Cir. 2002) ("an agent or employee of a signatory cannot invoke an arbitration clause unless the parties intended to bring them into the arbitral tent").

Since the Facility chose to limit the Arbitration Agreement to disputes between its parties, this purported contract does not indicate its parties intended to permit non-party enforcement. To grant White Oak Management, Inc. and White Oak Manor, Inc. enforcement rights, the Court would have to rewrite the Arbitration Agreement to expand its scope, and doing so would violate another long-standing contract interpretation rule. Poynter Invs., Inc. v. Century Builders of

Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) (quoting MailSource, LLC v. M.A. Bailey & Assoc., 356 S.C. 363, 369, 588 S.E.2d 635, 639 (Ct. App. 2003) (rejecting party's interpretation that would require disputed contract to be rewritten because that is "a service the courts of South Carolina do not perform").

Appellants' conception of the Great Western Coal/Arnold rule has one final flaw. The rule holds that a party cannot avoid arbitration altogether by naming a non-party to an arbitration contract. That is not what Respondent has done here. Respondent named White Oak Management, Inc. and White Oak Manor, Inc. as defendants not in an effort to avoid arbitration with the Facility but because, White Oak Management, Inc. and White Oak Manor, Inc.'s conduct substantially contributed to the losses Ms. Hensley and her statutory beneficiaries sustained. Respondent opposes arbitration with the Facility because, as discussed above, the Arbitration Agreement cited by the Facility is invalid. Even if the Court were to reject that argument and compel arbitration of the Respondent-Facility dispute, White Oak Management, Inc. and White Oak Manor, Inc. should not be permitted to ride the Facility's coattails to compel arbitration of the claims against them. Arbitration always remains a matter of contract and White Oak Management, Inc. and White Oak Manor, Inc. offers no colorable argument that they have an arbitration contract with Ms. Hensley/Respondent.[11]

CONCLUSION

Based on the arguments stated above, Respondent respectfully requests the Court affirm the circuit court's order denying Appellants' motion to compel arbitration. The Arbitration

[11] Thus, in the event the Court were to grant the Facility's motion to compel arbitration, Respondent's claims against White Oak Management, Inc. and White Oak Manor, Inc. should continue in litigation. The U.S. Supreme Court acknowledges the need for parallel dispute resolution processes where one defendant may claim the benefit of an arbitration contract and another may not. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 20 (1983).

Agreement was presented under grossly unfair circumstances using illegal, unconscionable terms on arbitrator selection, timing, and cost-shifting that no reasonable nursing home should expect its resident/customer to accept. Alternatively, even if the Arbitration Agreement were enforceable, it does not apply to Respondent's wrongful death claim which belongs to Ms. Hensley's statutory beneficiaries. Finally, based on basic South Carolina contract principles, Appellants White Oak Management, Inc. and White Oak Manor, Inc. may not enforce an arbitration contract to which they were not parties.

Respectfully submitted,

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