

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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SECURITY HEALTH CARE, L.L.C. d/b/a Grace  
Living Center-Norman, and AMITY CARE, L.L.C.,

*Petitioners,*

v.

JOHNNIE BOLER, Personal  
Representative of the Estate of Cleo Boler,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The Oklahoma Supreme Court**

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Does the Federal Arbitration Act preempt Oklahoma from applying its wrongful death law selectively, to deny enforcement of some of decedent's premortem agreements that would otherwise bind a wrongful death claimant, but not others, resulting in a disproportionate impact on agreements to arbitrate a wrongful death claim in contravention to *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011)?

## **LIST OF PARTIES IN PROCEEDINGS BELOW**

The following are the parties in the proceedings below:

### **1. Parties in Caption of this Matter**

JOHNNIE BOLER, Personal Representative of the Estate of Cleo Boler, Deceased, Plaintiff and RESPONDENT herein.<sup>1</sup>

SECURITY HEALTH CARE, L.L.C. d/b/a Grace Living Center-Norman, Defendant and PETITIONER herein.

AMITY CARE, L.L.C., Defendant and PETITIONER herein.

### **2. Defendants Omitted from Caption of this Matter**<sup>2</sup>

Norman Properties, L.L.C.

Mike Dimond.

Don Greiner, individually and as trustee of the Kenneth D. Greiner III Revocable Trust.

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<sup>1</sup> Judy L. Little was initially a co-plaintiff in the trial court, but since Respondent was substituted as sole plaintiff (Statement, ¶15), she was not a co-appellee in the Oklahoma Supreme Court.

<sup>2</sup> The defendants listed below are not petitioning herein because their interests are not directly affected; as noted in footnote 3, they neither directly own nor manage the nursing home involved in this controversy.

**LIST OF PARTIES IN  
PROCEEDINGS BELOW – Continued**

In accordance with S. Ct. R. 29.6, Petitioners Security Health Care, L.L.C. d/b/a Grace Living Center-Norman and Amity Care, L.L.C. state that they are limited liability companies that do not have parent corporations and do not issue stock.

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Petitioners Security Health Care, L.L.C. (doing business as Grace Living Center – Norman), and Amity Care, L.L.C., respectfully petition for a writ of certiorari to review the judgment of the Oklahoma Supreme Court in this case.

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**OPINIONS BELOW**

The opinion of the Oklahoma Supreme Court (App. 1, Opin.) is reported in that Court's official reporter at 2014 OK 80 ([www.oscn.net](http://www.oscn.net)), and by West Publishing (which Oklahoma designates an unofficial reporter) at 336 P.3d 468. The order of the Oklahoma County District Court (App. 28, Order) is not reported.

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**JURISDICTION**

The Oklahoma Supreme Court's judgment (its opinion) was entered September 30, 2014 (App. 1, Opin.), so this petition for certiorari was originally due December 29, 2014. On November 7, 2013, Justice Sotomayor extended the time to file the petition to February 12, 2015. Jurisdiction is conferred by 28 U.S.C. §1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Supremacy Clause of the United States Constitution, Art. VI, cl.2, provides in pertinent part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act (“FAA”), 9 U.S.C. §2, provides in pertinent part:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Oklahoma’s wrongful death statute, 12 Okla. Stat. §1053 is fully set forth in the Appendix (App. 32). The relevant provision here is subsection A, which provides in pertinent part:

When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, . . . if the former might have maintained

an action, had he or she lived, against the latter, . . . for an injury for the same act or omission. . . .



## STATEMENT OF THE CASE

### I. Introduction

1. This action involves care rendered at a nursing home. Upon admission to the nursing home, the resident (through her attorney-in-fact) executed an arbitration agreement which provides, *inter alia*, that the arbitration agreement “applies to and binds any and all persons and/or entities who . . . may assert a claim on behalf of, or derived through” the parties, including explicitly “their legal representatives, . . . heirs, executors, [and] administrators.” App. 41, Arbit. Agree., ¶6. The arbitration agreement also expressly provides that it “survives the death” of the resident. *Id.* When plaintiffs filed the action, the resident was alive and claimed damages solely for personal injuries; however, the resident passed away and the petition was amended to assert a wrongful death claim. The nursing home moved to compel arbitration of the personal injury claims and, subsequently, the wrongful death claim, relying on Oklahoma’s long-settled precedent that a wrongful death claimant’s rights are “derivative” and cannot exceed those of the decedent. Without overruling this precedent, the Oklahoma courts refused to enforce the arbitration agreement. The Oklahoma Supreme Court fashioned a new rule to except arbitration

agreements from those precedents, holding that a wrongful death claim is only *partially* derivative, with arbitration agreements falling on the *non-derivative* (and thus unenforceable) side of the court's new line. Under the state court's holding, a decedent may bind her personal representative by agreeing to *release* a wrongful death claim, but may not bind the representative by agreeing to *arbitrate* that same claim. While Oklahoma's holding is consonant with its historically low regard for arbitration agreements and this Court's decisions under the Federal Arbitration Act ("FAA"), as recently illustrated in *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 502 (2012), it runs afoul of the FAA's prohibition on state laws that are disproportionately inimical to arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

## II. Trial Court Proceedings

### A. Arbitration agreement and Plaintiffs' original claim

2. The decedent Cleo Boler ("Decedent") commenced this action as a co-plaintiff with her son (Respondent here) and daughter as attorneys-in-fact while she was residing at Grace Living Center-Norman ("Grace"), a nursing home in Norman, Oklahoma owned and managed by Petitioners.<sup>3</sup> App. 2-5,

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<sup>3</sup> Petitioner Security Health Care, L.L.C. d/b/a/ Grace Living Center-Norman is the owner and licensed operator of the  
(Continued on following page)



Opin., ¶¶2-3. Plaintiffs asserted claims against Grace for negligent care, violating the Oklahoma Nursing Home Care Act (63 Okla. Stat. §§1-1901, *et seq.*), and breach of contract. App. 5, Opin., ¶3.

3. When Decedent was admitted to Grace, her daughter (Judy Little) as attorney-in-fact executed on her behalf a Dispute Resolution Agreement (App. 2-3, Opin., ¶2), attached in full as App. 37. That agreement provides that the parties will submit any dispute as to any claim arising out of Grace’s care to Decedent “to neutral, binding arbitration” under “federal and state law and subject to appropriate judicial review of arbitration proceedings as authorized by such law(s).” App. 38-39, Arbit. Agree., ¶2. Both parties explicitly waived the right to have any such dispute decided in a court or by a jury or judge (*id.*, ¶2), and the parties recited:

Both Resident [Decedent] and GLC [Grace] acknowledge that state and federal law, as well as the decisions of the United States Supreme Court, favor the enforcement of valid arbitration provisions.

App. 39, Arbit. Agree., ¶3. The parties expressly agreed that the arbitration provision binds any *other* parties whose rights are “*derived*” through those of its

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nursing home facility and Petitioner Amity Care, L.L.C. provides management services to the facility. For simplicity they are collectively referred to as “Grace.” The remaining defendants are intentionally omitted.

signatories, including their personal representatives and heirs, and that the agreement “survives the death” of Decedent:

The Dispute Resolution Provision . . . applies to and binds any and all persons and/or entities who . . . may assert a claim on behalf of, or derived through, the Resident and/or [Grace], including without limitation their legal representatives, guardians, heirs, executors, administrators, estate(s), successors and assigns; . . . . As such, it is recognized and agreed that this Dispute Resolution Provision survives the death, as well as the incompetency, of the Resident and cannot be revoked by said death or incompetency.

App. 41, Arbit. Agree., ¶6. The arbitration agreement was also made expressly applicable to both Petitioners here. App. 37, Arbit. Agree., ¶1 and n.2.

**B. Petitioners’ motion to compel arbitration under the FAA and corollary federal jurisprudence**

4. While Decedent was still living, Grace moved to compel arbitration, expressly relying on the Federal Arbitration Act and asserting that it preempted contrary Oklahoma law. App. 5, Opin., ¶3. Some procedural context is needed here. The Oklahoma Nursing Home Care Act purports to invalidate arbitration agreements. 63 Okla. Stat. §1-1939(D) and (E) (App. 36). In a prior landmark Oklahoma case, the Oklahoma Supreme Court had

enforced this anti-arbitration statute to deny arbitration to another Grace Living Center facility, in *Bruner v. Timberlane Manor Ltd. Partnership d/b/a Grace Living Center*, 2006 OK 90, 155 P.3d 16. The result in *Bruner* and similar decisions by other state courts was later foreclosed by this Court in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), holding that the FAA preempted state anti-arbitration provisions in a state nursing home law (there West Virginia's).

The month after Plaintiffs filed the instant action, the Oklahoma Supreme Court relied on *Bruner* as an “exhaustive overview of the United States Supreme Court decisions construing the Federal Arbitration Act,” in refusing to enforce an arbitration agreement in an employment context on the guise of reviewing the validity of a non-competition clause. *Howard v. Nitro-Lift Technologies, L.L.C.*, 2011 OK 98, ¶15, 273 P.3d 20. As this Court observed in its decision *reversing* the Oklahoma Supreme Court: “The Oklahoma Supreme Court declared that its decision rests on adequate and independent state grounds.” *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 502 (2012). This Court held that the Oklahoma Supreme Court had “disregard[ed] this Court’s precedents on the FAA,” which “hold that the FAA forecloses precisely this type of ‘judicial hostility towards arbitration.’” *Nitro-Lift*, 133 S. Ct. at 503, quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011). Aside from implicitly disapproving the Oklahoma Supreme Court’s reliance on *Bruner*,

this Court pointed to its recent decision in *Marmet Nitro-Lift*, 133 S. Ct. at 504.

*Marmet* and *Nitro-Lift* thus foreclosed many of Plaintiffs' initial contentions in opposition to Grace's motion to compel, and ultimately Grace's motion was denied on the ground presented herein.

5. Decedent died after Grace filed its motion to compel, but before Plaintiffs had responded. App. 5-6, Opin., ¶4. Plaintiffs moved to substitute Respondent (co-plaintiff Johnnie Boler) as Decedent's personal representative to assert both a survival claim (12 Okla. Stat. §1051) and a wrongful death claim (12 Okla. Stat. §1053, App. 32 (statute)). App. 5-6, Opin., ¶4.<sup>4</sup> Respondent attached his proposed amended pleading naming himself as sole plaintiff to allege the same violations of law originally asserted by all Plaintiffs.<sup>5</sup> The trial court granted the motions to substitute and to amend the petition. App. 6, ¶4.<sup>6</sup>

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<sup>4</sup> Respondent ultimately dismissed the survival claim without prejudice on 10/9/2013, to rely solely on the wrongful death claim.

<sup>5</sup> State court record ("R.") 114, 10/23/2012 motion.

<sup>6</sup> Respondent's pleading was not filed until the next year (App. 6, Opin., ¶4), so both remaining plaintiffs responded to the motion to compel, and the trial court's order accordingly refers to "plaintiffs" in the plural.

### C. Parties' contentions and trial court ruling based on wrongful death statute

6. Plaintiffs argued, *inter alia*, that this Court's decision in *Marmet* was irrelevant because Respondent did not sign the arbitration agreement and Decedent's daughter signed it only as her attorney-in-fact. App. 6, Opin., ¶5; R. 128 at 12. Plaintiffs also argued that the wrongful death claim was independent of Decedent's rights, relying on a now-familiar dichotomy drawn by other states between wrongful death statutes creating "derivate" and "independent" rights in wrongful death claimants. App. 6-7, Opin., ¶5; R. 128 at 13-14.

7. The trial court acknowledged that *Marmet* and *Nitro-Lift* controlled as to the issues this Court decided adverse to Oklahoma's anti-arbitration statutes and jurisprudence.<sup>7</sup> However, the trial court denied arbitration on Respondent's alternate ground: that he and not Decedent was the wrongful death claimant, and he was not bound by Decedent's arbitration agreement.<sup>8</sup> The court held that although a wrongful death claimant is bound by the decedent's agreements extinguishing any and all *substantive* rights as to a wrongful death claim, this would not apply to an agreement for arbitration:

[I]n Oklahoma it talks about it being derivative. And I think we all agree it is derivative.

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<sup>7</sup> R. 531, 1/31/2013 Tr. at 8, 29-30, 49.

<sup>8</sup> R. 531, 1/31/2013 Tr. at 45-46.

I believe that goes more to the extinguishment of the cause of action, as opposed to whether or not someone chose to go to arbitration or not.<sup>9</sup>

The court formalized that holding in its written order: “[T]he Court **FINDS** Plaintiffs’ wrongful death [sic] is a separate and distinct cause of action, and is derivative only in the sense that Decedent must have a viable claim at the time of his death.” App. 29, Order. The trial court also referenced an Oklahoma constitutional provision preserving wrongful death claims, Art. 23, §7, Okla. Const. (App. 35), which is not relevant to the federal question presented, as Grace briefly discusses *infra*, Statement, ¶11.

### III. Oklahoma Supreme Court Proceedings

#### A. Federal preemption issue raised and decided

8. On appeal, Grace quoted in its opening brief Oklahoma’s long-settled precedent that in a wrongful death case “a personal representative suing for wrongful death ‘may not accomplish what the decedent could not,’” and that the wrongful death action is “burdened and incumbered [sic] by [the decedent’s] conduct, his settlement *and whatever else he did in his lifetime in reference thereto.*” (Original

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<sup>9</sup> R. 531, 1/31/2013 Tr. at 45.

emphasis.)<sup>10</sup> From this proposition Grace urged the federal issue raised herein:

To impose *some* contractual limitations on a decedent's heirs, including liability releases, but not others (*i.e.*, an arbitration agreement) is inconsistent with the derivative nature of wrongful death claims and creates a state rule of law treating arbitration agreements signed by decedents differently than other types of contracts signed by decedents. Such a result is both absurd and wholly unsupported by Oklahoma law *and similarly violates U.S. Supreme Court precedents under the FAA.*

(Emphasis added.) Appellant's 7/18/13 Brief in Chief at 12.<sup>11</sup>

9. The Oklahoma Supreme Court rejected Grace's contentions. Comparing Grace's arguments to those addressed by the Illinois Supreme Court in *Carter v. SSC Odin Operating Co., LLC*, 976 N.E.2d 344 (Ill. 2012), the Oklahoma Supreme Court approvingly summarized that court's rationale for holding that the FAA did not bind the wrongful death claimant:

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<sup>10</sup> Appellant's 7/8/13 Brief in Chief at p.11, quoting from *Haws v. Luethje*, 1972 OK 146, ¶11, 503 P.2d 871, itself quoting prior authority.

<sup>11</sup> For its part, Respondent urged that Grace was improperly relying on this Court's recent holding in *Marmet* to subvert the Oklahoma Supreme Court's decision in *Bruner*. Appellee's Brief at 1 and n.3.

Although the Federal Arbitration Act (FAA) directs courts to place arbitration agreements on equal footing with other contracts, it does not require parties to arbitrate when they have not agreed to do so. Arbitration under the FAA is a matter of consent, not coercion.

App. 20, Opin., ¶22. The Oklahoma Supreme Court later recited that same principle as applicable to this case:

Oklahoma has recognized that although the FAA favors arbitration when it is the parties' contractual choice of a remedial forum, courts will not impose arbitration upon parties where they have not agreed to do so. [Citation omitted.] To assure that the parties have consented to arbitration, the courts will decide whether there is a valid enforceable arbitration agreement, whether the parties are bound by it and whether the parties agreed to submit a particular dispute to arbitration.

App. 23, Opin., ¶24.<sup>12</sup>

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<sup>12</sup> A dissenting Justice also emphasized that this case implicated the preemptive force of the FAA, and noted the Court's recent decision in *Marmet*. App. 27, Opin, J. Winchester, dissenting, n.1.



## B. Oklahoma Supreme Court's analysis and decision

10. The Oklahoma Supreme Court framed the issue this way:

On appeal, the issue is whether claims brought by non-signatory, wrongful death claimants must be arbitrated. The parties disagree on whether wrongful death claims in Oklahoma are *wholly or partially derivative* and the *effect of that distinction*.

(Emphasis added.) App. 9, Opin., ¶9. The court reviewed the split of authority among the states on whether their respective wrongful death statutes are derivative or independent of the decedent's rights to redress the injury causing death. App. 11-21, Opin., ¶¶13-22. The court aligned itself, as to that state law question, with states holding their wrongful death statutes are only *partially* derivative – *i.e.*, derivative in all substantive respects, but not binding a wrongful death claimant to a decedent's agreement on procedural matters, including most importantly an arbitration agreement. App. 21-24, Opin., ¶¶23-27.<sup>13</sup>

11. The Oklahoma Supreme Court also observed (as had the trial court) that Oklahoma's constitution preserves the right to bring an action to

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<sup>13</sup> Justice Winchester dissented, opining that this holding was anomalous in view of Oklahoma's longstanding contrary jurisprudence (App. 25-26, Opin., J. Winchester, dissenting, ¶¶1-3).

recover damages for death. App. 22-23, Opin., ¶24, citing Art. 23, §7, Okla. Const. (App. 35). As the dissenter noted, Grace did not challenge Respondent’s right to bring a wrongful death claim, only his avoidance of arbitration on that claim. App. 26, Opin., J. Winchester, dissenting, ¶4. Moreover, the court’s reference to Oklahoma’s constitution pertains solely to its construction of the wrongful death statute, which Grace recognizes is a state law question. The federal preemption question presented is not affected, since the Supremacy Clause applies to state constitutions like other sources of state law.<sup>14</sup>



## ARGUMENT – REASONS TO GRANT WRIT

***Introduction and summary:*** Whether a state may selectively enforce a decedent’s pre-mortem agreements in a manner adversely affecting arbitration of a wrongful death claim presents an important and recurring question engaging the “disproportional impact” standard of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) (“*Concepcion*”). While a state may enforce or refuse to recognize a decedent’s agreement affecting wrongful death claims altogether, the FAA is implicated when it does so qualifiedly and the adverse effects are most often felt by parties to whom the decedent promised arbitration. The

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<sup>14</sup> *E.g.*, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014).

states conflict on this federal question, and several petitioners from different states have unsuccessfully sought certiorari on this and a related issue in the past two years (cited *infra*). Certiorari review would also provide needed guidance to federal and state courts struggling with the application of *Concepcion*'s disproportionality test.

This Court commenced its opinion reversing the Oklahoma Supreme Court in *Nitro-Lift* with these words (133 S. Ct. at 501), which continue to be apposite here:

State courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation. Here, the Oklahoma Supreme Court failed to do so.

In this case the Oklahoma Supreme Court has held that a party may by agreement bind a future wrongful death claimant to a waiver of all substantive rights on a claim for the party's death, but cannot bind such claimant to arbitrate the claim. To be sure, this constraint on the efficacy of the decedent's agreement presumably extends beyond arbitration to other procedural rights of enforcement, *e.g.*, a state forum selection clause. But under *Concepcion*, 131 S. Ct. at 1747, this does not salvage Oklahoma's law

from preemption by the FAA, since the law is disproportionately inimical to arbitration agreements.

**FAA preemption generally:** The FAA provides that a contract to arbitrate is valid and enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. §2. While “generally applicable” state law defenses may invalidate an arbitration agreement, the FAA requires that “such provisions be placed ‘upon the same footing as other contracts.’” *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). “The FAA was designed ‘to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.’” *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989). The FAA preempts state law to the extent that it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* at 477.

**FAA preemption of state laws identifying parties who must arbitrate:** State law determines which contracts are binding, and “‘traditional principles’ of state law allow a contract to be enforced by or against nonparties to the contract...” *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009). But while state law governs whether an enforceable arbitration agreement was formed, federal policy favoring arbitration is considered in applying that law. *E.g.*, *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1368 (11th Cir. 2005).

Oklahoma recognizes the numerous circumstances under which a nonsignatory to an arbitration agreement may be bound to arbitrate.<sup>15</sup> The FAA “reflects an ‘emphatic federal policy in favor of arbitral dispute resolution,’” which requires courts to enforce arbitration agreements against nonsignatories when state law so provides. *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011). Determining whether a party is bound to an arbitration agreement is a “gateway dispute.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). Thus under the FAA an obligation under a decedent’s agreement to arbitrate a wrongful death claim may attach to a nonsignatory claimant, in accordance with state principles of contract and agency. *Cleveland v. Mann*, 942 So. 2d 108, 117-18 (Miss. 2006).<sup>16</sup>

***Concepcion’s two-part preemption test:*** While state law informs whether a nonsignatory is bound to an arbitration agreement, the FAA’s preemptive force imposes two exceptions, as with *all* state law dictates regarding validity or enforceability of such agreements:

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<sup>15</sup> *Carter v. Schuster*, 2009 OK 94, ¶14, 227 P.3d 149 (nonsignatory not bound); *B.A.P., L.L.P. v. Pearman*, 2011 OK CIV APP 30, ¶¶13-19, 250 P.3d 332 (nonsignatory bound).

<sup>16</sup> A thorough annotation of federal and state case law addressing when nonsignatories may be bound to an arbitration agreement is T. Oehmke, *Binding Nonsignatories to Arbitration – Beware of Foot in Door*, 127 Am. Jur. Trials 107 (2014).

*First:* “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” *Concepcion*, 131 S. Ct. at 1747. Such state laws are not even facially evenhanded, and “Congress precluded States from singling out arbitration provisions for suspect status.” *Doctor’s Associates*, 517 U.S. at 687. *Marmet* illustrates this rule’s application in the context of a wrongful death claim against a nursing home: “West Virginia’s prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.” *Marmet*, 132 S. Ct. at 1203-04.

*Second:* Even a generally applicable state law may not be applied in a manner that effectively disfavors arbitration, *i.e.*, which has “a disproportionate impact on arbitration agreements.” *Concepcion*, 131 S. Ct. at 1747. As this Court explained: “Although § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of FAA’s objectives.” *Id.* at 1748. Thus the FAA prevents a state from adopting even facially neutral laws that undermine its federal policies, *e.g.*, by mandating certain discovery or evidentiary rules (two examples given in *Concepcion*). *Id.* at 1747.

Under *Concepcion*, the FAA preempts a state law that “disproportionally applies to arbitration agreements, invalidating them at a higher rate than other contract provisions.” *Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013). This second constraint on state laws extends to those defining the parties who are bound to an arbitration agreement, as *Concepcion* itself illustrates, holding that state law “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.*, 131 S. Ct. at 1748. A state cannot directly, or – if causing a disproportionate impact to arbitration – indirectly specify the parties obligated to arbitrate in a manner “that stand[s] as an obstacle to the accomplishment of the FAA’s objectives,” which “is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” *Concepcion*, 131 S. Ct. at 1748.

Oklahoma runs afoul of the second FAA constraint, by adopting a wrongful death law that is disproportionately adverse to arbitration agreements, effectively subverting their enforcement, regardless of whether the law facially singles out arbitration agreements for unfavorable treatment.

Grace expressly does *not* question the Oklahoma Supreme Court’s authority to conclusively construe a state statute. Grace urges only that neither Oklahoma’s high court nor its legislature is empowered to adopt a state wrongful death scheme that enforces

decedents' agreements affecting substantive rights but withholds enforcement of procedural ones, the most practically significant of which is an agreement to arbitrate.

**I. WHETHER THE FAA PREEMPTS DISCRIMINATORY WRONGFUL DEATH LAWS LIKE OKLAHOMA'S PRESENTS AN UNDECIDED AND RECURRING QUESTION OF NATIONAL IMPORTANCE**

Grace contends that the FAA forecloses Oklahoma from adopting a wrongful death statute that binds the claimant to decedent's pre-mortem agreements only as to substantive but not procedural rights, since the exception for procedural rights has a disproportionately adverse impact on arbitration agreements. The federal question presented, concerning disproportionate impact of state wrongful death laws on arbitration agreements, is an important and recurring one warranting this Court's resolution.

What information exists reflects substantial use of arbitration agreements in the nursing home industry,<sup>17</sup> and that courts are most divided on their enforceability in wrongful death actions, where arbitrability "currently depends in large part on what

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<sup>17</sup> J. Schleppenbach, *Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents*, 22 Elder L.J. 141, 150 (2014).



state the resident lives in.”<sup>18</sup> In the past two years (2013-14), three petitioners all from different states have unsuccessfully petitioned this Court to review whether the FAA prevents a state from refusing to enforce against a wrongful death claimant a nursing home resident’s arbitration agreement.<sup>19</sup> A fourth petitioner from a fourth state unsuccessfully sought review in 2014 of a cognate question, whether the state law which accorded a decedent’s relative authority to consent to a nursing home admission agreement on decedent’s behalf extended to an arbitration agreement.<sup>20</sup> While none of the four petitioners framed the question presented as Grace does here, the petitions attest to the seriousness of this recurrent issue and the nationally pressing need for its resolution.

Although *Marmet* forecloses state decisions like the Oklahoma Supreme Court’s holding in *Bruner* – relying on a *direct* anti-arbitration statute aimed at nursing homes – many states, like Oklahoma, now obtain the same anti-arbitration results by the different avenue presented here. Usually the otherwise

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<sup>18</sup> *Id.* at 166-69.

<sup>19</sup> *SSC Odin Operating Company LLC v. Carter*, No. 12-1012 (Illinois – denied 4/22/2013); *Beverly Enterprises, Inc. v. Ping*, No. 12-652 (Kentucky – denied 4/22/2013); *Extendicare Homes, Inc. v. Pisano*, No. 13-1423 (Pennsylvania – denied 6/30/2014).

<sup>20</sup> *Mariner Health Care, Inc. v. Coleman*, No. 14-149 (South Carolina – denied 11/10/2014).

arbitrable claim is asserted in a wrongful death action, so construction of the wrongful death law adversely to arbitration has the same practical consequence.

The question's importance extends beyond the nursing home industry, into any context in which a wrongful death claim may arise, such as medical malpractice actions,<sup>21</sup> or employment-related controversies.<sup>22</sup>

## II. STATE AND FEDERAL COURT DECISIONS CONFLICT ON THE QUESTION PRESENTED

State courts are struggling with, and conflict on, the question of whether the FAA permits a wrongful death statute to selectively validate only decedent's agreements affecting substantive but not procedural rights. Moreover, both federal and state courts are struggling with application of this Court's "disproportionality" standard in *Concepcion*. Resolving the question presented here would address both needs.

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<sup>21</sup> *E.g.*, *Ruiz v. Podolsky*, 237 P.3d 584 (Cal. 2010); *Cleveland v. Mann*, 942 So. 2d 108, 117-18 (Miss. 2006); *Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003); *Ballard v. Southwest Detroit Hospital*, 327 N.W.2d 370 (Mich. Ct. App. 1982).

<sup>22</sup> *Graves v. BP Am., Inc.*, 568 F.3d 221, 222 (5th Cir. 2009) (per curiam); *In re Labatt Food Service, L.P.*, 279 S.W.3d 640, 644-45 (Tex. 2009); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 1262 (Ohio 2007).

**A. Courts conflict on the specific preemption question presented in the wrongful death context**

*In re Labatt Food Service, L.P.*, 279 S.W.3d 640 (Tex. 2009) illustrates one side of the conflict between states on the question of whether the FAA disallows discriminatory wrongful death schemes like Oklahoma's. *Labatt* summarized precedents holding that "the FAA appears to preempt an exception for arbitration clauses because the FAA requires states to place arbitration contracts on equal footing with other contracts" (*id.* at 643-44), then relied on both state law and the FAA to reject the wrongful death claimants' contention that the state could enforce the decedent's other contracts relating to the wrongful death claim but refuse to enforce an agreement to arbitrate it:

We reject their argument. If we agreed with them, then wrongful death beneficiaries in Texas would be bound by a decedent's contractual agreement that completely disposes of the beneficiaries' claims, but they would not be bound by a contractual agreement that merely changes the forum in which the claims are to be resolved. Not only would this be an anomalous result, we believe it would violate the FAA's express requirement that states place arbitration contracts on equal footing with other contracts. 9 U.S.C. § 2; . . .

*Id.* at 645-46.

The Arkansas Supreme Court reached the same conclusion, again stressing that the FAA would not countenance a different result:

The FAA places arbitration agreements on equal footing with other contracts, and requires courts to enforce them according to their terms. By holding as [decedent's administrator] argues, we would be treating an arbitration agreement differently than we do other contracts, as other contracts signed by the decedent are binding on wrongful-death beneficiaries. We would also be assigning more rights to the wrongful-death beneficiaries than we would to the decedent, in a derivative action, as the decedent would not be able to avoid arbitration.

*Searcy Healthcare Center, LLC v. Murphy*, 2013 Ark. 463, 2013 WL 6047164, \*5-6 (2013) [internal citation omitted]. Other state decisions are less direct but still emphasize that the FAA may require the result reached under state law. *Estate of Krahmer ex rel. Peck v. Laurel Healthcare Providers, LLC*, 315 P.3d 298, 302 (N.M. App. 2013) (finding the wrongful death claimant against nursing home was derivatively bound to decedent's arbitration agreement, then stating that the court's conclusion "in favor of arbitration is also consistent with the United States Supreme Court's recent decision in *Marmet Health Care Center, Inc. v. Brown*, in which it upheld an agreement to arbitrate a decedent's wrongful death estate against West Virginia's categorical prohibition

against arbitration agreements covering wrongful death.”).

Conflicting with this view and reaching the opposite conclusion on the federal question presented here is (in addition to the opinion below) *Carter v. SSC Odin Operating Company, LLC*, 976 N.E.2d 344 (Ill. 2012), where the court refused to enforce the arbitration agreement against wrongful death claimants, applying its precedents that “under basic principles of contract law, only parties to the arbitration contract may compel arbitration or be compelled to arbitrate” and “[t]he FAA’s policy favoring arbitration does not alter these principles” (*id.* at 359). The court justified its holding as to FAA preemption because it “is not based on a categorical antiarbitration rule; it is based on common law principles governing all contracts.” *Id.* at 360. *Carter* is the case upon which the Oklahoma Supreme Court most heavily relied herein, and one of the four related wrongful death cases noted above where this Court has denied certiorari in the past two years. App. 17-21, Opin., ¶¶20-22.

In some instances a state has reached the same result as the Oklahoma Supreme Court herein, and as in *Carter*, without addressing the FAA preemption issue. *Bybee v. Abdulla, M.D.*, 189 P.3d 40, 46-47, ¶¶21-25 (Utah 2008) illustrates. As noted by the Oklahoma Supreme Court, App. 14, Opin., ¶16, *Bybee* was most heavily relied upon by the trial court herein.

*Carter* and *Bybee* both hold – as did the Oklahoma Supreme Court herein – that their state laws are *partially* derivative, but not derivative with respect to the arbitration agreements in question. See *Carter*, 976 N.E.2d at 358-59, ¶¶49, 54 (holding wrongful death law is “derivative” in sense that it is dependent on viability of decedent’s own cause of action before death, but is not derivative “in deciding who is bound by an arbitration agreement.”); *Bybee*, 189 P.3d at 46-47, ¶¶23-25 (distinguishing Utah wrongful death law from wholly derivative laws in other jurisdictions, stating: “The independent nature of the wrongful death cause of action in Utah means that in our state the heirs in a wrongful death action stand in, at most, one shoe of the decedent.” *Id.*, ¶23).

Some jurisdictions describe their wrongful death laws as entirely independent of the decedent’s rights. Pennsylvania has construed its wrongful death laws as independent and held that they also prevent the decedent from releasing *substantive* rights on a wrongful death claim. *Pisano v. Extencicare Homes, Inc.*, 77 A.3d 651, 658 (Pa. Super. 2013).<sup>23</sup> *Pisano* discusses at length the meaning of “derivative” in that state, concluding that “wrongful death actions are derivative of decedents’ injuries but are not derivative of decedents’ rights.” *Id.* at 660. *Pisano* recited FAA’s pro-arbitration policies, but found that

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<sup>23</sup> *Pisano* repudiated the Third Circuit’s contrary construction of Pennsylvania law in *Grbac v. Reading Fair Co.*, 688 F.2d 215 (3d Cir. 1982).

under its state laws the decedent could not derivatively bind the wrongful death claimant as to *any* of decedent's agreements, including an agreement to arbitrate. *Id.* at 660-61.<sup>24</sup> The question presented here would not affect the holdings of such jurisdictions, since their laws do not disproportionately impact arbitration. Similarly, states that hold a wrongful death claim is wholly derivative, and thus enforce decedents' arbitration agreements against a wrongful death claimant, obviously do not implicate the federal question here, since they also do not disproportionately impact arbitration.<sup>25</sup>

The Oklahoma Supreme Court did not join jurisdictions in either camp (wholly independent or wholly derivative) – but instead joined those like *Bybee*, 186 P.3d at 46 (Utah) and *Carter*, 976 N.E.2d

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<sup>24</sup> See also *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 599-600 (Ky. 2012) and *Estate of Decamacho ex rel. Guthrie v. La Solana Care and Rehab, Inc.*, 316 P.3d 607, ¶27 (Ariz. App. 2014), discussed by the Oklahoma Supreme Court, App. 15-17, Opin., ¶¶18-19.

<sup>25</sup> *E.g.*, *Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 762 (Fla. 2013) (“The estate and heirs stand in the shoes of the decedent for purposes of whether the defendant is liable and are bound by the decedent's actions and contracts with respect to defenses and releases.”); *THI of New Mexico at Hobbs Center, LLC v. Spradlin*, 532 F. App'x 813, 817-18 (10th Cir. 2013) (unpublished) (discussing split of authority and applying New Mexico law that claim is wholly derivative); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 665 (Ala. 2004) (personal representatives of decedents were bound to their arbitration agreements with nursing home in pursuing wrongful death claims).

at 358-59 (Illinois), holding that a wrongful death claim is not wholly derivative, but only derivative to decedents' substantive rights. App. 15-24, Opin., ¶¶18-26. *See also* the dissent, App. 26, Opin., J. Winchester, ¶3.

Where a state, like Oklahoma, has adopted a wrongful death scheme allowing the decedent to compromise or surrender the rights of wrongful death claimants, the FAA prevents the state from engrafting into that scheme an exception calculated to disproportionately withdraw vitality from decedent's agreement to arbitrate. A wrongful death scheme that binds a wrongful death claimant to decedent's agreement to compromise or extinguish the wrongful death claim, but *not* to select the forum in which it is to be litigated – “runs contrary to the FAA as interpreted by *Concepcion* because it disproportionately applies to arbitration agreements, invalidating them at a higher rate than other contract provisions.” *Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013).

*Mortensen* applied *Concepcion* to hold preempted a Montana rule impeding the parties' choice of law in a manner that would render their arbitration agreement unenforceable, stating: “We take *Concepcion* to mean what its plain language says: Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA.” *Id.* at 1159. *Mortensen* highlights how an incongruous wrongful death scheme like Oklahoma's subverts FAA's



pro-arbitration policy. Under the Oklahoma Supreme Court's holding here, Oklahoma will enforce a party's agreement releasing *substantive* rights to a claim for negligence which might result in death (App. 24, Opin., ¶26), and so presumably will enforce a choice of *substantive law* to determine the outcome of that negligence claim. But if the parties choose another state's law that would *allow arbitration*, Oklahoma will *not* enforce the agreement.

The dichotomy drawn by Oklahoma as to a decedent's contractual powers operates adversely most often on arbitration agreements, the kind of pre-mortem agreements that are most consequential and most likely to later come into controversy, particularly in the nursing home industry, as noted above.

#### **B. Courts also more generally conflict as to *Concepcion's* application**

Federal and state appellate courts would benefit from the Court's guidance on the reach of *Concepcion's* "disproportionate impact" holding, and their opinions conflict. The Ninth Circuit's decision in *Mortensen* illustrates the view favoring Grace's position here:

In our view, *Concepcion* crystalized the directive . . . that the FAA's purpose is to give preference (instead of mere equality) to

arbitration provisions. *Concepcion* outlaws discrimination in state policy that is unfavorable to arbitration by further limiting the savings clause.

*Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151, 1159-60 (9th Cir. 2013). [Internal citations omitted.]

Similarly, in *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013), the California Supreme Court revisited, on remand from this Court's order vacating in light of *Concepcion*,<sup>26</sup> its prior holding applying unconscionability rules to the parties' waiver of a statutory pre-arbitration employment wage-dispute procedure. The court held that *Concepcion* extended FAA's preemptive force to "evenhanded" laws which, "as applied," interfere with the FAA's pro-arbitration policies. *Id.* at 201. The court held that while California's unconscionability doctrine was not unqualifiedly preempted, it was preempted to the extent it thwarted the efficiency which is integral to arbitration. *Id.* at 203 and 221-22.

The Tenth Circuit similarly stated that *Concepcion* prevents the states from applying their laws in a manner which enforces an agreement's "basic terms" but will not enforce an arbitration clause. *Walker v. BuildDirect.com Technologies, Inc.*, 733 F.3d 1001, 1005 (10th Cir. 2013) ("[T]o avoid FAA preemption,

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<sup>26</sup> See *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011).

the standard governing this case must apply equally to all the Terms of Sale and should not disproportionately impact enforcement of the arbitration clause specifically.”). Of course, there are federal district court decisions holding likewise.<sup>27</sup>

By contrast, the Eleventh Circuit arguably stripped *Concepcion*’s “disproportionate impact” holding of independent significance, conflating it with general jurisprudence that a state cannot single out arbitration agreements for unfavorable or hostile treatment, and holding (apposite to the federal question presented here) that a state defense challenging validity of an arbitration agreement can have no disproportionate impact. *Barras v. Branch Banking & Trust Co.*, 685 F.3d 1269, 1277-79 (11th Cir. 2012) (still upholding arbitration agreement, however, since unconscionable contract provisions were severable from it).

The Montana Supreme Court reached the same conclusion to deny enforcement of an arbitration agreement on state unconscionability grounds, holding

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<sup>27</sup> *E.g.*, *Dean v. Draughons Jr. Coll., Inc.*, 917 F. Supp. 2d 751, 763 (M.D. Tenn. 2013) (FAA preempted *ex post facto* “cost-prohibitiveness defense,” stating “the Supreme Court in *Concepcion* found that state law policies that threaten to disproportionately disfavor arbitration agreements are preempted by the FAA.”).

that *Concepcion* did not change analysis of “generally applicable” contract validity defenses. *Kelker v. Geneva-Roth Ventures, Inc.*, 303 P.3d 777, 780, ¶16 (Mont.), *cert. dismissed*, 134 S. Ct. 734 (2013).

The Seventh Circuit has applied *Concepcion*’s holding in arguably different ways in the same opinion. The Seventh Circuit first understandably invalidated an arbitration agreement under Illinois law because it provided for an arbitration “process that is a sham from stem to stern.” *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 779 (7th Cir. 2014) (“It hardly frustrates FAA provisions to void an arbitration clause on the ground that it contemplates a proceeding for which the entity responsible for conducting the proceeding has no rules, guidelines, or guarantees of fairness.”)<sup>28</sup> But the Seventh Circuit also held that because Illinois’ unconscionability doctrine was generally applicable to forum selection clauses, and not just arbitration agreements, *Concepcion*’s disproportionality analysis was not engaged: “[W]e perceive no impediments in allowing states to apply their generally applicable unconscionability rules to arbitration provisions in the same manner they would

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<sup>28</sup> This sensible holding, that *Concepcion*’s disproportionality analysis does not invalidate state laws which frustrate rather than promote the federal policies behind arbitration, was also adopted by the Ninth Circuit in *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013). *Id.* at 925-27 (California unconscionability doctrine invalidated arbitration agreement imposing prohibitive costs on an employee invoking arbitration and giving no assurance of a fair and impartial proceeding).

apply those rules to clauses designating non-arbitral fora.” 764 F.3d at 778 n.39. This latter holding, like those of the Eleventh Circuit and the Montana Supreme Court, appears contrary to the views of the Ninth and Tenth Circuits, and the California Supreme Court.

### **III. THIS CASE PRESENTS THE FEDERAL QUESTION IN A HELPFUL CONTEXT ALLOWING FULL ANALYSIS OF POTENTIALLY RELEVANT FACTORS**

If the Court finds the federal question presented worthy of consideration, it may benefit by the factual context of this case, which will allow the Court to consider the relevance to *Concepcion*’s analytic framework of the credulity of a state court’s reasons given to support a putatively neutral application of state law that effectively undermines FAA’s policies.<sup>29</sup> The Oklahoma Supreme Court’s stark departure with its own precedents here suggests that Oklahoma’s historical hostility to arbitration may have played a role in the outcome, and that the exception the court embraced in wrongful death claims for procedural matters was calculated to resuscitate the anti-arbitration effect of the nursing home law it applied in *Bruner*, which was recently foreclosed by this Court’s decision in *Marmet*.

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<sup>29</sup> Compare standards by which the Court determines equal protection challenges to state laws. 3 Rotunda and Nowak, *Constitutional Law* §18.3(a) (5th Ed. West).

The Oklahoma Supreme Court did not even disavow its precedents that a wrongful death claimant's rights do not exceed those of the decedent for the same injury. *See* App. 10, Opin., ¶10, reciting Grace's reliance upon *Riley v. Brown and Root, Inc.*, 1992 OK 114, 836 P.2d 1298, where the court had held: "The survivors have no more and no less rights than did the decedent." 1992 OK 114, ¶13. The excerpt from *Riley* that the court quoted in its opinion here, App. 10, Opin., ¶10, facially contradicts its holding: "The action for wrongful death is not a separate and distinct tort, but is an action which derives from the rights of the decedent (citation omitted)." <sup>30</sup> *See also Haws v. Luethje*, 1972 OK 146, ¶11, 503 P.2d 871, the last case citation the court gave in its opinion, App. 24, Opin., ¶26, where it had stated the same rule of Oklahoma law. *See also Hill v. Graham*, 1967 OK 10, ¶14, 424 P.2d 35, one of the cases noted by the dissent here (App. 25, Opin., J. Winchester, dissenting, ¶1), where the court had held that "any right of action thus granted by the statute is predicated solely upon the right of action which was personal to the deceased had he lived." No distinction was made in these precedents between substantive and procedural rights, and in fact *Riley* invoked the doctrine to apply a statute of repose.

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<sup>30</sup> *Riley* also expressly rejected the contention that the constitutional provision the Oklahoma Supreme Court cited in support of its decision in this case (App. 22-23, Opin., ¶24), Art. 23, §7, Okla. Const. (App. 35), could change this result. *Riley*, 1992 OK 114, ¶19.

While the Oklahoma court may certainly adopt this new construction of Oklahoma’s wrongful death laws, the state’s legislative and judicial history suggest that the “disproportionate impact” involved in this case is more than randomly adverse to arbitration – and while purposeful hostility may not be *necessary* to this Court’s ultimate decision,<sup>31</sup> it may be a factor which the Court wishes to consider in the algebra of how *Concepcion*’s disproportionality test should be applied.

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## CONCLUSION

The petition for a writ of certiorari should be granted.

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<sup>31</sup> *E.g., Oblix, Inc. v. Winiecki*, 374 F.3d 488, 492 (7th Cir. 2004): “It is in the end irrelevant whether the Supreme Court of California wants to treat arbitration less favorably than other promises in form contracts; no state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule.”

**BOLER v. SECURITY HEALTH CARE, L.L.C.**

**2014 OK 80**

**Case Number: 111775**

**Decided: 09/30/2014**

**THE SUPREME COURT OF THE**

**STATE OF OKLAHOMA\* [SEAL]**

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Cite as: 2014 OK 80, \_\_\_ P.3d \_\_\_

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JOHNNIE BOLER, Personal Representative  
of the Estate of CLEO BOLER, Deceased,  
Plaintiff/Appellee,

v.

SECURITY HEALTH CARE, L.L.C., d/b/a )  
GRACE LIVING CENTER – NORMAN;  
NORMAN PROPERTIES LLC; AMITY CARE, LLC;  
MIKE DIMOND; and DON GREINER, individually  
and d/b/a DON GREINER TRUSTEE,  
KENNETH D. GREINER III REVOCABLE TRUST,  
BENEFICIARY/TRUSTEE, Defendants/Appellants.

APPEAL FROM THE DISTRICT COURT  
OF OKLAHOMA COUNTY, OKLAHOMA,  
THE HONORABLE PATRICIA PARRISH,  
DISTRICT JUDGE

¶0 This is an interlocutory appeal from an order of the District Court of Oklahoma County, Oklahoma, that refused to enforce an arbitration agreement in nursing home's contract against the wrongful death claim brought by decedent's personal representative

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\* *Petitioners' note:* The original opinion contains numerous typographical errors which are duplicated verbatim, as required.



against nursing home. We retained the appeal and affirm the trial court.

**AFFIRMED.**

Patrick M. Ryan, Phillip G. Whaley and Grant M. Lucky, RYAN WHALEY COLDIRON SHANDY PLLC, Oklahoma City, Oklahoma, and J. Michael DeYong, Gina K. Cheatham, DEYONG & CHEATHAM, P.A., Oklahoma City, Oklahoma, for the Appellants.

L. Ray Maples, II, Travis Dunn, Nicole R. Snapp-Holloway, MAPLES LAW FIRM, Edmond, Oklahoma, and David W. Crowe, BAILEY, CROWE, KUGLER & ARNOLD, LLP, Dallas, Texas, for the Appellee.

**EDMONDSON, J.**

¶1 The issue is whether the trial court erred in denying the nursing home's motion to compel arbitration. The trial judge held that the wrongful death claim belonging to Cleo Boler's statutory beneficiaries pursuant to 12 O.S. 2011 § 1053 is not subject to an agreement to arbitrate contained in her nursing home's admission contract. We agree with the trial court and hold that the personal representative and the next of kin are not bound by the arbitration agreement in the contract signed on Cleo Boler's behalf. They did not sign the nursing home contract in their personal capacities and their claim is not wholly derivative of Cleo Boler's claim.

¶2 Cleo Boler was admitted to Grace Living Center – Norman (Grace), a long-term care facility in January 2010 and was a resident there until January 2012. Judy Little (also known as Julie Little), as Cleo

Boler's attorney in fact, signed the admission documents which included a three-page Dispute Resolution Provision (arbitration agreement). The arbitration agreement provided that any claim, controversy, dispute or disagreement arising out of or in connection with the care rendered to Cleo Boler would be determined by submission to neutral, binding arbitration. It purported to bind not only Cleo Boler, but any future legal representatives, heirs, successors, etc., who might assert a claim against Grace.<sup>1</sup>

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<sup>1</sup> The Dispute Resolution Provision signed January 18, 2010, by Julie Little on behalf of Cleo Boler provides, in pertinent part:

**DISPUTE RESOLUTION PROVISION/AGREEMENT**

1. Resident and [Grace Living Center (GLC)] acknowledge that resolving legal claims in the courts can be, and often is, time consuming and expensive. Both Resident and GLC desire to have any claim, controversy, dispute or disagreement arising out of or in connection with the care rendered to Resident by GLC and/or arising out of or in connection with the Admission Agreement pursuant to which that care is rendered, whether asserted by Resident against GLC or by GLC against Resident, resolved quickly and with a minimum of legal expense and delay.

2. Both Resident and GLC therefore agree that any claim, controversy, dispute or disagreement arising out of or in connection with the care rendered to Resident by GLC, and/or arising out of or in connection with the Admission Agreement pursuant to which said care is rendered . . . including claims by Resident against GLC involving, and/or arising out of conduct committed by GLC's agents. . . . or others for whom and or which GLC is, may be or is asserted to be legally responsible . . . , said claim, controversy, dispute or disagreement to include without limitation any claim,

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controversy, dispute or disagreement arising out of the provision of services by GLC, the Admission Agreement, the validity, interpretation, construction, performance and/or enforcement thereof, or which otherwise alleges violations of any state or federal law and/or otherwise seeks an award of compensatory damages, punitive damages, injunctive relief, costs and/or attorney fees (referred to subsequently as “Resident/GLC dispute”), shall be determined by submission to neutral, binding arbitration pursuant to the guidelines and requirements promulgated by federal and state law and subject to appropriate judicial review of arbitration proceedings as authorized by such laws. **By entering into this agreement, both parties explicitly waive any right to have any Resident/GLC dispute decided in a court of law or equity, whether by or before a jury or by the court itself, and instead accept the use of neutral, binding arbitration as the sole means of dispute resolution.** \* \* \*

\* \* \*

6. The Dispute Resolution Provision applies to and binds the Resident and GLC. In addition, it applies to and binds any and all persons and/or entities who and/or which may assert a claim on behalf of, or derived through, the Resident and/or GLC, including without limitation their legal representative, guardians, heirs, executors, administrators, estate(s), successors and assigns; further, it applies to and binds any and all persons and/or entities who and/or which are or may be legally responsible for them, or for whom and/or which may be legally responsible, including without limitation their agents, principals, employees, managers, management companies, consultants, owners, members, operators, partners, officers, directors, shareholders, insurer(s), legal representatives, guardians, heirs, executors, administrators, estate(s), successors and assigns. As such, it is recognized and

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¶3 On October 28, 2011, Cleo Boler, individually, and Judy Little and Johnnie Boler as attorneys in fact, sued Grace and others for negligence, violation of the Nursing Home Care Act and breach of contract regarding the care and treatment of Cleo Boler. Grace filed a Motion to Compel Arbitration, asserting that the contract was one involving interstate commerce and was valid and enforceable under the Federal Arbitration Act (FAA), which preempts contrary state law.

¶4 Cleo Boler died on June 17, 2012, before a response to the motion to compel arbitration was filed. Johnnie Boler (Boler), as personal representative of Cleo's estate, filed a motion for substitution of parties and sought to amend the petition to add

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agreed that this Dispute Resolution Provision survives the death, as well as the incompetency, of the Resident and cannot be revoked by said death or incompetency.

\* \* \*

**NOTICE: BY SIGNING THIS AGREEMENT THE RESIDENT AGREES TO HAVE ANY RESIDENT/GLC DISPUTE DECIDED BY NEUTRAL BINDING ARBITRATION AND WAIVES ANY RIGHT TO TRIAL IN A COURT OF LAW OR EQUITY; PROVIDED; HOWEVER, NOTHING HEREIN SHALL PREVENT THE PARTIES FROM RESOLVING ANY RESIDENT/GLC DISPUTE BY NEGOTIATION BY AND BETWEEN THEMSELVES OR BY USE OF AN AGREED UPON THIRD PARTY MEDIATOR.**

**I hereby certify that I have read, understand, and agree to the terms of this Dispute Resolution Provision.**

survivor claims pursuant to 12 O.S. § 1051 and wrongful death claims pursuant to 12 O.S. § 1053.<sup>2</sup> By order filed March 7, 2013, the trial judge granted both motions. Johnnie Boler, as personal representative of Cleo Boler's estate, filed a second amended petition which brought survival claims on behalf of Cleo Boler's estate pursuant to 12 O.S. § 1051, and a wrongful death claim on behalf of Cleo Boler's beneficiaries, pursuant to 12 O.S. § 1053.<sup>3</sup>

¶5 Boler filed a response to Grace's Motion to Compel Arbitration arguing that Grace could not compel his sister and himself to arbitrate their wrongful death claim because their claim is independent and did not arise until the death of Cleo Boler; further, that they did not sign the arbitration agreement in their personal capacities and were not bound by Cleo Boler's arbitration agreement. This is

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<sup>2</sup> See footnotes 12 and 13, *infra*.

<sup>3</sup> The survival claim sought compensatory, actual and punitive damages allowed by law related to Cleo Boler's physical injuries, mental pain and suffering, loss of companionship and parental care from Cleo Boler, reasonable expenses for necessary medical care, treatment and services; funeral and burial expenses. The wrongful death claim was for all compensatory, actual and punitive damages allowed by law including, but not limited to, Cleo Boler's pain and suffering; the grief of her children; the loss of companionship and parental care from Cleo Boler to her children; the loss of companionship suffered by her children; her children's grief; the loss of Cleo Boler's society, services, companionship and marriage relationship suffered by her family; the medical and burial expenses and the loss of financial support of Cleo Boler to her children.

so, they maintain, even if Cleo Boler's claims must be arbitrated.

¶6 The hearing on Grace's motion to compel arbitration was held January 31, 2013, at which time the trial court addressed whether, as a matter of law, the wrongful death claim was subject to arbitration. The trial court found that wrongful death is a separate and distinct cause of action and is derivative only in the sense that the decedent must have a viable claim at the time of his death.<sup>4</sup> The motion to compel arbitration was denied as to the wrongful death claim and the court reserved ruling on all other issues and arguments. The trial judge did not rule on the validity of the contract, but looked solely to whether the arbitration agreement was enforceable.<sup>5</sup>

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<sup>4</sup> The trial court's order was filed April 16, 2013.

<sup>5</sup> The trial judge stated:

I am going to follow the rationale of the Utah case and hold that, particularly in Oklahoma, since there is a constitutional provision as there was in the Utah case, that sort of elevated the status of a wrongful death claim. That, coupled with the fact that in Oklahoma it talks about it being derivative. And I think we all agree it is derivative. I believe that goes more to the extinguishment of the cause of action as opposed to whether or not someone chose to go to arbitration.

\* \* \*

So I am going to rule, as a matter of law, that a wrongful death action is a separate and distinct cause of action. And that, although it is derivative, and that the decedent's claim has to have not been extinguished, I think that it doesn't apply to the arbitration clause in this case.

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Grace appealed, arguing that the trial court erred in relying on the Utah case of *Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008), to hold that non-signatories to the arbitration agreement were not bound by it for their wrongful death claim because the claim was not wholly derivative of Cleo Boler's claim.

¶7 An order denying a motion to compel arbitration is an appealable order. 12 O.S. § 1879(A)(1). The existence of an agreement to arbitrate is a question of law to be reviewed de novo. *Rogers v. Dell Computer Corp.*, 2005 OK 51 ¶ 18, 138 P.3d 826, 831.

¶8 The Nursing Home Care Act, 63 O.S. § 1-1918, created a statutory tort with a private right of action for nursing home residents or their guardians to redress a violation of rights conferred therein. *Morgan v. Galilean Health Enterprises, Inc.*, 1998 OK 130, 977 P.2d 357, 361-62. Liability for a statutory tort is incurred when it can be shown that the plaintiff's injury resulted from a statutory violation and

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So I'm not going to order this case to arbitration. But it is also my understanding that this is an issue that can be immediately appealed. Tr. pp. 45-46.

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Maybe we should just make that clear in the order that I'm ruling solely on wrongful death. I did not take evidence on the interstate commerce aspect of that. Tr. p. 53.

The trial judge did not rule on the plaintiff's unconscionability argument, stating that she would have wanted to take evidence on that issue. Tr. p. 48.

that the plaintiff falls into a class of persons whom the legislature intended to protect. The Nursing Home Care Act is not the patient's exclusive remedy. *Estate of Hicks v. Urban East*, 2004 OK 36, 92 P.3d 88. The Act provides that the plaintiff may seek any recovery permitted by law. 63 O.S. § 1-1939(B),(C).

¶9 Wrongful death claims were not cognizable at common law; the right of action for personal injury stood extinguished by the death of the injured party. This rule was abrogated by Oklahoma's wrongful death statute. A cause of action for injury to the person is now survivable and a new and independent wrongful death claim has been created. *Ouellette v. State Farm Ins. Co.*, 1994 OK 79, 918 P.2d 1363, 1366. On appeal, the issue is whether claims brought by non-signatory wrongful death claimants must be arbitrated. Title 12 O.S. § 1053 provides that wrongful death claims lie if, at the time of his or her death, the decedent had a right of recovery for the injury in suit. The parties disagree on whether wrongful death claims in Oklahoma are wholly or partially derivative and the effect of that distinction.

¶10 Grace argues that wrongful death claims are entirely derivative claims, binding on the next of kin, predicated solely upon the right of action personal to the decedent because the claim must have been one the decedent could have brought if she had lived. Grace directs our attention to cases in which the decedent's execution of a release and satisfaction of the claim meant there was no action surviving the death. *See Haws v. Luethje*, 1972 OK 146, 503 P.2d



871. Grace argues that Cleo Boler's personal representative can maintain only an action that Cleo Boler could have maintained if she had survived; otherwise, her rights are "enlarged" by Oklahoma's wrongful death statute. Thus, because she contracted to arbitrate her claims against Grace, her personal representative must arbitrate the wrongful death claim. Grace points to *Riley v. Brown and Root, Inc.*, 1992 OK 114, 836 P.2d 1298, 1300, 1301, for the proposition that such claims are wholly derivative of rights held by the decedent and the heirs are bound by the decedent's contractual agreement to arbitrate:

"The action for wrongful death is not a separate and distinct tort, but is an action which derives from the rights of the decedent (citation omitted). Whatever rights the decedent might have had in his life accrue to the personal representative at death, thus overcoming the common law barrier of death."

¶11 Boler, in opposition, argues that the wrongful death claim is not wholly derivative because the statute only requires that the decedent must have had a right to sue while alive. The claim is derivative only in the sense that it must not have been *extinguished* before death. Boler relies on *Ouellette v. State Farm Ins. Co.*, 1994 OK 79, 918 P.2d 1363, 1366, which states that Oklahoma's Wrongful Death Act created a new cause of action for pecuniary losses suffered by the deceased's spouse and next of kin by reason of his or her death and recovery under the Act does not go to the estate of the deceased, but inures to

the exclusive benefit of the surviving spouse and children or next of kin. Thus, Boler argues, a wrongful death claim is new and independent of the claim belonging to the deceased, a conclusion bolstered by Art. 23, § 7 of the Oklahoma Constitution which provides that the right of action to recover damages for injuries resulting in death shall never be abrogated. Boler argues that basic rules of contract law prevent the arbitration agreement from being enforceable against parties who did not sign the agreement in their personal capacities.

¶12 The first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. *Wilkinson v. Dean Witter Reynolds, Inc.*, 1997 OK 20, ¶9, 933 P.2d 878, 880 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). The existence of an arbitration agreement is governed by principles of state law. *Id.*

¶13 Courts in other states have differed when considering whether the decedent's heirs are bound by an arbitration agreement signed by or on behalf of the decedent. Courts in other states have based their rulings on whether the wrongful death claims are deemed wholly or only partially derivative. If wrongful death actions are considered independent and separate causes of action, courts are more likely to hold that the beneficiaries are not bound by the decedent's agreement to arbitrate. If wrongful death actions are deemed wholly derivative in nature,

beneficiaries are generally held to be bound by a decedent's arbitration agreement. *In re Labatt Food Service, L.P.*, 279 S.W.3d 640, 647 (Tex. 2009).

¶14 Even when construing statutes that predicate a wrongful death claim on the ability of the decedent to bring suit if he or she had lived, courts are split on whether the estate and heirs are bound by an arbitration agreement signed by the decedent. See *Laizure v. Avante at Leesburg, Inc.*, 109 So.3d 752, 761 (Fla. 2013). The “wholly derivative” states reason that if the decedent would have to arbitrate his or her claims, the heirs must arbitrate their claims because they “stand in the shoes of” the decedent. Courts that treat wrongful death claimants as wholly derivative include Florida, New Mexico, California, Texas, Mississippi, Alabama, and Michigan.<sup>6</sup> Other states, such as Arizona, Pennsylvania, Kentucky, Illinois, Washington, Missouri, Utah, and Ohio, have treated wrongful death claims as independent from claims the decedent had and have held that the damages are not awarded to those plaintiffs

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<sup>6</sup> *Laizure v. Avante at Leesburg, Inc.*, 109 So.3d 752 (Fla. 2013); *Estate of Krahmer ex rel. Peck v. Laurel Healthcare Providers, LLC*, 315 P.3d 298 (N.M. App. 2013); *Ruiz v. Podolsky*, 237 P.3d 584 (Cal. 2010); *In re Labatt Food Service, L.P.*, 279 S.W.3d 640 (Tex. 2009); *Trinity Mission Health & Rehab. of Clinton v. Estate of Scott ex rel. Johnson*, 19 So.3d 735 (Miss. Ct. App. 2008); *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).

on the decedent's behalf.<sup>7</sup> Colorado has looked to whether the contract reflects the intent of the parties to bind the beneficiaries.<sup>8</sup>

¶15 An example cited by Grace, *In re Labatt Food Service, L.P.*, 279 S.W.3d 640, 647 (Tex. 2009), was a wrongful death action brought by deceased employee's parents and children against his employer. The plaintiffs did not specifically challenge the validity of the arbitration agreement, but argued that the entire contract was void. The district court denied the employer's motion to compel arbitration and the employer petitioned for writ of mandamus. The Supreme Court of Texas held that an arbitration agreement in a contract between an employee and his employer requiring arbitration pursuant to the Federal Arbitration Act was, under Texas law, binding on the beneficiaries, even though they did not sign the agreement. They interpreted Texas law to mean that even though the wrongful death damages are for the exclusive benefit of the beneficiaries and meant to compensate them for their personal losses, the cause

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<sup>7</sup> *Estate of Decamacho ex rel. Guthrie v. La Solana Care and Rehab., Inc.*, 316 P.3d 607 (Ariz. App. 2014); *Pisano v. Extendicare Homes, Inc.* 77 A.3d 651 (PA Super. 2013); *Ping v. Beverly Enterprises, Inc.* 376 S.W.3d 581 (Ky 2012); *Carter v. SSC Odin Operating Co., Llc*, 976 N.E. 2d 344 (IL 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 (Ohio 2007).

<sup>8</sup> *Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003).

of action is entirely derivative of the decedent's rights. The court held that it was for the arbitrator, rather than the court, to resolve the claim that the entire contract was invalid.

¶16 The case relied on by the trial court, *Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008), held that the wrongful death claim was not wholly derivative. In that case the surviving spouse brought a wrongful death action against her husband's physician, alleging that his negligent care caused her husband to commit suicide. The physician filed a motion to compel arbitration which was denied. On appeal, the Supreme Court of Utah affirmed. The surviving spouse argued that she could not be compelled to arbitrate because she was not bound to a contract that she did not sign, and further that she had a constitutional right to pursue her wrongful death claim in court because it is a cause of action based on injury to the heirs rather than to an injury sustained by the patient. The court likewise found that she was not a third-party beneficiary who could be bound by the arbitration agreement. *Bybee* has been distinguished or held unpersuasive by the Florida Supreme Court in *Laizure v. Avante at Leesburg, Inc.*, 109 So.3d 752 (Fla. 2013), by the Texas Supreme Court in *In re Labatt Food Services, supra*, by the California Supreme Court in *Ruiz v. Podolsky*, 237 P.3d 584 (Cal. 2010), and by the New Mexico Court of Appeals in *Estate of Krahmer ex rel. Peck v. Laurel Health Care Providers*, 315 P.3d 298 (N.M. App. 2013). The Court of Appeals of New Mexico strictly construed that

state's Wrongful Death Act as transmitting the resident's cause of action against the nursing home to her personal representative. Because the resident was bound to arbitrate her claims, so was her personal representative. The court observed that New Mexico does not have a "survival" statute that is distinct from its Wrongful Death Act. The New Mexico wrongful death statute does not create a new cause of action and the Court held that the available remedies were limited to only those recoverable by the decedent. *Estate of Krahmer, supra*.

¶17 In *Laizure*, the Florida Supreme Court based its decision on the derivative nature of wrongful death actions in Florida. Because the signing party's estate and heirs are bound by defenses that could be raised in a personal injury suit brought by the decedent, as well as by releases signed by the decedent, they are also bound by the choice of forum agreement signed by the decedent in a wrongful death action arising out of the treatment and care of the decedent. The court stated that although Florida's wrongful death act has long been characterized as creating a new and distinct right of action from the right of action the decedent had prior to death, the actions are derivative because they are dependent on a wrong committed against the decedent. 109 So. 3d at 760-61. Defenses that would have been available to the defendant if the decedent had lived are equally available to the defendant in a wrongful death action.

¶18 Courts that are in accord with *Bybee, supra*, apply a similar analysis and conclude that the

wrongful death claim is *not* wholly derivative. In *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), the arbitration agreement was optional and was not a condition of admission. The court determined that the daughter's durable power of attorney did not authorize her to bind her mother to the arbitration agreement she signed. It also determined that even if the decedent were bound by the arbitration agreement, the wrongful death claimants would not be bound because their statutorily-distinct claim does not derive from any claim on behalf of the decedent. The court discussed the distinction between survival claims, which the estate brings on its own behalf, and the wrongful death claim, which the representative brings not on behalf of the estate, but on behalf of the statutory wrongful death beneficiaries. The Kentucky wrongful death statute provides that the wrongful death action shall be prosecuted by the personal representative and the amount recovered, less certain expenses, shall be for the benefit of and go to the kindred of the deceased as specified in the statute. It recognized that some states treat the wrongful death action as derivative of the personal injury claim, while in others the two claims are regarded as independent. It observed that the constitutional status of the wrongful death claim in Kentucky is a strong indication of that claim's independence. It concluded that under their law the wrongful death claim accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss; thus, the court agreed with *Bybee* and other cases holding that a decedent cannot bind his or

her beneficiaries to arbitrate their wrongful death claim.

¶19 In *Estate of Decamacho ex rel. Guthrie v. La Solana Care and Rehab, Inc.*, 316 P.3d 607 (Ariz. App. 2014), the Arizona Court of Appeals ruled that the arbitration agreement was valid and enforceable but because the wrongful death claim was not wholly derivative of the resident's rights it was therefore not subject to the arbitration clause. It recognized that the rules of contract interpretation apply equally in the context of arbitration clauses, citing the Arizona Supreme Court in *Southern California Edison Co. v. Peabody Western Coal Co.*, 977 P.2d 769, 773. The court concluded that a claim under Arizona's equivalent of our Nursing Home Care Act, belonged to the decedent and survived as an asset of her estate. The statutory beneficiaries under the wrongful death claim were not subject to the arbitration clause because the wrongful death statute confers an original and distinct claim for the damages sustained by the statutory beneficiaries named therein and is not derived from, nor a continuation of, claims that formerly existed in a decedent. 316 P.3d at 613.

¶20 The Supreme Court of Illinois rejected a nursing home's argument that the personal representative is merely the conduit by which the rights of the decedent are litigated after his or her death. *Carter v. SSC Odin Operating Co., LLC*, 976 N.E.2d 344 (IL 2012). Illinois' wrongful death statute provides that where the decedent could have maintained an action against the nursing home if death had not



ensued, the defendant shall be liable in an action for damages brought by the personal representative.<sup>9</sup>

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<sup>9</sup> The Illinois Wrongful Death Act is codified at 740 ILCS 180, et seq. Section 180/1 provides:

Whenever the death of a person shall be caused by wrongful act, neglect or default, 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, then and in every such case the person who or company or corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. No action may be brought under this Act if the decedent had brought a cause of action with respect to the same underlying incident or occurrence which was settled or on which judgment was rendered.

Section 180/2 provides, in pertinent part:

Every such action shall be brought by and in the names of the personal representatives of such deceased person and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person. In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow and mental suffering, to the surviving spouse and next of kin of such deceased person.

The amount recovered in any such action shall be distributed by the court in which the cause is heard or, in the case of an agreed settlement, by the circuit court, to each of the surviving spouse and next of kin of such deceased person in the proportion, as determined by

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The statute provides that no action can be brought if the decedent had brought a claim on the same occurrence which settled or had judgment rendered. The Illinois Supreme Court stated:

“Defendant overstates the significance of the derivative nature of a wrongful death action. Although a wrongful-death action is dependent upon the decedent’s entitlement to maintain an action for his or her injury had death not ensued, neither the Wrongful Death Act nor this court’s case law suggests that this limitation on the cause of action provides a basis for dispensing with basic principles of contract law in deciding who is bound by an arbitration agreement.

¶21 In the Illinois case, the special administrator signed an arbitration agreement with the nursing home as resident’s legal representative and the resident herself signed a second arbitration agreement with the nursing home. After the resident’s death, the special administrator of the decedent’s estate brought an action asserting claims under the Nursing Home Care Act and claims under the Wrongful Death Act against the nursing home operator. The court held that the administrator was bound to arbitrate the *survival* claims under the Nursing Home Care Act, but was not bound to arbitrate the

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the court, that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the deceased person. \* \* \*

claims under the Wrongful Death Act. The plaintiff could not be compelled to arbitrate the wrongful death claim because she did not sign the arbitration agreement in her individual capacity, a basic principle of contract law.<sup>10</sup>

¶22 The Illinois nursing home made essentially the same arguments Grace has made in this case: that a wrongful death action is derivative of, and thus limited to, what the decedent's cause of action against the defendant would have been if she had lived. If the decedent's claim would have been subject to arbitration, then the wrongful death claim is likewise subject to arbitration, the nursing home argued. The Illinois court observed that arbitration is a creature of contract, and under basic principles of contract law only parties to the contract may compel arbitration or be compelled to arbitrate. Although the Federal Arbitration Act (FAA) directs courts to place arbitration agreements on equal footing with other contracts, it does not require parties to arbitrate when they have not agreed to do so. Arbitration under the FAA is a matter of consent, not coercion. The Illinois court held that the special representative was a nominal party effectively filing suit on behalf of resident's next of kin. The court recognized the difference between the survival cause of action and the

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<sup>10</sup> The Illinois Supreme Court considered other contractual issues that are not presented in this appeal.

wrongful death cause of action.<sup>11</sup> The case was decided on basic principles governing contract law.

¶23 Oklahoma distinguishes survivor actions (those that could be brought by the decedent while alive) from wrongful death actions.<sup>12</sup> A wrongful death action pursuant to § 1053 may be maintained by the personal representative of the deceased person, for and on behalf of the surviving spouse and children and the parents.<sup>13</sup> The potential damages include: the

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<sup>11</sup> A survival action allows for recovery of damages for injury sustained by the deceased up to the time of death. A wrongful death action covers the time after death and addresses the injury suffered by the next of kin due to the loss of the deceased, rather than the injuries personally suffered by the deceased prior to death. *Id.* at ¶ 34.

<sup>12</sup> 12 O.S. § 1051 provides, in pertinent part:

In addition to the causes of action which survive at common law, causes of action for . . . an injury to the person . . . shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

<sup>13</sup> 12 O.S. 2011 § 1053 provides, in pertinent part:

A. When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter.. if the former might have maintained an action, had he or she lived, against the latter, or his or her representative, for an injury for the same act or omission. The action must be commenced within two (2) years.

B. The damages recoverable in actions for wrongful death . . . shall included the following: Medical and burial expenses . . .

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loss of consortium and grief of the surviving spouse; the mental pain and anguish suffered by the deceased, which shall be distributed to the surviving spouse and children, or next of kin, in the same proportion as personal property of the decedent; the pecuniary loss to the survivors based on the projected duration of the decedents life, which must inure to the exclusive benefit of the surviving spouse and children; and grief and loss of companionship of the parents and children of the decedent. The amounts recovered are distributed to those designated parties as specified in the statute. These are distinct claims for damages sustained by the statutory beneficiaries.

¶24 Oklahoma's Constitution, Art. 23 § 7, provides that the right of action to recover damages for

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The loss of consortium and the grief of the surviving spouse, which shall be distributed to the surviving spouse.

The mental pain and anguish suffered by the decedent, which shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent.

The pecuniary loss to the survivors based upon properly admissible evidence with regard thereto . . . , which must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin, and shall be distributed to them according to their pecuniary loss.

The grief and loss of companionship of the children and parents of the decedent, which shall be distributed to them according to their grief and loss of companionship.

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injuries resulting in death shall never be abrogated. The Oklahoma Arbitration Act provides that an agreement to submit any existing or subsequent controversy to arbitration is valid, enforceable and irrevocable except upon a ground that exists in law or equity for the revocation of a contract. 12 O.S. § 1857(A). If necessary, a court shall decide whether an agreement to arbitrate exists or whether a controversy is subject to an agreement to arbitrate. 12 O.S. § 1857(B). Oklahoma has recognized that although the FAA favors arbitration when it is the parties' contractual choice of a remedial forum, courts will not impose arbitration upon parties where they have not agreed to do so. *Okla. Oncology & Hematology P.C. v. US Oncology, Inc.*, 2007 OK 12 ¶22, 160 P.3d 936 (arbitration is a matter of consent, not coercion, citing *Volt Info. Sciences Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989)). To assure that the parties have consented to arbitration, the courts will decide whether there is a valid enforceable arbitration agreement, whether the parties are bound by it and whether the parties agreed to submit a particular dispute to arbitration.

¶25 Consent to arbitrate is an essential component of an enforceable arbitration agreement. The personal representative and the heirs are not bound to an agreement that they did not sign. Judy Little did not sign in her individual capacity and did not, by signing on her mother's behalf, express an intent to relinquish any rights she might possess in her individual capacity.

¶26 We agree with the courts that have held that a decedent cannot bind the beneficiaries to arbitrate their wrongful death claim. Oklahoma's Wrongful Death Act created a new cause of action for pecuniary losses suffered by the deceased's spouse and next of kin by reason of his or her death. Recovery under the wrongful death act does not go to the estate of the deceased, but inures to the exclusive benefit of the surviving spouse and children or next of kin. *Ouellette v. State Farm Ins. Co.*, 1994 OK 79, 918 P.2d 1363, 1366. If the decedent extinguishes the claim while alive, however, there is no claim surviving the decedent's death. *Haws v. Luethje*, 1972 OK 146, 503 P.2d 871.

¶27 We conclude that the wrongful death claim accrues separately to the wrongful death beneficiaries and is intended to compensate them for their own losses. The personal representative is prosecuting the wrongful death claim on behalf of the statutory beneficiaries set out in 12 O.S. § 1053. The trial court did not err in denying Grace's motion to compel arbitration of the wrongful death claim.

**AFFIRMED.**

¶28 COLBERT, C.J., REIF, V.C.J., KAUGER, WATT, EDMONDSON, TAYLOR, COMBS, GURICH, JJ., concur.

¶29 WINCHESTER, J., dissents

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**WINCHESTER, J., dissenting:**

¶1 Citing a handful of cases from other states, the majority disregards long-standing Oklahoma case law that finds wrongful death actions derivative of the rights of the deceased. *Riley v. Brown and Root, Inc.*, 1992 OK 114, ¶ 10, 836 P.2d 1298, 1300-1301 (“The action for wrongful death is not a separate and distinct tort, but is an action which derives from the rights of the decedent.”). While it is true that Oklahoma’s wrongful death statutes allow a cause of action to be brought by decedent’s beneficiaries, this right of action “is predicated solely upon the right of the action which was personal to the decedent had he lived.” *Hill v. Graham*, 1967 OK 10, ¶ 14, 424 P.2d 35, 37-38.

¶2 Wrongful death beneficiaries stand in the same legal shoes as the decedent, carrying “no more and no less rights than did the decedent.” *Riley v. Brown and Root, Inc.*, 1992 OK 114, ¶ 13, 836 P.2d 1298, 1301. *See also Haws v. Luethje*, 1972 OK 146, ¶ 13, 503 P.2d 871. In *Haws*, the Court held that a wrongful death claimant “may not accomplish what the decedent could not” even though the wrongful death claim does not technically accrue until the decedent’s death. To conclude otherwise would provide the beneficiaries with greater rights than those enjoyed by the decedent.



¶3 The majority's need to characterize the wrongful death action as either wholly or partially derivative is a distinction without difference. Our case law has long provided that the rights of the beneficiaries are derivative under the wrongful death statutes and, as such, the beneficiaries should be bound by the decedent's agreement to arbitrate. *Riley v. Brown and Root, Inc.*, 1992 OK 114, 836 P.2d 1298.

¶4 The majority points out that the Oklahoma Constitution "provides that the right of action to recover damages for injuries resulting in death shall never be abrogated." I agree. Enforcement of the parties' arbitration agreement in this matter in no way abrogates the right to recover damages, it merely changes the forum in which the case is heard. The decedent's daughter, as the authorized legal representative by virtue of a Durable Power of Attorney, signed a three page arbitration agreement, which was contained within the decedent's admission agreement with Appellant. The validity of this agreement has not been challenged by the beneficiaries on appeal. Because I believe the decedent would be required to arbitrate any claims she may have had against the nursing home prior to her death, her beneficiaries should be compelled to do the same pursuant to the

terms of the binding arbitration agreement.<sup>1</sup> Accordingly, I respectfully dissent.

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<sup>1</sup> Significantly, the United States Supreme Court has ruled in favor of the enforceability of an arbitration agreement even when an existing state law, much like the Nursing Home Act in this case, prohibits its enforcement. *See Marmet Health Care Ctr., Inc. v. Brown*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012) (per curiam). In *Marmet*, the Court upheld an arbitration agreement between a West Virginia nursing home and its resident even though West Virginia law prohibited the enforcement of arbitration agreements in nursing home residential contracts, citing the preemptive force of the Federal Arbitration Act, 9 U.S.C. § 2.

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**IN THE DISTRICT COURT  
OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA**

**JUDY L. LITTLE and )  
JOHNNIE L. BOLER, )  
as Co-Durable Power )  
of Attorney of CLEO )  
BOLER, and CLEO )  
BOLER, Individually, )  
Plaintiff, )**

**vs. )**

**SECURITY HEALTH )  
CARE, L.L.C. d/b/a )  
GRACE LIVING CENTER )  
- NORMAN; NORMAN )  
PROPERTIES, LLC; )  
AMITY CARE, LLC; MIKE )  
DIMOND; and DON )  
GREINER, Individually, )  
and d/b/a DON GREINER )  
TRUSTEE KENNETH D. )  
GREINER III )  
REVOCABLE TRUST, )  
BENEFICIARY/TRUSTEE, )  
Defendants. )**

**) Case No.:  
) CJ-2011-8333  
)  
) Judge Patricia Parrish**

**ORDER**

(Filed Apr. 16, 2013)

Defendants' Motion to Stay Litigation and Com-  
pel Arbitration came for Hearing before this Honor-  
able Court on the 31st day of January, 2013. Plaintiff

appeared by and through counsel of record, L. Ray Maples, Travis Dunn and John Arnold. Defendants appeared by and through counsel of record Grant M. Lucky and Gina K. Cheatham. Having read the briefs, reviewed evidentiary material, and listened to argument, the Court **FINDS** Plaintiffs' wrongful death is a separate and distinct cause of action, and is derivative only in the sense that Decedent must have a viable claim at the time of his death. Therefore, Defendants' Motion to Compel Arbitration is **DENIED** as to Plaintiffs' wrongful death claims.

The Court reserves ruling on all other issues and arguments.

IT IS SO ORDERED this 15th day of April, 2013

PATRICIA G. PARRISH  
HONORABLE  
PATRICA PARRISH

**APPROVED BY:**

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***ATTORNEYS FOR DEFENDANTS***

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**Oklahoma Statutes Citationized**

**Title 12. Civil Procedure**

**Chapter 17 – Survival and Abatement of Actions**

**Section 1053 – Wrongful Death – Limitation of  
Actions – Damages**

A. When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his or her personal representative if he or she is also deceased, if the former might have maintained an action, had he or she lived, against the latter, or his or her representative, for an injury for the same act or omission. The action must be commenced within two (2) years.

B. The damages recoverable in actions for wrongful death as provided in this section shall include the following: Medical and burial expenses, which shall be distributed to the person or governmental agency as defined in Section 5051.1 of Title 63 of the Oklahoma Statutes who paid these expenses, or to the decedent's estate if paid by the estate.

The loss of consortium and the grief of the surviving spouse, which shall be distributed to the surviving spouse.

The mental pain and anguish suffered by the decedent, which shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent.

The pecuniary loss to the survivors based upon properly admissible evidence with regard thereto including, but not limited to, the age, occupation, earning

capacity, health habits, and probable duration of the decedent's life, which must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin, and shall be distributed to them according to their pecuniary loss.

The grief and loss of companionship of the children and parents of the decedent, which shall be distributed to them according to their grief and loss of companionship.

C. In proper cases, as provided by Section 9.1 of Title 23 of the Oklahoma Statutes, punitive or exemplary damages may also be recovered against the person proximately causing the wrongful death or the person's representative if such person is deceased. Such damages, if recovered, shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent.

D. Where the recovery is to be distributed according to a person's pecuniary loss or loss of companionship, the judge shall determine the proper division.

E. The above-mentioned distributions shall be made after the payment of legal expenses and costs of the action.

F. 1. The provisions of this section shall also be available for the death of an unborn child as defined in Section 1-730 of Title 63 of the Oklahoma Statutes.



2. The provisions of this subsection shall not apply to:

a. acts which cause the death of an unborn child if those acts were committed during a legal abortion to which the pregnant woman consented, or

b. acts which are committed pursuant to the usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

3. Under no circumstances shall the mother of the unborn child be found liable for causing the death of the unborn child unless the mother has committed a crime that caused the death of the unborn child.

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**Oklahoma**

**Oklahoma Constitution**

**Article 23 – Miscellaneous**

**Personal Injuries**

**Section Article 23 section 7 – Right of action  
– Amount of recovery – Exclusiveness of  
remedy under Workers’ Compensation Law**

§ 7. Right of action – Amount of recovery – Exclusiveness of remedy under Workers’ Compensation Law.

The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, provided however, that the Legislature may provide an amount of compensation under the Workers’ Compensation Law for death resulting from injuries suffered in employment covered by such law, in which case the compensation so provided shall be exclusive, and the Legislature may enact statutory limits on the amount recoverable in civil actions or claims against the state or any of its political subdivisions.

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**EXCERPT FROM 63 OKLA. STAT. §1-1939 –**  
**Oklahoma Nursing Home Care Act –**

A. The owner and licensee are liable to a resident for any intentional or negligent act or omission of their agents or employees which injures the resident. . . .

\* \* \*

D. Any waiver by a resident or the legal representative of the resident of the right to commence an action under this section, whether oral or in writing, shall be null and void, and without legal force or effect.

E. Any party to an action brought under this section shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.

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**DISPUTE RESOLUTION  
PROVISION\AGREEMENT**

1. Resident<sup>1</sup> and Security Health Care LLC d/b/a Grace Living Centers Norman<sup>2</sup> (herein after “the Facility” or “GLC”) acknowledge that resolving legal claims in the courts can be, and often is, time consuming and expensive. Both Resident and GLC desire to have any claim, controversy, dispute or disagreement arising out of or in connection with the care rendered to Resident by GLC and/or arising out of or in connection with the Admission Agreement pursuant to which that care is rendered, whether

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<sup>1</sup> Resident, for purposes of this Agreement, is the person who this Admission Agreement permits to reside at the Facility. It is understood and agreed, however, that this Dispute Resolution Provision applies to and binds all persons or entities including those identified in paragraph two (2) and six (6) of this Provision to the extent any claim(s) whatsoever are asserted by them for or on behalf of the Resident, or for or on behalf of the Resident’s estate, survivor(s), heir(s), etc., including without limitation any claim(s) derived from or arising from Resident’s claim(s).

<sup>2</sup> The Facility is an Oklahoma company and has been granted a license to operate pursuant to a Certificate of Need issued by the State of Oklahoma All services provided pursuant to the Admission Agreement are the sole and exclusive responsibility of the Facility Notwithstanding the foregoing, the provisions of this Dispute Resolution Agreement shall apply to any and all entities, however denominated, involved in the services provided by the Facility, expressly including but not limited to Amity Care, L.L.C. or any other consultant or management entity Resident expressly agrees that disputes with respect to such entities shall be resolved by way of binding arbitration as set forth and pursuant to the terms of this Agreement.

asserted by Resident against GLC or by GLC against Resident, resolved quickly and with a minimum of legal expense and delay,

2. Both Resident and GLC therefore agree that any claim, controversy, dispute or disagreement arising out of or in connection with the care rendered to Resident by GLC, and/or arising out of or in connection with the Admission Agreement pursuant to which said care is rendered, whether asserted by Resident against GLC or by GLC against Resident, including claims by Resident against GLC involving, and/or arising out of conduct committed by GLC's agent(s), principal(s), employee(s), manager(s), management company(ies), consultant(s), owner(s), operator(s), partner(s), officer(s), director(s), shareholder(s), insurer(s), or others for whom and/or which GLC is, may be or is asserted to be legally responsible, or who and/or which are or may be legally responsible for GLC, said claim, controversy, dispute or disagreement to include without limitation any claim, controversy, dispute or disagreement arising out of the provision of services by GLC, the Admission Agreement, the validity, interpretation, construction, performance and/or enforcement thereof, or which otherwise alleges violations of any state or federal law and/or otherwise seeks an award of compensatory damages, punitive damages, injunctive relief, costs and/or attorney's fees (referred to subsequently as "Resident/GLC dispute"), shall be determined by submission to neutral, binding arbitration pursuant to the guidelines and requirements promulgated by federal and

state law and subject to appropriate judicial review of arbitration proceedings as authorized by such law(s). **By entering into this agreement, both parties explicitly waive any right to have any Resident/GLC dispute decided in a court of law or equity, whether by or before a jury or by the court itself, and instead accept the use of neutral, binding arbitration as the sole means of dispute resolution.** Provided, however, nothing herein shall prevent the parties from resolving any Resident/GLC dispute by negotiation by and between themselves or by use of an agreed upon third party mediator.

3. Both Resident and GLC acknowledge that state and federal law, as well as the decisions of the United States Supreme Court, favor the enforcement of valid arbitration provisions. As such, unless otherwise agreed by Resident and GLC in writing, any Resident/GLC dispute shall be resolved by binding arbitration, which shall be conducted by a neutral arbitrator selected in accordance with the arbitration guidelines and requirements provided under state and federal law. If Resident and GLC are unable to agree on one arbitrator, each party shall select one arbitrator, with a third arbitrator selected by the other two arbitrators. In reaching a decision, the arbitrator(s) shall prepare findings of fact and conclusions of law. Further, Resident and GLC may agree to utilize an arbitration administrative service or other arbitration administrator for the arbitration. GLC shall bear the initial costs of any arbitration administration and the fees of the arbitrator(s); provided,

however, at the conclusion or resolution of the arbitration, the arbitrator(s) may allocate responsibility for the arbitration administration costs and/or the arbitrator's fees. In addition, the arbitrator(s) may award to the prevailing party, and allocate and assess against the non-prevailing party, the costs and attorney's fees incurred in connection with the arbitration and any related proceedings; any award, allocation and/or assessment of costs and attorney's fees to be in accordance with the federal and state law governing the nature and/or type of claim, controversy, dispute or disagreement in issue.

4. The arbitrator(s) shall conduct the arbitration under the guidelines and requirements set forth by state and federal law and may utilize the rules provided by any agreed upon arbitration administrative service or other arbitration administrator; provided, Resident and GLC may agree to modifications of said rules or to the arbitrator establishing rules to govern any particular arbitration proceeding or any part of the arbitration proceeding. Such agreement must be in writing and signed by the party to be charged.

5. The arbitration decision shall be made within nine (9) months of the commencement of the arbitration proceedings, and the arbitrator shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by the agreement of all parties and/or by the arbitrator, if necessary, but not to exceed an additional nine (9) months. The arbitrator may award any remedies

allowable by law, and shall comply with the state and federal law in determining said remedies.

6. The Dispute Resolution Provision applies to and binds the Resident and GLC. In addition, it applies to and binds any and all persons and/or entities who and/or which may assert a claim on behalf of, or derived through, the Resident and/or GLC, including without limitation their legal representatives, guardians, heirs, executors, administrators, estate(s), successors and assigns; further, it applies to and binds any and all persons and/or entities who and/or which are or may be legally responsible for them, or for whom and/or which may be legally responsible, including without limitation their agents, principals, employees, managers, management companies, consultants, owners, members, operators, partners, officers, directors, shareholders, insurer(s), legal representatives, guardians, heirs, executors, administrators, estate(s), successors and assigns. As such, it is recognized and agreed that this Dispute Resolution Provision survives the death, as well as the incompetency, of the Resident and cannot be revoked by said death or incompetency.

7. If any term, phrase or provision of this Dispute Resolution Provision is held to be invalid or unenforceable for any reason, this Dispute Resolution Provision will be deemed to be amended to conform with such law and will otherwise remain in full force and effect, as it is the intention of Resident and GLC to ensure that the disputes covered by this agreement are resolved solely via arbitration. To that end, in the



event there is any issue concerning the enforcement of this Dispute Resolution Provision, (including but not limited to the competence of Resident/Resident Representative to enter this Agreement) Resident and GLC recognize and acknowledge that such issue will be submitted to the arbitrator(s) selected pursuant to the provisions herein. Resident and GLC further agree that the determination of whether any particular dispute is subject the provisions of this Dispute Resolution Provision and\or must be determined by arbitration shall be submitted to and determined by the arbitrator(s).

8. Resident acknowledges that Resident has had the opportunity to ask questions concerning this Dispute Resolution Agreement and understands that Resident may consult with any persons or authorities, including an attorney, which Resident desires or chooses with respect to the terms and provisions of this Dispute Resolution Agreement before agreeing to the provisions herein. Resident has made such inquiries and consultations as Resident desires and enters this Dispute Resolution Agreement as a free and voluntary act and in order to receive the benefits it provides.

9. Resident and GLC agree that their interests and the intent and spirit of this Dispute Resolution Agreement are best achieved through a resolution procedure which is carried out in a confidential and private manner and setting. The Arbitration proceedings carried out pursuant to this Dispute Resolution Agreement will therefore be maintained as private

and confidential and the proceedings, discovery and information disclosed during the course of those proceedings and any results will not be disclosed to third or outside parties absent written agreement of the Resident and GLC.

10. Resident and GLC acknowledge that the obligation to demand arbitration is on the claimant and not the respondent with respect to any dispute. In the event a party overlooks the obligation to arbitrate or otherwise proceeds with litigation, it is agreed that the responding party shall not be deemed to have waived the right to enforce and compel arbitration provided a motion to compel arbitration is served before the first day of trial. It is further agreed that in the event a party overlooks or for any reason proceeds to resolution outside arbitration with respect to any dispute, it shall not preclude or constitute a waiver of the right to enforce or insist upon arbitration in the future.

11. Resident and GLC further agree that the venue for all proceedings relating to this Dispute Resolution Agreement and/or any associated Court proceedings, shall be in the county and in which the facility rendering service to Resident is located.

12. Notwithstanding any other provision herein, in the event any provision herein, if construed as a part of this Dispute Resolution Provision, would render this agreement unenforceable or otherwise result in a dispute being resolved outside the arbitration process, this agreement shall be read to exclude

such provision, the remainder being enforced so that the ability, obligation and right of the parties to compel and enforce resolution of disputes by way of arbitration is preserved in all circumstances, the same being the paramount intent and purpose of this agreement.

NOTICE: BY SIGNING THIS AGREEMENT THE RESIDENT AGREES TO HAVE ANY RESIDENT/GLC DISPUTE DECIDED BY NEUTRAL BINDING ARBITRATION AND WAIVES ANY RIGHT TO TRIAL IN A COURT OF LAW OR EQUITY; PROVIDED; HOWEVER, NOTHING HEREIN SHALL PREVENT THE PARTIES FROM RESOLVING ANY RESIDENT/GLC DISPUTE BY NEGOTIATION BY AND BETWEEN THEMSELVES OR BY USE OF AN AGREED UPON THIRD PARTY MEDIATOR.

I hereby certify that I have read, understand, and agree to the terms of this Dispute Resolution Provision.

Date: 1/18/10 \_\_\_\_\_  
Resident

Date: \_\_\_\_\_ /s/ Julie Little  
Legal Representative of  
Resident (if any)/Agent  
of Resident (if any)

\_\_\_\_\_  
TITLE: of Legal Representative  
of Resident or  
TITLE: of Agent of Resident  
(if any)

Date: \_\_\_\_\_  
Resident Spouse

Date: \_\_\_\_\_  
Family of Resident (Please  
Indicate Relation; e.g Son,  
Daughter, Parent, etc.)

Date: \_\_\_\_\_  
Family of Resident (Please  
Indicate Relation; e.g Son,  
Daughter, Parent, etc.)

Date: \_\_\_\_\_  
Family of Resident (Please  
Indicate Relation; e.g Son,  
Daughter, Parent, etc.)

Date: \_\_\_\_\_  
Family of Resident (Please  
Indicate Relation; e.g Son,  
Daughter, Parent, etc.)

Date: \_\_\_\_\_  
Family of Resident (Please  
Indicate Relation; e.g Son,  
Daughter, Parent, etc.)

Date: 1/18/10 /s/ Debbie Coleman  
Authorized Representative  
of Facility

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