

No. SD 28737

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IN THE  
MISSOURI COURT OF APPEALS  
SOUTHERN DISTRICT

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BOBBY ROUSE, PLAINTIFF, PATRICIA WARD AND DARRELL WOODS,  
INDIVIDUALLY AND IN THEIR CAPACITY AS PLAINTIFF AD LITEM FOR  
NONA WOODS,

Plaintiffs/Respondents,

v.

NATIONAL HEALTHCARE CORPORATION, ET AL., APPELLANTS.  
CHARLESTON MANOR NURSING, LLC, ET AL.,

Defendants/Appellants

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Appeal from Circuit Court of Dunklin County  
Case No. 05DU-CC00085  
The Honorable Stephen R. Sharp

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APPELLANTS' BRIEF

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES.....iv

JURISDICTIONAL STATEMENT..... 1

FACTUAL BACKGROUND/PROCEDURAL HISTORY ..... 2

STANDARD OF REVIEW..... 4

POINTS RELIED ON ..... 5

ARGUMENT..... 7

**I. THE TRIAL COURT ERRED IN DENYING THE MOTION TO ENFORCE ARBITRATION FILED BY NATIONAL HEALTHCARE CORPORATION, NATIONAL HEALTHCARE, L.P., NHC HEALTHCARE/KENNETT, L.L.C. AND NHC, INC. (HEREAFTER COLLECTIVELY ‘APPELLANTS’ OR ‘NHC’) BECAUSE THE PARTIES ENTERED INTO A VALID, ENFORCEABLE ARBITRATION AGREEMENT IN THAT THE PLAIN LANGUAGE OF THE AGREEMENT SHOWED THE PARTIES INTENDED TO ARBITRATE THIS DISPUTE, THE WAIVER OF A JURY TRIAL WAS CLEAR AND UNMISTAKABLE, THE AGREEMENT IS NOT AN UNCONSCIONABLE CONTRACT OF ADHESION, AND ARBITRATION CAN BE**

	<b>COMPLETED WITHOUT THE NEED TO RE-WRITE THE AGREEMENT.....</b>	<b>7</b>
A.	The Plain Language of the Executed Agreement Establishes the Parties’ Intent to Arbitrate This Dispute .....	7
B.	The Waiver of a Jury Trial was Clear and Unmistakable. ....	9
C.	The Agreement is Not an Unconscionable Contract of Adhesion. ....	11
D.	Arbitration Can Be Compelled Without the Need to Re-Write the Agreement. ....	13
<b>II.</b>	<b>THE TRIAL COURT ERRED IN DENYING NHCS MOTION TO ENFORCE ARBITRATION BECAUSE THE AGREEMENT SHOULD BE ENFORCED UNDER THE FEDERAL ARBITRATION ACT (FAA) IN THAT THE FAA GOVERNS THE AGREEMENT AND PREEMPTS RESTRICTIONS IMPOSED BY STATE LAW.....</b>	<b>14</b>
A.	The Agreement is Governed by the FAA.....	15
B.	The FAA’s Application to Nursing Home Agreements has been Recognized by Courts Throughout the Country. ....	16
C.	The FAA Preempts the Notice Requirement of § 435.460 and Other Restrictions Imposed by State Law.....	19
<b>III.</b>	<b>THE TRIAL COURT ERRED IN DENYING NHCS MOTION TO ENFORCE ARBITRATION BECAUSE THE PARTIES COULD AGREE TO ARBITRATE RESPONDENTS CLAIMS</b>	

<b>IN THAT THE PARTIES AGREED TO ARBITRATE CLAIMS THAT HAD NOT YET ARISEN WHICH INCLUDES DERIVATIVE CLAIMS SUCH AS WRONGFUL DEATH ACTIONS.....</b>	<b>21</b>
A. The Agreement Covers Future Claims.....	22
B. The Missouri Supreme Court and the Wrongful Death Statute Indicate Wrongful Death Claims are Covered Under the Agreement. ....	22
C. No Existing Authority Prevents Compelling Arbitration of Wrongful Death Claims in the Nursing Home Context.....	25
D. Other Jurisdictions have Found Arbitration Agreements Apply to Wrongful Death Claims in the Nursing Home Context. ....	26
E. Public Policy Favors Application of Arbitration Agreements to Wrongful Death Claims.....	29
F. The Agreement Should Apply to Respondent’s Claims Because Respondent Signed the Agreement. ....	30
CONCLUSION .....	32
CERTIFICATE OF SERVICE.....	34
CERTIFICATE OF COMPLIANCE .....	35
APPENDIX .....	A-1

## TABLE OF AUTHORITIES

### Cases:

<u>Allied-Bruce Terminix Co., Inc. v. Dobson</u> , 513 U.S. 265 (1995) .....	15, 18
<u>American Motorists Ins. Co. v. Moore</u> , 970 S.W.2d 876 (Mo. App. E.D. 1998) .....	6, 30
<u>Binkley v. Palmer</u> , 10 S.W.3d 166 (Mo. App. E.D. 1999).....	5, 8
<u>Briarcliff Nursing Home, Inc. v. Turcotte</u> , 894 So.2d 661 (Ala. 2004) .....	17, 26
<u>Bunge Corp. v. Perryville Feed &amp; Produce</u> , 685 S.W.2d 837 (Mo. banc 1985) .....	6, 19, 20, 21
<u>Citizens Bank v. Alafabco, Inc.</u> , 539 U.S. 52 (2003) .....	15, 16
<u>Cleveland v. Mann</u> , 942 So.2d 108 (Miss. 2006).....	6, 27, 28
<u>Del E. Webb Const. v. Richardson Hosp. Authority</u> , 823 F.2d 145 (5th Cir.1987) .....	15
<u>Denton v. Soonattrukal</u> , 149 S.W.3d 517 (Mo. App. S.D. 2004).....	23, 31, 32
<u>Drexel Home, Inc.</u> , 182 N.L.R.B. 1045 (1970) .....	17
<u>Duggan v. Zip Mail Services, Inc.</u> , 920 S.W.2d 200 (Mo. App. E.D. 1996).....	1, 6, 15, 19, 21
<u>Dunn Indus. Group, Inc. v. City of Sugar Creek</u> , 112 S.W.3d 421 (Mo. banc 2003) .....	4, 5, 8, 9
<u>Finney v. National HealthCare Corp.</u> , 193 S.W.3d 393 (Mo. App. S.D. 2006).....	4, 23, 25, 26
<u>Franklin v. Franklin</u> , 858 So.2d 110 (Miss. 2003) .....	29

<u>Gainesville Health Care Center, Inc. v. Weston</u> , 857 So.2d 278 (Fla. Dist. Ct. App. 2003)	
.....	17, 27
<u>Gibson v. Adams</u> , 946 S.W.2d 796 (Mo. App. E.D. 1997)	8
<u>Glen Manor Home for the Jewish Aged v. N.L.R.B.</u> , 474 F.2d 1145 (6th Cir. 1973)	17
<u>Green Tree Fin. Corp. v. Randolph</u> , 531 U.S. 79 (2000)	18
<u>Greenpoint Credit, LLC v. Reynolds</u> , 151 S.W.3d 868 (Mo. App. S.D. 2005)	1
<u>Heartland Health Systems v. Chamberlain</u> , 871 S.W.2d 8 (Mo. App. W.D. 1993)	5, 8
<u>Houlihan v. Offerman &amp; Co., Inc.</u> , 31 F.3d 692 (8th Cir. 1994)	8
<u>Ideal Unlimited Services v. Swift-Eckrich, Inc.</u> , 727 F. Supp. 75 (D.P.R.1989)	15
<u>Kennedy v. State Farm Mut. Auto. Ins.</u> , 986 S.W.2d 936	
(Mo. App. E.D. 1999)	6, 30
<u>Kinzenbaw v. Dir. of Revenue</u> , 62 S.W.3d 49 (Mo. banc 2001)	4
<u>Kirby v. Grand Crowne Travel Network, LLC</u> , 229 S.W.3d 253	
(Mo. App. S.D. 2007)	6, 15, 18, 19
<u>Liberty Financial Management v. Beneficial Data</u> , 670 S.W.2d 40	
(Mo. App. 1984)	11
<u>Ledet v. Living Centers of Texas, Inc.</u> 2004 WL 2945699	
(Tex. App – San Antonio 2004)	27
<u>Malan Realty v. Harris</u> , 953 S.W.2d 624 (Mo. banc 1997)	5, 9, 10
<u>Mariner Healthcare, Inc. v. Green</u> , 2005 WL 1683554 (N.D. Miss. 2005)	17, 27
<u>Mariner Healthcare, Inc. v. King</u> , 2005 WL 1384632 (N. D. Miss. 2005)	17, 27
<u>Mastrobuono v. Shearson Lehman Hutton, Inc.</u> , 514 U.S. 52 (1995)	18

<u>McGuffey Health &amp; Rehabilitation Center v. Gibson</u> , 864 So.2d 1061	
(Ala. 2003).....	17, 27
<u>Mesa Operating Ltd. Partnership v. Louisiana Interstate Gas Corp.</u> , 797 F.2d 238,	
(5th Cir.1986) .....	15
<u>Miller v. Cotter</u> , 863 NE 2d 537, 542 (Mass. March 30, 2001).....	28, 29
<u>Mr. Mudd, Inc. v. Petra Tech, Inc.</u> , 892 S.W.2d 389 (Mo. App. E.D. 1995).....	15, 18
<u>Nexion Health at Humble, Inc.</u> , 173 S.W.3d 67 (Tex. 2005).....	17, 27
<u>Owens v. Coosa Valley Health Care, Inc.</u> , 890 So.2d 983 (Ala. 2004) .....	17, 26
<u>Raper v. Oliver House</u> , 637 S.E.2d 551 (N.C. App. 2006) .....	27
<u>Sandford v. Castleton Health Care Center, L.L.C.</u> , 813 N.E.2d 411	
(Ind. Ct. App. 2004).....	17, 27
<u>Smith v. Kriska</u> , 113 S.W.3d 293 (Mo. App. E.D. 2003) .....	11
<u>Southland Corp. v. Keating</u> , 465 U.S. (1984) .....	5, 6, 9, 19, 20
<u>Sowell v. Dresser Industries, Inc., et al.</u> , 866 S.W.2d 803 (Tx. Ct. App. 1993) .....	29
<u>Starr Elec. Co. v. Basic Const. Co.</u> , 586 F. Supp. 964 (M.D.N.C.1982) .....	15
<u>State ex rel. Burns v. Whittington</u> , 219 S.W.3d 224 (Mo. banc 2007) .....	6, 22, 24, 26, 30
<u>Swain v. Auto Services</u> , 128 S.W.3d 103 (Mo. App. E.D. 2003) .....	7, 11
<u>Triarch Industries, Inc. v. Crabtree</u> , 158 S.W.3d 772 (Mo. banc 2005).....	1
<u>United Steelworkers of America v. Warrior &amp; Gulf Navigation Co.</u> ,	
363 U.S. 574 (1960) .....	9
<u>Vicksburg Partners, LP et al. v. Stephens</u> , 911 So.2d 507 (Miss. 2005).....	16, 27
<u>Whelan Sec. Co., Inc. v. Allen</u> 26 S.W.3d 592 (Mo. App. E.D. 2000).....	12

Wilkerson v. Nelson, 395 F.Supp.2d 281 (M.D. NC 2005)..... 27

Woermann Construction Co. v. Southwestern Bell Telephone Co., 846 S.W.2d 790

(Mo. App. 1993)..... 6, 15, 16, 20, 21

**Statutes:**

9 U.S.C. § 2 ..... 6, 14, 18

9 U.S.C. § 16(a)(1)(B)..... 1

Miss. Code Ann. § 11-7-13 ..... 29

MO. REV. STAT. § 435.440.1 ..... 1

MO. REV. STAT. § 435.460 ..... 14, 20

MO. REV. STAT. § 537.080 ..... 24, 30, 31

MO. REV. STAT. § 537.080.1 ..... 6, 23, 31

MO. REV. STAT. § 537.080.2 ..... 31

MO. REV. STAT. § 537.095.1 ..... 31

MO. REV. STAT. § 537.100 ..... 32

Tex. Civ. Prac. & Rem. Code Ann § 71.001 et al ..... 29

**Other Authorities:**

Missouri Constitution Article 5, Section 3 ..... 2

Missouri Supreme Court Rule 74.01(a)..... 2

Missouri Supreme Court Rule 74.01(b) ..... 2

## JURISDICTIONAL STATEMENT

This appeal arises from the Honorable Stephen R. Sharp, Circuit Court of Dunklin County, 35<sup>th</sup> Judicial Circuit's Order dated September 4, 2007, denying a motion to enforce arbitration filed by appellants National HealthCare Corporation, National Healthcare, L.P., NHC Healthcare/Kennett, L.L.C. and NHC, Inc. (hereafter collectively "Appellants" or "NHC"). The underlying lawsuit is a claim by respondent for alleged negligence and wrongful death resulting from the care provided at NHC Healthcare/Kennett (hereafter "NHC Kennett"), a long-term care facility. Upon admission to the facility the decedent, Nona Woods, signed an admission contract (hereinafter the "Contract") containing an agreement to arbitrate any dispute (hereinafter the "Agreement"). Appellants moved to enforce and compel arbitration pursuant to the Agreement, and respondent opposed the motion. The trial court denied the motion.

The Missouri Uniform Arbitration Act, § 435.440.1 (the "Missouri Act") and the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(B)(the "FAA") provide for an appeal directly from an order denying a motion to compel arbitration. Greenpoint Credit, LLC v. Reynolds, 151 S.W.3d 868, 873 (Mo. App. S.D. 2005); Triarch Industries, Inc. v. Crabtree, 158 S.W.3d 772, 774 (Mo. banc 2005); and Duggan v. Zip Mail Services, Inc., 920 S.W.2d 200, 202 (Mo. App. E.D. 1996). Pursuant to the Missouri Act and the FAA, Appellants filed a timely notice of appeal on September 14, 2007.

On November 1, 2007, this Court issued a *sue sponte* Order questioning its jurisdiction over this appeal and requesting Appellants file suggestions in support of jurisdiction. Specifically, this Court suggested it lacked jurisdiction because the trial

court's order denying NHC's Motion to Enforce Arbitration was not denominated as a "judgment" and the court did not specifically find "there is no just reason for delay."

On November 6, 2007, Appellants filed with the trial court a Motion to Denominate September 4, 2007 Order as "Judgment." (Supp. LF 174). On November 9, 2007, Plaintiff filed a brief opposing appellant's motion. (Supp. LF 179). On November 9, 2007, the Honorable Stephen R. Sharp, Circuit Court of Dunklin County, 35<sup>th</sup> Judicial Circuit signed an order denominating his September 4, 2007 order as a "Judgment" for the purposes of Rule 74.01(a) and specifically found that "there is no just reason for delay" pursuant to Rule 74.01(b). (Supp. LF 186). Therefore, any jurisdictional concerns have been resolved.

This case does not fall within the category of cases over which the Missouri Supreme Court has exclusive jurisdiction, and therefore general appellate jurisdiction is with the Missouri Court of Appeals, Southern District, by virtue of the Missouri Constitution Article 5, Section 3.

### **FACTUAL BACKGROUND/PROCEDURAL HISTORY**

Decedent Nona Woods was admitted to NHC Kennett on May 16, 2003. (LF 18). Prior to admission, Nona Woods executed an "Admission and Financial Contract" (hereinafter the "Contract") containing an agreement to arbitrate any dispute (hereinafter the "Agreement"). (LF 102-114). The Contract was also executed by Ms. Woods's daughter, respondent Bobby Rouse. (LF 108-114). On Page 11 of the Contract, the Section entitled "Binding Arbitration" states:

Any claim, controversy, dispute or disagreement initiated by either party prior to written notice of mediation, shall be resolved by binding arbitration administered by either the American Arbitration Association (AAA) or the American Health Lawyers Association (AHLA), as selected by the party requesting arbitration.

(LF 112). The Contract contains on Page 12 the following provision:

By agreeing to arbitration of all disputes, both parties are waiving a jury trial for all contract, tort, statutory, regulatory, and other claims. The parties agree that this agreement to arbitrate shall survive and not otherwise be revoked by the death or incompetency of patient.

(LF 113). At the end of the Section entitled “Binding Arbitration” the contract states in bold:

**I am in total agreement with the arbitration procedures described above in Section H, including the use where applicable of the AAA defined ‘consumer related disputes.’ The provisions of this Section H have been reviewed with me prior to my signature below.**

(LF 113) (emphasis in original). The decedent and respondent Bobby Rouse’s signatures appear directly below that statement. (LF 113).

Respondent Bobby Rouse, daughter of the decedent Nona Woods, (hereinafter “Respondent”) filed a Petition for negligence and wrongful death on August 18, 2005, alleging that the Defendants’ negligent acts led to the death of her mother on October 19,

2003. (LF 13-38). Appellants answered Respondent's Petition on September 30, 2005. (LF 39-52, 53-66, 67-80, and 81-94).

Appellants then filed their "Memorandum of Law to Enforce Arbitration Clause" on November 7, 2005. (LF 95-114). Respondent opposed the motion by filing "Plaintiff's Memorandum of Law in Opposition to Defendants Motion to Dismiss Pending Arbitration" on January 23, 2006. (LF 115-165). The motion was argued on August 22, 2007. (LF 10). The trial court issued its order denying Appellant's motion to enforce arbitration on September 4, 2007. (LF 59-62). The trial court did not state its reason(s) for the decision. Appellants timely filed a Notice of Appeal on September 14, 2007 (LF 169-172).

### **STANDARD OF REVIEW**

An appellate court's review of a trial court's denial of a motion to compel arbitration is *de novo*. Finney v. National HealthCare Corp., 193 S.W.3d 393 (Mo. App. S.D. 2006) (citing Dunn Indus. Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421, 428 (Mo. banc 2003)). Although the reviewing court should consider the record below, deference should not be given to the trial court's conclusions. Id. (citing Kinzenbaw v. Dir. of Revenue, 62 S.W.3d 49, 52 (Mo. banc 2001)).

The usual rules and canons of contract interpretation govern the subsistence and validity of an arbitration clause. Dunn Indus. Group, 112 S.W.3d at 428 (Mo. banc 2003). Whether a dispute is covered by an arbitration provision is left to the courts as a question of law. Id. "A motion to compel arbitration of a particular dispute should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible

of an interpretation that covers the asserted dispute.” Id. at 429. Doubts as to arbitrability should be resolved in favor of coverage. Id.

### **POINTS RELIED ON**

**I. THE TRIAL COURT ERRED IN DENYING THE MOTION TO ENFORCE ARBITRATION FILED BY NATIONAL HEALTHCARE CORPORATION, NATIONAL HEALTHCARE, L.P., NHC HEALTHCARE/KENNETT, L.L.C. AND NHC, INC. (HEREAFTER COLLECTIVELY ‘APPELLANTS’ OR ‘NHC’) BECAUSE THE PARTIES ENTERED INTO A VALID, ENFORCEABLE ARBITRATION AGREEMENT IN THAT THE PLAIN LANGUAGE OF THE AGREEMENT SHOWED THE PARTIES INTENDED TO ARBITRATE THIS DISPUTE, THE WAIVER OF A JURY TRIAL WAS CLEAR AND UNMISTAKABLE, THE AGREEMENT IS NOT AN UNCONSCIONABLE CONTRACT OF ADHESION, AND ARBITRATION CAN BE COMPLETED WITHOUT THE NEED TO REWRITE THE AGREEMENT.**

*Brinkley v. Palmer*, 10 S.W.3d 166 (Mo. App. E.D. 1999).

*Dunn Industrial Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. banc 2003).

*Heartland Health Systems v. Chamberlain*, 871 S.W.2d 8 (Mo. App. W.D.).

*Malan Realty v. Harris*, 953 S.W.2d 624 (Mo. banc 1997).

*Southland Corp. v. Keating*, 465 U.S. 1 (1984).

**II. THE TRIAL COURT ERRED IN DENYING NHC’S MOTION TO ENFORCE ARBITRATION BECAUSE THE AGREEMENT SHOULD BE**

**ENFORCED UNDER THE FEDERAL ARBITRATION ACT (FAA) IN  
THAT THE FAA GOVERNS THE AGREEMENT AND PREEMPTS  
RESTRICTIONS IMPOSED BY STATE LAW.**

9 U.S.C. §2.

*Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837 (Mo. banc 1985).

*Duggan v. Zip Mail Services, Inc.*, 920 S.W.2d 200 (Mo. App. E.D. 1996).

*Kirby v. Grand Crowne Travel Network, LLC*, 229 S.W.3d 253 (Mo. App. S.D. 2007).

*Southland Corp. v. Keating*, 465 U.S. 1 (1984).

*Woerman Construction Co. v. Southwestern Bell Telephone Co.*, 846 S.W.2d 790 (Mo. App. E.D. 1993).

**III. THE TRIAL COURT ERRED IN DENYING NHCS MOTION TO  
ENFORCE ARBITRATION BECAUSE THE PARTIES COULD AGREE  
TO ARBITRATE RESPONDENTS CLAIMS IN THAT THE PARTIES  
AGREED TO ARBITRATE CLAIMS THAT HAD NOT YET ARISEN  
WHICH INCLUDES DERIVATIVE CLAIMS SUCH AS WRONGFUL  
DEATH ACTIONS.**

*American Motorists Ins. Co. v. Moore*, 970 S.W.2d 876 (Mo. App. E.D. 1998).

*Cleveland v. Mann*, 942 So.2d 108 (Miss. 2006).

*Kennedy v. State Farm Mut. Auto. Ins.*, 986 S.W.2d 936 (Mo. App. E.D. 1999).

MO. REV. STAT. § 537.080.1

*State ex rel. Burns v. Whittington*, 219 S.W.3d 224 (Mo. banc 2007).

## ARGUMENT

The record from the trial court illustrates that the trial court's denial of NHC's Motion and to Enforce Arbitration Clause was erroneous and therefore must be overturned. Appellants present the following Points Relied On.

**I. THE TRIAL COURT ERRED IN DENYING THE MOTION TO ENFORCE ARBITRATION FILED BY NATIONAL HEALTHCARE CORPORATION, NATIONAL HEALTHCARE, L.P., NHC HEALTHCARE/KENNETT, L.L.C. AND NHC, INC. (HEREAFTER COLLECTIVELY "APPELLANTS" OR "NHC") BECAUSE THE PARTIES ENTERED INTO A VALID, ENFORCEABLE ARBITRATION AGREEMENT IN THAT THE PLAIN LANGUAGE OF THE AGREEMENT SHOWED THE PARTIES INTENDED TO ARBITRATE THIS DISPUTE, THE WAIVER OF A JURY TRIAL WAS CLEAR AND UNMISTAKABLE, THE AGREEMENT IS NOT AN UNCONCIONABLE CONTRACT OF ADHESION, AND ARBITRATION CAN BE COMPELLED WITHOUT THE NEED TO RE-WRITE THE AGREEMENT.**

**A. The Plain Language of the Executed Agreement Establishes the Parties' Intent to Arbitrate This Dispute**

If a court determines by ordinary rules of contract interpretation that a valid agreement to arbitrate exists and that the dispute falls within the scope of that agreement, then arbitration must be compelled. Swain v. Auto Services, 128 S.W.3d 103, 106 (Mo. App. E.D. 2003). "A court must compel arbitration if it determines that the parties

agreed to arbitrate the dispute.” Dunn Industrial Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421, 427-28 (Mo. banc 2003), citing Houlihan v. Offerman & Co., Inc., 31 F.3d 692, 694-95 (8th Cir. 1994). Under contract law, it has “long been settled in Missouri that absent a showing of fraud, a party who is capable of reading and understanding a contract is charged with the knowledge of that which he or she signs.” Binkley v. Palmer, 10 S.W.3d 166, 171 (Mo. App. E.D. 1999); Gibson v. Adams, 946 S.W.2d 796 (Mo. App. E.D. 1997). A person is bound by the terms of a contract he signs and he will not be heard to say he was ignorant of its contents and is therefore not bound by its provisions. Heartland Health Systems v. Chamberlain, 871 S.W.2d 8, 10 (Mo. App. W.D. 1993).

The plain language of the executed Agreement covers, “[a]ny claim, controversy, dispute or disagreement.” (LF 112). Moreover, the Agreement specifically provided, “[b]y agreeing to arbitration of all disputes, both parties are waiving a jury trial for all contract, tort, statutory, regulatory, and other claims.” (LF 113). The Contract and the Agreement to arbitrate were executed by decedent Nona Woods on March 11, 2003. (LF 108-114). The plain language of the Agreement states that Respondent’s claims, which are based in tort (negligence) or statutory in nature (wrongful death), are subject to arbitration. (LF 113). Furthermore, “[t]he parties agree that this agreement to arbitrate shall survive and not otherwise be revoked by the death of incompetency of patient.” (LF 113).

“Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of

the very risks the parties, by contracting for arbitration, sought to eliminate.” Southland Corp. v. Keating, 465 U.S. 1, 7 (1984). The Missouri Supreme Court has articulated that motions to compel arbitration should be liberally granted:

Where an arbitration clause is broad and contains no express provision excluding a particular grievance from arbitration, only the most forceful evidence of purpose to exclude the claim from arbitration can prevail. A motion to compel arbitration of a particular dispute should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts as to arbitrability should be resolved in favor of coverage.

Dunn Industrial Group, Inc., 112 S.W.3d at 429 (emphasis added) (citing United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960)).

Because Respondent’s present claims are encompassed by the Agreement, this matter must be sent to arbitration. Therefore, NHC requests this Court reverse the trial court’s denial of NHC’s motion to enforce arbitration and compel arbitration of Respondent’s claims against NHC.

**B. The Waiver of a Jury Trial was Clear and Unmistakable.**

In Malan Realty v. Harris, the Missouri Supreme Court held that a provision waiving a jury trial was enforceable. 953 S.W.2d 624 (Mo. banc 1997). The court said the provision was unambiguous in part because the print size of the waiver provision was the same size as that found throughout the lease, the party opposing its enforcement

signed immediately below the provision in question, which was the only paragraph on the signature page and the provision used clear, unambiguous, and unmistakable language. Id. at 627. In addition, the jury waiver paragraph was enforceable because it was not “buried” in the lease. Id.

Similar to Malan, the print size of the arbitration clause in this case is the same size as the rest of the Agreement, which is approximately the same size as the type in this Motion. (LF 112-113). In addition, the jury waiver paragraph was not “buried” in the contract. It was at the end of the Agreement and required the decedent’s signature immediately at the end of the section. (LF 113). The Agreement contains on Page 12 the following provision: “By agreeing to arbitration of all disputes, both parties are waiving a jury trial for all contract, tort, statutory, regulatory, and other claims. The parties agree that this agreement to arbitrate shall survive and not otherwise be revoked by the death or incompetency of patient.” (LF 113). At the end of the Section entitled “Binding Arbitration” the contract states in bold: **“I am in total agreement with the arbitration procedures described above in Section H, including the use where applicable of the AAA defined ‘consumer related disputes.’ The provisions of this Section H have been reviewed with me prior to my signature below.”** (LF 113). The signatures of both Nona Woods and Respondent appear directly below that statement. (LF 113). As in Malan, the provision is clear, unambiguous, and easy to read. Therefore, as in Malan, the Court should find that the arbitration clause was clear and therefore, enforceable.

**C. The Agreement is Not an Unconscionable Contract of Adhesion.**

In Missouri, an adhesion contract, as opposed to a negotiated contract, has been described as a form contract created and imposed by a stronger party upon a weaker party on a “take this or nothing” basis, the terms of which unexpectedly or unconscionably limit the obligations of the drafting party. Swain v. Auto Services, 128 S.W.3d 103, 107 (Mo. App. E.D. 2003). However, form contracts are not “inherently sinister and automatically unenforceable.” Id. Because the bulk of contracts signed in this country are form contracts – “a natural concomitant of our mass production-mass consumer society” – any rule automatically invalidating adhesion contracts would be “completely unworkable.” Id. Rather, our courts seek to enforce the reasonable expectations of the parties. Id. Because standardized contracts address the mass of users, the test for “reasonable expectations” is objective, addressed to the average member of the public who accepts such a contract, not the subjective expectations of an individual adherent. Id.

An agreement choosing arbitration over litigation, even between parties of unequal bargaining power, is not unconscionably unfair. Id. In order for a court to invalidate a contract for unconscionability, the contract must be one “such as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept on the other.” Id.; Smith v. Kriska, 113 S.W.3d 293 (Mo. App. E.D. 2003); Liberty Financial Management v. Beneficial Data, 670 S.W.2d 40, 49 (Mo. App. 1984).

In Smith v. Kriska, the court held that an employment contract was NOT a contract of adhesion, even though the agreement was a prerequisite to employment. 113

S.W.3d 293 (Mo. App. E.D. 2003). The contract was not one of adhesion because the employee still had the option of foregoing the employment if he did not like the terms of the contract. The court said “because defendant had the option of seeking employment elsewhere, the relative [bargaining power] of the Board does not make the Agreement an adhesion contract or unconscionable.” Id. at 298.

Similarly, in Whelan Sec. Co., Inc. v. Allen, the court rejected the employee's claim that a contract was adhesive because it had not been freely negotiated, even though the employee testified his employer told him he would be fired if he did not sign the contract. 26 S.W.3d 592 (Mo. App. E.D. 2000). The court said that "the fact that an employment contract is a prerequisite to employment does not force the employee to accept and execute it; the employee has the option of foregoing the employment if the terms of the agreement are not satisfactory." Id. at 596.

Respondent cannot argue that the Contract or the Agreement to arbitrate were unconscionable because Nona Woods had no alternative to signing it. Ms. Woods was not obligated to sign the Contract and could have selected another nursing home if she did not want to sign it. She cannot produce sufficient evidence of unfairness. Following precedence, the fact that the contract is a pre-printed form is not enough to invalidate the Agreement to arbitration in the Contract. Therefore, this Court should rule that the Agreement is valid and reverse the trial court's denial of NHC's motion to enforce arbitration.

**D. Arbitration Can Be Compelled Without the Need to Re-Write the Agreement.**

In proceedings below, Respondent argued the Agreement could not be enforced in its present form due to policy changes by the American Arbitration Association (AAA) and the American Health Lawyers Association (AHLA). (LF 122-125). Respondent's argument is based on the language of the Agreement which calls for arbitration to be administered by AAA or AHLA. (LF 113). Respondent cites language from each organization which suggests these organizations no longer accept consumer healthcare liability claims under pre-injury agreements to arbitrate. (LF 123-124). However, Respondent omits relevant language of the AHLA's policy changes which permits the enforcement of the Agreement in its present form.

The AHLA will, in fact, arbitrate claims under pre-injury arbitration agreements when provided under court order. The relevant policy language states:

Effective June 2006, the Service will administer a "consumer health care liability claim" on or after January 1, 2004 only if (1) all of the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the agreement is received by the Service at the time the parties make a request for a list of arbitrators or (2) a judge orders that the Service administer an arbitration under the terms of a pre-injury agreement.

American Health Lawyers Association, Important Rules Amendments (November 3, 2007), at [http://www.healthlawyers.org/PrinterTemplate.cfm?Section=About\\_Arbitration](http://www.healthlawyers.org/PrinterTemplate.cfm?Section=About_Arbitration)

\_and\_Mediation\_Services&Template=/ContentManagement/ContentDisplay.cfm&ContentID=3049.

Therefore, because AHLA will arbitrate claims under pre-injury arbitration agreements pursuant to court order, the terms of the Agreement can be fulfilled without the need for a judicial re-write. Accordingly, NHC requests this Court reverse the trial court's denial of NHC's motion to enforce arbitration.

**II. THE TRIAL COURT ERRED IN DENYING NHC'S MOTION TO ENFORCE ARBITRATION BECAUSE THE AGREEMENT SHOULD BE ENFORCED UNDER THE FEDERAL ARBITRATION ACT (FAA) IN THAT THE FAA GOVERNS THE AGREEMENT AND PREEMPTS RESTRICTIONS IMPOSED BY STATE LAW.**

The trial court erred in denying NHC's motion to enforce arbitration. The Federal Arbitration Act (FAA) specifically provides:

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

9 U.S.C. § 2 (emphasis added).

As detailed below, the Contract and its Agreement to arbitrate is governed by the FAA because the Contract "involves commerce." The FAA's application to nursing home agreements has been recognized by courts throughout the country. Furthermore, the FAA preempts the notice requirement of § 435.460 and other restrictions imposed by

state law. Accordingly, this Court should find the trial court erred in denying NHC's motion to arbitrate and compel arbitration of Respondent's claims against NHC.

**A. The Agreement is Governed by the FAA.**

The FAA's requirement that the contract or transaction involves commerce is a minimal threshold. The United States Supreme Court in Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265, 277 (1995) stated this FAA language should be interpreted "as broadly as the words 'affecting commerce' . . . a full exercise of constitutional power." (Emphasis added). See also Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003); Duggan v. Zip Services, 920 S.W.2d 200, 202 (Mo. App. E.D. 1996); Woerman Construction Co. v. Southwestern Bell Telephone Co., 846 S.W.2d 790 (Mo. App. E.D. 1993); and Mr. Mudd, Inc. v. Petra Tech, Inc., 892 S.W.2d 389 (Mo. App. E.D. 1995).

A contract comes under the Federal Arbitration Act so long as it simply relates to interstate commerce. Woermann, 846 S.W.2d at 792 (citing Del E. Webb Const. v. Richardson Hosp. Authority, 823 F.2d 145, 147 (5th Cir.1987) and Mesa Operating Ltd. Partnership v. Louisiana Interstate Gas Corp., 797 F.2d 238, 243 (5th Cir.1986)). The relationship to commerce need not even be substantial. Id. (citing Del E. Webb, 823 F.2d at 147). A contract involves commerce under the Federal Arbitration Act in situations where materials are purchased from suppliers in other states, where the U.S. Postal System is used, where materials are transported over state borders, or when the contracting parties are from different states. Id. (citing Starr Elec. Co. v. Basic Const. Co., 586 F. Supp. 964, 966 (M.D.N.C.1982); Mesa, 797 F.2d at 243; Ideal Unlimited Services v. Swift-Eckrich, Inc., 727 F. Supp. 75, 76 (D.P.R.1989)).

In Kirby v. Grand Crowne Travel Network, LLC, this Court acknowledged the FAA governs arbitration agreements between parties of different states. 229 S.W.3d 253, 254 (Mo. App. S.D. 2007); see also Woermann, 846 S.W.2d at 243. Likewise, the Contract and the Agreement to arbitrate in the present case “involves commerce” because Decedent and the NHC Defendants are from different states. (LF 14-15). Additionally, some aspect of the supplies used and care provided to Decedent undoubtedly crossed state borders. Therefore, given that courts broadly construe the meaning of “involving commerce,” the Federal Arbitration Act applies to the Agreement.

**B. The FAA’s Application to Nursing Home Agreements has been Recognized by Courts Throughout the Country.**

Courts throughout the country have held that nursing home contracts and agreements to provide nursing services constitute interstate commerce. For instance, the Mississippi Supreme Court has upheld an arbitration agreement in a nursing home wrongful death suit. Vicksburg Partners, LP et al. v. Stephens, 911 So.2d 507 (Miss. 2005). There, in its determination that interstate commerce exists with nursing home admissions agreements so as to come under the purview of the FAA, the court wrote, in pertinent part,

Singular agreements between care facilities and care patients, when taken in the aggregate, affect interstate commerce. As stated in [*Citizens Bank v. Alafabco*], “only the general practice need bear on interstate commerce in a substantial way” . . . Thus, since the arbitration clause is part of a contract

(a nursing home admissions agreement) evidencing interstate commerce, the Federal Arbitration Act is applicable.

Id. at 5.

Similarly, the Texas Supreme Court held in In re Nexion Health at Humble, Inc., 173 S.W.3d 67 (Tex. 2005) that the FAA “extends to any contract affecting commerce, as far as the Commerce Clause of the United States Constitution will reach,” and determined Medicare funds crossing state lines constitutes interstate commerce. See also Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004); McGuffey Health & Rehabilitation Center v. Gibson, 864 So.2d 1061 (Ala. 2003); Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983 (Ala. 2004) (Alabama Supreme Court noted in relevant part that the underlying transaction at hand, the nursing home care to the resident “involve[d] interstate commerce under the FAA” and “furthermore, if there were any doubt as to whether providing nursing-home services to [resident] involved interstate commerce, that doubt would be put to rest by the fact that the transaction is unquestionably economic in nature”); Sandford v. Castleton Health Care Center, L.L.C., 813 N.E.2d 411 (Ind. Ct. App. 2004) (court enforced FAA arbitration agreement); Gainesville Health Care Center, Inc. v. Weston, 857 So.2d 278 (Fla. Dist. Ct. App. 2003) (arbitration agreement enforced where court noted agreement is applicable under FAA or state arbitration act); Mariner Healthcare, Inc. v. Green, 2005 WL 1683554 (N.D. Miss. 2005); and Mariner Healthcare, Inc. v. King, 2005 WL 1384632 (N. D. Miss. 2005). See also Drexel Home, Inc., 182 N.L.R.B. 1045, 1046 (1970) and Glen Manor Home for the Jewish Aged v. N.L.R.B., 474 F.2d 1145, 1149 (6th Cir. 1973) (two National Labor

Relations Board decisions finding that nursing home operations affect interstate commerce).

To reiterate, the interstate commerce threshold is minimal. Allied-Bruce v. Terminix Co., Inc. v. Dobson, 513 U.S. 265 (1995); see also Mr. Mudd, Inc. v. Petra Tech, Inc., 892 S.W.2d 389 (Mo. App. E.D. 1995) (FAA arbitration agreement enforced where out-of-state corporation satisfied minimal criteria for interstate commerce threshold). As the FAA governs the Agreement, this Court should honor the national policy favoring arbitration and enforce the Agreement. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995). The FAA provides that an agreement to submit a “controversy” to arbitration “shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The enforceability of arbitration agreements extends to statutory claims. The U.S. Supreme Court has held that, generally, “federal statutory claims can be appropriately resolved through arbitration.” Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 89 (2000).

The Trial Court in this matter denied NHC’s Motion to Enforce Arbitration Agreement without any specific finding that any contract defense at common law, such as fraud, duress, or unconscionability applied to the Agreement. (LF 168). As there is no such finding by the Trial Court, the Agreement is necessarily enforceable under the FAA, and the Trial Court erred in failing to compel arbitration.

**C. The FAA Preempts the Notice Requirement of § 435.460 and Other Restrictions Imposed by State Law.**

The FAA “creates a body of federal substantive law that applies in both state and federal courts.” Kirby v. Grand Crowne Travel Network, LLC, 229 S.W.3d 253, 254 (Mo. App. S.D. 2007). In Kirby, this Court recognized the FAA’s preemption of Missouri law. Id. The plaintiffs in Kirby argued that a contract containing an arbitration provision was invalid under various Missouri statutory provisions. Id. This Court found because the FAA applied to the arbitration agreement, the arbitration was “mandated by a preemptive federal law.” Id. at 255. Accordingly, Missouri statutory provisions “cannot be applied to circumvent a FAA-enforceable arbitration agreement.” Id. This Court reversed a trial court’s denial of the defendant’s motion to compel arbitration with instructions to stay the proceedings pending arbitration. Id. See also Bunge Corp. v. Perryville Feed & Produce, Inc., 685 S.W.2d 837 (Mo. banc 1985), Duggan v. Zip Mail Services, Inc., 920 S.W.2d 200 (Mo. App. E.D. 1996), and Southland Corp. v. Keating, 465 U.S. 1 (1984).

In Southland Corp., the United States Supreme Court determined a California statute precluding arbitration in franchise agreements violated the Supremacy Clause of the United States Constitution. Southland Corp., 465 U.S. at 16. Discussing the FAA’s authority which is based on Congress’ plenary power under the Commerce Clause, the court wrote,

We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a

written maritime contract or contract evidencing a transaction involving commerce and such clauses may be revoked upon grounds as exist at law or in equity for the revocation of any contract. We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under State law.

*Id.* at 10-11(emphasis added) (internal quotes omitted).

In the proceedings below, Respondent asserted that the Agreement is unenforceable because it failed to comply with various state law restrictions, including the notice requirement of § 435.460. (LF 119). This notice requirement stems from Missouri’s Uniform Arbitration Act which requires that arbitration agreements “shall include adjacent to, or above, the space provided for signatures a statement, in ten point capital letters, which read substantially as follows: ‘THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.’” MO. REV. STAT. § 435.460.

However, Respondent will not succeed in her argument because § 435.460 is effectively pre-empted when the Federal Arbitration Act applies. See Woermann Construction Co. v. Southwestern Bell Telephone Co., 846 S.W.2d 790, 793 (Mo. App. 1993). The requirement of § 435.460 does not have a counterpart in the Federal Arbitration Act. *Id.* at 792. All that is required under the Federal Arbitration Act is language sufficient for an ordinarily written contract. Bunge Corp. v. Perryville Feed & Produce, 685 S.W.2d 837, 839 (Mo. banc 1985). As such, a contract which does not comply with § 435.460 would appear to be invalid under Missouri law and yet valid

under federal law. Woermann, 846 S.W.2d at 793. However, “[a]ny requirement of state law which adds a burden not imposed by Congress is in derogation of the Congressional power, and *pro tanto* invalid.” Bunge, 685 S.W.2d at 839.

Addressing this very issue, the Missouri Court of Appeals has held that when the Federal Arbitration Act applies, Missouri’s Uniform Arbitration Act is pre-empted and the arbitration agreement cannot be invalidated for failure to comply with section 435.460. Woermann Construction Co. v. Southwestern Bell Telephone Co., 846 S.W.2d 790, 793 (Mo. App. 1993). Therefore, Respondent’s argument that the agreement did not comply with § 435.460 will be unsuccessful.

*Stare decisis* requires this Court follow binding authority such as Bunge Corp. and Duggan to enforce the Agreement. The trial court’s denial must be reversed and NHC’s Motion to Enforce Arbitration must be granted and this matter referred to arbitration in accordance with the Agreement. Missouri courts have held that the FAA preempts state arbitration acts. Therefore, under the FAA and the broad Federal policy favoring the enforcement of arbitration agreements, the trial court erred in refusing to grant NHC’s Motion to Enforce Arbitration.

**III. THE TRIAL COURT ERRED IN DENYING NHCS MOTION TO ENFORCE ARBITRATION BECAUSE THE PARTIES COULD AGREE TO ARBITRATE RESPONDENT’S CLAIMS IN THAT THE PARTIES AGREED TO ARBITRATE CLAIMS THAT HAD NOT YET ARISEN WHICH INCLUDES DERIVATIVE CLAIMS SUCH AS WRONGFUL DEATH ACTIONS.**

**A. The Agreement Covers Future Claims**

One of the purposes of an arbitration clause is to provide a forum in which potential claims, which have yet to arise, will be adjudicated. There is no requirement that a claim be already in existence before one can agree to arbitration.

The language of the Agreement is broad. It expressly applies to “[a]ny claim, controversy, dispute or disagreement initiated by either party.” (LF 112). The terms of the Agreement clearly include any claims between the parties concerning the care provided to decedent Nona Woods and expressly includes “all contract, tort, statutory, regulatory, and other claims.” (LF 113). Furthermore, the Agreement specifically provides the “agreement to arbitrate shall survive and not otherwise be revoked by the death or incompetency of patient.” (LF 113).

**B. The Missouri Supreme Court and the Wrongful Death Statute Indicate Wrongful Death Claims are Covered Under the Agreement.**

The plain language of the wrongful death statute and Missouri precedent establishing that a wrongful death claim is a derivative claim. A claim cannot be both independent and derivative. The Missouri Supreme Court in State ex rel Burns v. Whittington, 219 S.W.3d 224 (Mo. banc 2007) (discussed *infra*) has recently reaffirmed the derivative nature of a wrongful death claim, and that Court’s holding cannot be ignored. Further, the wrongful death statute provides in relevant part:

“Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance **which, if death had not ensued, would have entitled such person to recover damages in respect thereof**, the person

or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured, which damages may be sued for”

MO. REV. STAT. § 537.080.1 (emphasis added). The statute by its plain language provides for a cause of action only if the injured party would have been entitled to bring a claim had the injured party survived. The wrongful death claimants have a claim that is derivative of the claim that the decedent would have had, had she survived. The wrongful death claimant does not ascend to rights greater than the decedent.

A wrongful death claim is a creature of statute. Finney v. National Healthcare Corp., 193 S.W.3d 393, 395 (Mo. App. S.D. 2006); Denton v. Soonattrukal, 149 S.W.3d 517, 520 (Mo. App. S.D. 2004) (“Wrongful death is a statutory cause of action.”) Pursuant to the language of the Agreement, Decedent agreed to arbitrate any claim they may have for all claims – including those arising in tort or statute. (LF 113). The agreement covers claims that have not yet arisen, including wrongful death claims.

The wrongful death claim is derivative of any claim for negligence or malpractice that decedent may have had while living. Respondent’s wrongful death claim arises from the death of Nona Woods and is derivative of the claim that Ms. Woods may have brought while living for personal injury or negligence. While the cause of action is created upon the death of the decedent, this does not foreclose the arbitrability of a wrongful death claim. The plain language of the statute illustrates that a plaintiff, as identified in MO. REV. STAT. § 537.080.1(1-3), is entitled to sue a defendant, as identified in MO. REV. STAT. §537.080.1, for the death of decedent “which results from any act,

conduct, occurrence, transaction, or circumstance.” MO. REV. STAT. §537.080. Respondent has no greater action under the Missouri wrongful death statute than decedent would have possessed but for the death. See MO. REV. STAT.. § 537.080. The wrongful death cause of action is inherently derivative and codified as such.

Recently, the Missouri Supreme Court in State ex rel. Burns v. Whittington, again recognized the derivative nature of a wrongful death claim: “Although death is the necessary final event in a wrongful death claim, the cause of action is derivative of the underlying tortious acts that cause the fatal injury.” 219 S.W.3d at 225. The Missouri Supreme Court went on to conclude that the husband’s pre-death negligence claim, and the wife’s post-death wrongful death claim, were the same “cause of action” as they stemmed from the same group of operative facts. Id. Similarly here, Decedent’s negligence claim, had she survived, and Respondents’ wrongful death claim stem from the same set of operative facts, and are thus properly considered the same cause of action.

Because Decedent agreed to arbitrate all claims, she could not have litigated this cause of action. Accordingly, Respondent’s wrongful death claim should likewise be subject to arbitration. Respondent does not have more rights than Decedent as Respondent’s wrongful death claim is derivative in nature.

Respondent is bound by the Agreement. Therefore, this Court must enforce the arbitration agreement.

C. **No Existing Authority Prevents Compelling Arbitration of Wrongful Death Claims in the Nursing Home Context**

Existing Missouri jurisprudence provides very little guidance on the issue of the enforcement of arbitration agreements for wrongful death claims in nursing home context. The undersigned counsel is aware of only one case to have broached this issue. In Finney v. National Healthcare Corp., this Court found no prior cases addressing the enforcement of arbitration agreements for wrongful death claims in the nursing home context. 193 S.W.3d 393, 394 (Mo. App. S.D. 2006) (“we agree with the trial court that there is no Missouri case directly on point”).

In Finney, the decedent’s granddaughter executed a nursing home contract on behalf of decedent which contained an arbitration clause. Id. Decedent’s daughter, who was neither a party nor a signatory to the contract, later brought a wrongful death action. Id. This Court affirmed the trial court’s denial of defendant’s motion to enforce arbitration reasoning (1) decedent’s daughter was not a signatory to the contract and therefore should not be bound by its arbitration provision, and (2) a wrongful death claim is “new” cause of action, separate from a negligence claim which may have been brought by decedent prior to her death. Id. at 396-97.

Finney is inapplicable to the present action in both respects. First, while Respondent may not have been a party to the agreement, she was a signatory. Respondent’s initials and signature are included throughout the executed agreement. (LF 108-114). At the end of the Section entitled “Binding Arbitration” the Agreement states in bold: “I am in total agreement with the arbitration procedures described above in

Section H, including the use where applicable of the AAA defined ‘consumer related disputes.’ The provisions of this Section H have been reviewed with me prior to my signature below.” (LF 113). Respondent’s signature appears directly below that statement. (LF 113). Because Respondent is a signatory to the Agreement, this case presents a situation expressly left unaddressed by the Finney court. See Finney, 193 S.W.3d at 394 (“Our resolution of this matter is based upon the enforceability of this contract as to Respondent and does not address the supposition that a wrongful death action brought by a signatory to the contract may be the subject of an arbitration clause.”).

Furthermore, in Finney, this Court did not have the benefit of the Missouri Supreme Court’s guidance in State ex rel. Burns v. Whittington, 219 S.W.3d 224 (Mo. banc 2007) (discussed *supra*), handed down a year later, which emphasized the derivative nature of wrongful death claims and concluded wrongful death claims are not independent from a cause of action in tort for the underlying allegedly negligent conduct.

**D. Other Jurisdictions have Found Arbitration Agreements Apply to Wrongful Death Claims in the Nursing Home Context.**

In addition to the plain language of the executed Agreement and binding precedent from the Missouri Supreme Court, persuasive authority also demonstrates that sister courts enforce arbitration agreements in nursing home, wrongful death cases. For example, in Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004), the Supreme Court of Alabama specifically rejected arguments that FAA arbitration agreement was not enforceable simply because the wrongful death claim is statutory and

not a creature of common law. In Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983 (Ala. 2004), the Supreme Court of Alabama enforced FAA arbitration agreement where resident's guardian admitted resident and executed arbitration agreement. The Owens court rejected plaintiff's argument which "asks us to adopt a *per se* rule that would find unconscionable any arbitration agreement involving a nursing home and an elderly patient in poor health." Id. at 989. Also, in In re Nexion Health at Humble, Inc., 173 S.W.3d 67 (Tex. 2005), the Texas Supreme Court, in a wrongful death suit against a nursing home, acknowledged the FAA preempts the Texas Arbitration Act and enforced arbitration against widow. In Raper v. Oliver House, 637 S.E.2d 551 (N.C. App. 2006), the court enforced the arbitration agreement in a wrongful death case against the plaintiff who had signed as decedent's attorney-in-fact. For additional examples, see also McGuffey Health & Rehabilitation Center v. Gibson, 864 So.2d 1061 (Ala. 2003); Sandford v. Castleton Health Care Center, L.L.C., 813 N.E.2d 411 (Ind. Ct. App. 2004); Gainesville Health Care Center, Inc. v. Weston, 857 So.2d 278 (Fla. Dist. Ct. App. 2003); Mariner Healthcare, Inc. v. Green, 2005 WL 1683554 (N.D. Miss. 2005); Mariner Healthcare, Inc. v. King, 2005 WL1384632 (N. D. Miss. 2005); Vicksburg Partners, L.P. v. Stephens, 911 So.2d 507 (Miss. 2005); and Ledet v. Living Centers of Texas, Inc., 2004 WL 2945699 (Tex. App.-San Antonio 2004).

Respondent's claims are derivative "because wrongful death actions exist if and only if the decedent could have maintained an action for negligence or some other misconduct if she had survived." Wilkerson v. Nelson, 395 F.Supp.2d 281, 288 (M.D. NC 2005). The Mississippi Supreme Court has recently confronted this issue, and

particularly the issue of whether the arbitration agreement is binding on the wrongful death beneficiaries/claimants. In Cleveland v. Mann, 942 So.2d 108 (Miss. 2006), the court concluded that the arbitration agreement was binding, despite that fact that the wrongful death claimants had not signed the agreement. The court noted that the death of a party to an arbitration agreement does not invalidate the agreement, and that the agreement can be binding on heirs, successors, and administrators. Id. at 118. The court also properly recognized the derivative nature of a wrongful death claim: “Wrongful death is not a tort, but rather a cause of action based upon an underlying tort that must have been committed against the decedent, resulting in the decedent’s death.” Id. This Court should adopt the well-reasoned logic of the Mississippi Supreme Court, which concluded as follows:

[A] wrongful death beneficiary is only allowed to bring claims that the decedent could have brought had the decedent survived. Since the beneficiaries may only bring claims the decedent could have brought had the decedent survived, logic requires us to conclude that the converse is true, that is, the decedents may NOT bring claims the decedent could not have brought, had the decedent survived.

Id. at 118-119 (emphasis in original). Because wrongful death claims in Missouri are derivative, the same logic applies.

The Supreme Judicial Court of Massachusetts recently upheld a nursing home arbitration agreement, where decedent’s son brought an action for negligence; willful, wanton, and reckless conduct; and wrongful death. See Miller v. Cotter, 863 N.E.2d 537, 542 (Mass. March 30, 2007). The court noted the national policy in favor of arbitration expressed in the Federal Arbitration Act, and that agreements to arbitrate are enforceable

unless subject to attack under grounds that existed at common law, such as fraud, duress, or unconscionability. Id. at 543. The only defense at issue was unconscionability. The court found “nothing in the circumstances of an ordinary admission to a nursing home that would suggest unfairness or oppression necessary to support a claim of procedural unconscionability.” Id. at 546.

In the absence of binding precedent on point, NHC respectfully requests that this Court consider the reasoning of courts from other jurisdictions. State courts around the country are enforcing arbitration agreements in wrongful death suits regardless of who possesses the cause of action. Wrongful death claims in Texas and Mississippi (two jurisdictions cited above for enforcing arbitration agreements in nursing home wrongful death claims) like Missouri, do not belong to decedent’s estate. See Tex. Civ. Prac. & Rem. Code Ann § 71.001 *et al.* and Sowell v. Dresser Industries, Inc., et al., 866 S.W.2d 803 (Tx. Ct. App. 1993); Miss. Code Ann. § 11-7-13 and Franklin v. Franklin, 858 So.2d 110 (Miss. 2003). This underscores that ownership of the cause of action is irrelevant. Regardless of who possesses the state statutory cause of action for wrongful death, the courts strictly enforce arbitration agreements.

**E. Public Policy Favors Application of Arbitration Agreements to Wrongful Death Claims.**

It would be unworkable, as a matter of policy, for courts to require that upon admittance to a long-term care facility, the facility obtain the signatures of any individual who might later bring a claim on his or her behalf. This Court should not require a perspective resident to obtain the signatures of any and all family members, friends, and

acquaintances who might have any cause of action. This requirement is unduly burdensome. Such a holding would require the resident, or the facility, to obtain the signatures of any and all individuals who fall under the Missouri wrongful death statute and the signature of all individuals who might be able to assert any “contract, tort, statutory, regulatory, and other claims.” (See CF 113).

Additionally, it would be unworkable as a matter of policy if courts were to enforce arbitration agreements as to claims of personal injury or negligence, but refuse to enforce arbitration agreements as to the derivative claim of wrongful death. One of the purposes of arbitration is to provide a more expedient and less expensive forum for the resolution of claims. In many instances, a petition contains claims for both negligence and wrongful death. Refusal to enforce the arbitration agreement could result in personal injury claims being sent to arbitration, and wrongful death claims being heard in court. Such a result would impede the purpose of arbitration and would frustrate the agreement of the parties.

**F. The Agreement Should Apply to Respondent's Claims Because Respondent Signed the Agreement.**

Even if this Court holds contrary to the authority cited above and concludes arbitration agreements should not usually apply to wrongful death actions, it should still bar Respondent's litigation of this matter because she signed the Agreement.

This Agreement is signed by decedent's daughter, a member of the class pursuant to MO. REV. STAT. § 537.080 who is entitled to bring a claim for wrongful death. In the Agreement, the parties agreed the “agreement to arbitrate shall survive and not otherwise

be revoked by the death or incompetency of patient.” (LF 113). Under Missouri law, wrongful death claims are derivative. State ex rel. Burns; see also Kennedy v. State Farm Mut. Auto. Ins., 986 S.W.2d 936, 937 (Mo. App. E.D. 1999); American Motorists Ins. Co. v. Moore, 970 S.W.2d 876 (Mo. App. E.D. 1998). The Agreement clearly included those individuals who derived their claim from the resident, and also included children or legal representatives of the resident.

To the extent that this Court should find that the wrongful death claim belonged to the class under MO. REV. STAT. § 537.080, that class, through one of its members (Bobby Rouse) agreed to arbitrate the claim. There may be only one action brought under the wrongful death statute. MO. REV. STAT. § 537.080.2 (“Only one action may be brought under this section against any one defendant for the death of any one person.”). Any one class member is entitled to bring suit or to compromise or settle the wrongful death claim. MO. REV. STAT. § 537.095.1 (“if two or more persons are entitled to sue for and recover damages as herein allowed, then any one or more of them may compromise or settle the claim for damages with approval of any circuit court, or may maintain such suit and recover such damages without joinder therein”). In this instance, a class member, Bobby Rouse, agreed to arbitrate the claim.

Respondents Patricia Ward and Darrell Woods cannot avoid the valid arbitration agreement by contending that he did not sign the agreement. Their sister, Respondent Bobby Rouse signed the arbitration agreement. Respondent, Ms. Ward and Mr. Woods are members of the class entitled to bring a wrongful death claim under MO. REV. STAT. § 537.080.1. Either Ms. Ward or Mr. Woods is authorized by statute, with approval of

the court, to settle or compromise the claim. MO. REV. STAT. § 537.095.1. There may be only one action under the statute. MO. REV. STAT. § 537.080.2. Regardless of the specific plaintiff bringing the claim, it remains the same cause of action. See Denton v. Soonattrukal, 149 S.W.3d 517, 522 (Mo. App. S.D. 2004) (noting that “the one indivisible cause of action [under § 537.080] remains the same whether enforceable by the surviving spouse, by the minor child or children, or by the others named in the statute.”) The Denton court went on to conclude that Thelma Denton, who originally filed the wrongful death action, and her sister Betty Conley-Denton, who refiled after the voluntary dismissal of the first action, were the same plaintiff for purposes of the savings statute, MO. REV. STAT. § 537.100. Accordingly, as Respondent, Ms. Ward, and Mr. Woods are the same plaintiff under the law, bringing the same cause of action, the signature of Respondent, evidencing her agreement to arbitration, is effective against her, Ms. Ward, Mr. Woods, and any other member of the class entitled to pursue the wrongful death claim.

Accordingly, the trial court erred in failing to enforce the arbitration agreement.

### **CONCLUSION**

For all the reasons cited in Appellant’s Brief, NHC requests this Court reverse the trial court’s denial of NHC’s motion to compel arbitration and enforce arbitration pursuant to the executed Agreement.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing was sent by United States mail, postage pre-paid, this \_\_\_\_ day of \_\_\_\_\_, 2008, to following counsel of record:

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Missouri Rule of Civil Procedure 84.06(c), the undersigned attorney certifies that:

1. This brief includes the information required by Missouri Rule of Civil Procedure 55.03.
2. This brief complies with Missouri Rule of Civil Procedure 84.06(b).
3. This brief contains approximately 9,398 words according to the Word Count feature of Microsoft Word.
4. The submitted disk has been scanned for viruses and is virus-free.

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**APPENDIX**

1.	Order dated September 4, 2007 .....	A-2
2.	Order and Judgment dated November 9, 2007 .....	A-3
3.	Admission and Financial Contract (with Arbitration Agreement).....	A-5
4.	MO. REV. STAT.. § 537.080 .....	A-18
5.	MO. REV. STAT. § 537.095 .....	A-19
6.	9 U.S.C. § 2 .....	A-21