No. 89291

IN THE

SUPREME COURT OF MISSOURI

DALE LAWRENCE, individually and
As the personal representative of the estate of DOROTHY LAWRENCE
Plaintiff/Respondent,

v.

BEVERLY MANOR, a Missouri corporation,
Defendant/Appellant.

APPELLANT'S SUBSTITUTE BRIEF

Appeal from the Circuit Court of Jackson County, Division 18;
Honorable Jon R. Gray; Cause No. 04CV237251

After Opinion by the Missouri Court of Appeals
Western District; Cause No. WD67920

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JURISDICTIONAL STATEMENT

Jurisdiction is proper pursuant to Missouri Constitution Article 5, Section 10. This appeal arises from the Honorable Jon R. Gray, Circuit Court of Jackson County, 16th Judicial Circuit's Order of January 5, 2007, denying appellant Beverly Manor's motion to enforce its agreement with respondent and compel arbitration. The underlying lawsuit is a claim by respondent for alleged negligence and wrongful death as a result of care provided at Beverly Healthcare-Maryville (hereafter "Beverly Manor"), a long-term care facility. The nursing home admission agreement contained a mandatory arbitration clause. Appellant 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, section 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). Specifically, MO. REV. STAT. § 435.440.1(1) provides that an appeal may be taken from an order denying an application to compel arbitration. Section 435.440 is a "special statute" that takes precedent over Missouri Rule of Civil Procedure 74.01, and an order denying a motion to compel arbitration need not be denominated a "judgment" in order to be appealable. See Jackson County v. McClain Enterprises, Inc., 190 S.W.3d 633 (Mo. App. W.D. 2006). Additionally, an order denying a motion to compel arbitration need not dispose of all

parties and issues as is generally required by Rule 74.01 to be appealable. See Whitney v. Alltel Communications, Inc., 173 S.W.3d 300, 306 (Mo. App. W.D. 2005).

After the notice of appeal was docketed, the Court of Appeals issued a letter to counsel requesting that the parties address the issue of whether an "order" denying a motion to compel arbitration was properly appealable, or whether the "order" must be denominated a "judgment" in light of recent Missouri Supreme Court precedent. Counsel were invited to submit suggestions addressing this issue, and/or file the judgment. Appellant Beverly Manor filed Suggestions in the Court of Appeals on February 8, 2007, and sought to move the Circuit Court to denominate its January 5, 2007 "Order" as a "Judgment." The Circuit Court entered a "Judgment" on February 9, 2007, and that Judgment was filed with the Court of Appeals and is included in the Legal File. (LF 73). Thereafter, the Court of Appeals issued correspondence stating that this "appeal will proceed in the normal course." Therefore, any jurisdictional concerns of the Court of Appeals were resolved.

On March 18, 2008, the Missouri Court of Appeals, Western District, issued its opinion. On April 2, 2008, Appellant timely filed with the Court of Appeals, Western District, an Application for Transfer to this Court pursuant to Rule 83.02. The Court of Appeals denied Appellant's Application for Transfer on April 29, 2008. On May 9, 2008, Appellant timely filed its Application for Transfer with this Court pursuant to Rule 83.04, which was granted on June 24, 2008. Accordingly, this Court has Jurisdiction pursuant to Missouri Constitution Article 5, Section 10.

FACTUAL BACKGROUND/PROCEDURAL HISTORY

Decedent Dorothy Lawrence was admitted to Beverly Manor on March 27, 2003. (LF 67). Prior to admission, Phyllis Skoglund, Decedent's daughter, executed a "Resident and Facility Arbitration Agreement"(hereinafter the "Agreement"). (LF 31-33). Ms. Skoglund had authority to sign on behalf of Decedent pursuant to a grant of durable power of attorney that had been established on July 8, 1992. (LF 42-45). This Agreement clearly stated at the top of page one: "NOT A CONDITION OF ADMISSION – READ CAREFULLY". (LF 31). The Agreement additionally provided that the parties agree it "evidences a transaction in interstate commerce governed by the Federal Arbitration Act". (LF 31). The Agreement further provided that "any and all claims, disputes, and controversies" would be resolved by binding arbitration and "not by lawsuit or resort to court process". (LF 31). The Agreement further provided, in all capital letters, and in bold:

> **THE PARTIES UNDERSTAND AND AGREE THAT THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES, AND THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT, THE PARTIES ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES.**

(LF 32). Ms. Skoglund signed this Agreement. (LF 33).

Plaintiff Dale Lawrence, son of the decedent Dorothy Lawrence, (hereinafter "Plaintiff" or "Respondent") filed a Petition for wrongful death on December 23, 2004, alleging that Appellant's negligent acts led to the death of Dorothy Lawrence on March 31, 2003. Plaintiff thereafter filed a Second Amended Petition in April 2005, and served this Defendant, Beverly Manor on or about December 13, 2005. (LF 66). Beverly Manor answered the Second Amended Petition on December 27, 2005. Plaintiff then filed a Third Amended Petition, the operative pleading, and Beverly Manor answered on May 15, 2006. (See LF 8 & 17).

Beverly Manor then filed its "Motion and Memorandum of Law to Enforce Arbitration Agreement" on or about June 30, 2006. (LF 24). Plaintiff opposed the motion by filing "Suggestions in Opposition to Defendant's Motion to Enforce Arbitration" on July 10, 2006. (LF 35) Beverly Manor filed a reply (LF 40) and Plaintiff filed a surreply (LF 47). The Motion was discussed at a case management conference on August 21, 2006, but not fully heard and submitted[1]. The motion was then argued on October 31, 2006. (TR 1-3). The trial court issued its order denying Beverly Manor's motion to enforce arbitration on January 5, 2007. (LF 59-62). Beverly Manor timely filed a Notice of Appeal on January 12, 2007 (LF 64-65), and this appeal ensues.

On appeal, after the parties submitted briefs and appeared for oral argument, the Missouri Court of Appeals, Western District, issued its opinion on March 18,

[1] No transcript is available of this hearing.

2008, affirming the trial court's denial of Appellant's motion to enforce the parties' arbitration agreement. In its opinion, The Court of Appeals recognized, pursuant to State ex rel. Burns v. Whittington, 219 S.W.3d 224 (Mo. banc 2007), that wrongful death claims are derivative in nature and subject to an applicable arbitration agreement executed by a claimant's decedent prior to his death. Lawrence, 2008 WL 731561 at *4. The Court of Appeals erroneously concluded, however, that Burns should not be retroactively applied to the arbitration agreement in this action. Id. at *5.

On April 2, 2008, Appellant timely filed with the Court of Appeals, Western District, an Application for Transfer to this Court pursuant to Rule 83.02. The Court of Appeals denied Appellant's Application for Transfer on April 29, 2008. On May 9, 2008, Appellant timely filed its Application for Transfer with this Court pursuant to Rule 83.04, which was granted on June 24, 2008.

STANDARD OF REVIEW

An appellate court's review of a trial court's denial of a motion to compel arbitration is *de novo*. 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. Finney v. National HealthCare Corp., 193 S.W.3d 393 (Mo. App. S.D. 2006).

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 BEVERLY MANOR'S MOTION TO ENFORCE ARBITRATION BECAUSE THE PARTIES ENTERED INTO A VALID, ENFORCEABLE ARBITRATION AGREEMENT IN THAT THE PLAIN LANGUAGE OF THE AGREEMENT SHOWED THE PARTIES INTENDED TO ARBITRATE THEIR DISPUTE AND TO DO SO PURSUANT TO THE FEDERAL ARBITRATION ACT.

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

Dunn Industrial Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421, 427-28 (Mo. banc 2003)

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

9 U.S.C. § 2 *et seq.*

II. THE TRIAL COURT ERRED IN DENYING BEVERLY MANOR'S MOTION TO ENFORCE ARBITRATION BECAUSE THE PARTIES ENTERED INTO A VALID, ENFORCEABLE ARBITRATION AGREEMENT IN THAT DECEDENT'S DAUGHTER, PHYLLIS

SKOGLUND, SIGNED THE ARBITRATION AGREEMENT PURSUANT TO A DURABLE POWER OF ATTORNEY.

Ledet v. Living Centers of Texas, Inc., 2004 WL 2945699 (Tex.App.- San Antonio 2004)

Miller v. Cotter, 863 N.E.2d 537, 542, 543, 546 (Mass. March 30, 2007)

MO. REV. STAT. § 431.061

MO. REV. STAT. § 404.700 *et. seq.*

III. THE TRIAL COURT ERRED IN FAILING TO ENFORCE THE ARBITRATION AGREEMENT BECAUSE THE ARBITRATION AGREEMENT APPLIES TO RESPONDENT'S CLAIM IN THAT DOROTHY LAWRENCE AGREED TO ARBITRATE ALL CLAIMS ARISING OUT OF ANY HEALTHCARE PROVIDED BY BEVERLY MANOR AND RESPONDENT'S WRONGFUL DEATH CLAIM IS DERIVATIVE OF THE CLAIM DOROTHY LAWRENCE COULD HAVE BROUGHT.

MO. REV. STAT. § 537.080

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

Sumners v. Sumners, 701 S.W.2d 720, 723 (Mo. banc 1985)

Trout v. State, 231 S.W.3d 140 (Mo. banc 2007)

ARGUMENT

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

I. THE TRIAL COURT ERRED IN DENYING BEVERLY MANOR'S MOTION TO ENFORCE ARBITRATION BECAUSE THE PARTIES ENTERED INTO A VALID, ENFORCEABLE ARBITRATION AGREEMENT IN THAT THE PLAIN LANGUAGE OF THE AGREEMENT SHOWED THE PARTIES INTENDED TO ARBITRATE THEIR DISPUTE AND TO DO SO PURSUANT TO THE FEDERAL ARBITRATION ACT.

The trial court erroneously denied enforcement of the executed arbitration agreement (hereinafter "the Agreement"). This denial was erroneous pursuant to (1) the plain language of the executed Agreement; (2) United States Supreme Court Precedent; and (3) Missouri Supreme Court Precedent. Additionally, persuasive authority provides for the enforcement of analogous arbitration agreements, including arbitration of wrongful death claims, as discussed further under Point III.

A. The Plain Language of the Executed Agreement Requires Enforcement of Arbitration.

The plain language of the executed Agreement covers, "[a]ny and all claims, disputes, and controversies" (LF 31). Moreover, the Agreement specifically provided for arbitration of any claims for:

> "[B]reach of contract, fraud or misrepresentation, **negligence**, gross negligence, **malpractice**, or claims based on **any departure from accepted medical or health care or safety standards**, as well as any an all claims based on contract, tort, **statute**, warranty…."

(LF 31)(emphasis added). The Agreement was executed by the resident's daughter, under a durable power of attorney on March 27, 2003. (LF 31-33; 42-45).

"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)). "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, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984).

> 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, 582-83 (1960)).

The plain language of the Agreement states that Respondent's claim is statutory in nature (wrongful death) and which arise from alleged negligence are subject to arbitration. (LF 31) Moreover, the Agreement contains no express exclusions. The parties agreed that the Agreement "evidences a transaction in interstate commerce governed by the Federal Arbitration Act". (LF 31). The parties also made clear their intention to bind "successors" and "assigns" and "all persons whose claim is derived through or on behalf of the Resident". (LF 31-32). Dale Lawrence's present claim is encompassed by the Agreement and this matter must be sent to arbitration. Therefore, Appellant's Motion to Enforce Arbitration Agreement must be granted, and the trial court's order must be reversed.

B. United States Supreme Court Precedent Requires Enforcement of Arbitration.

Southland Corp. discusses the FAA's preemption over state statutes and statutory causes of action. 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's 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).

That the transaction involves interstate commerce is a minimal threshold. The United States Supreme Court in Allied-Bruce Terminix Co., Inc. v. Dobson, stated this FAA language should be interpreted "as broadly as the words 'affecting commerce' . . . **a full exercise of constitutional power**." 513 U.S. 265, 277 (1995) (emphasis added). See, also, Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003); Triarch Industries, Inc. v. Paul A. Crabtree d/b/a Crabtree Painting, Inc., 2004 WL 941218 (Mo. App. W.D. 2004) (overruled on other grounds Triarch Industries, Inc. v. Paul A. Crabtree d/b/a Crabtree Painting, Inc., 158 S.W.3d 772 (Mo. banc 2005)); 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).

Moreover, persuasive authority holds that nursing home contracts and agreements to provide nursing services constitute interstate commerce. For instance, the Mississippi Supreme Court has upheld an FAA 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,

> [s]ingular 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); 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).

To reiterate, the interstate commerce threshold is minimal and nonetheless, the parties agreed that the transaction involved interstate commerce and would be governed by the FAA. Allied-Bruce v. Terminix Co., Inc. v. Dobson, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (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). Courts have held that where the parties agree to be governed by the FAA, such choice-of-law

provision should be upheld and the reviewing court need not inquire as to whether the transaction involves interstate commerce. For example, in In re Ledet, 2004 WL 2945699 (Tex. App. - San Antonio 2004), the Texas Court of Appeals stated that "where there is an express agreement to arbitrate under the FAA, courts have upheld such choice-of-law provisions. Id. (citing Volt Info. Sciences, Inc. v. Bd. of Trs., 489 U.S. 468, 478-79 (1989)). The Ledet court concluded: "Thus, when the parties agree to arbitrate under the FAA, they are not required to establish that the transaction at issue involves or affects interstate commerce." Id.

As the FAA governs this 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 did not rely on one of the contract defenses at common law, such as fraud, duress, or unconscionability when it denied Beverly Manor's Motion to Enforce Arbitration Agreement. (LF 59-63). As there is no such finding by the Trial Court, the Agreement was necessarily enforceable under the FAA, and the Trial Court erred in failing to compel arbitration.

C. Enforcement of Arbitration Pursuant to the FAA is Proper Because the FAA Preempts the Missouri Act.

The parties agreed that the Agreement was to be governed by the FAA. Missouri courts, specifically Bunge Corp. v. Perryville Feed & Produce, Inc., 685 S.W.2d 837 (Mo. banc 1985), and Duggan v. Zip Mail Services, Inc., 920 S.W.2d 200 (Mo. App. E.D. 1996), have held that the FAA preempts the Missouri Act. In Bunge Corp., this Court, sitting *en banc*, acknowledged Southland Corp. v. Keating, 465 U.S. 1 (1984) and the preemption doctrine with respect to the FAA and state arbitration acts. 685 S.W.2d at 837.

Stare decisis requires this Court follow binding authority such as Bunge Corp. and Duggan, and therefore the trial court's denial must be reversed and Beverly Manor's motion to enforce arbitration must be granted and this matter referred to arbitration in accordance with the Agreement. The parties specifically agreed that that their agreement to arbitrate would be governed by the Federal Arbitration Act. 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 Beverly Manor's Motion to Enforce Arbitration.

II. THE TRIAL COURT ERRED IN DENYING BEVERLY MANOR'S MOTION TO ENFORCE ARBITRATION BECAUSE THE PARTIES ENTERED INTO A VALID, ENFORCEABLE ARBITRATION AGREEMENT IN THAT DECEDENT'S DAUGHTER, PHYLLIS SKOGLUND, SIGNED THE ARBITRATION AGREEMENT PURSUANT TO A DURABLE POWER OF ATTORNEY.

A. Ms. Skoglund had Authority to Consent to the Agreement and Contract for her Mother's Care Pursuant to her Durable Power of Attorney.

In this case, Ms. Skoglund, admitted her mother to the nursing home and executed the Agreement. (LF 31-33; 61). She represented to the nursing home that she was the "daughter" and executed the admission agreement and arbitration agreement as "daughter." (LF 31-33; 61). Ms. Skoglund further represented that she was authorized pursuant to a durable power of attorney. Ms. Skoglund represented she possessed authority to act on her mother's behalf.[2] The facility acted in good faith when it relied on the representations of Ms. Skoglund and the durable power of attorney, and the facility was never put on notice to the contrary. Pursuant to MO. REV. STAT. § 431.061, Ms. Skoglund was an individual "authorized and empowered to consent to any surgical,

[2] The Trial Court in its Order denying Beverly Manor's Motion to Enforce Arbitration found that Phyllis Skoglund "under a grant of durable power of attorney" established on July 8, 1992, had executed the arbitration agreement.

medical or other treatment or procedures" and contract on behalf of the resident for nursing services, and further Ms. Skoglund was the appointed attorney in fact pursuant to a durable power of attorney and had all the powers enumerated in MO. REV. STAT. § 404.700 *et. seq.*

The Durable Power of Attorney executed by Dorothy Lawrence and appointing Phyllis Skoglund (her daughter) unquestionably authorized Ms. Skoglund to act as she did in admitting Ms. Lawrence. The Durable Power of Attorney, entitled "Durable Power of Attorney Including The Making Of Health Care Decisions", empowered Ms. Skoglund to, in relevant part:

> To make any and all arrangements deemed appropriate and in my best interests for my personal care, support, maintenance, living arrangements, medical, surgical, or dental care; to authorize, consent, or request for me and in my name that I be admitted or placed as a patient or resident in any type of retirement home facility, extended care facility, nursing care facility, hospital, or other similar facility; and…to sign, execute, acknowledge, and deliver for me and in my name any and all instruments or documents of any kind or type whatsoever deemed by my said attorney in the sole discretion of my said attorney to be in my best interest s or to be necessary or appropriate…

(LF 43-44).

Further, MO. REV. STAT. § 431.061 under the "Contracts and Contractual Relations" title addresses the individuals "authorized and empowered to consent to any surgical, medical or other treatment or procedures." The statute specifically states, that the provisions "shall be construed liberally." MO. REV. STAT. § 431.061.3. Additionally, section 431.061.5 reads,

> Any person acting in good faith and not having been put on notice to the contrary shall be justified in relying on the representations of any person purporting to give such consent, including, but not limited to, his identity, his age, his marital status, and his relationship to any other person for whom the consent is purportedly given.

MO. REV. STAT. § 431.061.5.

Under the "Durable Power of Attorney Law of Missouri," MO. REV. STAT. § 404.700 *et. seq.*, a principal may delegate general powers to act in accord with all lawful subjects and purposes. MO. REV. STAT. § 404.710.1. The statute further provides that an attorney in fact[3]

> has with respect to the subjects or purposes of the power complete discretion to make a decision for the principal, to

[3] An "attorney in fact" is defined as an individual appointed to act as an agent of a principal in a written power of attorney. MO. REV. STAT. § 404.703. The trial court referred to Ms. Skoglund as the attorney in fact. (LF 68).

> act or not act, to consent or not consent to, or withdraw consent for, any act, and to execute and deliver or accept any . . . contract . . . application, acknowledgment or other document necessary or convenient to implement or confirm any act, transaction, or decision.

MO. REV. STAT. § 404.710(4). Ms. Skoglund clearly had authority under the Durable Power of Attorney that Ms. Lawrence executed, and under Missouri law, to execute the admission documents, including the Agreement. Beverly Manor, had the right to rely on Ms. Skoglund's authority and to expect that the Agreement would be enforceable. MO. REV. STAT. § 404.710(8) ("A third person may freely rely on, contract and deal with an attorney in fact delegated general powers . . .").

Under the plain language of the Durable Power of Attorney, Ms. Skoglund was authorized to admit Ms. Lawrence to a long-term care facility and to execute the appropriate documents. Ms. Skoglund, acting under this authority, did so execute the documents, including the Agreement. Under the authorities discussed above, including the FAA, and state and federal precedent, the arbitration agreement must be enforced.

B. Even if Ms. Skoglund Had Lacked Durable Power of Attorney, She Had Authority to Act on her Mother's Behalf.

Cases in other jurisdictions show that, even if Ms. Skoglund had not been empowered by her mother pursuant to a durable power of attorney to admit her to a nursing facility, Ms. Skoglund had authority to do so. Persuasive authority from Texas, Florida, and Massachusetts illustrate that this arbitration agreement should be enforced.

Ledet v. Living Centers of Texas, Inc. is a factually analogous case where the court enforced arbitration. 2004 WL 2945699 (Tex. App. - San Antonio 2004). There, the resident was admitted to a nursing home by a son who executed the admittance papers as the "responsible party" and "legal representative." Id. The resident's children filed suit alleging injuries and death, and the nursing home moved to compel arbitration pursuant to the agreement signed by the son. Id.

The plaintiffs in Ledet argued the agreement could not be enforced where (1) the resident did not sign the agreement, and (2) the son who executed the agreement lacked legal authority because he was neither guardian nor power of attorney. Id. The Ledet, court cited Texas' analogous Consent to Medical Treatment Act and determined the son was an "individual with decision making capacity who is identified as the person who has authority to consent to medical treatment on behalf of an incapacitated patient in need of medical treatment." Id. at 4 (citing Tex. Health & Safety Code Ann. § 313.002(10)). The court found the son possessed "actual authority," and his execution of the arbitration agreement bound the other children to arbitrate any and all claims against the nursing home. Id.

In Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus, the resident's son who admitted resident executed an arbitration agreement. 853 So.2d 500 (Dist. App. Fl. 2003). Thereafter, the personal representative of the estate filed suit for negligence and wrongful death. The Florida court enforced the arbitration agreement pursuant to a similar Florida health care surrogate statute. Recently, the Massachusetts Supreme Judicial Court upheld a long-term care facility arbitration agreement signed by the

resident's son, who later brought claims for wrongful death and negligence. See Miller v. Cotter, 863 N.E.2d 537 (Mass. 2007).

As discussed earlier, Ms. Skoglund had authority to contract on behalf of her mother pursuant to her Durable Power of Attorney. However, even if she had not possessed such authority, the Court should follow the persuasive authority of sister courts and find she nonetheless had authority to contract for medical services on her mother's behalf.

III. THE TRIAL COURT ERRED IN FAILING TO ENFORCE THE ARBITRATION AGREEMENT BECAUSE THE ARBITRATION AGREEMENT APPLIES TO RESPONDENT'S CLAIM IN THAT DOROTHY LAWRENCE AGREED TO ARBITRATE ALL CLAIMS ARISING OUT OF ANY HEALTHCARE PROVIDED BY BEVERLY MANOR AND RESPONDENT'S WRONGFUL DEATH CLAIM IS DERIVATIVE OF THE CLAIM DOROTHY LAWRENCE COULD HAVE BROUGHT.

A. The Arbitration 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 was broad. It expressly applied to "any and all claims, disputes, and controversies…**arising out of**, or in connection with…any service or health care provided". (LF 31) (emphasis added). The Agreement clearly applied to

any claims which were to arise from the care and services provided by Beverly Manor. Further the Agreement provided that it applied to any claims for: "…negligence, gross negligence, malpractice, or claims based on any departure from accepted medical or health care or safety standards, as well as any and all claims for equitable relief or claims based on contract, tort, statute, warranty, or any alleged breach, default, negligence…"(LF 31).

B. The Wrongful Death Statute Indicates Wrongful Death Claims are Derivative and Should be Covered by Agreements to Arbitrate.

The plain language of the wrongful death statute establishes a wrongful death claim is a derivative claim. A claim cannot be both independent and derivative. 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 Arbitration Agreement, Decedent and Beverly Manor agreed to arbitrate any claim they may have for all claims – including those arising in tort or statute. (LF 31). The Arbitration 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 Dorothy Lawrence and is derivative of the claim that Ms. Lawrence 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.

C. This Court in *State ex rel. Burns v. Whittington* Acknowledged Wrongful Death Claims are Derivative, and, Therefore, Are Covered by Decedent's Arbitration Agreement.

While this case was pending on appeal, this Court in State ex rel Burns v. Whittington, 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 224, 225 (Mo. banc 2007). The 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, the decedent's negligence claim, had she survived, and respondent's wrongful death claim stem from the same set of operative facts, and are thus properly considered the same cause of action.

In the case at bar, the Missouri Court of Appeals for the Western District acknowledged this Court's guidance in Burns and properly found the claim asserted by Respondent was derivative of the claim Dorothy Lawrence would have had if she had survived. Lawrence v. Manor, ___ S.W.3d ___, 2008 WL 731561 (Mo. App. W.D.). The Court further recognized that had Dorothy Lawrence been alive, she would have been bound by the arbitration agreement. Id. Therefore, a wrongful death claim would be subject to an arbitration agreement executed by the decedent prior to her death. Id.

The Western District's opinion correctly recognizes the derivative nature of wrongful death claims as clearly codified by statute and recognized by this Court, therefore, that portion of the Western District's reasoning should be upheld on appeal.

Because wrongful death claims are derivative, Respondent, as a wrongful death claimant, cannot ascend to greater rights than that of the decedent. Dorothy Lawrence would have been bound by the terms of the Agreement she executed; therefore, Respondent is equally bound. Because Respondent is bound by the Agreement, this Court should reverse the trial court's denial of Beverly Manor's motion to enforce arbitration and immediately compel arbitration pursuant to its terms.

D. This Court's Guidance *State ex rel. Burns v. Whittington* Applies to the Present Case.

This Court's guidance in Burns was handed down while this case was pending on appeal and should apply to the present case. Unlike statutory changes, which generally apply only prospectively, judicial opinions are usually applied retroactively. Estate of Pierce v. State of Missouri Dep't of Social Services, 969 S.W.2d 814, 822 (Mo. App. W.D. 1998), Sumners v. Sumners, 701 S.W.2d 720, 723 (Mo. banc 1985).

The Court of Appeals routinely applies new guidance provided by this Court retroactively to cases pending of an appeal. See, e.g., Dorsch v. Family Medicine, Inc., 159 S.W.3d 424, 429-30 (Mo. App. W.D. 2005) (applying State ex rel. Loenardi v. Sherry, 137 S.W.3d 462 (Mo. banc 2004), handed down while the appeal was pending, which "clarified Missouri's position on the equitable cleanup doctrine."); Porter v. Toys 'R' Us-Delaware, Inc., 152 S.W.3d 310, 320-21 (Mo. App. W.D. 2005) (conducting extensive analysis of Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818 (Mo. banc 2003), handed down while the appeal was pending, which interpreted a workers' compensation statute to exclude recovery for amounts written-off by medical

providers); State v. Smith, 89 S.W.3d 568, 570-71 (Mo. App. W.D. 2002) (applying State v. French, 79 S.W.3d 896 (Mo. banc 2002), handed down while the appeal was pending, which found two convictions for failure to provide support did not constitute double jeopardy); and State v. Hayes, 23 S.W.3d 783, 789-91 (Mo. App. W.D. 2000) (applying State v. Beeler, 12 S.W.3d 294 (Mo. banc 2000), handed down while the appeal was pending, which clarified Missouri law regarding the interpretation of statutes governing self-defense and involuntary manslaughter).

In the present case, however, the Western District Court of Appeals decided this Court's decision in Burns should not apply retroactively. In deciding the issue, the Court of Appeals correctly noted, "courts generally should apply a decision retroactively." Lawrence, 2008 WL 731561 at *4. The Court of Appeals identified an exception applicable to cases where the "parties have relied on the state of the decisional law as it existed prior to the change, the courts may apply the law prospectively-only in order to avoid injustice and unfairness." Id. (quoting Sumners v. Sumners, 701 S.W.2d 720, 723 (Mo. banc 1985).

To determine whether this exception applies, Missouri courts use the three-factor test adopted in Sumners which requires (1) the decision "must establish a new principle of law by overruling clear past precedent," (2) the court "must determine whether or not the purpose and effect of the new rule will be enhanced or retarded by applying the rule retroactively," and (3) "the court must balance the interests of those who may be affected by the change in the law, weighing the degree to which the parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective

operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule." Id. at *4-5 (citing Sumners, 701 S.W.2d at 723-24).

With regard to the first factor, this Court's opinion in Burns did not create a new rule of law because the issue of whether a wrongful death claimant is subject to an arbitration agreement executed by the decedent is an issue of first-impression for this Court. Rather, it affirms the derivative nature of wrongful death claims which is already clearly established and codified by statute. However, even assuming the Burns decision does represent a new rule of law, the Western District failed to properly apply this Court's test to determine if a new rule of law is given retroactive application. See Sumners v. Sumners, 701 S.W.2d 720, 724 (Mo. banc 1985).

The Court of Appeals properly found the second factor favored retrospective application of Burns as retroactively applying the decision would "enhance the Supreme Court's purpose." Id. While not expressly stated by the Court of Appeals, applying the decision retroactively would promote this country's national policy favoring arbitration and the enforcement of arbitration agreements. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995).

The Court of Appeals' determination of prospective-only application of Burns, therefore, rested on its analysis of the third factor in the Sumners analysis – balancing the extent to which the plaintiff relied on the old rule against defendant's hardship in being denied the benefit of the new rule. Therein lies the Court of Appeals' error. The Court of Appeals' analysis of this third factor, in its entirety, reads:

> The third factor, the balancing of interests and hardship, weighs against applying the rule retroactively. It appears that, in light of the case law before Burns, the parties presumably knew when they executed the arbitration agreement that it did not cover wrongful death claims. Why Beverly Manor, as the party that prepared the contract, should gain the benefit of an unexpected and surprising change in Missouri law is unclear. Perhaps Dorothy Lawrence's daughter would have refused to sign the agreement had she known that a wrongful death claim was a derivative action and would be included in the arbitration agreement. Hence, fairness dictates that the parties receive the benefit of their bargain and that the courts construe the law as it existed when Beverly Manor and Dorothy Lawrence's daughter entered into this agreement.

Lawrence, 2008 WL 731561 at *4.

The Court of Appeals' application of the Sumners three-factor test is contrary to this Court's precedent of Trout v. State, 231 S.W.3d 140 (Mo. banc 2007). In Trout, the plaintiff brought a declaratory judgment action against the State and various political candidates, challenging the constitutionality of certain provisions and amendments in the campaign finance reform bill. Id. at 143. This Court found an amendment purporting to repeal campaign contribution limits was unconstitutional. Id. at 148. Thus, the opinion effectively changed the law by re-instating contribution limits. Id.

The Trout Court then employed the Sumners three-factor test to determine whether the Court's decision would apply retroactively or prospectively to the parties. Id. at 148-49. The Court emphasized that solely prospective application of a decision constitutes "extraordinary relief" as prospective application is "the exception not the norm." Id.

In evaluating the third factor of the Sumners analysis, the Trout Court sought to determine "the hardship imposed on those who may have relied on the previous rule." Id. at 149. The Court established that to be granted prospective application, a party must have actually relied on the previous rule and that such reliance must have been reasonable. Id. The consideration of this third factor of the Sumners analysis "necessarily is dependent on the degree of notice, reliance and hardship shown by that particular [party]." Id. While the evidence in the record established defendants' reasonable reliance on the old rule to justify prospective-only application, the court could not determine "whether non-parties reasonably relied on the validity of the prior statute because the record is silent as to the extent and nature of their awareness of this pending litigation." Id. While all candidates had constructive knowledge of the statutory challenge, the issue of their actual knowledge was undeveloped. Id. Accordingly, the Court could not declare whether its decision would apply only prospectively to non-parties as the Court is unable to determine the subjective knowledge and reliance of such individuals. Id.

In the case at bar, the Court of Appeals' opinion is inconsistent with the Supreme Court's requirements of Trout because it granted prospective-only application of a

judicial decision without establishing a necessary element. To grant this "extraordinary relief" the Court of Appeals was first required to establish that Dorothy Lawrence, through her daughter who held power of attorney, actually and reasonably relied on the prior rule when executing the Agreement. There is no evidence in the record to support such a finding. Instead, the court reasoned that "the parties *presumably knew* when they executed the arbitration agreement that it did not cover wrongful death claims." Lawrence, 2008 WL 731561 at *5 (emphasis added). Constructive knowledge, however, is not sufficient – the party must possess actual knowledge to establish her reliance on the prior rule of law. See Trout, 231 S.W.3d at 149.

Furthermore, even if the Court of Appeals had determined Dorothy Lawrence's daughter had actually relied on the prior law, it must then establish the reliance was objectively reasonable. See Id. Here, it would not be reasonable for Dorothy Lawrence's daughter to have relied on the fact that wrongful death claims were generally considered independent causes of action to conclude such claims would not have been covered by the Agreement. When the Agreement was executed before Dorothy Lawrence's admission to Beverly Manor on March 27, 2003, no previous Missouri court had ever addressed whether a wrongful death claim was subject to an arbitration agreement executed by the decedent. The issue was first addressed three years later. See Finney v. National Healthcare Corp., 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").

For the reasons stated above, the Court of Appeals' Opinion is inconsistent with this Court's ruling in Trout v. State. The Court of Appeals failed to establish that

Dorothy Lawrence, through her daughter who held power of attorney, actually and reasonably relied on the prior rule when executing the Agreement. The Court of Appeals additionally failed to establish it was reasonable to rely on the fact that wrongful death claims were generally considered independent causes of action to conclude such claims would not have been covered by the Agreement. Accordingly, as the extraordinary remedy of prospective-only application is inapplicable, this Court's opinion in Burns should be given traditional retrospective application to the present case.

Furthermore, if left to stand, the Court of Appeals' prospective-only analysis would have significant ramifications on the state of Missouri jurisprudence. As noted above, the general rule is that judicial decisions which change prior law are applied retroactively. Trout, 231 S.W.3d at 148. Solely prospective application of a decision constitutes "extraordinary relief" as prospective application is "the exception not the norm." Id. at 149. If left to stand, the Court of Appeals' opinion regarding the application of this limited exception would effectively swallow the rule.

The keystone to this analysis is whether the party seeking prospective-only application of the new rule reasonably relied on the old rule. The Court of Appeals' opinion suggests the reliance element is satisfied because the old rule was in effect at the time the Agreement was signed. See Lawrence, 2008 WL 731561 at *5 (reasoning "in light of the caselaw before Burns, the parties presumably knew when they executed the arbitration agreement that it did not cover wrongful death claims"). If prospective-only application no longer requires the establishment of reasonable reliance on the old rule, but merely an acknowledgement that there was an old rule in effect at the time of the

events giving rise to the cause of action, this previously narrow exception will quickly become the rule of law in Missouri.

E. The Circuit Court's Denial of Beverly Manor's Motion to Enforce Arbitration Ignores Binding Authority.

The Circuit Court incorrectly ruled that the arbitration agreement did not apply to respondent's wrongful death claim. In doing so, it relied primarily on three cases in reaching its decision. Two of the cases, O'Grady v. Brown, 654 S.W.2d 904 (Mo. banc 1983) and State ex rel. Jewish Hospital v. Buder, 540 S.W.2d 100 (Mo. App. 1976), for the simple proposition that a wrongful death claim is statutory and does not revive or transmit a cause of action. However, neither of these cases address whether wrongful death claims are subject to an arbitration agreement executed by the decedent. The third case, Finney v. National Healthcare Corp., 193 S.W.3d 393, 395 (Mo. App. S.D. 2006), does involve issues of arbitration in the nursing home context, but is easily factually distinguishable. The extent to which the trial court relied on Finney is unclear, because the trial court recognized some of the distinguishing features:

> Policy considerations were not thoroughly considered in *Finney* because the Court found no signed contract between the *Finney* plaintiff and the defendant named therein. In the case at bar, the arbitration agreement **was executed by the decedent** acting through her attorney in fact under the authority of a durable power of attorney.

(LF 68) (emphasis added).

Thus the distinction between Finney and the case at bar could not be clearer: in one instance there was an executed arbitration agreement, and in the other there was not. The perplexing question remains, why the trial court, having found an executed agreement, chose not to enforce it? The answer appears to be because the trial court considered the wrongful death cause of action to be an independent cause of action. (LF 68). However, as noted above, the wrongful death statute and guidance from this court both establish a wrongful death claim is a derivative claim. Accordingly, in bringing a derivative claim, Respondent cannot ascend to greater rights than that of the decedent. Because Dorothy Lawrence executed a binding arbitration agreement, she would have been bound by its terms. Therefore, Respondent, too, is bound.

F. 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 Arbitration 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., 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. 173 S.W.3d 67 (Tex. 2005). In Raper v. Oliver House, the court enforced the arbitration agreement in a wrongful death case against the plaintiff who had signed as decedent's attorney-in-fact. 637 S.E.2d 551 (N.C. App. 2006). 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 claim is 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. See Cleveland v. Mann, 942 So.2d 108 (Miss. 2006). In Cleveland, the court concluded that the arbitration agreement was binding, despite the 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 Miller 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 prior Missouri precedent on point, Beverly Manor 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.

G. 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 future 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 a claim arising from contract, tort, or statutory law.

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 would 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.

H. Even if Wrongful Death Claims Were Not Derivative, Ms. Skoglund had Authority to Bind Wrongful Death Claimants.

This Agreement was signed by Ms. Skoglund, the 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. The Agreement expressly applied to "any and all claims, disputes, and controversies…arising out of, or in connection with…any service or health care provided". (LF 31). The Agreement clearly applied to any claims which were to arise from the care and services provided by Beverly Manor. Further the Agreement provided that it applied to any claims for:

> negligence, gross negligence, malpractice, or claims based on any departure from accepted medical or health care or safety standards, as well as any and all claims for equitable relief or claims based on contract, tort, statute, warranty, or any alleged breach, default, negligence . . .

(LF 31). 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 (Phyllis Skoglund) 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, Phyllis Skoglund, agreed to arbitrate the claim.

CONCLUSION

For all the reasons cited in Appellant's Substitute Brief, Appellant respectfully requests this Court reverse the trial court's denial of Beverly Manor's motion to enforce arbitration and immediately compel arbitration of Respondent's wrongful death claim pursuant to the terms of the Agreement.

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The undersigned certifies that a copy of the foregoing was sent by United States mail, postage pre-paid, this 14th day of July, 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 10,661 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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IN THE

SUPREME COURT OF MISSOURI

DALE LAWRENCE, individually and
As the personal representative of the estate of DOROTHY LAWRENCE
Plaintiff/Respondent,

v.

BEVERLY MANOR, a Missouri corporation,
Defendant/Appellant.

APPELLANT'S SUBSTITUTE APPENDIX

Appeal from the Circuit Court of Jackson County, Division 18;
Honorable Jon R. Gray; Cause No. 04CV237251

After Opinion by the Missouri Court of Appeals
Western District; Cause No. WD67920

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