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 REPLY 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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Appellant Beverly Manor files this Substitute Reply Brief in response to assertions made by Respondent and *Amicus Curiae* Missouri Association of Trial Attorneys (MATA). Respondent and MATA assert the trial court's denial of Appellant's motion to enforce arbitration was appropriate and puts forth several arguments in support of upholding the trial court's ruling. Appellant addresses each argument herein. For the reasons stated in Appellant's Substitute Brief and supplemented below, the trial court's denial of Appellant's motion to enforce arbitration was erroneous. Appellant requests this court reverse the trial court's decision and immediately compel arbitration pursuant to the terms of the arbitration agreement (hereinafter the "Agreement") executed prior to decedent Dorothy Lawrence's admission to Beverly Manor.

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.

A. The Existence of Arbitration Costs Does Not Render the Agreement Unenforceable.

Without citations to authority, MATA suggests the Agreement is unenforceable because Respondent would incur "substantial expense" and "delay of time" in submitting

his case to arbitration. (MATA Brief p. 13). However, MATA also acknowledges that the very purpose of arbitrating claims is "to afford the parties the chance to reach a final result to their differences in a quicker and cheaper manner than afforded by court litigation." (MATA Brief, p. 12, quoting State ex rel. Telecom Management, Inc. v. O'Malley, 965 S.W.2d 215, 218 (Mo. App. W.D. 1998)).

As the United States Supreme Court has recognized, the existence of arbitration costs does not render an arbitration agreement unenforceable. See Green Tree v. Randolph, 531 U.S.79 (2000). In Green Tree, the plaintiff argued the possible costs associated with arbitration would be cost prohibitive and effectively deny her the right to assert a statutory claim under the Truth in Lending Act for defendants' failure to disclose a finance charge. Id. at 90. In support of her claim, the plaintiff identified reports of average costs of arbitration, but failed to establish the specific costs for which the plaintiff would be responsible. Id., fn.6. The Court found the plaintiff failed to meet her burden of establishing the costs of arbitration would have been prohibitively expensive. Id.

MATA's mere suggestion that Respondent would incur "substantial expense" in arbitrating his claim is insufficient as neither MATA nor Respondent identifies the specific costs for which Respondent would be responsible. Therefore, pursuant to the United States Supreme Court in Green Tree, MATA's challenge to the arbitration agreement on the basis of cost must fail. Furthermore, the efficiency of arbitration can result in significantly lower legal costs as compared with the legal costs incurred during

prolonged litigation. See Southland Corp. v. Keating, 465 U.S. 1, 7 (1984) (prolonged litigation is one of the risks which arbitration agreements seek to avoid).

As MATA's argument is without merit, Appellant requests this court reverse the trial court's denial of its motion to enforce arbitration and immediately compel arbitration of all claims.

B. Pre-dispute Arbitration Agreements Are Enforceable.

MATA argues that pre-dispute arbitration agreements should be unenforceable as a matter of law. (MATA Brief, p. 13). As its sole basis for this argument, MATA cites to a statement contained in a report by the Commission on Health Care Dispute Resolution which advocates for a change in the law. (MATA Brief, p. 13).

As legislative debate over possible changes to our country's healthcare system continues to ensue, various solutions have been proposed. See, e.g., Hagel Health Care Commission Final Report, January 15, 2007, available at http://www.unmc.edu/publichealth/NHSummit/HAGEL%20HEALTH%20CARE%20COMMISSION.pdf (which advocates a change in the law to require all healthcare disputes be submitted to a mandatory dispute resolution procedure similar to the Federal Tort Claims Act). However, reforming the nation's healthcare system is a task which goes well beyond the scope of the issue before this court and the two parties to this dispute. Accordingly, any advocacy for such changes is properly directed to the legislature.

Under the law as it exists today, the Agreement is enforceable. Neither Respondent nor MATA dispute that the Federal Arbitration Act ("FAA") applies to the enforcement of the Agreement. Pursuant to the FAA, an arbitration agreement "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. As acknowledged by this Court, and pursuant to binding authority by the United States Supreme Court, pre-dispute arbitration agreements are valid and enforceable contracts. See Dunn Industrial Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421 (Mo. banc 2003); Southland Corp. v. Keating, 465 U.S. 1 (1984); Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

As pre-dispute arbitration agreements are valid and enforceable as a matter of law, MATA's argument is without merit. Accordingly, Appellant requests this Court reverse the trial court's ruling and compel arbitration of all claims.

C. The FAA Preempts Provisions of State Law Which Would Prevent Enforcement of the Agreement.

MATA argues the enforcement of arbitration would infringe on statutory rights created by the Missouri Omnibus Nursing Home Act. (MATA Brief, p. 14). However, such argument is irrelevant as Respondent's Third Amended Petition does not assert a claim under the Act. (See LF 8-15). Further, any restrictions on the enforcement of arbitration agreements which are imposed by state law are preempted by federal law pursuant to the FAA. See 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); Dunn Industrial Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421 (Mo. banc 2003); Southland Corp. v. Keating, 465 U.S. 1 (1984); Kirby v. Grand Crowne Travel Network, LLC, 229 S.W.3d 253, 254 (Mo. App. S.D. 2007).

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).

Missouri Courts have further acknowledged that the FAA "creates a body of federal substantive law that applies in both state and federal courts." Kirby, 229 S.W.3d at 254. The Kirby 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. The 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. The Court reversed a trial

court's denial of the defendant's motion to compel arbitration with instructions to stay the proceedings pending arbitration. Id.

Neither Respondent nor MATA dispute the FAA's application to the Agreement. As any state law restrictions on the enforceability of the Agreement are preempted by the FAA, MATA's reference to Missouri's Omnibus Nursing Home Act as a possible basis for invalidating the Agreement is without merit. Accordingly, Appellant requests this Court reverse the trial court's denial of its motion to enforce arbitration and compel arbitration of all claims.

D. The Agreement Is Not an Unconscionable Contract of Adhesion.

MATA suggest the Agreement is an unconscionable contract of adhesion. (MATA Brief, p. 16). First, contracts of adhesion, or "form" contracts, are not "automatically unenforceable," as such a rule would be "completely unworkable." Swain v. Auto Services, 128 S.W.3d 103, 107 (Mo. App. 2003). Rather, to be deemed unenforceable, adhesion contracts must be "unconscionable" in that they are such that "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. An examination of the terms of the Agreement will reveal the Agreement fails to meet this standard. (See LF 31-35).

Without explanation, MATA asserts the arbitration rules identified by the Agreement "far exceed the reasonable expectation of an average family attempting to place their loved one in a nursing home." (MATA Brief, p. 16). Even ignoring the fact that, under Missouri law, a person is bound by the terms of a contract she signs and will not be allowed to argue she is ignorant as to its contents, Heartland Health Systems v.

Chamberlain, 871 S.W.2d 8, 10 (Mo. App. 1993), MATA fails to identify any specific rules which it finds objectionable. MATA further argues that an arbitration clause should be invalidated when it restricts the type of relief available in arbitration. (MATA Brief, p. 17). However, the Agreement places no restrictions on the damages that may be awarded in an arbitral forum nor any limitations on the arbitrator's ability to adjudicate the case.

Without identifying any specific aspect of the Agreement which it argues is unconscionable, MATA's argument lacks sufficient basis for this Court's finding of unconsionability and insufficient detail to allow Appellant to appropriately respond. Accordingly, MATA has failed to establish the Agreement is an unconscionable contract of adhesion which could justify denying Beverly Manor its right to enforce arbitration. Accordingly, Respondent requests this Court find the Agreement valid and enforce arbitration of all claims.

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.

This point is in response to arguments included in point II of Respondent's brief.

A. Phyllis Skoglund Had Valid Durable Power of Attorney to Enter Into the Agreement on Her Mother's Behalf.

Respondent acknowledges that his sister, Phyllis Skoglund, "was Durable Power of Attorney" (hereinafter "DPOA") for their mother, Dorothy Lawrence. (Resp. Brief p. 13). Respondent then argues, however, that the DPOA was "void due to its lack of proper notary seal." (Resp. Brief at 11.) Respondent claims the DPOA required proof or acknowledgement by a notary public having a seal and cites the Court to MO. REV. STAT. § 442.150(2). However, Respondent relies upon the wrong Missouri statute. First, the cited statute is found in Chapter 442, entitled "Titles and Conveyance of Real Estate" and expressly limits its application to "[t]he proof or acknowledgment of every conveyance or instrument in writing *affecting real estate*." MO. REV. STAT. § 442.150 (emphasis added). Respondent has cited to no authority supporting this statute's application to the execution of a DPOA, and the undersigned counsel has found none.

Even if this Court finds the validity of a DPOA is somehow affected by this real estate statute, Respondent clearly cites to the wrong subsection. Respondent cites to 442.150(2) which expressly applies only to acknowledgments made *outside* the State of Missouri. Acknowledgements made *within* the State of Missouri, are governed by subsection 442.150(1). Section 442.150 reads in pertinent part,

> The proof or acknowledgment of every conveyance or instrument in writing *affecting real estate* in law or equity, including deeds of married women, shall be taken by some one of the following courts or officers:

> (1) If acknowledged or proved *within this state*, by some court having a seal, or some judge, justice or clerk thereof, or a notary public; or
>
> (2) If acknowledged or proved *without this state* and within the United States, by any notary public or by any court of the United States, or of any state or territory, having a seal, or the clerk of any such court or any commissioner appointed by the governor of this state to take the acknowledgment of deeds. . .

MO. REV. STAT. § 442.150 (emphasis added). The DPOA was executed in Missouri. (LF 45). Therefore, if section 442.150 applies to this action, this Court should look to the requirements of subsection (1) which applies to acknowledgements made by a notary within the State of Missouri. Unlike conveyances or instruments notarized outside the State of Missouri, those notarized within the State do not require a seal. *See* MO. REV. STAT. § 442.150(1).

Even if this Court finds a valid DPOA requires a seal, the requirement is was met even if the seal is not visible on the copy of the DPOA located in the court record. The notary who acknowledged Ms. Lawrence's signature on the DPOA wrote, "In testimony whereof, I have hereunto set my hand *and affixed my official seal. . .*" (LF 45, emphasis added).

Noteworthy is the fact that Respondent does not contend his mother did not want his sister to act on her behalf. The Alabama Supreme Court recently considered that fact essential in determining that an arbitration agreement signed by a resident's brother was

binding. In Carraway v. Beverly Enterprises Alabama, Inc., the Court held that the brother who had signed the admission and arbitration agreements without having first been appointed attorney-in-fact still bound his sister to the agreements because she "passively permit[ted] the agent to appear to a third person to have authority." 978 So.2d 27, 30 (Ala. 2007). In the instant case, Respondent's sister signed the admission and arbitration agreements upon taking their mother to the nursing facility. Their mother was admitted and resided at the facility. Respondent has never claimed his sister lacked authority to admit his mother. Therefore, even if this court finds the DPOA was somehow invalid because the photocopy of the document does not contain a visible seal, this Court should find that Phyllis Skoglund acted with authority because her mother permitted her to act on her behalf.

B. Any Challenge to Phyllis Skoglund's Authority Must Be Submitted to the Arbitrator.

To the extent Respondent challenges his sister's authority to act on his mother's behalf, he challenges the validity of the entire admission contract, not merely the arbitration agreement. When a plaintiff challenges the contract as the admission contract as a whole, the arbitrator—not this Honorable Court—is charged with determining the validity of it. See Kirby v. Grand Crowne Travel Network, 229 S.W.3d 253 (Mo. App. W. D. 2007) (recognizing and adopting the holding in Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006)).

In Buckeye, the U.S. Supreme Court held that the Federal Arbitration Act applies and puts the burden of determining the validity of the contract on the arbitrator if the

opponent attacks the entire contract rather than the arbitration clause specifically. 546 U.S. 440 (2006). In the instant case, Respondent claims that the DPOA held by Phyllis Skoglund was void and, as a result, she lacked authority to sign on behalf of her mother. The arbitration agreement signed by Ms. Skoglund was part of the admission contract to the nursing facility. (LF 31.) By claiming she had no authority to sign the contract, Respondent is challenging the entire document and, therefore, the arbitrator is charged with resolving Respondent's allegations.

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 Agreement Executed Prior to Dorothy Lawrence's Admission to Beverly Manor is Binding on her Wrongful Death Claimants For Disputes Relating to her Care.

This point is in response to arguments contained in Respondent's point I and MATA's point V(A).

Respondent and MATA both argue that the Agreement is binding only upon Dorothy Lawrence and not upon her son, the Respondent. However, such arguments run

contrary to the plain language of the Agreement which expressly applies to "any and all claims, disputes, and controversies . . . *arising out of,* or in connection with . . . any service or health care provided" and expressly binds "all persons whose claim is *derived through or on behalf of* [Ms. Lawrence], including any . . . child." (LF 31, emphasis added). Further, Ms. Lawrence expressly agreed that the Agreement would survive her death. (LF 32).

Respondent and MATA's argument additionally fails to overcome the plain language of the wrongful death statute and the acknowledgment by this court that wrongful death claims are derivative in nature. See MO. REV. STAT. § 537.080.1 (authorizing a wrongful death claimant to bring an action of the decedent "which, if death had not ensued, would have entitled such person to recover damages"); State ex rel Burns v. Whittington, 219 S.W.3d 224, 225 (Mo. banc 2007) (acknowledging wrongful death claims as "derivative of the underlying tortuous acts that cause the fatal injury").

As the holder of a divertive action, Respondent cannot ascend to rights greater than what Ms. Lawrence would have had if she had survived. In bringing his wrongful death claim, which alleges his mother received inadequate and inappropriate care at Beverly Manor, Respondent is bound by the terms of the Agreement executed by his mother when she was admitted to the facility. Because Ms. Lawrence would have been required to submit her claim to arbitration pursuant to the terms of the Agreement, any claim brought by Respondent must also be submitted to arbitration. Accordingly, this Court should reverse the trial court's denial of Appellant's motion to enforce arbitration and compel arbitration of all claims.

B. Many States with Wrongful Death Statutes Similar to Missouri Have Held Wrongful Death Claimants Are Bound by the Decedent's Agreement to Arbitrate.

MATA argues Missouri's Wrongful death statute is unlike other states' statutes in that it provides for recovery of "the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training and support of which those on whose behalf suit may be brought have been deprived by reason of death." (MATA Brief, p. 10, quoting MO. REV. STAT. § 537.090).

Without identifying relevant portions of other states' wrongful death statutes, MATA boldly states, "This is an important distinction Defendant overlooks in Missouri's Wrongful Death Statute as compared to those of other states." (MATA Brief, p. 11). Had MATA reviewed the authority cited in Appellant's Brief, however, it would have found that many other states, which have nearly identical provisions to that of Missouri, have required wrongful death claimants to arbitrate their claims pursuant to arbitration agreements executed by the decedent.

For example, in Mississippi, the state's wrongful death statute provides even broader rights of recovery for damages to the plaintiff than provided by Missouri's wrongful death statute. The relevant Mississippi statue states, in relevant part,

> [I]n such action the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind

> to the decedent and *all damages of every kind to any and all parties interested in the suit.*

MISS. CODE ANN. § 11-7-13 (relevant portion). Case law in Mississippi confirms, in a wrongful death action, the "plaintiff may recover present value of any pecuniary advantage which evidence discloses plaintiff might reasonably have expected from continuance of decedent's life." Natchez Coca-Cola Bottling Co. v. Watson, 133 So. 677, 678 (Miss. 1931). "The object of the statute is to furnish compensation for the injuries received to the parties suing for the death of the deceased, they having the right to sue for the *value of the life* under the statute." Gordon v. Lee, 43 So.2d 665, 667 (Miss. 1949) (emphasis in original). Therefore, in addition to the damages the decedent could have obtained, the wrongful death claimant may also recover the value of services she would have received from the decedent during the decedent's lifetime. Id. Furthermore, Mississippi courts are "committed to the doctrine that under this statute the proper parties have a right to recover the pecuniary value, as estimated by the jury, of the loss of companionship and society." Gulf Refining Co. v. Miller, 121 So. 482, 483 (Miss. 1929).

With a similar wrongful death statute to that of Missouri, the Mississippi Supreme Court has recently addressed the binding effect of a valid arbitration agreement on wrongful death 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. Although the computation of damages to the wrongful death claimants may be different, the ability to bring a cause of action for wrongful death is derivative in nature. The Court reasoned,

> [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). See, also, Vicksburg Partners, L.P. v. Stephens, 911 So.2d 507 (Miss. 2005).

Florida's Wrongful Death Act similarly allows for the recovery of damages for "the value of lost support and services . . . loss of the decedent's companionship . . . instruction, and guidance and for mental pain and suffering." FLA. STAT. § 768.21. Despite the difference in calculating the damages of the decedent and that of a wrongful death claimant, Florida law acknowledges the derivative nature of wrongful death claims and requires arbitration of such claims pursuant to the terms of the decedent's arbitration

agreement. See Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus, 853 So.2d 500 (Fla. App. 2003); Gainesville Health Care Center, Inc. v. Weston, 857 So.2d 278 (Fla. App. 2003).

Indiana similarly permits, "In an action to recover damages for the death of an adult person, the damages . . . may include but are not limited to . . . [l]oss of the adult person's love and companionship." IND. CODE § 34-23-1-2. Indiana courts require wrongful death claimants to honor the agreement to arbitrate executed by their decedent. See Sandford v. Castleton Health Care Center, L.L.C., 813 N.E.2d 411 (Ind. App. 2004)

The wrongful death statute of Massachusetts provides recovery for "the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent." MASS. G.L. 229 § 2. 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. 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 issue before the court was the alleged unconscionability of the agreement. 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.

North Carolina's wrongful death statute permits recovery for "[s]ervices, protection, care and assistance of the decedent, . . . [s]ociety, companionship, comfort, guidance, kindly offices and advice of the decedent." N.C. GEN. STAT. § 28A-18-2(b). A decedent's agreement to arbitrate applies to wrongful death claims in North Carolina "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). See, also, Raper v. Oliver House, 637 S.E.2d 551 (N.C. App. 2006).

According to the wrongful death statute in Texas, "[t]he jury may award damages in an amount proportionate to the injury resulting from the death." TEX. REV. CIV. STAT. § 71.010(a). Under the statute, wrongful death claimants may recover for the value of lost services, Baray v. Escobedo, 259 S.W. 1099 (Tex. App. 1924), mental anguish, loss of society, loss of companionship, Wellborn v. Sears, Roebuck & Co., 970 F.2d 1420, 1429 (5th Cir. (Tex.) 1992), and loss of personal guidance, advice, and support. Hartzell Propeller Co., Inc. v. Alexander, 485 S.W.2d 943, 947 (Tex. App. 1972). With the allowance of damage recovery similar to Missouri, Texas requires wrongful death claimants to comply with the terms of the arbitration agreement executed by the decedent at the time of her admission to the defendant's facility. See Nexion Health at Humble, Inc., 173 S.W.3d 67 (Tex. 2005); Ledet v. Living Centers of Texas, Inc., 2004 WL 2945699 (Tex. App. 2004).

Based on the above authority, MATA's effort to distinguish Missouri's wrongful death statutes applicable to the cases has plainly failed. Many states, like Missouri, allow

for the recovery of damages in a wrongful death case which vary from the damages that the decedent could have recovered. However, as acknowledged by the courts above, the calculation of damages and the right to bring a cause of action are two entirely separate issues. A wrongful death claimant's right to bring a cause of action is dependent upon the decedent's right and is, thus, derivative in nature. Accordingly, this Court should follow the guidance of its sister courts and find that Respondent must honor his mother's agreement to arbitrate future disputes regarding her care and submit his claims to arbitration.

CONCLUSION

For all the reasons cited in Appellant's Substitute Brief and supplemented above, 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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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent by United States mail, postage pre-paid, this ____ day of August, 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 5,171 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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