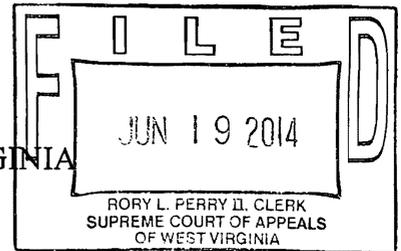


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 14-0319



(Kanawha County Civil Action No. 13-C-1279)

AMFM, LLC; Commercial Holdings, Inc.
k/n/a Commercial Holdings, LLC; Integrated
Commercial Enterprises, Inc.; Manzanita
Holdings, LLC; Manzanita Management, Inc.;
Lifetree, LLC; Wisteria, LLC; Mercer Nursing &
Rehabilitation Center, Inc. d/b/a Mercer Nursing
& Rehabilitation Center; and Matt Tucker,
Petitioners

v.

Peggy Sue Davis, Individually and on behalf
of the Estate and Wrongful Death Beneficiaries
of Lillie Mae Gibson,
Respondent

PETITIONERS' BRIEF

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ASSIGNMENT OF ERROR

1. THE CIRCUIT COURT'S PROPOSED ANSWER TO THE CERTIFIED QUESTION IS ERROR AND MISINTERPRETS CLEAR PRECEDENT OF THIS COURT AND THE SUPREME COURT OF THE UNITED STATES.

STATEMENT OF THE CASE

This appeal arises from a wrongful death action filed on behalf of the Estate of Lillie Mae Gibson against Petitioners in the Circuit Court of Kanawha County arising from care and treatment during Ms. Gibson's admission to Mercer Nursing & Rehabilitation Center ("Mercer Nursing"). *See generally* JA at 3-182. Upon admission to Mercer Nursing, Charles Gibson, acting as attorney-in-fact for Lillie Mae Gibson pursuant to a *Durable General Power of Attorney*, (JA at 193-197), signed a *Resident and Facility Arbitration Agreement*, (JA at 211-212). Respondent's Complaint alleges various wrongful death and survival causes of action arising from Ms. Gibson's residency at Mercer Nursing. JA at 3-182. Petitioners filed *Defendants' Motion to Dismiss Plaintiff's First Amended Complaint and to Compel Arbitration*, (JA at 183-212), and moved to stay discovery pending ruling on the motion, (JA at 213-222). The parties engaged in a period of discovery related solely to formation of the subject arbitration agreement, and the matter was brought on for hearing on January 8, 2014. Thereafter, by order entered February 18, 2014, the lower court certified the following question:

Are the Statutory Wrongful Death Beneficiaries bound by an arbitration agreement that was executed by the decedent or the decedent's legal representative?

JA at 299-305. The lower court answered the Certified Question in the negative, reasoning that because "...[t]here is no scenario under our law upon which a wrongful death claim could ever belong to the decedent or his/her estate... this Court finds that Lillian Mae Gibson [or her durable power of attorney] did not have the authority to waive the constitutional right to a jury

trial of her subsequent wrongful death beneficiaries and bind them to arbitration.” JA at 302-303.

The Circuit Court further found that the parties’ agreement that binding arbitration shall be conducted “in accordance with the Code of Procedure of the National Arbitration Form (“NAF”) which is hereby incorporated into this Agreement,” (JA at 211), constitutes merely “an ancillary logistical concern” and not “an integral part of the agreement to arbitrate” within the meaning of Syl. Pt. 3, *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 745 S.E.2d 556 (2013), (JA at 304).

This appeal followed.

SUMMARY OF ARGUMENT

This appeal presents a question certified by the Circuit Court of Kanawha County regarding whether an arbitration agreement signed by a nursing home resident or her legal representative which specifically references claims for wrongful death and other derivative actions may be enforced against the statutory wrongful death beneficiaries in a subsequent wrongful death action. Pursuant to Syllabus Point 1 of *Front, supra*, this Court docketed this appeal as an interlocutory appeal from denial of a motion to enforce arbitration.

West Virginia’s wrongful death statute creates a cause of action for wrongful death which is derivative of the decedent’s personal-injury claims. *Davis v. Foley*, 193 W. Va. 595, 598, 457 S.E.2d 532, 535 (1995). Because the statutory wrongful death beneficiaries have no standing to pursue a claim for damages independent of the wrongful death claim, they do not have independent standing to attack the validity of an arbitration agreement signed by the decedent which encompasses the wrongful death claim. A rule of law to the contrary would be both inconsistent with a large body of case law from states with similar wrongful death statutes and,

more importantly, directly preempted by the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, *et seq.*

The lower court further found that the National Arbitration Forum (“NAF”), whose code of procedure was selected by the parties to the arbitration agreement, is unavailable as a forum for arbitration in this case. The lower court correctly found that the choice of the NAF Code of Procedure in the arbitration agreement was a mere ancillary concern, and that the parties or the court could select an alternative arbitrator pursuant to *Section 5* of the FAA. JA at 303-304.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Rule 18 of the *West Virginia Rules of Appellate Procedure* states that oral argument is unnecessary if all of the parties have waived oral argument, the appeal is frivolous, the dispositive issues have been authoritatively decided, or all of the facts and legal arguments are adequately presented in the briefs. None of these criteria are present in this case, and therefore oral argument is necessary. Because the certified question posed in this matter is one of first impression, Petitioners believe that argument pursuant to Rule 20(a) is appropriate.

STANDARD OF REVIEW

The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*. Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996). “When an appeal from an order denying a motion to dismiss is properly before this Court, our review is *de novo*.” *Front*, 231 W. Va. 518, 745 S.E.2d at 563 (citations omitted)

ARGUMENT

I. AN ARBITRATION AGREEMENT SIGNED BY A NURSING HOME RESIDENT OR HER ATTORNEY-IN-FACT IS BINDING ON STATUTORY WRONGFUL DEATH BENEFICIARIES.

West Virginia, like many other states in the early 19th century, had no common law action for a wrongfully caused death. *Swope v. Keystone Coal & Coke Co.*, 89 S.E. 284, 286 (W. Va. 1916). However, the state passed its first Wrongful Death statute in the same year it achieved statehood in 1863. “As no right of action for death existed at common law, the right or cause of action for wrongful death, if maintainable, exists under and by virtue of the wrongful death statute . . .” *Baldwin v. Butcher*, 155 W. Va. 431, 433-34, 184 S.E.2d 428, 429 (1971) Every wrongful death statute has as its end the compensation of a certain class of beneficiaries: the primary distinction is whether the statute regards the beneficiaries’ claims as derivative or independent of the injury to the decedent. West Virginia’s wrongful death statute defines a cause of action for wrongful death as follows:

Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, . . .

W. Va. Code § 55-7-5. This Court has interpreted West Virginia’s wrongful death statute as creating a derivative claim in favor of the statutory beneficiaries. In *Davis v. Foley*, this Court expressly rejected the contention that “a wrongful death action, unlike a claim for loss of consortium, is an independent action and not a derivative action” and held “the damages in a wrongful death action arise out of the death of the decedent thereby making a wrongful death action a derivative claim.” 193 W. Va. 595, 598, 457 S.E.2d 532, 535 (1995).

A well-recognized split of authority exists among the states as to whether the class of wrongful death beneficiaries created by its wrongful death statute are bound by an arbitration agreement signed by or on behalf of the decedent prior to death. Nearly every court which has addressed this specific issue has based its holding on whether that state's wrongful death statute is treated as creating an independent or derivative cause of action. The clear precedent of this Court, the Supreme Court of the United States, and the Federal Arbitration Act compel the conclusion that the wrongful death beneficiaries in this case are bound by the arbitration agreement executed on behalf of Ms. Gibson by her attorney-in-fact.

A. States which regards wrongful death claims as derivative in nature also enforce arbitration agreements signed by the decedent in wrongful death cases, and West Virginia should follow this rule.

Appellate courts sitting in Alabama, Arkansas, Florida, Georgia, Michigan, Mississippi, New Mexico, North Carolina, and Texas have enforced arbitration agreements against wrongful death beneficiaries based on their interpretation of state wrongful death statutes as derivative in nature.

Alabama

In *Briarcliff Nursing Home, Inc. v. Turcotte*, the Supreme Court of Alabama stated that an “administratrix of a decedent’s estate stands in the shoes of the decedent.” 894 So. 2d 661, 665 (Ala. 2004) (quoting *SouthTrust Bank v. Ford*, 835 So. 2d 900, 993 (Ala. 2002)). In *Briarcliff*, the resident’s attorney-in-fact signed an admission contract containing an arbitration provision. *Id.* at 663. Following the death of the resident and the filing of a wrongful death action, the administratrix opposed arbitration on the grounds that she had not signed the agreement in her capacity as administratrix and that the agent who signed the agreement was dead. *Id.* The court found that the administratrix was bound by the arbitration provisions:

For the same reason the powers of an executor or an administrator encompasses all of those formerly held by the decedent, those powers must likewise be restricted in the same manner and to the same extent as the powers of the decedent would have been. Thus, where an executor or administrator asserts a claim on behalf of the estate, he or she must also abide by the terms of any valid agreement, including an arbitration agreement, entered into by the decedent.

Id. at 665 (citations omitted). Thus, the *Briarcliff* court found that the wrongful death beneficiaries were bound by the arbitration agreement. *Id.*; see also *Carraway v. Beverly Enters. Ala., Inc.*, 978 So. 2d 27 (Ala. 2007) (compelling arbitration in a nursing home arbitration case); *Entrekin v. Internal Med. Assocs. of Dothan*, 689 F.3d 1248 (11th Cir. 2012) (applying Alabama law, following *Briarcliff* and *Carraway*, and compelling arbitration in a nursing home case).

Arkansas

Similarly, the Arkansas Supreme Court found that statutory wrongful death beneficiaries are bound by an arbitration agreement executed by a nursing home resident prior to injury. *Searcy Healthcare Ctr., LLC v. Murphy*, 2013 Ark. 463 (2013). The *Murphy* court analyzed Arkansas' wrongful death statute and held that the statutory beneficiaries' claims that is "derivative of the claim that the decedent would have had, had he survived." Notably, Arkansas' wrongful death statute mirrors the West Virginia statute:

Whenever the death of a person . . . is caused by a wrongful act, neglect, or default and the act, neglect, or default would have entitled the party injured to maintain an action and recover damages in respect thereof if death had not ensued, then and in every such case, the person or company or corporation that would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person . . .

Arkansas Code Annotated § 16-62-102(a)(1).

Florida

Florida's Supreme Court has held that "[A] wrongful death action is derivative of the injured person's right, while living, to recover for personal injury." *Celotex Corp. v. Meehan*, 523 So. 2d 141, 147 (Fla. 1988). In 2013, the Supreme Court of Florida held that "the execution of a nursing home arbitration agreement by a party with the capacity to contract binds the decedent's estate and statutory heirs in a subsequent wrongful death action arising from an alleged tort within the scope of an otherwise valid arbitration agreement." *Laizure v. Avante at Leesburg, Inc.*, 109 So.3d 752, 762 (Fla. 2013). In *Laizure*, a nursing home patient signed an admission agreement with a nursing home containing an arbitration provision. *Laizure*, 109 So.3d at 754. After the patient's death, the personal representative of his estate filed a wrongful death action and argued that the arbitration clause was unenforceable against the statutory beneficiaries because their claims are "an independent claim belonging to the estate and the statutory heirs." *Id.* at 756. This argument is identical to the theory advanced by Respondents and the lower court in this case. JA at 317-323.

The *Laizure* court rejected the beneficiaries' argument, holding that "[w]hile the Wrongful Death Act creates independent claims for the survivors, these claims are also derivative in the sense that they are dependent upon a wrong committed upon another person." *Id.* at 760 (*quoting Valient Ins. Co v. Webster*, 567 So.2d 408, 411 (Fla. 1990), *receded from on other grounds by Gov't Employees Ins. Co v. Douglas*, 654 So.2d 118, 119-20 (Fla. 1995)). Moreover, "[n]o Florida decision has allowed a survivor to recover under the wrongful death statute where the decedent could not have recovered." *Id.* (*quoting Webster*, 567 So.2d at 411).

Furthermore, the *Laizure* court recognized that courts in other jurisdiction are split when considering the effect of arbitration provisions on beneficiaries in wrongful death claims:

Principled arguments exist on both sides of this issue. However, we ultimately conclude that the nature of a wrongful death cause of action in Florida is derivative in the context of determining whether a decedent's estate and heirs are bound by the decedent's agreement to arbitrate. ***The estate and heirs stand in the shoes of the decedent for purposes of whether the defendant is liable and are bound by the decedent's actions and contracts with respect to defenses and releases.***

Id. at 761–62 (emphasis added). Because wrongful death actions are derivative, the *Laizure* court held that the plaintiffs were bound by the decedent's arbitration agreement with the nursing home. *Id.* at 762.

Georgia

In Georgia, a “wrongful death claim is entirely derivative of the cause of action the decedent would have had if she had survived.” *Thi of Ga. at Shamrock, LLC v. Fields*, 2013 U.S. Dist. LEXIS 168598 (S.D. Ga. Nov. 18, 2013) (citing *Mowell v. Marks*, 269 Ga. App. 147, 603 S.E.2d 702 (2004)). *Fields* involved an arbitration agreement signed by a nursing home resident's attorney-in-fact which the wrongful death beneficiaries later challenged after filing a wrongful death action. *Fields, supra*. Applying Georgia law, the United States District Court for the Southern District of Georgia found that the wrongful death beneficiaries' claims were subject to the same defenses, including the arbitration agreement, because “the Georgia wrongful death statute essentially places a beneficiary in the same shoes as the decedent”. *Fields* at 9.

Michigan

In *Ballard v. Southwest Detroit Hospital*, the Court of Appeals of Michigan held that the personal representative of a deceased patient who signed an arbitration agreement upon admission to the hospital is similarly bound by the arbitration agreement. 327 N.W.2d 370, 371-372 (Mich. Ct. App. 1982). The *Ballard* court reasoned that “although the Michigan wrongful death act provides for additional damages benefiting the decedent's next of kin for loss of society

companionship, it did not create a separate cause of action independent of the underlying rights of the decedent.” *Id.* Although the *Ballard* court held the arbitration agreement unenforceable on other grounds, it did specifically hold that the wrongful death statute does not present a defense to enforceability. *Id.*

Mississippi

Mississippi’s Supreme Court has held that “[a] wrongful death suit is a derivative action by the beneficiaries, and those beneficiaries, therefore, stand in the position of their decedent.” *Trinity Mission of Clinton, LLC v. Barber*, 988 So.2d 910, 919 (Miss. 2007) (quoting *Carter v. Miss. Dep’t of Corr.*, 860 So. 2d 1187, 1192 (Miss. 2003)). The *Barber* court concluded that because the contract between the nursing home and the decedent’s son was entered into for the benefit of the decedent, the decedent was a third-party beneficiary. *Id.* The *Barber* court specifically notes that “[a] wrongful death suit is a derivative action by the beneficiaries, and those beneficiaries, therefore, stand in the position of their decedent.” *Id.* (citing *Carter v. Miss. Dep’t of Corr.*, 860 So. 2d 1187, 1192 (Miss. 2003)). Therefore, the decedent was “bound by the arbitration provision contained in the admissions agreement, notwithstanding her status as a non-signatory to the agreement.” *Id.* More importantly, the *Barber* court found “that because the arbitration provision could be enforced against [the decedent] it may be equally enforced against her wrongful death beneficiaries.” *Id.* (citing *Cleveland v. Mann*, 942 So. 2d 108, 117–18 (Miss. 2006)).

New Mexico

New Mexico’s wrongful death act is “a survival statute [that] provides a cause of action for the benefit of the statutory beneficiaries to sue a tortfeasor for the damages, measured by the value of the decedent’s life, which the decedent [herself] would have been entitled to recover had

death not ensued." *Romero v. Byers*, 117 N.M. 422, 872 P.2d 840, 846 (1994). Applying New Mexico law, the United States District Court for the District of New Mexico enforced an arbitration agreement signed by a nursing home resident's attorney-in-fact against the statutory wrongful death beneficiaries. *Thi of N.M. at Vida Encantada, LLC v. Lovato*, 848 F. Supp. 2d 1309 (D.N.M. 2012). In *Lovato*, the District Court reasoned that because a "wrongful death claim . . . is derivative of, and limited in scope to, the claims that [the decedent] would have had if she had lived," the personal representative was bound to submit the wrongful death claim to arbitration. *Id.*

The New Mexico Court of Appeals expressly adopted the District Court's analysis in *Lovato* in a similar case involving enforcement of an arbitration agreement against a nursing home resident's wrongful death beneficiaries. *Peck v. Laurel Healthcare Providers, LLC*, 315 P.3d 298 (N.M. Ct. App. 2013).

North Carolina

The United States District Court for the Western District of North Carolina specifically rejected the argument that the wrongful death beneficiaries are not bound by an arbitration agreement signed by or on behalf of a nursing home resident. *SSC Statesville Maple Leaf Operating Co., LLC v. Morgan*, 2012 U.S. Dist. LEXIS 106316 (W.D. N.C. 2012). In *Morgan*, the decedent's son and attorney-in-fact signed an arbitration agreement at the time his mother was admitted to a nursing home. Following her death, a wrongful death action was filed, and the statutory wrongful death beneficiaries sought to avoid enforcement of the arbitration agreement.

Id. The District Court held:

With regard to [the beneficiaries]' argument that the [arbitration agreement] should not apply to wrongful death claims under North Carolina law, the United States Supreme Court has held that under the Supremacy Clause, the FAA preempts state laws that seek to

limit or prohibit the arbitration of certain claims. *See Perry v. Thomas*, 482 U.S. 483, 490-91, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987). Consequently, Defendant's argument that the [arbitration agreement] should not apply to wrongful death claims under North Carolina law is unpersuasive. Furthermore, [the beneficiaries]' claims for wrongful death and negligence stem directly from the care and treatment that Ms. Morgan received during her residency at the Statesville facility and are clearly covered under the Arbitration Agreement.

Morgan at 10.

The North Carolina Court of Appeals also enforced nursing home arbitration agreements against wrongful death beneficiaries. *Westmoreland v. High Point Healthcare Inc.*, 721 S.E.2d 712 (N.C. Ct. App. 2012). The *Morgan* court's citation to *Perry v. Thomas*, an 8-1 opinion striking down California's requirement that "litigants be provided a judicial forum for resolving wage disputes", is particularly instructive inasmuch as the *Morgan* court did not engage in construction or interpretation of North Carolina's wrongful death act; rather, the *Morgan* court simply applied the FAA pursuant to the Supremacy Clause of the United States Constitution.

Texas

Although in a general personal injury context, the Texas Supreme Court addressed the very same issue presented to this Court when the wrongful death beneficiaries of a deceased employee sought to avoid enforcement of an arbitration agreement signed by the decedent:

Under Texas law, wrongful death beneficiaries are generally bound by a decedent's pre-death contractual agreement because of the derivative nature of their claims. In this case, we consider whether the arbitration provision in an agreement between a decedent and his employer requires the employee's wrongful death beneficiaries to arbitrate their wrongful death claims against the employer even though they did not sign the agreement. We hold that it does.

In re Labatt Food Serv., L.P., 279 S.W.3d 640, 642 (Tex. 2009). The *Labatt* Court's analysis is particularly instructive in that the Texas wrongful death statute is worded similarly to West

Virginia's statute. *Compare* Tex. Civ. Prac. & Rem. Code § 71.003(a) (“[the Wrongful Death Act] applies only if the individual injured would have been entitled to bring an action for the injury if the individual had lived . . .”) with W. Va. Code § 55-7-5 (“Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured. . .”).

The common sense rationale of *Labatt* is perhaps best summarized by the court as follows: “[S]tatutory wrongful death beneficiaries' claims place them in the exact 'legal shoes' of the decedent, and they are subject to the same defenses to which the decedent's claims would have been subject.” 279 S.W.3d at 644.

B. States which do not enforce arbitration agreements in wrongful death claims do so because those states' wrongful death statutes treat the beneficiaries' claims as independent in nature.

Based on the treatment of wrongful death beneficiaries' claims as independent, courts in Arizona, California, Kentucky, Missouri, Ohio, Pennsylvania, and Washington have held that an arbitration agreement signed by or on behalf of a nursing home resident is not enforceable against the wrongful death beneficiaries.

Arizona

In a wrongful death case brought by the estate of a nursing home resident, the Arizona Court of Appeals correctly notes that “[s]everal jurisdictions also have addressed the scope of arbitration clauses in this context, and nearly all distinguish between derivative and independent claims in this manner.” *Estate of Decamacho v. La Solana Care & Rehab, Inc.*, 316 P.3d 607, 613 (Ariz. 2014). The *Decamacho* court observed that “those states that treat wrongful death

actions a separate and distinct from the decedent's underlying claims do not bind claimants to the decedent's arbitration agreement . . . [b]ut states that consider wrongful death actions as derivative of the decedent's claims conclude that the decedent's heirs are bound." *Id.* (citations omitted).

Arizona's wrongful death statute is substantially similar to West Virginia's:

When death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to murder in the first or second degree or manslaughter.

A.R.S. § 12-611. However, Arizona regards its wrongful death statute as independent and not derivative. Accordingly, it declines to enforce the subject arbitration agreement as to the wrongful death claims. *Decamacho*, 316 P.3d at 615.

California

California's wrongful death statute expressly permits a wrongful death action to be brought by any of an enumerated class of beneficiaries. Cal. Code Civ. Proc. § 377.60 ("a cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf..."). As California's Supreme Court has explained:

[u]nlike some jurisdictions wherein wrongful death actions are derivative, [§ 377.60] 'creates a new cause of action in favor of the heirs as beneficiaries, based upon their own independent pecuniary injury suffered by loss of a relative, and distinct from any the deceased might have maintained had he survived.'

Horwich v. Superior Court, 21 Cal. 4th 272, 283 (Cal. 1999). Based expressly on this reasoning, California courts do not compel wrongful death beneficiaries to arbitrate their claims. *See e.g. Daniels v. Sunrise Senior Living, Inc.*, 151 Cal. Rptr. 3d 273 (Cal. App. 4th Dist. 2013).

Kentucky

The Kentucky wrongful death act is distinct from West Virginia’s wrongful death act or that of any of the other “derivative” states: “Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it.” K.R.S. § 411.130(1) Kentucky has long held that “the wrongful death action is not derivative... [It] is distinct from any that the deceased may have had if he had survived.” *Moore v. Citizens Bank of Pikeville*, 420 S.W.2d 669, 672 (Ky. 1967).

The Supreme Court of Kentucky held in *Ping v. Beverly Enterprises, Inc.* that statutory wrongful death beneficiaries are not bound by a valid arbitration agreement executed by or on behalf of a deceased nursing home resident. 376 S.W.3d 581, 597 (Ky. 2012). The *Ping* court expressly based its decision on prior interpretations of the Kentucky wrongful death statute as “independent”:

Because under our law the wrongful death claim is not derived through or on behalf of the resident, but accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss, we agree with the Courts cited above which have held that a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim.

376 S.W.3d at 599.

Missouri

In *Lawrence v. Beverly Manor*, the Supreme Court of Missouri held that wrongful death beneficiaries are not bound by arbitration agreement signed by or on behalf of a deceased

nursing home resident because “A claim for wrongful death is not derivative from any claims [the decedent] might have had. . .” 273 S.W.3d 525, 529 (Mo. 2009) (en banc). Notably, Missouri’s wrongful death statute provides a right of action which may be asserted by any member of a class of beneficiaries individually. Mo. Rev. Stat. § 537.080.

Ohio

Ohio’s wrongful death statute allows only a personal representative to bring a wrongful death action. Ohio Rev. Code Ann. § 2125.02(A)(1). However, Ohio courts view wrongful death claims as independent and separate from the decedent’s survival claim. *Grady v. Winchester Place Nursing & Rehab. Ctr.*, 2009 Ohio 3660 (Ohio Ct. App. 2009). The *Grady* court held that a decedent’s beneficiaries, who were not parties to an arbitration agreement, did not have to arbitrate a wrongful death claim based on the “separate nature” of wrongful death and survival claims under Ohio law. The plaintiff’s decedent had executed an arbitration agreement with a nursing home.

Pennsylvania

The Pennsylvania wrongful death statute expressly provides that “the right of action created by this section shall exist only for the benefit of the spouse, children or parents of the deceased.” 42 Pa.C.S.A. § 8301 (1978). For this reason, the Superior Court of Pennsylvania held that although “wrongful death actions are derivative of decedents’ injuries,” they are “not derivative of decedents’ rights.” *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660 (Pa. Super. Ct. 2013). In *Pisano*, the decedent’s power of attorney signed arbitration agreement upon admission to the defendant’s nursing facility. Because in Pennsylvania “wrongful death actions are recognized as independent and separate causes of action,” the court held that “compelling

arbitration upon individuals who did not waive their right to jury trial would infringe upon wrongful claimants' constitutional rights." *Id.*

Utah

In its analysis of the derivative/independent split of authority, the Supreme Court of Utah notes that "Courts that compel nonsignatory heirs to abide by arbitration agreements often do so because under their law a wrongful death cause of action is wholly derivative of and dependent on the underlying personal injury claim." *Bybee v. Abdulla*, 189 P.3d 40, 46 (Utah 2008). The *Bybee* court notes that Utah's wrongful death statute finds its roots in the state's Constitution and was reticent to adopt reasoning from other jurisdictions. *Id.*

Washington

In *Woodall v. Avalon Care Ctr.-Federal Way, LLC*, a Washington Court of Appeals explained:

Washington's wrongful death statutes do not expressly condition a beneficiary's wrongful death claims on the decedent's right to maintain a suit for injuries. In view of that difference, wrongful death claims in Washington are not "derivative" in the same sense as was discussed in [other cited] cases.

155 Wn. App. 919, 930 (Wash. Ct. App. 2010). On that basis, the statutory wrongful death beneficiaries were not bound by the arbitration agreement signed by the decedent upon his admission to the subject skilled nursing facility.

C. The FAA preempts a rule of state law that categorically prohibits the arbitration of wrongful death claims in accordance with a valid arbitration agreement signed by the decedent or her legal representative.

"When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740, 1747 (2011) (citing *Preston v. Ferrer*, 128 S. Ct. 978 (2008)). In

its opinion overruling portions of *Brown v. Genesis Healthcare Corporation*, 228 W. Va. 646, 724 S.E.2d 250 (2011) (“Brown I”), the Supreme Court of the United States notes that *Brown I* “held unenforceable all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes.” *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201, 1202 (2012). After reviewing the other holdings in *Brown I*, the Supreme Court summarily notes that the FAA’s “text includes no exception for personal injury or wrongful death claims. It ‘requires courts to enforce the bargain of the parties to arbitrate.’” 132 S.Ct. at 1203 (citations omitted).

In the case at bar, respondents urge this Court to adopt a rule of law which would exempt wrongful death claims from arbitration. Despite being plainly contrary to this Court’s precedent, such a rule cannot withstand federal preemption analysis under the FAA. *Concepcion*, 131 S. Ct. at 1746-47 (FAA preempts rules of state law that “apply only to arbitration,” that “derive their meaning from the fact that an agreement to arbitrate is at issue,” that are “applied in a fashion that disfavors arbitration,” or that “have a disproportionate impact on arbitration agreements”).

As this Court recognized in Syllabus Point 8 of *Brown I*:

A state statute, rule, or common-law doctrine, which targets arbitration provisions for disfavored treatment and which is not usually applied to other types of contract provisions, stands as an obstacle to the accomplishment and execution of the purposes and objectives of the Federal Arbitration Act, 9 U.S.C. § 2, and is preempted.

overruled on other grounds by Marmet, supra.

II. THE LOWER COURT CORRECTLY FOUND THAT THE UNAVAILABILITY OF THE NATIONAL ARBITRATION FORUM IS AN “ANCILLARY LOGISTICAL CONCERN” WHICH DOES NOT RENDER THE AGREEMENT IMPOSSIBLE TO PERFORM.

The subject arbitration agreement contains an agreement that binding arbitration shall be conducted “in accordance with the Code of Procedure of the National Arbitration Forum (“NAF”) which is hereby incorporated into this agreement.” JA at 211. As this Court recognized in *Credit Acceptance Corp. v. Front*, “the NAF entered into a consent decree forbidding it from conducting consumer arbitration.” 745 S.E.2d 556, 559 (W. Va. 2013). The subject arbitration agreement incorporates only the NAF’s Code of Procedure and does not expressly require arbitration be conducted by the NAF. Respondent’s sole argument that the unavailability of the NAF to conduct arbitrations has *any* impact on the subject arbitration agreement arises from the NAF’s requirement that the NAF’s “Code shall be administered only by the National Arbitration Forum...” JA at 242, 312-317. Respondent has cited no other reason why the unavailability of the NAF is “an integral part of the agreement to arbitrate.” *Front*, 745 S.E.2d at 568. The record is devoid of any argument or evidence that the NAF has any peculiar expertise such that the appointment of a substitute arbitrator pursuant to *Section 5* of the FAA would materially alter the proceedings.

In *Front*, this Court first interpreted *Section 5* of the FAA when it adopted the majority rule as formulated in Syllabus Point 3:

Where an arbitration agreement names a forum for arbitration that is unavailable or has failed for some reason, a court may appoint a substitute forum pursuant to *section 5* of the Federal Arbitration Act, 9 U.S.C. § 5 (1947) (2006 ed.), only if the choice of forum is an ancillary logistical concern. Where the choice of forum is an integral part of the agreement to arbitrate, the failure of the chosen forum will render the arbitration agreement unenforceable.

Front, supra. In adopting this majority rule, this Court noted the following underlying rationale for distinguishing between forum selections which are “integral” and those which are merely an “ancillary logistical concern”: “. . ., when the choice of arbitration forum was integral to the agreement, such that the parties would not have agreed upon arbitration absent the selected forum, application of Section 5 to appoint a substitute arbitrator is more problematical.” 745 S.E.2d at 568 (*quoting Jones v. GGNSC Pierre, LLC*, 684 F. Supp. 2d 1161, 1166 (D.S.D. 2010)).

In the present case, no argument has been made nor does the record suggests that the parties would not have agreed to arbitrate future disputes and the absence of the NAF. In point of fact, Respondent’s construction of the arbitration agreement – and not the text of the agreement itself – basis suggests that the NAF would be required arbitrate disputes arising between the parties. The lower court correctly found that the NAF’s requirement that it administer its Code of Procedure is not binding, and no evidence or argument that Mr. Gibson would not have agreed to arbitrate absent the availability of the NAF was presented.

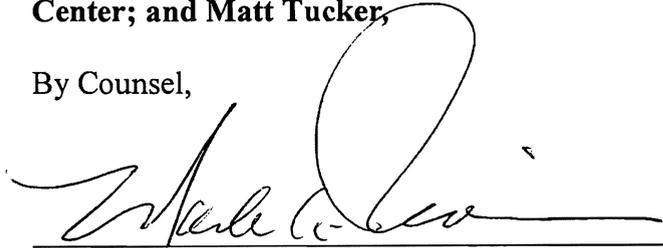
CONCLUSION AND REQUEST FOR RELIEF

Petitioners respectfully request that this Court answer the Certified Question as presented in the affirmative. Petitioners acknowledge a clear split of authority with well-reasoned positions on both sides. However, the most critical aspect of this split of authority is not as to the weight of authority on each side but rather on why the cases split where they do. West Virginia’s wrongful death statute and this Court’s clear precedent align it with the “derivative” line of cases. Accordingly, Respondent is bound by the subject arbitration agreement to the same extent as the resident would be, had she survived.

Petitioners further request that the Court affirm the lower court's finding that any purported designation of the National Arbitration Forum constitutes a mere "ancillary logistical concern" subject to substitution pursuant to Section 5 of the Federal Arbitration Act.

Petitioners AMFM, LLC; Commercial Holdings, Inc. k/n/a Commercial Holdings, LLC; Integrated Commercial Enterprises, Inc.; Manzanita Holdings, LLC; Manzanita Management, Inc.; Lifetree, LLC; Wisteria, LLC; Mercer Nursing & Rehabilitation Center, Inc. d/b/a Mercer Nursing & Rehabilitation Center; and Matt Tucker,

By Counsel,

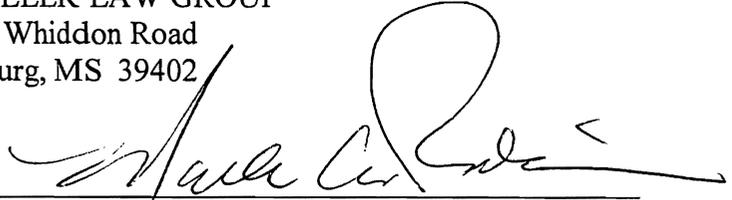
A handwritten signature in black ink, appearing to read "Mark A. Robinson", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of June 2014, the foregoing *Petitioner's Brief* and *Joint Appendix* were deposited in the U.S. Mail, first class postage prepaid, addressed to all other parties to this appeal as follows:

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