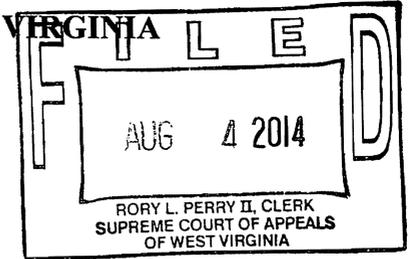


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 14-0319



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 / DEFENDANTS

v.

On Appeal from Kanawha County
Circuit Court Cause No.13-C-1279

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

RESPONDENT / PLAINTIFF

**RESPONDENT'S BRIEF
(includes cross-appeal)**

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SUMMARY OF ARGUMENT

When Lillie Mae Gibson was admitted into Mercer Nursing & Rehabilitation Center on November 6, 2008, Charles Gibson, acting pursuant to a Durable General Power of Attorney (JA at 000193-000197), completed admissions paperwork on her behalf. As a part of that paperwork, Charles Gibson signed a Resident and Facility Arbitration Agreement (JA at 000211-000212), purportedly waving Lillie Mae Gibson's constitutional right to a jury trial.

While residing at Mercer Nursing & Rehabilitation Center, Lillie Mae Gibson suffered numerous personal injuries, including, but not limited to, pressure sores, dehydration, acute renal failure, and urinary tract infections. As a result of these injuries, Lillie Mae Gibson passed away on August 14, 2011, possessing a claim against Petitioners—the owners, operators, and managers of Mercer Nursing & Rehabilitation Center—for her injuries.

Respondent filed her Complaint on behalf of Lillie Mae Gibson's Estate and on behalf of Lillie Mae Gibson's wrongful death beneficiaries. (JA at 00072-000139.) Petitioners requested that the trial court require Respondent to arbitrate her claims. (JA at 000183.) Respondent, in turn, argued that (1) the claims raised on behalf of the wrongful death beneficiaries were not covered by the arbitration agreement, and (2) the arbitration agreement is unenforceable as a result of Defendants' incorporation of the National Arbitration Forum's (NAF) Code of Procedure as a term of the agreement. (*See generally* JA at 000238-000249.) After hearing arguments from Petitioners and Respondent, the trial court determined that Lillie Mae Gibson's wrongful death beneficiaries were not bound by the arbitration agreement. (JA at 000300-000303.) Thus, they were not required to arbitrate their claims. Additionally, the trial court determined that the incorporation of the NAF's Code of Procedure did not make the arbitration

agreement unenforceable. (JA at 000303-000304.) As such, the claims raised on behalf of Lillie Mae Gibson's Estate would proceed to arbitration.

The Corporate Defendants, Petitioners here, have appealed the trial court's ruling that the wrongful death beneficiaries are not bound by the arbitration agreement. Simultaneously, Plaintiff, Respondent here, cross-appeals, arguing that the trial court erred in holding that the arbitration agreement remained enforceable despite the unavailability of the NAF.

As set forth herein, Petitioners' arguments have no merit. Petitioners ask this Court to reverse the trial court's ruling based on "clear precedent of this Court and the Supreme Court of the United States." (*See* Pet'r's Br. 1). However, this Court has not had occasion to examine the interplay between West Virginia's Wrongful Death Statute and an arbitration agreement that mandates arbitration of claims belonging solely to the wrongful death beneficiaries. For the reasons advanced herein, this Court must affirm the trial court's ruling that the wrongful death beneficiaries are not required to arbitrate their claims. Additionally, Respondent respectfully requests that this Court reverse the trial court's finding that the incorporation of the NAF's Code of Procedure does not make the arbitration agreement unenforceable.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent requests oral argument pursuant to West Virginia Rule of Appellate Procedure 20, as the issues presented for resolution by Petitioners and Respondent are issues of first impression.

STANDARD OF REVIEW

The proper standard of review for both of the issues before the Court is *de novo*. As this Court has stated, "[w]hen an appeal from an order denying a motion to dismiss is properly before

this Court, our review is de novo.” *Credit Acceptance Corp. v. Front*, 745 S.E.2d 556, 563 (W.Va. 2013). Similarly,

[t]his Court will preclude enforcement of a circuit court’s order compelling arbitration only after a de novo review of the circuit court’s legal determinations leads to the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that a matter be arbitrated or that the circuit court’s order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate.

Toney v. EQT Corp., No 13-1101, 2014 WL 2681091, at *2 (W.Va. June 13, 2014) (quoting Syl. Pt. 4, *McGraw v. American Tobacco Co.*, 681 S.E.2d 96 (W.Va. 2009)).

ARGUMENT

The trial court’s ruling should be affirmed except insofar as the court refused to find that Petitioners’ incorporation of the NAF’s Code of Procedure made the arbitration agreement unenforceable. Accordingly, this Court should affirm in part, reverse in part, and remand this case to the trial court.

I. LILLIE GIBSON’S WRONGFUL DEATH BENEFICIARIES ARE NOT BOUND BY THE ARBITRATION AGREEMENT

A. The Rights of the Wrongful Death Beneficiaries are not Derivative of the Decedent’s Rights

Contrary to Petitioners’ argument, the trial court correctly determined that the wrongful-death beneficiaries in this case are not bound by the arbitration agreement signed by Lillie Gibson’s legal representative on behalf of Lillie Gibson. As such, this Court should affirm the trial court’s ruling on this issue.

The interplay of three statutes is essential to a proper resolution of this case. First, West Virginia’s wrongful-death statute provides:

Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued)

have entitled the party injured to maintain an action 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 shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his death. Any right of action which may hereafter accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against the executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death, whether or not the death of the wrongdoer occurred before or after the death of the injured party.

W.Va. Code § 55-7-5. Second, West Virginia Code section 55-7-6(a) provides that

[e]very such action [for wrongful death] shall be brought by and in the name of the personal representative of such deceased person who has been duly appointed in this State, or in any other state, territory or district of the United States, or in any foreign country, and the amount recovered in every such action shall be recovered by said personal representative and be distributed in accordance herewith.

Lastly, West Virginia Code section 55-7-6(b)-(c) lists the wrongful-death beneficiaries and outlines the components of the wrongful-death recovery as follows:

In every such action for wrongful death, the jury, or in a case tried without a jury, the court, may award such damages as to it may seem fair and just, and, may direct in what proportions the damages shall be distributed to the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitled to share in such distribution after making provision for those expenditures, if any, specified in subdivision (2), subsection (c) of this section. If there are no such survivors, then the damages shall be distributed in accordance with the decedent's will or, if there is no will, in accordance with the laws of descent and distribution as set forth in chapter forty-two of this code. If the jury renders only a general verdict on damages and does not provide for the distribution thereof, the court shall distribute the damages in accordance with the provisions of this subsection.

(c)(1) The verdict of the jury shall include, but may not be limited to, damages for the following: (A) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent; (B)

compensation for reasonably expected loss of (i) income of the decedent, and (ii) services, protection, care and assistance provided by the decedent; (C) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and (D) reasonable funeral expenses.

Petitioners contend that these statutes, along with findings from this Court, “create[] a cause of action for wrongful death which is derivative of the decedent’s personal injury claims.” (Pet’r’s Br. 2). Respondent disagrees, in part. Black’s Law Dictionary (9th ed. 2009) defines a “derivative action” as “[a] lawsuit arising from an injury to another person[.]” In concert with this definition, this Court, in *Davis v. Foley*, 457 S.E.2d 532, 537 (W.Va. 1995), held that because a wrongful death action arises out of the death of the decedent, it is a derivative claim. Therefore, Petitioners are correct in stating that the claim is derivative, as the wrongful death claim, by its very nature, arises because of the death of the decedent.

However, the issue presented to this Court for resolution focuses on more than just the origin of the wrongful death claim. This issue focuses on the holder of the wrongful death rights. The rights retained and/or obtained by the wrongful death beneficiaries are separate and distinct from any that the decedent could have asserted during her lifetime and through her estate after her death. As such, neither the wrongful death claim nor the wrongful death beneficiaries’ right to recovery is defined by the decedent’s rights. The wrongful death statute creates an independent right in designated survivors to sue for damages that they have sustained as a result of the decedent’s death. Neither the decedent nor the decedent’s estate has the right to recover for such an action.

A brief examination of the roles filled by the decedent’s personal representative in a wrongful death claim demonstrates the independence of a wrongful death claim from a survival claim. Survival actions and wrongful death actions proceed in the name of the decedent’s personal representative. *See generally*, W.Va. Code §§ 55-7-6 to -8(a). This Court has written

that “it cannot be questioned that a wrongful death action must be brought by the personal representative of a decedent’s estate.” *Manor Care, Inc. v. Douglas*, No. 13-0470, 2014 WL 2835831 (W.Va. June 18, 2014) (quoting *Richardson v. Kennedy*, 475 S.E.2d 418, 424 (W.Va. 1996)). However, the personal representative in a wrongful death case “is merely a nominal party, and any recovery passes directly to the beneficiaries designated in the wrongful death statute, and not to the decedent’s estate.” *Id.* (citations omitted). Further, when bringing the wrongful death claims, the personal representative acts, not as an agent of the estate, but as a fiduciary to the wrongful death beneficiaries. *See Ellis v. Swisher*, 741 S.E.2d 871, 875-76 (W.Va. 2013); Syl. Pt. 4, *McClure v. McClure*, 403 S.E.2d 197 (W.Va. 1991); *Trail v. Hawley*, 259 S.E.2d 423, 425 (W.Va. 1979). Therefore, the nominal party in a wrongful death action, although identical to the real party in interest in a survival action, has substantially different responsibilities.

The independence and separateness of a wrongful death claim is more evident in that not only are the components of the recovery in a wrongful death action different from the components of the recovery in the survival action; but the wrongful death action, according to West Virginia Code section 55-7-6(d), has its own two-year statute of limitations. Furthermore, the recovery awarded to the wrongful death beneficiaries, unlike the recovery awarded in a survival action, specifically passes outside of the decedent’s estate. *See* W.Va. Code § 55-7-6.

Accordingly, the right to recover from Petitioners in the event of Lillie Gibson’s death never belonged to Lillie Gibson; thus, she never had any such right to give away.

B. The Wrongful Death Claims are Excluded From Arbitration

As the right to recover for wrongful death never belonged to Lillie Gibson, she could not agree to submit any claims that arose as a result of that right to arbitration. Hence, the trial court

correctly determined that neither Lillie Gibson nor her durable power of attorney could waive the wrongful death beneficiaries' constitutional right to a jury trial of their claims. *See* JA000303.

This Court has held that “arbitration is simply a matter of contract between the parties[.]” *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 555 (W.Va. 2012). Additionally, this Court has reinforced the holding from the United States Supreme Court that “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 511 S.E.2d 134, 136 (W.Va. 1998) (quoting *Air Line Pilots Association v. Miller*, 523 U.S. 866, 876 (1998)). “Consequently, ‘a party who has not agreed to arbitrate will normally have a right to a court’s decision about the merits of its dispute[.]’” *Id.* at 137 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)).

Here, it is undisputed that Charles Gibson signed the admissions paperwork and the arbitration agreement on his mother’s behalf. It is also undisputed that Charles Gibson signed only in his representative capacity- not individually- and that none of the wrongful death beneficiaries signed the arbitration agreement. Consequently, as Lillie Gibson’s wrongful death beneficiaries were not signatories to the arbitration agreement—in addition to the fact that only the wrongful death beneficiaries are the real parties in interest to the wrongful death claims—they are not required to submit their claims to arbitration. Rather, they are entitled to have their claims resolved in court. Accordingly, this Court should affirm the trial court’s ruling on this issue.

Petitioners are correct in that some states classify the wrongful death action as derivative of the decedent’s personal injury claim; and, thus, require wrongful death claims to be arbitrated in the face of a valid arbitration agreement. However, there are distinctions in some of those states that may justify that conclusion. For example, in Mississippi, the wrongful death statute,

despite the legislature's assigned nomenclature, encompasses all claims, including survival claims. *See Caves v. Yarbrough*, 991 So.2d 142 (Miss. 2008). Therefore, Mississippi does not draw a distinction between wrongful death claims and survival claims.

Additionally, New Mexico, another state to which Petitioners look for support of their position, does not have a survival statute that is separate and distinct from wrongful death, and the recoverable remedies are limited to those that would have been recoverable by decedent. *See Estate of Krahmer ex rel. Peck v. Laurel Healthcare Providers, LLC*, 315 P.3d 298 (N.M. Ct. App. 2013). Similarly, the Texas Legislature, and subsequently the Texas Supreme Court, has stated that any cause of action that decedent's survivors might have for negligence under the wrongful death statute or the survival statute is derivative of decedent's **rights**. *See Verdeur v. King Hospitality Corp.*, 872 S.W.2d 300 (Tex. App. 1994). This Court has made no such pronouncement.

Further, it is no surprise that Michigan required the wrongful death beneficiaries to arbitrate their claims in *Ballard v. Southwest Detroit Hospital*, 327 N.W.2d 370 (Mich. Ct. App. 1982), as Michigan's wrongful death act, unlike West Virginia's wrongful death statute, "does not create a separate cause of action independent of the underlying rights of the decedent. Rather, the cause of action is expressly made derivative of the decedent's **rights**." *Ballard*, 327 N.W.2d at 371-72 (citing *Maiuri v. Sinacola Construction Co.*, 170 N.W.2d 27 (Mich. 1969)). The treatment of wrongful death claims in Michigan is in stark contrast to the treatment of wrongful death claims in West Virginia and the difference between the two is too great.

Curiously, Petitioners cite *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So.2d 661 (Ala. 2004), as offering support for their position. However, *Turcotte* is factually distinguishable from the instant matter before the Court. In *Turcotte*, an administratrix of a decedent's estate sought to

avoid arbitration on the basis that she had not signed the arbitration agreement in her capacity as administratrix. *Id.* at 663. The court determined that because she was the administratrix and because an “administratrix of a decedent’s estate stands in the shoes of the decedent,” the administratrix would be bound by the arbitration agreement. *Id.* at 665. Contrary to Petitioners’ characterization and discussion of the case, the arbitrability of the wrongful death claims, which is the issue before this Court, was not at issue in *Turcotte*. Specifically, the Alabama Supreme Court stated, “Therefore, in this case, Turcotte, as executor of Noella’s estate, and Woodman, as administratrix of Sarah’s estate, are bound by the arbitration provisions contained in the admission contracts.” *Id.*

Additionally, in further contradiction to Petitioners’ characterization of *Turcotte* and the wrongful death law in Alabama, the Alabama Supreme Court has stated of the wrongful death statute that “the right of action which the statute gives is a new right, not derivative . . . to the person slain.” *Wood v. Wayman*, 47 So.3d 1212, 1216 (Ala. 2010) (quoting *Breed v. Atlanta, Birmingham & Coast R.R.*, 4 So.2d 315, 317 (Ala. 1941)). Thus, Petitioners classification of wrongful death claims in Alabama as derivative is incorrect.

Moreover, there are numerous jurisdictions in which the wrongful death action is treated, as this Court should, as an independent claim and have held that a decedent’s agreement to arbitrate personal injury claims does not bind wrongful death claimants because they were not parties to the contract. *See, e.g., Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660-63 (Pa. Super. Ct. 2013); *Carter v. SSC Odin Operating Co., LLC*, 976 N.E.2d 344, 353-58 (Ill. 2012); *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 599 (Ky. 2012); *Woodall v. Avalon Care Center-Federal Way, LLC*, 231 P.3d 1252 (Wash. Ct. App. 2010); *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009); *Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008); *Peters v. Columbus*

Steel Castings Co., 873 N.E.2d 1258 (Ohio 2007). In 2012, the Supreme Court of Kentucky examined the arbitrability of wrongful death claims. In *Ping*, 376 S.W.3d at 599, the Supreme Court, after discussing the distinctions between a survival action and a wrongful death action, reasoned that

[b]ecause 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.

Also, in *Carter*, 976 N.E.2d at 353-58, the Supreme Court of Illinois, similar to the course of action taken by the Supreme Court of Kentucky, began its examination of the arbitrability of wrongful death claims with a review of the difference between survival claims and wrongful death claims. The court ultimately stated that

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

Id. at 359. Consequently,

although the arbitration agreements purport to bind not only [the decedent], but also her 'successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives, including the personal representative or executor of her estate,' . . . plaintiff, as a nonparty to the arbitration agreements, cannot be compelled to arbitrate a wrongful-death claim that does not belong to the decedent[.]

Id. at 359-60.

Recently, in *Pisano*, 77 A.3d at 660-63, the Pennsylvania Superior Court, after concluding that "wrongful death actions are derivative of decedents' injuries but are not derivative of decedents' rights[.]" held that the decedent's "contractual agreement with [defendant] to arbitrate all claims was not binding on the non-signatory wrongful death

claimants.” Also, the Ohio Court of Appeals applied the Ohio Supreme Court’s rationale from *Peters*, 873 N.E.2d 1258, in which the Supreme Court stated that “while a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claims, the beneficiaries can agree to arbitrate these claims themselves, but they are not required to do so.” *McFarren v. Emeritus at Canton*, 997 N.E.2d 1254, 1262 (Ohio Ct. App. 2013) (quoting *Peters*, 873 N.E.2d 1258) (internal quotation marks omitted). With *Peters* as the controlling law, the court of appeals found that the arbitration agreement at issue in the case was not enforceable against the wrongful death beneficiaries. *Id.* at 1262.

Although the law pronounced in the above cited cases is not binding on this Court, Respondent submits that this Court should follow the reasoning of those courts that regard a wrongful death action as a separate and distinct action, with the right to assert the wrongful death claim resting with the beneficiaries and not the decedent. Additionally, this Court should find that the trial court correctly ruled that the claims asserted by Lillie Gibson’s wrongful death beneficiaries cannot be submitted to arbitration, as the arbitration agreement put forth by the Petitioners could not apply to the non-signatory, wrongful death beneficiaries.

II. THE ARBITRATION AGREEMENT IS UNENFORCEABLE BECAUSE THE NAF AND THE APPLICATION OF ITS CODE OF PROCEDURE IS UNAVAILABLE

The trial court additionally ruled that Petitioners’ incorporation of the NAF’s Code of Procedure into the arbitration agreement, and the NAF’s subsequent unavailability, did not make the arbitration agreement unenforceable. Respondent contends that this finding was in error and therefore cross-appeals this issue, asking this Court to reverse the trial court’s decision. The reference to the NAF, the incorporation of the NAF’s Code of Procedure, and the Petitioners’ failure to opt-out of certain provisions of the Code demonstrate that the availability of the NAF is

an integral part of the arbitration agreement, as opposed to being just an ancillary logistical concern. As such, the unavailability of the NAF and its Code of Procedure makes the arbitration agreement unenforceable. Accordingly, this Court should reverse the trial court's ruling on this issue.

The arbitration agreement at issue here states that

any legal dispute, controversy, demand or claim that arises out of or relates to the Resident Admission Agreement or any service or health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the Code of Procedure of the National Arbitration Forum ("NAF") which is hereby incorporated into this Agreement and not by a lawsuit or resort to court process except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards.

JA at 000211.

Petitioners argue that the agreement remains enforceable because section 5 of the Federal Arbitration Agreement (FAA), 9 U.S.C. §5, permits the appointment of a substitute arbitrator. This Court has stated that while Section 5 requires the court to appoint a substitute arbitrator under certain circumstances, "section 5 of the FAA does warrant the automatic appointment of a substitute arbitrator when the chosen arbitrator is unavailable." *Credit Acceptance v. Front*, 745 S.E.2d 556, 566 (W.Va. 2013). This Court cited the Third Circuit Court of Appeal's summary regarding the application of Section 5:

In determining the applicability of Section 5 of the FAA when an arbitrator is unavailable, courts have focused on whether the designation of the arbitrator was integral to the arbitration provision or was merely an ancillary consideration. Only if the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern, will the failure of the chosen forum preclude arbitration. In other words, a court will decline to appoint a substitute arbitrator, as provided in the FAA, only if the parties' choice of forum is so central to the arbitration agreement that the unavailability of that arbitrator brings the agreement to an end. In this light, the parties must have unambiguously expressed their intent not to arbitrate their disputes in the event that the designated arbitral forum is

unavailable.

Id. at 567 (quoting *Khan v. Dell Inc.*, 669 F.3d 350, 354 (3d Cir. 2012)).

In *Front*, this Court defined “integral to the agreement” as a term “that the parties would not have agreed upon . . . absent the selected forum.” (citing *Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1166 (D.S.D. 2010)). Despite Petitioners’ argument, *Front* is inapposite to this case. The arbitration agreement in *Front* contained the following forum provision: “You or we may elect to arbitrate under the rules and procedures of either the National Arbitration Forum or the American Arbitration Association [(AAA)].” *Front*, 745 S.E.2d at 568. The NAF was unavailable to arbitrate the claims as a result of the “consent decree barring it from handling consumer arbitrations.” *Id.* (quoting *CompuCredit Corp. v. Greenwood*, --- U.S. ---, --- n.2, 132 S.Ct. 665, 677 n.2, 1818 L.Ed.2d 586 (2012)). Additionally, the AAA had “issued a moratorium on arbitrating cases concerning consumer debt collections if those *if those cases were brought by the company* and the consumer did not consent to the arbitration.” *Montgomery v. Applied Bank*, 848 F.Supp.2d 609, 613 (S.D. W.Va. 2012) (emphasis in original). Because the claims in *Front* were not raised by the company, the AAA remained an available forum to arbitrate the claims. In concluding its analysis on this issue, this Court noted “[b]ecause one of the arbitration forums named in the arbitration agreements remains available to arbitrate the disputes underlying this appeal, it is not necessary for this Court to conduct an analysis as to whether the forum selection was merely an ancillary logistical concern, or was instead an integral part of the agreement to arbitrate.” *Front*, 745 S.E.2d at 569.

Here, unlike the arbitration agreement in *Front*, the parties are not allowed to choose between two forums in which to arbitrate their claims. The agreement exclusively adopts the NAF’s Code of Procedure. Therefore, because there is no listed, alternative arbitration forum, the

“integral term versus ancillary logistical concern” test remains necessary.

Though their findings are not binding on this Court, courts in other jurisdictions have examined similar language in arbitration agreements and have applied the “integral term versus ancillary logistical concern” test. Most notably and most recently, the Georgia Court of Appeals held that the unavailability of the NAF’s Code of Procedure made arbitration of a plaintiff’s claims impossible. *Sunbridge Retirement Care Assocs. LLC v. Smith*, 757 S.E.2d 157 (Ga. Ct. App. 2014). In *Smith*, plaintiff admitted the decedent, her mother, to a Sunbridge nursing facility. *Id.* at 158. During the admissions process, the plaintiff signed an arbitration agreement, which read, in pertinent part, as follows:

[T]he arbitrator *shall apply the NAF’s Code of Procedure* (in effect as of May 1, 2006) unless otherwise stated in this Agreement. The parties’ selection of the NAF Code of Procedure to govern the arbitration proceedings is not tantamount to the selection of NAF as the administrator of the arbitration. The Parties hereby opt out of NAF rules (45 regarding indigents and 43 regarding appeals and judicial review).

Id. Plaintiff’s mother died after eleven months at the facility. *Id.* at 159. Plaintiff and two of her siblings, as co-executors of their mother’s estate, commenced suit against Sunbridge, alleging medical malpractice, ordinary negligence, and wrongful death. *Id.* Sunbridge moved to compel arbitration of the dispute pursuant to the arbitration agreement. *Id.* The trial court denied Sunbridge’s motion but certified the order for immediate review by the appellate courts. *Id.*

On appeal, the court applied the “integral term versus ancillary logistical concern” test, which it had articulated in *Miller v. GGNSC Atlanta*, 746 S.E.2d 680 (Ga. Ct. App. 2013), to determine whether an arbitration agreement becomes unenforceable when the forum designated therein becomes unavailable. *Id.* at 159. According to this test,

where the language of the agreement reflects that the choice of arbitral forum is an integral part of the agreement to arbitrate, then the agreement will be considered void if the forum is unavailable. When a court asks whether a choice

of forum is integral, it asks whether the whole arbitration agreement becomes unenforceable if the chosen arbitrator cannot or will not act. If, on the other hand, the agreement shows that the selection of a particular forum was merely an ancillary logistical concern, section 5 of the FAA will apply and a substitute arbitrator may be named.

Id. (quoting *Miller*, 746 S.E.2d at 685). Sunbridge contended that section 5 of the FAA would apply because use of the NAF was not an integral part of the agreement. The court restated the following note from *Miller*:

[A]n arbitration agreement's express designation of a single arbitration provider weighs in favor of a finding that the designated provider is integral to the agreement to arbitrate. Where the parties have agreed explicitly to settle their disputes before [a] particular arbitration forum, [the] agreement must control.

Smith, 757 S.E.2d at 160 (quoting *Miller*, 746 S.E.2d at 686). Additionally, the court noted that while the agreement opted out of NAF Rules 45 and 43, regarding indigents and judicial review, the parties did not opt out of NAF Rule 48, which authorizes "parties to seek legal and other remedies in the event the Code of Procedure was canceled." *Id.* Next, the court noted that the Code of Procedure could only be administered by the NAF. *Id.*

Despite Sunbridge's repeated contention that the NAF was not an integral part of the agreement, the court held:

Even if a non-NAF arbitrator were appointed, the NAF Code would still apply under the terms of the parties' agreement. And because the NAF Code has in effect been canceled, Rule 48 of the Code authorizes the parties to pursue other remedies.

[T]he Arbitration Agreement by its terms provides that the procedural law governing the arbitration proceedings would be the NAF Code; that the arbitrators would apply the NAF Code; and that in the absence of the NAF and/or the NAF Code as written, the parties would not be obligated to arbitrate their disputes but instead would be free to seek legal remedies. Accordingly, we find that the availability of the NAF Code of Procedure and, consequently, the availability of NAF as an arbitral forum, are integral to the Arbitration Agreement. To hold otherwise would require us to impose a strained construction on a straightforward agreement. It is far better to interpret the agreements based on what is specified, rather than attempt to incorporate other remote rules by reference. To appoint a

substitute arbitrator, who would have to apply procedural rules other than the NAF Code, would constitute a wholesale revision of the arbitration clause. We therefore find that section 5 of the FAA does not apply in this case, as that law would allow a court to select and impose on the contracting parties a substitute arbitrator inconsistent with the plain terms of their contract. Rather, the unavailability of the NAF and its Code render the Arbitration Agreement impossible to enforce.

Id. at 160 (quoting *Miller*, 746 S.E.2d at 688). Consequently, plaintiff and her siblings were not required to arbitrate their claims.

The arbitration agreement at issue before this Court, like the arbitration agreement in *Smith*, designates a single arbitration provider and demonstrates Petitioners' intent, as the drafters of the agreement, to unequivocally have arbitration disputes resolved in a particular arbitration forum. Also, Petitioners, unlike the nursing-home defendants in *Smith*, adopted the NAF's Code of Procedure in its entirety. Thus, they failed to opt out of provisions which would have prevented Respondents from seeking legal remedies in the event that the Code of Procedure was cancelled or became inapplicable. Further, if the trial court were to apply section 5 and appoint a non-NAF arbitrator, that arbitrator would, nevertheless, be required to apply the NAF's Code of Procedure, which, as the court explained in *Smith*, has been canceled. Therefore, just like the *Smith* court, this Court should find that the incorporation of the NAF's Code of Procedure is integral to the arbitration agreement. Consequently, the unavailability of the NAF and its Code render the arbitration agreement impossible to enforce.

Courts from the following jurisdictions have examined this issue and have issued rulings that support the conclusion that the NAF's participation in the arbitration process is an "integral part" of the agreement to arbitrate:

In *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215, 219 (Pa. Super. Ct. 2010), the Pennsylvania Superior Court examined other jurisdictions that had the opportunity to determine whether an arbitration agreement is enforceable in the absence of the NAF. Importantly, the Pennsylvania Court found that the "conclusion that the Agreement was

unenforceable due to the NAF's unavailability is **supported by a majority of the decisions that have analyzed language similar to that in the Agreement.**” *Id.* (emphasis added).

In *Carr v. Gateway, Inc.*, 944 N.E.2d 327 (Ill. 2011), the Court held that the “fact that the NAF restricts the use of its rules to only those entities and individuals providing arbitral services by agreement with the NAF militates in favor of a finding that the designation of the NAF and its rules was integral to the parties' agreement to arbitrate.” *Id.* at 336.

In *Riley v. Extencicare Health Facilities, Inc.*, 826 N.W. 2d 398 (Wis. Ct. App. 2012), the Court noted a “significant problem in applying the NAF Rules of Procedure in the absence of NAF” in the fee schedule imposed by the rules. *Id.* at 409. The NAF rules conclude by setting a fee schedule that presumably reflects NAF's costs and experience (such as the opening Administrative Fee, defined as “[t]he fee assessed by the Forum for its case work”). *Id.* “It would be unreasonable to impose that fee schedule on the parties because such fees would not be based on actual costs of non-NAF arbitrators and non-NAF administrators—rather these substantial fees would essentially be arbitrary.” *Id.* The Court continued, stating, “Moreover, even if the court were to appoint a substitute arbitrator, no applicable NAF rules exist for the substitute arbitrator to apply.” *Id.* (Citation omitted.) Although the Court acknowledged that “the mere fact parties name an arbitral service to handle arbitrations and specify rules to be applied does not, standing alone, make that designation integral to the agreement,” it further stated that the “NAF is not just any arbitrator and its rules are not just any rules—both were discredited and invalidated by the Minnesota consent judgment.” *Id.* at 410. The NAF Rules of Procedure are “restricted by their terms for use only by NAF or entities providing arbitration services by agreement with NAF,” suggesting that “in explicitly selecting the NAF Rules of Procedure, the parties exclusively selected NAF to administer the arbitration procedures.” *Id.* The Court further concluded that even if the NAF provisions were severable, the contract would be left without an arbitrator or a set of rules, requiring the court to rewrite substantial portions of the agreement not contemplated by the parties, and to devise a new form and mode of arbitration for the parties. *Id.* at 411.

In *GGNSC Tylertown, LLC v. Dillon*, 87 So.3d 1063, 1066 (Miss. Ct. App. 2011), the Court held that the arbitration agreement reflected that the nursing home sought to have its disputes resolved exclusively by arbitration in accordance with the NAF, a forum that now refuses to arbitrate disputes such as the one before the Court. In keeping with the precedent set by the Mississippi Supreme Court, the Court recognized that the “forum in the agreement between Tylertown and Dillon was no longer available, and the Court ‘decline[d] to order the lower court to pick a forum’ not anticipated by either party[.]” (quoting *Covenant Health and Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So.3d 695, 706 (Miss. 2009)).

Accordingly, because an integral part of the agreement—the forum itself, and consequently, the forum's code of procedure—is no longer available, the arbitration agreement at

issue between the parties in this matter cannot be enforced. Consequently, the survival claims raised by Lillie Mae Gibson's Estate cannot proceed to arbitration. This Court should reverse the trial court's ruling on this issue and remand this case to the trial court.

CONCLUSION

Like Petitioners, Respondent acknowledges the split of authority among courts as to the classification of wrongful death claims, and it cannot be denied that a wrongful death claim is derivative in nature. However, the analysis cannot stop there. The true question, though not framed in this way by Petitioners, is who holds the wrongful death rights and who can give those rights away. Based on West Virginia's wrongful death statute and the subsequent statutes addressing the litigation and recovery in wrongful death cases, it is clear that Lillie Mae Gibson did not have any wrongful death rights and, as such, could not give any of those rights away. Accordingly, the trial court correctly found that Lillie Mae Gibson's wrongful death beneficiaries were not bound by the arbitration agreement signed on behalf of Lillie Mae Gibson, and this Court should answer the Certified Question in the negative.

Additionally, Respondent respectfully requests that this Court reverse the trial court's ruling regarding the enforceability of the arbitration agreement. The requirement that arbitration be conducted according to the NAF's Code of Procedure is an integral term of the agreement, which fails as a consequence of the NAF's unavailability as an arbitration forum. This failure makes the arbitration agreement unenforceable.

For the reasons stated herein, Respondent respectfully requests that this Honorable Court affirm the trial court's finding as to the wrongful death beneficiaries, reverse the finding that the NAF is not an integral term in the arbitration agreement, and remand this case to the trial court for further proceedings.

Respectfully submitted,

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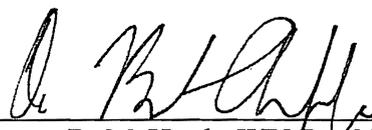
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 1st day of August, 2014, the foregoing Respondent's Brief was deposited in the U.S. Mail contained in a postage paid envelope addressed to Counsel for all other parties to this appeal as follows:

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