No.

In the Supreme Court of the United States

SSC ODIN OPERATING COMPANY LLC,
D/B/A ODIN HEALTHCARE CENTER, PETITIONER

v.

SUE CARTER, SPECIAL ADMINISTRATOR
OF THE ESTATE OF JOYCE GOTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITION FOR A WRIT OF CERTIORARI

MALCOLM J. HARKINS III
Counsel of Record
JAMES F. SEGROVES
BENJAMIN R. OGLETREE
PROSKAUER ROSE LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 416-6800
mharkins@proskauer.com

MARK R. FELDHAUS
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 436-8326

QUESTION PRESENTED

Whether Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, preempts a state rule of law treating arbitration agreements signed by decedents differently than other contracts signed by decedents.

CORPORATE DISCLOSURE STATEMENT

Petitioner SSC Odin Operating Company LLC, doing business as Odin Healthcare Center, is a limited liability company whose sole member is SSC Submaster Holdings LLC. SSC Submaster Holdings LLC is a limited liability company whose sole member is SSC Equity Holdings, LLC. SSC Equity Holdings, LLC is a limited liability company whose sole member is SavaSeniorCare, LLC. SavaSeniorCare, LLC is a limited liability company whose sole member is SVCARE Holdings LLC. SVCARE Holdings LLC is a limited liability company whose sole member is Canyon Sudar Partners, LLC.

No publicly held company owns a 10 percent or greater ownership interest in petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner SSC Odin Operating Company LLC, doing business as Odin Healthcare Center (Healthcare Center or Center), respectfully submits this petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (App., *infra*, 1a-29a) is reported at 2012 IL 113204, 976 N.E.2d 344. The opinion of the Appellate Court of Illinois, Fifth District (App., *infra*, 30a-49a) is reported at 2011 IL App (5th) 070392-B, 955 N.E.2d 1233. The order of the Circuit Court for the Fourth Judicial Circuit, Marion County, Illinois (App., *infra*, 50a-52a) is unreported. Previous opinions of the Supreme Court of Illinois and the Appellate Court of Illinois in this case, but which are not at issue here, are reported at 237 Ill. 2d 30, 927 N.E.2d 1207, and 381 Ill. App. 3d 717, 885 N.E.2d 1204, respectively.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on September 20, 2012. App., *infra*, 1a. On December 4, 2012, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 17, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution (the Supremacy Clause) provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, provides, in pertinent part:

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

The Illinois Wrongful Death Act, 740 Ill. Comp. Stat. 180, provides, in pertinent part:

> § 1. 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 and recover damages in respect thereof, then and in every such case the person who or company or 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 . . . .

§ 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person. In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, to the surviving spouse and next of kin of such deceased person. . . .

§ 2.1. In the event that the only asset of the deceased estate is a cause of action arising under this Act, and no petition for letters of office for his or her estate has been filed, the court, upon motion of any person who would be entitled to a recovery under this Act, and after such notice to the party's heirs or legatees as the court directs, and without opening of an estate, may appoint a special administrator for the deceased party for the purpose of prosecuting or defending the action. . . .

Finally, the Illinois Survival Act, 755 Ill. Comp. Stat. 5/27-6, provides, in pertinent part:

> In addition to the actions which survive by the common law, the following also survive: . . . actions to recover damages for an injury to the person . . . .

STATEMENT

"State courts rather than federal courts are most frequently called upon to apply the [FAA], including the [FAA's] national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam); *see also KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam) ("Agreements to arbitrate that fall within the scope and coverage of the [FAA] must be enforced in state and federal courts. State courts, then, 'have a prominent role to play as enforcers of agreements to arbitrate.'") (quoting *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009)).

Last Term, the Court reaffirmed that state courts must enforce the FAA "with respect to all arbitration agreements covered by that statute." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (per curiam). Because the FAA "includes no exception for personal-injury or wrongful-death claims," *id.* at 1203, the Court summarily reversed a state supreme court's holding that the FAA does not apply to arbitration agreements covering such claims, *id.* at 1203-04. However, because of the categorical nature of the state supreme court's erroneous holding, the Court did not have occasion to define the precise

contours of the FAA's preemptive effect in the wrongful-death context.

The state courts of last resort in two of the Nation's most populous States have given conflicting answers to that important question of federal law under substantially identical circumstances. In this case, the Supreme Court of Illinois held that arbitration agreements signed by decedents cannot be enforced to require arbitration of wrongful-death claims even though the same agreements will be enforced to require arbitration of personal-injury claims that survive the decedent's death. The state supreme court reached this conclusion despite the fact that other contractual limitations imposed by decedents on claims asserted by the decedents' heirs will be enforced, including liability releases that bar wrongful-death claims completely. The holding below thus creates a state rule of law treating arbitration agreements signed by decedents differently than other types of contracts signed by decedents. In contrast, the Supreme Court of Texas, in a wrongful-death case virtually identical to this one, held that the FAA prohibits courts from singling out wrongful-death claims for special treatment in this manner.

The foregoing conflict exists against a backdrop of great legal uncertainty throughout the United States regarding the arbitrability of wrongful-death claims generally. At least eleven different state courts of last resort have struggled with the issue recently, reaching conflicting results.

This case provides an ideal vehicle in which to resolve the preemptive effect of the FAA in the wrongful-death context. There are no factual disputes. In addition, threshold legal issues that often complicate

cases of this nature (e.g., questions as to whether the arbitration agreement is generally enforceable or whether the FAA applies at all) will not inhibit the Court's review of the wrongful-death question in this case. All such questions have been finally resolved in the Healthcare Center's favor following the Center's six-year-long effort to enforce the straightforward arbitration agreements at issue here. Therefore, the Court can be assured of reaching the wrongful-death question were it to grant plenary review in this case. The Court should do so in order to provide much-needed guidance in this important and unresolved area of federal law.

1. Respondent Sue Carter (Estate Administrator) is the special administrator of the estate of Joyce Gott (Decedent). The Decedent was a resident of the Healthcare Center, which is a nursing facility located in Illinois. Upon the Decedent's initial admission to the Center, the Estate Administrator executed an arbitration agreement with the Center. App., *infra*, 53a-59a. The Decedent was eventually discharged from the Center and later readmitted. Upon her readmission, the Decedent personally signed a second arbitration agreement identical to the first agreement. App., *infra*, 60a-66a.

In both agreements, the parties agreed to submit to binding arbitration "all disputes against each other and their representatives . . . arising out of or in any way related or connected to [the Decedent's] Admission Agreement and all matters related thereto[,] including matters involving [the Decedent's] stay and care provided at the [Healthcare Center]." App., *infra*, 55a, 62a. The parties also agreed that they would not have to arbitrate any dis-

pute with an amount in controversy less than $200,000. *Id.* at 54a, 61a.

The agreements expressly stated that they were governed by the FAA. *Id.* at 55a, 62a. The agreements also provided that they bound the Decedent's heirs, as well as the Decedent's personal representative and estate administrator. *Id.* The Healthcare Center promised to pay all fees charged by three arbitrators and up to $5,000 in attorney's fees incurred by the Decedent or her representative, regardless of the arbitration's outcome. *Id.* at 54a, 61a. The Center also gave the Decedent and her representative the unilateral right to select the arbitration's location and to rescind the agreements by providing written notice to the Center within 30 days of signing the agreements. *Id.* at 54a, 58a, 61a, 65a. The Decedent's admission to the Center and continued treatment therein were not conditioned on executing the arbitration agreements. *Id.* at 58a, 65a.

2. The Decedent passed away following her readmission to the Healthcare Center. Acting pursuant to § 2.1 of the Illinois Wrongful Death Act, 740 Ill. Comp. Stat. 180/2.1, the Estate Administrator filed a petition in the Circuit Court for the Fourth Judicial Circuit, Marion County, Illinois, seeking to be appointed special administrator of the Decedent's estate. App., *infra*, 73a-74a. The Estate Administrator's petition explained that the Decedent's estate had but one asset: a wrongful-death cause of action. *Id.* at 74a. The circuit court granted the Estate Administrator's petition, thereby authorizing her to commence a wrongful-death action. App., *infra*, 75a-76a.

3. The Estate Administrator subsequently filed a two-count complaint against the Healthcare Center in the same circuit court. App., *infra*, 67a-72a. The complaint's first count asserted a survival claim under the Illinois Nursing Home Care Act, 210 Ill. Comp. Stat. 45/3-601 to -612. *Id.* at 67a-70a. The second count asserted a wrongful-death claim. *Id.* at 70a-72a.

The Healthcare Center moved to compel arbitration. In its brief supporting the motion, the Center explained that § 2 of the FAA, 9 U.S.C. § 2, as well as this Court's FAA jurisprudence, required the circuit court to compel arbitration of both the survival claim and the wrongful-death claim. In addition, the Center filed an affidavit setting forth facts establishing that, as the arbitration agreements stated, the agreements involved interstate commerce within the meaning of the FAA.

The Estate Administrator neither challenged this evidence nor produced any evidence to the contrary. Instead, she challenged the Healthcare Center's motion by primarily invoking § 2's savings clause, which provides that the FAA does not preempt "grounds as exist at law or in equity for the revocation of any contract." In doing so, the Estate Administrator argued that the arbitration agreements were unenforceable on grounds of illegality, citing provisions of the Illinois Nursing Home Care Act rendering "null and void" any "waiver by a resident [of a nursing facility] or his legal representative of the right to commence an action" to enforce the statute, as well as any "waiver of the right to a trial by jury" executed prior to the commencement of any such action. 210 Ill. Comp. Stat. 45/3-606, 3-607.

The Estate Administrator also argued that the arbitration agreements' amount-in-controversy requirement rendered the agreements unenforceable for lack of mutuality of obligation because, the Estate Administrator claimed, the requirement essentially ensured that the Healthcare Center would never have to arbitrate any of its claims against a facility resident. Alternatively, the Estate Administrator argued that the agreements did not preclude judicial resolution of a wrongful-death claim because a decedent's arbitration agreement should not bind the personal representative of the decedent's estate.

4. The circuit court denied the Healthcare Center's motion to compel arbitration. App., *infra*, 50a-52a. The circuit court determined that the FAA was inapplicable because the arbitration agreements did not satisfy the FAA's interstate-commerce requirement. *Id.* at 51a-52a. The circuit court also concluded that the arbitration agreements were unenforceable because they were "in direct violation of emphatically stated public policy and for lack of mutuality." *Id.* at 51a. Even if the agreements were otherwise enforceable, the circuit court found that the Estate Administrator could not be compelled to arbitrate the wrongful-death claim because a decedent's arbitration agreement did not bind the personal representative of the decedent's estate. *Id.*

5. The Appellate Court of Illinois, Fifth District, initially affirmed the circuit court's decision based solely on the appellate court's finding that, even if the FAA applied, it did not preempt the Illinois Nursing Home Care Act's anti-waiver provisions. *Carter v. SSC Odin Operating Co.*, 885 N.E.2d 1204, 1208-09 (Ill. App. Ct. 2008) (*Carter I*). The Supreme

Court of Illinois, however, granted the Healthcare Center leave to appeal and reversed the appellate court's judgment, remanding the matter for consideration of the other grounds cited by the circuit court for denying the Center's motion to compel arbitration. *Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207, 1220 (Ill. 2010) (*Carter II*).[1]

6. Upon remand, the Appellate Court of Illinois again affirmed the circuit court's order denying the motion to compel arbitration. App., *infra*, 30a-47a. Although the appellate court found that the FAA governed the agreements and rejected the circuit court's contrary finding, *id.* at 38a-41a, the appellate court held that the agreements' amount-in-controversy requirement rendered the agreements unenforceable for lack of mutuality, *id.* at 41a-45a.

The appellate court also held that, even if the agreements were otherwise enforceable, the Estate

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[1] The Supreme Court of Illinois initially denied the Healthcare Center leave to appeal. *Carter v. SSC Odin Operating Co.*, 897 N.E.2d 250 (Ill. 2009). The Center then filed a petition for a writ of certiorari in this Court. After the Estate Administrator responded to the Court's call for a response to the petition, a different division of the same appellate court rejected *Carter I*'s holding. *See Fosler v. Midwest Care Ctr. II, Inc.*, 928 N.E.2d 1, 12 (Ill. App. Ct. 2009). This Court later denied the Center's petition for a writ of certiorari. *SSC Odin Operating Co. v. Carter*, 129 S. Ct. 2734 (2009) (No. 08-805). Citing the newly created intrastate split of appellate authority, the Center asked the Supreme Court of Illinois to reconsider its denial of leave to appeal. The state supreme court granted the Center's request, reversed the appellate court's judgment, and remanded the matter for further proceedings in the appellate court. *See Carter II*, 927 N.E.2d at 1214.

Administrator could not be required to arbitrate a wrongful-death claim because she did not sign the first arbitration agreement in her individual capacity. *Id.* at 45a-47a. The appellate court did not address the fact that both agreements expressly bind the Decedent's heirs and estate administrator, nor did the appellate court expressly address the Healthcare Center's argument that the FAA preempts a state rule of law treating arbitration agreements signed by decedents differently than other contracts signed by decedents. *See id.* For example, the Center had cited well-established Illinois precedent holding that a release signed by a decedent will be enforced even when the release completely bars wrongful-death claims. *See Mooney v. City of Chicago*, 88 N.E. 194, 196 (Ill. 1909); *see also Varelis v. N.W. Mem'l Hosp.*, 657 N.E.2d 997, 1000-01 (Ill. 1995) (confirming *Mooney*'s continued viability).

7. After granting the Healthcare Center leave to appeal for a second time, the Supreme Court of Illinois reversed the appellate court's judgment in part and affirmed it in part. App., *infra*, 1a-29a. Because the Estate Administrator had not sought review of the appellate court's interstate-commerce finding, the state supreme court "proceed[ed] from the premise that, as held by the appellate court and expressly stated in the arbitration agreements, the FAA governs the agreements." *Id.* at 7a. The state supreme court then reversed the appellate court's mutuality finding, holding that the arbitration agreements are enforceable. *Id.* at 7a-12a.

The Supreme Court of Illinois nonetheless affirmed that part of the appellate court's judgment finding that the Estate Administrator could not be

compelled to arbitrate the wrongful-death claim. *Id.* at 12a-29a. The state supreme court's wrongful-death analysis was comprised of three principal components.

First, the Supreme Court of Illinois rejected the Healthcare Center's argument that, because a wrongful-death claim is specifically denominated an "asset of the deceased estate," 740 Ill. Comp. Stat. 180/2.1, a wrongful-death claim should be treated as any other estate asset that can be encumbered by a decedent. According to the state supreme court, when the Illinois Wrongful Death Act refers to a wrongful-death claim as an "asset of the deceased estate," the term "asset" has a special meaning that, as a practical matter, is applicable only when an agreement to arbitrate is involved. Specifically, the state supreme court found that a wrongful-death claim is not a "true" asset of the deceased estate and, therefore, is not subject to a decedent's agreement to arbitrate. *Id.* at 19a. The language of the state wrongful-death statute, the court held, did not "evince an intent by the legislature to treat a wrongful-death action as an asset of the deceased's estate for the purpose [the Center] urges, *i.e.*, to allow the deceased to control the forum and manner in which a wrongful-death claim—in which the deceased has no interest—is determined." *Id.* at 21a. "Rather, the statutory language indicates that the 'asset' label adopted by the legislature is intended to facilitate the filing and prosecution of a wrongful-death claim." *Id.*

Second, the Supreme Court of Illinois held that the derivative nature of wrongful-death claims—i.e., the fact that such claims can only be brought if the

decedents would have been able to maintain actions and recover damages had death not ensued—did not require the Estate Administrator to arbitrate the wrongful-death claim. In so ruling, the state supreme court recognized that appellate courts throughout the United States have disagreed regarding the arbitrability of such claims. *Id.* at 24a-25a. For example, the state supreme court explained that the Healthcare Center relied on "case law from several of our sister [S]tates generally holding that because a wrongful-death action is derivative of the decedent's personal injury action, a wrongful-death action is subject to an arbitration agreement entered by the decedent." *Id.* at 24a (citing the collection of cases by *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 646-47 (Tex. 2009)). The Supreme Court of Illinois correctly noted, however, that other state appellate courts have ruled to the contrary, relying primarily on the argument that wrongful-death beneficiaries are not bound by arbitration agreements they did not sign. *Id.* at 24a-25a (citing, among others, *Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008)).

Ultimately, the Supreme Court of Illinois agreed with those jurisdictions that have refused to compel arbitration of wrongful-death claims. "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," the state supreme court explained, "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 25a. Because the Estate Administrator was not a party to

the arbitration agreements, the state supreme court reasoned that she could not be compelled to arbitrate the wrongful-death claim. *Id.* at 26a. In so ruling, the state supreme court rejected the Center's reliance on the Supreme Court of Texas's decision in *Labatt*, which held that the FAA preempts a state rule of law treating arbitration agreements signed by decedents differently than other contracts signed by decedents. *See id.* at 24a-25a; *Labatt*, 279 S.W.3d at 645-46.

Third, the Supreme Court of Illinois rejected the Healthcare Center's reliance on this Court's decision in *Marmet*. App., *infra*, 27a-28a. Despite its unique interpretation of the "asset of the deceased estate" statutory language, the court below claimed that, unlike the state supreme court decision summarily reversed by *Marmet*, its holding was "not based on a categorical anti[-]arbitration rule; it is based on common law principles governing all contracts." *Id.* at 28a.

Accordingly, the Supreme Court of Illinois concluded that the Estate Administrator was required to arbitrate the complaint's survival claim but not its wrongful-death claim. *Id.* at 26a-27a. The state supreme court therefore remanded the matter for further proceedings on the wrongful-death claim. *Id.* at 28a-29a. Although the state supreme court later denied the Healthcare Center's motion to stay issuance of the mandate pending the outcome of this petition, the Estate Administrator has refrained from actively prosecuting the wrongful-death claim in the circuit court. The Center, in turn, has refrained from moving forward with arbitration of the survival claim, pending the outcome of this petition.

REASONS FOR GRANTING THE PETITION

Section 2 of the FAA reflects "both a liberal federal policy favoring arbitration . . . and the fundamental principle that arbitration is a matter of contract . . . . In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, . . . and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (internal quotation marks and citations omitted). As discussed below, state and federal courts throughout the United States have been unable to reconcile these well-established principles in the context of wrongful-death claims, resulting in a patchwork of conflicting rulings, creating great legal uncertainty, and needlessly multiplying the litigation burden imposed on parties and courts where, as here, survival and wrongful-death claims arise from the same nucleus of operative facts. As a result, the pro-arbitration goals of the FAA and the value of arbitration agreements in a wide variety of settings are significantly undermined. This case provides the Court with an ideal vehicle in which to synthesize these principles and provide much-needed guidance in this important area of federal law.

I. LOWER COURTS ARE SHARPLY DIVIDED REGARDING ARBITRATION OF WRONGFUL-DEATH CLAIMS

A. State Courts of Last Resort Disagree Regarding the Preemptive Effect of the FAA in the Wrongful-Death Context

The Supreme Court of Texas has held that the FAA preempts a state rule of law treating arbitration agreements signed by decedents differently than

other types of contracts signed by decedents. In *Labatt*, the parents and children of a deceased employee filed a wrongful-death action against the decedent's employer. *See* 279 S.W.3d at 642. The employer moved to compel arbitration, invoking an arbitration agreement signed by the employee that, like the agreements at issue here, expressly bound the employee's "heirs and beneficiaries." *Id.* The trial court refused to compel arbitration. *Id.*

The Supreme Court of Texas reversed. *Id.* As in Illinois, Texas wrongful-death claims are derivative of the decedent's rights because the ability to pursue such claims is conditioned on the decedent's ability to bring an action had death not ensued. *Compare* Tex. Civ. Prac. & Rem. Code § 71.003(a) (explaining such claims can only be maintained "if the individual injured would have been entitled to bring an action for the injury if the individual had lived"), *with* 740 Ill. Comp. Stat. 180/1 (explaining such claims can only be maintained if the act causing death "is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof"). As in Illinois, Texas's highest court has enforced agreements signed by decedents that bar wrongful-death claims completely. *Compare Labatt*, 279 S.W.3d at 644-45, *with Mooney*, 88 N.E. at 196.

In light of the foregoing principles, the Supreme Court of Texas refused to treat arbitration agreements signed by decedents differently than other contracts signed by decedents, explaining:

> [T]he wrongful death beneficiaries argue that agreements to arbitrate are different than other contracts, and they should not be bound by [the

> decedent's] agreement. We reject their argument. If we agreed with them, then wrongful death beneficiaries in Texas would be bound by a decedent's contractual agreement that completely disposes of the beneficiaries' claims, but they would not be bound by a contractual agreement that merely changes the forum in which the claims are to be resolved. *Not only would this be an anomalous result, we believe it would violate the FAA's express requirement that [S]tates place arbitration contracts on equal footing with other contracts*.

Labatt, 279 S.W.3d at 645-46 (emphasis added).

Despite the fact that this case is virtually identical to *Labatt*, the Supreme Court of Illinois rejected *Labatt*'s preemption holding and found that the FAA does not prohibit a state court from treating arbitration agreements signed by decedents differently than other contracts signed by decedents. *See* App., *infra*, 24a-28a. The Supreme Court of Illinois did so based on its conclusion that the "FAA's policy favoring arbitration" does not alter "basic principles of contract law," the latter of which supposedly provide that "*only parties* to the arbitration contract may compel arbitration or be compelled to arbitrate." *Id.* at 25a (emphasis added).

As explained in Section IV, *infra*, basic principles of contract law provide that nonparties are bound by contracts in a wide variety of circumstances. Therefore, despite being characterized as an application of "basic principles of contract law," the Supreme Court of Illinois's "only parties" holding constitutes an arbitration-specific rule that conflicts with generally applicable contract law principles and is therefore preempted by the FAA.

B. State and Federal Courts Throughout the United States Disagree Regarding the Arbitrability of Wrongful-Death Claims Generally

The conflict between the Supreme Court of Texas's interpretation of the FAA and that of the Supreme Court of Illinois exists against a backdrop of great legal uncertainty regarding the arbitrability of wrongful-death claims generally. For example, the United States Court of Appeals for the Eleventh Circuit recently addressed the wrongful-death issue in *Entrekin v. Internal Medicine Associates of Dothan, P.A.*, 689 F.3d 1248 (2012), which involved a claim under Alabama's wrongful-death statute. Like the arbitration agreements at issue here, the arbitration agreement at issue in *Entrekin* purported to bind not only a nursing facility resident, but her heirs and estate administrator as well. *Id.* at 1249. "[B]ecause neither the decedent nor her estate ever owned the wrongful death claim," the Eleventh Circuit explained, "it would seem to follow that a decedent cannot bind the entity that would later own the claim to arbitrate (the executor). But things are not always as they seem." *Id.* at 1253-54. After surveying Alabama case law, the Eleventh Circuit ultimately found that the estate administrator was required to arbitrate the wrongful-death claim. *Id.* at 1259.

The Eleventh Circuit's decision in *Entrekin* is consistent with published opinions issued by at least six state courts of last resort and two intermediate state appellate courts. *See Laizure v. Avante at Leesburg, Inc.*, --- So. 3d ---, No. SC10-2132, slip op. at 18-19 (Fla. Feb. 14, 2013) (finding wrongful-death claims subject to arbitration agreement); *Ruiz v.*

Podolsky, 237 P.3d 584, 586 (Cal. 2010) (same); *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 646-47 (Tex. 2009) (same); *Cleveland v. Mann*, 942 So. 2d 108, 119 (Miss. 2006) (same); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 665 (Ala. 2004) (same); *Allen v. Pacheco*, 71 P.3d 375, 378-79 (Colo. 2003) (same); *Sanford v. Castleton Health Care Ctr.*, 813 N.E.2d 411, 422 (Ind. Ct. App. 2004) (same); *Ballard v. S.W. Detroit Hosp.*, 327 N.W.2d 370, 371-72 (Mich. Ct. App. 1983) (per curiam) (same). Most recently, in circumstances indistinguishable from this case, the Supreme Court of Florida held that a decedent's agreement to arbitrate wrongful-death claims binds the representative of the decedent's estate. *Laizure*, slip op. at 18-19. In reaching this conclusion, the Supreme Court of Florida followed closely the Supreme Court of Texas's reasoning in *Labatt*, explaining:

> Because the signing party's estate and heirs are bound by defenses that could be raised in a personal injury suit brought by the decedent, as well as by releases signed by the decedent, *it would be anomalous to conclude that they are not also bound by a choice of forum agreement signed by the decedent in a wrongful death action arising out of the treatment and care of the decedent.*

Id. at 3 (emphasis added).

The pro-arbitration approach taken by the foregoing courts is consistent with federal district court opinions in three other States. *See THI of N.M. at Hobbs Ctr., LLC v. Spradlin*, --- F. Supp. 2d ---, No. 2:11-cv-00792, 2012 WL 4466639, at *15 (D.N.M. Sept. 25, 2012) (finding estate representative was bound by arbitration agreement signed on decedent's

behalf); *THI of N.M. at Vida Encantada, LLC v. Lovato*, 848 F. Supp. 2d 1309, 1328 (D.N.M. 2012) (same); *Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 288-89 (W.D.N.C. 2005) (same); *Bales v. Arbor Manor*, No. 4:08-cv-03072, 2008 WL 2660366, at *7 (D. Neb. July 3, 2008) (same).[2]

In contrast to the foregoing decisions, several state courts of last resort have held that arbitration of wrongful-death claims cannot be compelled under circumstances similar to those at issue here. For example, shortly before the Supreme Court of Illinois issued its decision in this case, the Supreme Court of Kentucky addressed the wrongful-death issue in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), *pet. for cert. filed*, No. 12-652 (U.S. Nov. 20, 2012). After surveying the conflicting approaches taken by appellate courts throughout the United States, the state supreme court ruled that wrongful-death claims did not have to be arbitrated by an

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[2] In its application for an extension of time to file this petition, the Healthcare Center explained that the Supreme Court of New Mexico was also expected to decide the arbitrability of wrongful-death claims. *See* Application for Extension of Time at 4, *SSC Odin Operating Co. v. Carter*, No. 12A561 (U.S. Dec. 3, 2012). However, that state court of last resort has since declined to address the issue after full merits briefing and oral argument. *See THI of N.M. at Vida Encantada, LLC v. Archuleta*, No. 33,618 (N.M. Dec. 26, 2012) (quashing previously granted certification of wrongful-death issue from federal district court). As a result, the state supreme court left undisturbed federal case law holding that estate administrators in New Mexico are bound by arbitration agreements signed by, or on behalf of, decedents. *See Lovato*, 848 F. Supp. 2d at 1328; *Spradlin*, 2012 WL 4466639, at *15.

estate administrator. *Id.* at 598-99. "Because under our law the wrongful death claim is not derived through or on behalf of the [nursing facility] resident, but accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss," the Supreme Court of Kentucky held that a decedent "cannot bind his or her beneficiaries to arbitrate their wrongful death claim." *Id.* at 599.[3]

When one includes the Supreme Court of Illinois's decision in this case, the Supreme Court of Kentucky's decision in *Ping* is consistent with published opinions issued by four other state courts of last resort and one intermediate state appellate court. *See Lawrence v. Beverly Manor*, 273 S.W.3d 525, 528 (Mo. 2009) (refusing to compel arbitration of wrongful-death claims); *Bybee v. Abdulla*, 189 P.3d 40, 50 (Utah 2008) (same); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 1262 (Ohio 2007) (same); *Woodall v. Avalon Care Ctr.-Fed. Way, LLC*, 231 P.3d 1252, 1261 (Wash. Ct. App. 2010) (same). *Ping* is also consistent with federal district court decisions from two other States. *See Chung v. StudentCity.com, Inc.*,

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[3] The defendants in *Ping* have since filed a petition for a writ of certiorari asking this Court to decide two questions, the second of which asks: "Does the FAA preempt a rule of state law that categorically prohibits the arbitration of wrongful death claims in accordance with a valid arbitration agreement entered into by the decedent?" Pet. for Cert. at i, *Beverly Enters., Inc. v. Ping*, No. 12-652 (U.S. Nov. 20, 2012), *available at* 2012 WL 5928330. The Court has called for a response to the petition in *Ping*. The estate administrator has until March 18, 2013, to file her response.

No. 1:10-cv-10943, 2011 WL 4074297, at *2 (D. Mass. Sept. 9, 2011) (refusing to compel arbitration of wrongful-death claims); *Washburn v. Beverly Enters.-Ga., Inc.*, No. 1:06-cv-00051, 2006 WL 3404804, at *5 (S.D. Ga. Nov. 14, 2006) (same).

* * *

The preemptive effect of the FAA in the wrongful-death context and the arbitrability of wrongful-death claims generally are issues that have divided courts throughout the United States, creating a patchwork of conflicting rulings in an area of law where a uniform federal rule is vitally important. This Court's review is therefore warranted to provide much-needed guidance on one of the few remaining areas of legal uncertainty in the arbitration field.

II. ARBITRATION IN THE WRONGFUL-DEATH CONTEXT CONSTITUTES AN IMPORTANT QUESTION OF FEDERAL LAW

The Healthcare Center's six-year-long effort to enforce the straightforward arbitration agreements at issue here is emblematic of the practical reality facing thousands of individuals and businesses throughout the Nation who wish to enforce their federal arbitration rights. In many States, such parties must run a gauntlet of contract defenses being applied by courts openly hostile to the very idea of arbitration. As this case illustrates, the anti-arbitration decisions of such courts often require years of appellate litigation prior to this Court's FAA jurisprudence being faithfully applied (if at all). *See, e.g.*, App., *infra*, 51a (circuit court decision in this case asserting that the Healthcare Center had "boldly suggest[ed]" that the FAA preempts any Illinois law voiding the arbitration agreements for

violation of public policy); *Nitro-Lift*, 133 S. Ct. at 503 ("[T]he Oklahoma Supreme Court must abide by the FAA . . . and by the opinions of this Court interpreting that law. It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.") (internal quotation marks and citation omitted); *Marmet*, 132 S. Ct. at 1202-03 (explaining that, although West Virginia's highest court had found the reasoning of this Court's FAA jurisprudence to be "tendentious" and "made from whole cloth," state courts "may not contradict or fail to implement the rule" established by this Court on questions of federal law).

The net result is that parties seeking to enforce their federal arbitration rights are often forced to expend significant time and resources on an issue having nothing to do with the merits of the underlying dispute, thereby greatly reducing or outright eliminating the cost and time savings brought by arbitration. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (explaining that arbitration agreements achieve streamlined proceedings and expeditious results); Br. *Amici Curiae* of Extendicare, Inc. et al. in Supp. of Pet. for Cert. at 9, *Beverly Enters., Inc. v. Ping*, No. 12-652 (U.S. Dec. 21, 2012) (explaining that the "primary benefits of arbitration—efficiency and cost savings to the parties—are negated when parties must first spend years hashing out the enforceability of arbitration agreements before they can even begin to address their primary dispute"), *available at* 2012 WL 6722083.

As demonstrated by this Court's decisions in cases such as *Marmet*, *Nitro-Lift*, and *Cocchi*, the

Court has dedicated significant time and energy in the past few years invalidating state appellate decisions negatively affecting federal arbitration rights. The rules surrounding arbitration of wrongful-death claims, however, remain one of the few areas in which this Court has not defined the precise contours of the FAA's preemptive effect.

The wrongful-death issue arises in every State. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 390 (1970) (explaining every State has enacted a wrongful-death statute). Moreover, the arbitrability of wrongful-death claims is a legal question of significant importance beyond the specific context in which this case arises (i.e., long-term care). The issue has a significant impact in the health care industry as a whole. *See, e.g.*, *Podolsky*, 237 P.3d at 586 (physicians); *Bybee*, 189 P.3d at 50 (same); *Ballard*, 327 N.W.2d at 372 (hospitals); *Pacheco*, 71 P.3d at 378-79 (managed care).

The question's importance goes beyond just the health care industry, however. Given that wrongful-death claims are often valued in the millions of dollars, the question is of vital importance in every context in which such claims arise, particularly for employers. *See, e.g.*, *Graves v. BP Am., Inc.*, 568 F.3d 221, 222 (5th Cir. 2009) (per curiam) (reviewing arbitrability of such claims pursuant to employer-employee arbitration agreement where employer was engaged in oil refining); *Labatt*, 279 S.W.3d at 644-45 (reviewing same where employer was engaged in food distribution); *Peters*, 873 N.E.2d at 1262 (reviewing same where employer was engaged in steelmaking).

III. THIS CASE PROVIDES AN IDEAL VEHICLE IN WHICH TO RESOLVE THE WRONGFUL-DEATH QUESTION

As the Supreme Court of Illinois acknowledged, no relevant factual disputes exist in this case and the wrongful-death question is purely one of law. App., *infra*, 6a. Importantly, this case also presents none of the threshold legal questions that often complicate review in disputes of this nature.

For example, it is commonplace for parties seeking to avoid arbitration to argue that the FAA does not govern the agreements in question. *Compare, e.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 53 (2003) (per curiam) (reversing state supreme court's narrow interpretation of FAA's interstate-commerce requirement); *Ping*, 376 S.W.3d at 589-90 (rejecting narrow interpretation of FAA's interstate-commerce requirement in case similar to this one); *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 514-16 (Miss. 2005) (same); *Estate of Ruszala v. Brookdale Living Cmtys., Inc.*, 1 A.3d 806, 815-18 (N.J. Super. Ct. App. Div. 2010) (same); *Triad Health Mgmt. of Ga., III, LLC v. Johnson*, 679 S.E.2d 785, 787-88 (Ga. Ct. App. 2009) (same), *with Bradley v. Brentwood Homes, Inc.*, 730 S.E.2d 312, 316-18 (S.C. 2012) (narrowly interpreting FAA's interstate-commerce requirement); *and Bruner v. Timberlane Manor Ltd. P'ship*, 155 P.3d 16, 28-31 (Okla. 2006) (doing same in case similar to this one).

In this case, however, the question whether the FAA governs the arbitration agreements has been finally resolved in the Healthcare Center's favor. The Appellate Court of Illinois specifically held that the FAA governs the arbitration agreements and re-

jected the circuit court's contrary finding. App., *infra*, 37a-41a. The Estate Administrator did not ask the Supreme Court of Illinois to review that question; accordingly, the state supreme court explained that the applicability of the FAA is no longer in dispute. App., *infra*, 7a.

As amply demonstrated by the record in this case, it is also common practice for parties seeking to avoid arbitration to challenge the validity of an arbitration agreement using § 2's savings clause, claiming that any number of generally applicable grounds for revoking contracts render the agreements unenforceable. *See, e.g.*, *Marmet*, 132 S. Ct. at 1204 (noting parties' reliance on unconscionability arguments); *Concepcion*, 131 S. Ct. at 1746-53 (rejecting use of state supreme court's unconscionability rule to invalidate arbitration agreements); *see generally* F. Paul Bland Jr., *Fighting Mandatory Arbitration Clauses*, 48 Trial 22 (2012) (recommending multiple arguments trial lawyers should use to frustrate the enforcement of arbitration agreements). Although the Estate Administrator challenged the underlying agreements by citing two such defenses (illegality and lack of mutuality), the Supreme Court of Illinois resolved both questions in the Healthcare Center's favor. *See* App., *infra*, 7a-12a (rejecting mutuality argument); *Carter II*, 927 N.E.2d at 1214-20 (rejecting illegality argument).

Finally, this case presents none of the agency or contract-interpretation questions that often arise in this context. *See, e.g.*, *State ex rel. AMFM, LLC v. King*, --- S.E.2d ---, No. 12-0717, 2013 WL 310086, at *7 (W. Va. Jan. 24, 2013) (refusing to compel arbitration because daughter supposedly did not have au-

thority to execute arbitration agreement on behalf of incapacitated parent); *Ping*, 376 S.W.3d at 592 (holding that broadly worded power of attorney did not give daughter authority to execute arbitration agreement on behalf of incapacitated parent because power of attorney did not specifically mention authority to enter into arbitration agreements); *Dickerson v. Longoria*, 995 A.2d 721, 740 (Md. 2010) (refusing to compel arbitration because estate administrator did not have actual or apparent authority to execute arbitration agreement on behalf of incapacitated parent); *Pacheco*, 71 P.3d at 378-79 (addressing argument that arbitration agreement's language did not encompass wrongful-death claims). In this case, no argument has ever been made that the Estate Administrator lacked the authority to execute the first arbitration agreement on behalf of the Decedent, nor has there ever been any contention that the Decedent's personal signature of the second arbitration agreement was ineffective. Furthermore, no argument has ever been made that wrongful-death claims fall outside the arbitration agreements' broad scope.[4]

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[4] The Estate Administrator argued below that the first arbitration agreement, which she executed on the Decedent's behalf, was superseded when the Decedent personally signed the second arbitration agreement. The lower courts did not decide that issue. However, even if the Estate Administrator were correct, it is irrelevant to the questions at issue here since the second arbitration agreement expressly binds the Decedent's heirs and estate administrator. App., *infra*, 64a. Therefore, for purposes of deciding this case, the Court can assume that the first arbitration agreement is no longer effective.

Accordingly, the layers of the onion have been peeled away in this case following years of hard-fought litigation, leaving the wrongful-death issue cleanly presented and unfettered by factual disputes or antecedent legal questions. The Court can thus be assured of reaching the wrongful-death question were it to grant plenary review in this case.

IV. THE DECISION BELOW IS INCORRECT

"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." *Concepcion*, 131 S. Ct. at 1747. The Court has applied this straightforward preemption principle to reverse a blanket rule of state law prohibiting arbitration of wrongful-death claims, which was based on the mistaken assertion that the FAA does not apply to arbitration agreements covering such claims. *Marmet*, 132 S. Ct. at 1203. While the Supreme Court of Illinois's decision in this case is not as overtly hostile to arbitration as the state supreme court decision reversed by *Marmet*, its *sui generis* reasoning results in the same outcome: wrongful-death claims are a special species of claims not subject to arbitration. *See, e.g.*, *Podolsky*, 237 P.3d at 592 (explaining the practical impossibility of finding all of a health care patient's potential wrongful-death beneficiaries prior to a procedure and having them sign an arbitration agreement, as well as the medical privacy concerns raised by a rule requiring such efforts).

Nor can the decision below be justified on the ground that it is merely based on an interpretation of state law. Even if one were to credit the Supreme Court of Illinois's conclusion that a wrongful-death

claim is not a "true" asset of the decedent's estate—a highly questionable conclusion based on a special rule of statutory interpretation requiring a legislature to affirmatively list arbitration in order for a general, well-understood statutory term to embrace the concept, *cf. Ping*, 376 S.W.3d at 592 (applying similar rule in power-of-attorney context)—the fact remains that, at a minimum, *federal* law requires States to treat arbitration agreements signed by decedents no differently than other contracts signed by decedents. Illinois has refused to do so. *Compare* App., *infra*, 25a-28a (decision below refusing to compel arbitration on ground that Estate Administrator was not a party to arbitration agreements), *with Biddy v. Blue Bird Air Serv.*, 30 N.E.2d 14, 18-19 (Ill. 1940) (finding decedent's agreement to be bound by workers' compensation statute precluded non-signatory estate representative from pursuing wrongful-death claim); *Mooney*, 88 N.E. at 196 (finding release signed by decedent barred wrongful-death claim filed by non-signatory estate representative); *and Mackin v. Haven*, 58 N.E. 448, 453 (Ill. 1900) (finding decedent's agreement creating easement on real property bound non-signatory heirs).

At least two additional aspects of the Supreme Court of Illinois's decision evidence the fact that the state supreme court went out of its way to craft an exception to the law applicable to contracts generally in order to exempt wrongful-death claims from arbitration.

First, the state supreme court mistakenly relied on this Court's decision in *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002), twice repeating the *Waffle House*

majority's statement: "It goes without saying that a contract cannot bind a nonparty." App., *infra*, 13a, 25a-26a. *Waffle House* was never cited in any of the parties' briefs, and with good reason.

The Supreme Court of Illinois's reading of *Waffle House* as establishing a blanket rule that nonparties to arbitration agreements can never be compelled to arbitrate was specifically rejected by this Court in *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009). There, the Court examined the FAA and explained that "traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Id.* at 1902 (internal quotation marks and citation omitted). The Court also noted that *Waffle House*'s "goes without saying" statement was dictum. *Id.* at 1903. Until the Supreme Court of Illinois's decision in this case, Illinois contract law was consistent with the "traditional principles" recognized in *Arthur Andersen*. *See, e.g.*, *Olson v. Etheridge*, 686 N.E.2d 563, 566 (Ill. 1997) (explaining Illinois recognized third-party-beneficiary doctrine, which is "widely accepted throughout the United States"); *Equistar Chem., LP v. Hartford Steam Boiler Inspection & Ins. Co. of Conn.*, 883 N.E.2d 740, 747 (Ill. App. Ct. 2008) (explaining Illinois appellate courts "have recognized several contract-based theories under which a non-signatory to an agreement may be bound to the arbitration agreements of others, such as (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing or alter ego, (5) estoppel, and (6) third-party-beneficiary status"); *Cont'l Cas. Co. v.*

Am. Nat'l Ins. Co., 417 F.3d 727, 734-35 (7th Cir. 2005) (applying Illinois contract law and finding nonparty could enforce arbitration agreement).

Waffle House also involved distinguishable facts. There, the question was whether a private individual's agreement to arbitrate all employment-related disputes with his employer barred the Equal Employment Opportunity Commission (EEOC) from filing an action seeking relief for the employee. *See* 534 U.S. at 282. A majority of the Court found that the EEOC was not bound by the employee's arbitration agreement, explaining that the statute under which the EEOC had sued "clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake." *Id.* at 291. The majority also explained that the EEOC's claim was not "merely derivative" of the employee's personal claim under the statute. *Id.* at 297. It is in that specific context that the majority observed: "No one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims. It goes without saying that a contract cannot bind a nonparty." *Id.* at 294.[5]

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[5] Several Justices disagreed with the majority's analysis on this point. *See Waffle House*, 534 U.S. at 308-09 (Thomas, J., dissenting, joined by Rehnquist, C.J., & Scalia, J.) ("The Court's analysis entirely misses the point. The relevant question is not whether the EEOC should be bound by the [employee's] agreement to arbitrate. Rather, it is whether a court should give effect to the arbitration agreement between [the employer] and [the employee] or whether it should instead allow the EEOC to reduce that arbitration agreement to all but a nullity. I believe that the FAA compels the former course."). Furthermore, although *Waffle House* was cited as authority by the parties (continued)

Unlike the situation confronted by the Court in *Waffle House*, it is well established that an estate administrator is *not* the master of an Illinois wrongful-death claim since such a claim is entirely derivative of the decedent's cause of action. *See Williams v. Manchester*, 888 N.E.2d 1, 11-12 (Ill. 2008) (explaining that a wrongful-death claim "is derived from the decedent's cause of action and is limited to what the decedent's cause of action against the defendant would have been had the decedent lived"); *Varelis*, 657 N.E.2d at 1000 (finding pre-death judgment obtained by decedent in tort action bars wrongful-death claim by estate administrator); *Biddy*, 30 N.E.2d at 18-19 (finding decedent's pre-death agreement to be bound by workers' compensation statute binds non-signatories); *Mooney*, 88 N.E. at 196 (finding decedent's pre-death release binds non-signatories); *Crane v. Chicago & W. Ind. R.R. Co.*, 84 N.E. 222, 223 (Ill. 1908) ("An injury resulting from the wrongful act, neglect, or default of another gives the injured party, if he survives, a right of action, and, if he dies, this right of action survives to his personal representatives under the statute. In either case the cause of action is the same."). Moreover, it is one thing to say that a federal agency should not be bound by a private individual's arbitration agree-

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seeking to avoid arbitration in *Labatt*, the Supreme Court of Texas found the decision irrelevant to its analysis. *Compare* Merits Br. for Real Parties in Interest at 5-6, *In re Labatt Food Serv., Inc.*, No. 07-0419 (Tex. Dec. 5, 2007) (relying on *Waffle House*), *available at* 2007 WL 4580590, *with Labatt*, 279 S.W.3d at 646-47 (compelling arbitration by non-signatories without addressing *Waffle House*).

ment with his employer. It is quite another to say that a private individual who derives a claim from another private individual can ignore the latter's agreement to arbitrate.

Second, despite the contrary impression given by the state supreme court's decision (App., *infra*, 21a-22a), no party ever claimed that the wrongful-death statute's "asset" language was ambiguous. In fact, the Estate Administrator's brief ignored the statutory language entirely. When confronted with that language at oral argument, counsel for the Estate Administrator gave a response foreshowing the "not a true asset" reasoning eventually used by the state supreme court, stating: "It [referring to the wrongful-death statute] says it's an asset, but it's not actually an asset of the decedent's estate." Oral Arg. Recording 24:28 to 24:32, *Carter v. SSC Odin Operating Co.*, No. 113204 (Ill. May 23, 2012).[6]

Finally, the rule of law adopted by the court below leads to absurd results. Suits involving survival and wrongful-death claims almost always arise from the same nucleus of operative facts. However, "when a complaint contains both arbitrable and nonarbitrable claims, the [FAA] requires courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Cocchi*, 132 S. Ct. at 26 (internal quotation marks and citation omitted).

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[6] Available at http://163.191.183.117/court/SupremeCourt/Video/2012/052312_113204.wmv (last visited Feb. 14, 2013).

As a result, suits involving survival and wrongful-death claims will often be forced to proceed on parallel tracks. Permitting state courts to exempt wrongful-death claims from arbitral obligations imposed by a decedent on all other claims passed to her heirs, such that wrongful-death claims must be resolved in a judicial forum while mirror-image survival claims proceed in arbitration, effectively doubles the litigation burden imposed on the parties with no benefit to them or the judicial system. *See also Laizure*, slip op. at 19 (noting that treating survival claims differently than wrongful-death claims would allow plaintiffs to craft their complaints so as to circumvent otherwise-enforceable arbitration agreements).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari. If the Court also grants the petition for a writ of certiorari in *Ping*, the Court should consolidate the two cases for resolution on the merits.[7]

Respectfully submitted.

MALCOLM J. HARKINS III
Counsel of Record
JAMES F. SEGROVES
BENJAMIN R. OGLETREE
PROSKAUER ROSE LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 416-6800
mharkins@proskauer.com

MARK R. FELDHAUS
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 436-8326

FEBRUARY 2013

[7] The Healthcare Center has served copies of this petition on counsel of record in *Ping*.

APPENDICES

APPENDIX A

2012 IL 113204

IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS

Docket No. 113204

SUE CARTER, Special Adm'r of the Estate of Joyce Gott, Deceased, Appellee,

v.

SSC ODIN OPERATING COMPANY, LLC, d/b/a Odin Healthcare Center, Appellant.

Opinion filed September 20, 2012.

JUSTICE THEIS delivered the judgment of the court, with opinion.

Chief Justice Kilbride and Justices Thomas, Garman, and Burke concurred in the judgment and opinion.

Justices Freeman and Karmeier took no part in this decision.

OPINION

[¶ 1] This appeal involves an arbitration agreement between plaintiff's decedent and defendant nursing home. At issue is whether the arbitration agreement is enforceable and, if so, whether plaintiff can be compelled to arbitrate a wrongful-death claim against defendant. The appellate court ruled in favor of plaintiff, holding that the arbitration agreement is unenforceable based on a lack of mutuality of obligation, and that the wrongful-death claim is not subject to arbitration in any event. 2011 IL App (5th) 070392-B, ¶¶ 29, 34. The appellate court thus affirmed the trial court's denial of defendant's motion to compel arbitration. *Id.* ¶ 36.

[¶ 2] For the reasons that follow, we affirm in part and reverse in part the judgment of the appellate court, and remand to the trial court for further proceedings.

[¶ 3] BACKGROUND

[¶ 4] Plaintiff, Sue Carter, as the special administrator of the estate of Joyce Gott, deceased, filed a complaint in the circuit court of Marion County against defendant, SSC Odin Operating Company, LLC, that does business as Odin Healthcare Center, a nursing home located in Odin, Illinois. Gott was a resident of the nursing home for a two-month period during 2005, and again in early 2006 until her death on January 31, 2006. In count I, a survival action (755 ILCS 5/27-6 (West 2006)), plaintiff alleged that defendant violated the Nursing Home Care Act (210 ILCS 45/1-101 *et seq.* (West 2006)) and, as a result,

Gott sustained personal injury including gastrointestinal bleeding, anemia, and respiratory failure. In count II, a claim under the Wrongful Death Act (740 ILCS 180/0.01 *et seq*. (West 2006)), plaintiff sought damages for injuries sustained by Gott's heirs resulting from Gott's wrongful death.

[¶ 5] Defendant filed a motion to compel arbitration, relying on two identical arbitration agreements executed at the time of Gott's 2005 and 2006 nursing home admissions. The 2005 agreement was signed by plaintiff as Gott's "Legal Representative." The 2006 agreement was signed by Gott herself. The parties agreed that, with respect to claims where the amount in controversy is at least $200,000,

> "they shall submit to binding arbitration all disputes against each other and their representatives, affiliates, governing bodies, agents and employees arising out of or in any way related or connected to the Admission Agreement and all matters related thereto including matters involving the Resident's stay and care provided at the Facility, including but not limited to any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care including allegations of medical malpractice; any disputes concerning whether any statutory provisions relating to the Resident's rights under Illinois law were violated; any disputes relating to the payment or non-payment for the Resident's care and stay at the Facility; and any other dispute under state or Federal law based on contract, tort, statute (including any deceptive trade practices and consumer protection statutes), warranty or any alleged breach, default, negligence,

wantonness, fraud, misrepresentation or suppression of fact or inducement."

[¶ 6] The parties also agreed that defendant would pay the fees of the arbitrators; defendant would pay up to $5,000 of the resident's attorney fees and costs in claims against defendant; the resident would have the right to choose the location of the arbitration; and the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) (FAA) would govern the agreements.

[¶ 7] After briefing, and without an evidentiary hearing, the trial court denied defendant's motion to compel arbitration. The trial court ruled that the agreements were unenforceable because they violated Illinois public policy and lacked mutuality of obligation; the wrongful-death claim was not arbitrable; and the agreements did not evince a transaction involving commerce within the meaning of the FAA. Defendant appealed. The appellate court affirmed the denial of defendant's motion to compel arbitration. *Carter v. SSC Odin Operating Co.*, 381 Ill. App. 3d 717 (2008).

[¶ 8] The appellate court examined Illinois public policy as set forth in sections 3-606 and 3-607 of the Nursing Home Care Act, which provide that any waiver by a resident, or his legal representative, of the right to commence an action under the Nursing Home Care Act, or to a jury trial of such action, shall be "null and void." 210 ILCS 45/3-606, 3-607 (West 2006). The appellate court held that these antiwaiver provisions present a legitimate state law contract defense to the arbitration agreements that is not preempted by the FAA. *Carter*, 381 Ill. App. 3d at 722-23. We allowed defendant's petition for leave to

appeal and reversed the judgment of the appellate court. *Carter v. SSC Odin Operating Co.*, 237 Ill. 2d 30 (2010). We held that the antiwaiver provisions of sections 3-606 and 3-607 of the Nursing Home Care Act are the functional equivalent of antiarbitration legislation, which is preempted by the FAA and Supreme Court precedent. *Id.* at 48-49 (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984)). We remanded the cause to the appellate court for consideration and resolution of the remaining issues on appeal. *Id.* at 51.

[¶ 9] On remand, the appellate court again affirmed the trial court's denial of defendant's motion to compel arbitration. 2011 IL App (5th) 070392-B, ¶ 1. The appellate court first held that the arbitration agreements evince a transaction involving interstate commerce, rendering them subject to the FAA. *Id.* ¶ 21. The appellate court next held, over a dissent, that defendant's promise to arbitrate was illusory, and that the arbitration agreements were thus unenforceable for lack of mutuality of obligation. *Id.* ¶ 29. The appellate majority explained:

> "By excluding all claims but those $200,000 and greater from the requirements of the arbitration agreement, the defendant essentially ensured that none of its claims against Joyce [Gott] would have to be arbitrated under the terms of the agreement. Instead, only Joyce's claims for personal injuries due to the defendant's improper or inadequate care would ever have to be arbitrated under the agreements. The defendant cannot offer any realistic scenario where the amount in controversy in disputes relating to the nonpayment of Joyce's care would equal or exceed

> $200,000. The arbitration agreements, therefore, do not contain mutually binding promises to arbitrate, but only a unilateral obligation on the part of Joyce to arbitrate her personal injury claims. The agreements, therefore, are not enforceable." *Id.*

The dissenting justice would not have found defendant's promise to arbitrate to be illusory, noting that a claim against a nursing home resident in excess of $200,000 could arise where, for example, the resident intentionally or unintentionally started a fire causing damage to the nursing home. *Id.* ¶¶ 40-41 (Spomer, J., concurring in part and dissenting in part).

[¶ 10] The appellate court unanimously held, however, that even if the arbitration agreements are enforceable, plaintiff cannot be compelled to arbitrate the wrongful-death claim because plaintiff did not sign the arbitration agreement in her individual capacity. *Id.* ¶ 34. The appellate court disagreed with defendant that the "derivative" nature of a wrongful-death claim required a different result. *Id.* ¶¶ 33-34.

[¶ 11] We allowed defendant's petition for leave to appeal. Ill. S. Ct. R. 315(a) (eff. Feb. 26, 2010).

[¶ 12] ANALYSIS

[¶ 13] I. Standard of Review

[¶ 14] The facts relevant to defendant's motion to compel arbitration are not in dispute, and the trial court's decision denying defendant's motion was based on purely legal issues: (1) the enforceability of the arbitration agreement, and (2) the arbitrability of the wrongful-death claim, which raises issues of statutory construction. Accordingly, our review pro-

ceeds *de novo*. See *Royal Indemnity Co. v. Chicago Hospital Risk Pooling Program*, 372 Ill. App. 3d 104, 107 (2007); *Carter*, 237 Ill. 2d at 39.

[¶ 15] II. Mutuality of Obligation

[¶ 16] The appellate court held that the arbitration agreements at issue here "evidence a transaction involving interstate commerce" and are thus governed by the FAA. 2011 IL App (5th) 070392-B, ¶¶ 16-21. Plaintiff did not seek review of that issue before this court. Thus, we will proceed from the premise that, as held by the appellate court and expressly stated in the arbitration agreements, the FAA governs the agreements.

[¶ 17] Originally adopted in 1925, the FAA was enacted "to reverse the longstanding judicial hostility to arbitration agreements" and "to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Section 2 of the FAA provides in relevant part that:

> "A written provision in *** a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction *** shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." (Emphasis added.) 9 U.S.C. §2 (2012).

[¶ 18] Thus, an arbitration agreement may be invalidated by a state law contract defense of general applicability, such as fraud, duress, or unconscionability, without contravening section 2. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

An arbitration agreement may not be invalidated, however, by a state law applicable only to arbitration agreements. *Id.*

[¶ 19] Here, the state law contract defense on which the appellate court relied when it invalidated the arbitration agreements is a lack of mutuality of obligation. According to the appellate court, defendant's promise to arbitrate is illusory based on the $200,000 arbitration floor, rendering the arbitration agreements unenforceable for lack of a mutual promise to arbitrate. 2011 IL App (5th) 070392-B, ¶ 29.

[¶ 20] "An illusory promise appears to be a promise, but on closer examination reveals that the promisor has not promised to do anything." *W.E. Erickson Construction, Inc. v. Chicago Title Insurance Co.*, 266 Ill. App. 3d 905, 909 (1994). Although defendant disputes that its obligation to arbitrate its claims against Gott is illusory, defendant's principal argument before this court is that mutuality of obligation is not essential to the validity of the arbitration agreements because Gott's promise to arbitrate is supported by other consideration. In other words, according to defendant, a lack of mutual promises to arbitrate will not destroy the validity of the arbitration agreements.

[¶ 21] The concept of "mutuality of obligation" is intimately tied to the concept of "consideration." As this court explained:

> "While consideration is essential to the validity of a contract, mutuality of obligation is not. Where there is no other consideration for a contract the mutual promises of the parties constitute the consideration, and these promises must be binding on both parties or the contract falls for want of

> consideration, but where there is any other consideration for the contract mutuality of obligation is not essential." *Armstrong Paint & Varnish Works v. Continental Can Co.*, 301 Ill. 102, 108 (1921).

Accord *S.J. Groves & Sons Co. v. State of Illinois*, 93 Ill. 2d 397, 403-04 (1982), *overruled on other grounds by Rossetti Contracting Co. v. Court of Claims*, 109 Ill. 2d 72, 79 (1985); *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 488 (1997). See also Restatement (Second) of Contracts § 79 (1981) ("If the requirement of consideration is met, there is no additional requirement of *** 'mutuality of obligation.'"); 3 Richard A. Lord, Williston on Contracts § 7:14, at 326-30 (4th ed. 2008) (mutuality of obligation is "simply an awkward way of stating that there must be a valid consideration").

[¶ 22] These principles apply equally to arbitration agreements as they do to other types of contracts. In *Vassilkovska v. Woodfield Nissan, Inc.*, 358 Ill. App. 3d 20 (2005), for example, the appellate court was presented with a challenge to an arbitration agreement similar to the challenge in the instant case. There, the plaintiff claimed that the defendant's promise to arbitrate was illusory, thus rendering the arbitration agreement unenforceable for lack of mutuality of obligation. *Vassilkovska* observed that mutuality of obligation is "nothing more than a proxy for consideration," and that the court would review the plaintiff's lack-of-mutuality challenge in terms of whether consideration existed for the parties' agreement to arbitrate. *Vassilkovska*, 358 Ill. App. 3d at 25 n.2. In *Vassilkovska*, however, the only consideration that could have supported the

plaintiff's promise to arbitrate was the defendant's reciprocal promise, which the appellate court held was illusory. *Id.* at 29. Here, defendant argues that other consideration, apart from its own promise to arbitrate, supports Gott's promise to arbitrate her disputes with defendant. If defendant is correct that other consideration exists, we need not decide whether defendant's promise to arbitrate is illusory.

[¶ 23] "Consideration" is the "bargained-for exchange of promises or performances, and may consist of a promise, an act or a forbearance." *McInerney*, 176 Ill. 2d at 487 (citing Restatement (Second) of Contracts § 71 (1981)). "Any act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract." *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 330 (1977). See also *Lipkin v. Koren*, 392 Ill. 400, 406 (1946) (consideration "consists of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other"). Thus, the enforceability of Gott's promise to arbitrate, rather than to litigate, her claims against defendant is dependent upon whether defendant suffered a detriment, or Gott received a benefit, in exchange for that promise. See *Vassilkovska*, 358 Ill. App. 3d at 26.

[¶ 24] Principles of contract law do not require that the values Gott and defendant exchanged be equivalent. *Ryan v. Hamilton*, 205 Ill. 191, 197 (1903); *Keefe v. Allied Home Mortgage Corp.*, 393 Ill. App. 3d 226, 230 (2009). See also Restatement (Second) of Contracts § 79 (1981) ("[i]f the requirement of consideration is met, there is no additional requirement of *** equivalence in the values exchanged");

Harris v. Green Tree Financial Corp., 183 F.3d 173, 180 (3d Cir. 1999) (observing that "state courts have concluded that an arbitration clause need not be supported by equivalent obligations"). Moreover, we will not inquire into the adequacy of the consideration to support a contract. *Gallagher v. Lenart*, 226 Ill. 2d 208, 243 (2007); *Ryan*, 205 Ill. at 197. "[A]dequacy of the consideration is within the exclusive dominion of the parties where they contract freely and without fraud." *Id.* at 198. See also 2 Joseph M. Perillo & Helen Hadjiyannakis Bender, Corbin on Contracts § 6.1, at 207 (rev. ed. 1995) (to the extent courts use the term mutuality of obligation to require something tending toward equivalence of obligation, this is "'simply a species of the forbidden inquiry into the adequacy of consideration'") (quoting *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 629 (Minn. 1983)).

[¶ 25] Defendant contends that, apart from its own promise to arbitrate, Gott's promise to arbitrate is supported by the following consideration: defendant's promise to pay the arbitrators' fees[1]; defendant's promise to pay $5,000 of Gott's attorney fees and costs in any action against defendant; and Gott's right to choose the location of the arbitration. In her brief before this court, plaintiff does not address defendant's contention that the foregoing provisions supply the consideration supporting Gott's promise to arbitrate. At oral argument, plaintiff addressed only the attorney fee provision in the arbitration

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[1] The arbitration agreements require that disputes be settled by a panel of three arbitrators.

agreement, noting that under the Nursing Home Care Act defendant is already required to pay attorney fees to a resident whose rights (as specified in part 1 of article II of the Act) are violated. See 210 ILCS 45/3-602 (West 2006). Thus, plaintiff argued that defendant's promise to pay $5,000 of Gott's attorney fees is no consideration. We disagree.

[¶ 26] Under the Nursing Home Care Act, Gott would only be entitled to attorney fees if she prevailed in a claim against defendant. Under the arbitration agreements, however, Gott is entitled to a portion of her attorney fees even if defendant prevails. The contractual fee provision thus supplements the statutory fee provision, constituting a benefit to Gott and a detriment to defendant. Similarly, defendant's promise to pay the arbitrators' fees, and Gott's right to choose the location of the arbitration, each also constitute a benefit to Gott and a detriment to defendant.

[¶ 27] Based on these contract provisions, we conclude that Gott's promise to arbitrate, even if not met with a reciprocal promise to arbitrate by defendant, is nonetheless supported by consideration. Thus, we hold, contrary to the appellate court judgment, that the arbitration agreements are enforceable. The state law contract defense of lack of mutuality of obligation is not available under the facts of this case.

[¶ 28] In light of this holding, we necessarily consider defendant's further argument that the appellate court erred in holding that plaintiff is not required to arbitrate the wrongful-death claim.

[¶ 29] III. Wrongful-Death Action

[¶ 30] The appellate court held that because plaintiff signed the agreement as Gott's legal representative, and not in her individual capacity or on her own behalf as a potential wrongful-death plaintiff, the arbitration agreement is not binding upon her with regard to the wrongful-death claim. 2011 IL App (5th) 070392-B, ¶ 34. As the appellate court succinctly stated, plaintiff "is not a party to the agreements." *Id.* ¶ 32. Thus, the appellate court's holding is based on a basic principle of contract law. See *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty.").

[¶ 31] Defendant does not dispute that plaintiff signed the agreement only on behalf of Gott, and conceded at oral argument that nonsignatories to a contract are typically not bound. Defendant, nonetheless, urges us to reverse the appellate court judgment, contending that the court's holding is based on a misunderstanding of the Wrongful Death Act. According to defendant, a wrongful-death action is an asset of the decedent's estate that the decedent can limit during her lifetime. In this case, defendant continues, the decedent limited the forum in which the action could be heard. Defendant further argues that a wrongful-death action is derivative of, and thus limited to, what a decedent's cause of action against the defendant would have been had the decedent lived, and if the decedent's cause of action against the defendant would have been subject to arbitration, the wrongful-death claim against the defendant is likewise subject to arbitration. For

these reasons, defendant contends that its motion to compel arbitration should have been granted. Because defendant's arguments focus on the nature of a wrongful-death action, we begin our analysis with an overview of the Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 2006)).

[¶ 32] At common law, no cause of action existed to recover damages for the wrongful death of another, and a cause of action abated at the death of the injured party. *Williams v. Manchester*, 228 Ill. 2d 404, 418 (2008). Thus, "'it was cheaper for the defendant to kill the plaintiff than to injure him.'" *Id.* (quoting Prosser & Keeton on Torts § 127, at 945 (W. Page Keeton *et al.* eds., 5th ed. 1984)). In 1853, however, the legislature adopted the Injuries Act (1853 Ill. Laws 97), now known as the Wrongful Death Act, creating a new cause of action for pecuniary losses suffered by the deceased's spouse and next of kin by reason of the death of the injured person. *Nudd v. Matsoukas*, 7 Ill. 2d 608, 612 (1956).

[¶ 33] Section 1 of the Act provides in relevant part:

> "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 and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages ***." 740 ILCS 180/1 (West 2006).

Although section 2 provides that every wrongful-death action shall be brought by and in the names of

the "personal representatives" of the deceased, the action is filed for the "exclusive benefit of the surviving spouse and next of kin of such deceased person." 740 ILCS 180/2 (West 2006). Thus, the personal representative in a wrongful-death claim is "merely a nominal party to this action, effectively filing suit as a statutory trustee on behalf of the surviving spouse and next of kin, who are the true parties in interest." *Glenn v. Johnson*, 198 Ill. 2d 575, 583 (2002). See also *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 361 (1995) (statutory requirement that wrongful-death action be brought by and in the name of the personal representative serves to avoid a multiplicity of suits by the next of kin, and ensures that the interests of all the beneficiaries are protected).

[¶ 34] A wrongful-death action is perhaps best understood when contrasted with an action under our so-called "Survival Act," now section 27-6 of the Probate Act of 1975. 755 ILCS 5/27-6 (West 2006). The Survival Act allows an action (such as a claim under the Nursing Home Care Act) to survive the death of the injured person. *Vincent v. Alden-Park Strathmoor, Inc.*, 241 Ill. 2d 495, 503 (2011); *National Bank of Bloomington v. Norfolk & Western Ry. Co.*, 73 Ill. 2d 160, 172 (1978). Whereas the Wrongful Death Act created a new cause of action that does not accrue until death, the Survival Act simply allows a representative of the decedent to maintain those statutory or common law actions that had already accrued to the decedent prior to death. *Wyness v. Armstrong World Industries, Inc.*, 131 Ill. 2d 403, 410-12 (1989). In other words:

> "A survival action allows for recovery of damages for injury sustained by the deceased up to the

> time of death; a wrongful death action covers the time after death and addresses the injury suffered by the next of kin due to the loss of the deceased rather than the injuries personally suffered by the deceased prior to death." *Id.* at 410.

With this background we turn to defendant's arguments.

[¶ 35] *Section 2.1 of the Wrongful Death Act*

[¶ 36] Defendant directs our attention to section 2.1 of the Wrongful Death Act, which describes a wrongful-death action as an "asset" of the decedent's estate. 740 ILCS 180/2.1 (West 2006). Section 2.1 provides in pertinent part:

> "In the event that the only asset of the deceased estate is a cause of action arising under this Act, and no petition for letters of office for his or her estate has been filed, the court, upon motion of any person who would be entitled to a recovery under this Act, and after such notice to the party's heirs or legatees as the court directs, and without opening of an estate, may appoint a special administrator for the deceased party for the purpose of prosecuting or defending the action." 740 ILCS 180/2.1 (West 2006).

Based on this provision, defendant argues that the wrongful-death action plaintiff filed against it is an asset of Gott's estate that Gott could and did limit when she entered into the arbitration agreement. Plaintiff counters that a wrongful-death action does not belong to the decedent, noting that the proceeds of a wrongful-death action do not pass through the decedent's estate.

[¶ 37] When construing a statute, the primary objective is to ascertain and give effect to the intent of the legislature, the language of the statute being the best indicator of such intent. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). Words and phrases should not be considered in isolation. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 41. Rather, the language in each section of the statute must be examined in light of the statute as a whole (*id.*), which is construed in conjunction with other statutes touching on the same or related subjects (*In re B.L.S.*, 202 Ill. 2d 510, 515 (2002)). Legislative intent may be ascertained not only by examining the statutory language, but by considering the reason and necessity for the law, the evils to be remedied, and the objects and purposes to be obtained. *People v. Lucas*, 231 Ill. 2d 169, 176 (2008).

[¶ 38] Applying these principles in the present case, we observe that although section 2.1 plainly refers to a wrongful-death action as an "asset of the deceased estate" (740 ILCS 180/2.1 (West 2006)), the legislature does not treat a wrongful-death action like other assets of the deceased's estate. Pursuant to the Probate Act, assets of a deceased's estate are subject to the claims of creditors and chargeable with the expenses of estate administration. 755 ILCS 5/18-14 (West 2006). With respect to a testate estate, assets of a deceased's estate are distributed in accordance with the deceased's will (755 ILCS 5/4-13 (West 2006)), and in the case of an intestate estate, according to the rules of descent and distribution (755 ILCS 5/2-1 (West 2006)). These rules generally provide that an intestate estate is distributed one-half to the surviving spouse and one-half to the decedent's descendants *per stirpes*. *Id.*

[¶ 39] Under the Wrongful Death Act, however, amounts recovered in a wrongful-death action are not made subject to the provisions of the Probate Act. Rather, such amounts shall be distributed "to each of the surviving spouse and next of kin of such deceased person in the proportion, as determined by the court, that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the deceased person." 740 ILCS 180/2 (West 2006).

[¶ 40] The import of the distribution provision in the Wrongful Death Act was recognized by this court just a few short years after the Act's adoption. At that time, the Act provided that amounts recovered "shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate." 1853 Ill. Laws 97, § 2. We observed:

> "The legislature intended that the money recovered should not be treated as a part of the estate of the deceased. They designed to exclude creditors from any benefit of it, and to prevent its passing by virtue of any provisions of the will of the deceased. The personal representative brings the action, not in right of the estate, but as trustee for those who had a more or less direct pecuniary interest in the continuance of the life of the deceased, and who had some claims, at least, upon his or her natural love and affection." *City of Chicago v. Major*, 18 Ill. 349, 358 (1857).

Although the Wrongful Death Act has undergone various amendments during its long history, this court's observation that the "legislature intended the money recovered should not be treated as a part of

the estate of the deceased" remains true today by virtue of the Act's express directive, set forth in section 2, regarding distribution of amounts recovered under the Act.

[¶ 41] Our analysis of the issue before this court is also informed by this court's opinion in *McDaniel v. Bullard*, 34 Ill. 2d 487 (1966). There we held that a pending action under the Wrongful Death Act does not abate upon the beneficiary's death, but is subject to the provisions of the Survival Act. *McDaniel*, 34 Ill. 2d at 490-91. Thus, under *McDaniel*, the right to receive wrongful-death benefits is an asset of the estates of the next of kin, should they die; it is not an asset of the estate of the decedent who is the subject of the wrongful-death action. *National Bank of Bloomington v. Podgorski*, 57 Ill. App. 3d 265, 267 (1978). *McDaniel* is consistent with our observation in *Major*, quoted above, that the "personal representative brings the action, *not in right of the estate*, but as trustee for those who had a more or less direct pecuniary interest in the continuance of the life of the deceased." (Emphasis added.) *Major*, 18 Ill. at 358.

[¶ 42] We conclude that a wrongful-death action is not a true asset of the deceased's estate. That said, we are constrained to give effect to the statutory language in section 2.1. See *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 77 ("statute should be construed, if possible, so that no word is rendered meaningless or superfluous"). We find guidance in our appellate court's opinion in *In re Estate of Savio*, 388 Ill. App. 3d 242 (2009). There the appellate court considered whether an estate could be reopened following the discovery, after additional

autopsies of the decedent, of a wrongful-death action. The former executor of the decedent's estate, who was also the decedent's ex-husband, objected, arguing in relevant part that a wrongful-death action is not an asset of the decedent's estate and, therefore, the estate could not be reopened. See 755 ILCS 5/24-9 (West 2006) (providing that decedent's estate may be reopened "to permit the administration of a newly discovered asset").

[¶ 43] To determine whether the wrongful-death action was an asset of the decedent's estate, the appellate court considered wrongful-death law in Illinois, including section 2.1 of the Wrongful Death Act, on which defendant here relies. The appellate court stated:

> "It is clear that under Illinois law, a wrongful death claim may only be brought by the personal representative of the decedent. See 740 ILCS 180/2 (West 2006); *Pasquale*, 166 Ill. 2d at 361 ***. Moreover, section 2.1 of the Wrongful Death Act specifically references a cause of action for wrongful death as being an asset of the decedent's estate. See 740 ILCS 180/2.1 (West 2006). *** The distinction to be made here is one of purpose. A wrongful death claim is not an asset of a decedent's estate for the purpose of whether it may be used to satisfy the claims of creditors of the estate. See *Berard v. Eagle Air Helicopter, Inc.*, 257 Ill. App. 3d 778, 781 *** (1994). However, a newly discovered wrongful death claim is an asset of a decedent's estate for the purpose of whether the estate may be reopened under section 24-9 [of the Probate Act] ***. See 740 ILCS 180/2.1 (West 2006). Therefore, we affirm the portion of the trial

court's ruling granting the petition to reopen Savio's estate." *Savio*, 388 Ill. App. 3d at 248-49.

[¶ 44] We agree with the *Savio* opinion that whether a wrongful-death action is an "asset of the deceased estate" (740 ILCS 180/2.1 (West 2006)) is a matter of "purpose." The language in section 2.1 of the Wrongful Death Act, and the language in the statute as a whole, does not evince an intent by the legislature to treat a wrongful-death action as an asset of the deceased's estate for the purpose defendant urges, *i.e.*, to allow the deceased to control the forum and manner in which a wrongful-death claim—in which the deceased has no interest—is determined. Rather, the statutory language indicates that the "asset" label adopted by the legislature is intended to facilitate the filing and prosecution of a wrongful-death claim. See also *In re Estate of Fields*, 588 S.W.2d 50, 54 n.2 (Mo. Ct. App. 1979) (applying Illinois law and observing that the reference in section 2.1 to a wrongful-death action as an estate asset is "simply legislative shorthand or acknowledgment of the procedural legal fiction that, after death, an administrator can be appointed only if there is an estate subject to possible administration," but "substantively the [wrongful-death] action is not a general asset of the decedent's estate").

[¶ 45] To the extent the parties' arguments suggest that an ambiguity exists in section 2.1, we will consider legislative history. See *In re D.D.*, 196 Ill. 2d 405, 419 (2001) (noting that only when the meaning of an enactment cannot be ascertained from the language may a court resort to other aids for construction). Section 2.1 was adopted in 1977. Pub. Act 80-752 (eff. Sept. 16, 1977). Although this section was

enlarged over the years, the language at issue here has remained intact since its adoption. Compare 740 ILCS 180/2.1 (West 2006), with Pub. Act 80-752 (eff. Sept. 16, 1977). The legislative history indicates that the intent of this new provision was to "make it more convenient" to bring a wrongful-death action, and "cut the red tape" by permitting a court to appoint a special administrator who could prosecute the action without opening an estate. 80th Ill. Gen. Assem., House Proceedings, May 3, 1977, at 142 (statements of Representative Beatty). Representative Beatty's statements reinforce our conclusion that the legislature denominated a wrongful-death action an "asset of the deceased estate" for the primary purpose of facilitating the filing and prosecution of such an action.

[¶ 46] For the foregoing reasons, we reject defendant's argument that the wrongful-death action filed by plaintiff is an asset of Gott's estate that she could limit via the arbitration agreement.

[¶ 47] *Derivative Nature of Wrongful-Death Action*

[¶ 48] In urging this court to hold that the wrongful-death action is subject to arbitration, defendant also relies on the so-called "derivative" nature of a wrongful-death action.

[¶ 49] Liability under section 1 of the Wrongful Death Act "depends upon the condition that the deceased, at the time of his death, had he continued to live, would have had a right of action against the same person or persons for the injuries sustained." *Biddy v. Blue Bird Air Service*, 374 Ill. 506, 513-14 (1940). Accord *Varelis v. Northwestern Memorial Hospital*, 167 Ill. 2d 449, 454 (1995); *Williams*, 228

Ill. 2d at 421. If the deceased had no right of action at the time of his or her death, then the deceased's personal representative has no right of action under the Wrongful Death Act. *Id.*; *Biddy*, 374 Ill. at 514. In this sense, a wrongful-death action is said to be "derivative" of the decedent's rights. *Varelis*, 167 Ill. 2d at 454. The early case of *Mooney v. City of Chicago*, 239 Ill. 414 (1909), is illustrative.

[¶ 50] In *Mooney*, the decedent, Edward Dillon, was injured while driving a wagon for his employer when the wagon hit a pothole. Dillon settled his personal injury action with his employer, releasing him from all liability. Following Dillon's death, allegedly from those injuries, the administrator of Dillon's estate filed a wrongful-death action against the city for maintaining the streets in a dangerous condition. The appellate court expressed the opinion that the release executed by Dillon had no relation to the case and was erroneously admitted into evidence. *Mooney*, 239 Ill. at 422. We disagreed, explaining that the administrator's right to maintain an action under the statute was dependent upon Dillon's right to sue the city at the time of his death, but "if Dillon had released the cause of action the statute does not confer upon his administrator any right to sue." *Id.* at 423. See also *Varelis*, 167 Ill. 2d at 456 (following *Mooney* and holding that a wrongful-death action could not be pursued where the decedent, during his lifetime, obtained a judgment in a personal injury action based on the same occurrence).

[¶ 51] Although cases like *Mooney* and *Varelis* involve instances where the decedent's personal injury claim was settled in some manner during his lifetime, no legal significance attaches to the particular

reason why a decedent's claim would have been barred had he or she lived. If the decedent could not have maintained a personal injury action at the time of death, then no wrongful-death action can be maintained based on that injury and the death that ensued. *Id.* at 460.

[¶ 52] Defendant argues that just as a decedent's settlement of a personal injury action constitutes a complete bar to a wrongful-death action based on the same occurrence, Gott's agreement to arbitrate disputes with defendant limits the wrongful-death action in the same manner. Defendant relies on case law from several of our sister states generally holding that because a wrongful-death action is derivative of the decedent's personal injury action, a wrongful-death action is subject to an arbitration agreement entered by the decedent. See *In re Labatt Food Service, L.P.*, 279 S.W.3d 640, 646-47 (Tex. 2009) (collecting cases).

[¶ 53] Plaintiff argues that the derivative nature of a wrongful-death action does not mean that she is subject to any and all contractual limitations—such as an agreement to arbitrate—that are applicable to the decedent. See *Bybee v. Abdulla*, 189 P.3d 40, 46 (Utah 2008) (rejecting argument that because decedent is master of his personal injury action he may, by contract, expose his unwilling heirs to any imaginable defense to their wrongful-death action). Plaintiff further responds that, as a nonparty to the arbitration agreements, she cannot be made to arbitrate the wrongful-death action, which does not belong to Gott's estate. See *Finney v. National Healthcare Corp.*, 193 S.W.3d 393, 395 (Mo. Ct. App. 2006) (holding that decedent's daughter, who was a nonparty to

the arbitration agreement, did not stand in the shoes of the decedent with respect to a wrongful-death action because such action did not belong to the decedent or decedent's estate).

[¶ 54] Defendant 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.

[¶ 55] Arbitration is a "creature of contract" (*Board of Managers of the Courtyards at the Woodlands Condominium Ass'n v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 74 (1998)), and under basic principles of contract law, only parties to the arbitration contract may compel arbitration or be compelled to arbitrate (*Gingiss International, Inc. v. Bormet*, 58 F.3d 328, 331 (7th Cir. 1995); *Vukusich v. Comprehensive Accounting Corp.*, 150 Ill. App. 3d 634, 640 (1986)). The FAA's policy favoring arbitration does not alter these principles. As the Supreme Court has stated:

> "The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.' *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). *** 'Arbitration under the [FAA] is a matter of consent, not coercion.' *Id.*, at 479. *** It goes without

saying that a contract cannot bind a nonparty." *Waffle House*, 534 U.S. at 293-94.

See also *Grundstad v. Ritt*, 106 F.3d 201, 205 n.5 (7th Cir. 1997) ("the federal policy favoring arbitration applies to issues concerning the scope of an arbitration agreement entered into consensually by contracting parties; it does not serve to extend the reach of an arbitration provision to parties who never agreed to arbitrate in the first place" (emphasis omitted)) (citing *McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994).

[¶ 56] In the present case, although the arbitration agreements purport to bind not only Gott, but also her "successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives, including the personal representative or executor of *** her estate," no dispute exists that the only parties to the agreements are Gott and defendant. Although plaintiff signed the 2005 arbitration agreement, she did so only as Gott's legal representative. Accordingly, plaintiff is bound to arbitrate only to the extent that plaintiff is acting in Gott's stead.

[¶ 57] For purposes of count I of the complaint, which alleges a violation of the Nursing Home Care Act by defendant pursuant to our survival statute, plaintiff is bound to arbitrate that claim, which had already accrued to Gott prior to death and which is brought for the benefit of Gott's estate. For purposes of count II, the wrongful-death action, plaintiff is not acting in Gott's stead. As already discussed, a wrongful-death action does not accrue until death and is not brought for the benefit of the decedent's estate, but for the next of kin who are the true parties in interest. Plaintiff, as Gott's personal representative

in the wrongful-death action, is merely a nominal party, effectively filing suit as a statutory trustee on behalf of the next of kin. See *Glenn*, 198 Ill. 2d at 583. Plaintiff is not prosecuting the wrongful-death claim on behalf of Gott, and thus plaintiff is not bound by Gott's agreement to arbitrate for purposes of this cause of action.

[¶ 58] Defendant's reliance on the Supreme Court's recent decision in *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. __, 132 S. Ct. 1201 (2012) (*per curiam*), as a basis for compelling arbitration of the wrongful-death claim, is misplaced. *Marmet* involved three negligence suits against nursing homes in West Virginia. In each case a family member of the deceased patient signed an agreement that contained an arbitration clause. The West Virginia Supreme Court held that the FAA does not preempt that state's public policy against predispute arbitration agreements that apply to personal injury or wrongful-death claims against nursing homes, and thus, the arbitration clauses would not be enforced. *Id.* at __, 132 S. Ct. at 1203. In two of the cases, the West Virginia court proposed an alternative holding, namely, that the arbitration clauses were unconscionable. *Id.* at __, 132 S. Ct. at 1204.

[¶ 59] The Supreme Court vacated the West Virginia decision. *Id.* at __, 132 S. Ct. at 1202. Noting that the FAA's text includes no exception for personal injury or wrongful-death claims, the Supreme Court held that "West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the

terms and coverage of the FAA." *Id.* at __, 132 S. Ct. at 1203-04. Unclear as to the extent the West Virginia court's alternative holding was influenced by its invalid, categorical antiarbitration rule, the Supreme Court remanded the case so that the West Virginia court could consider whether the arbitration clauses were unenforceable under state common law principles that are not specific to arbitration and preempted by the FAA. *Id.* at __, 132 S. Ct. at 1204.

[¶ 60] Our holding in the present case that plaintiff, as a nonparty to the arbitration agreements, cannot be compelled to arbitrate a wrongful-death claim that does not belong to the decedent is not contrary to *Marmet*. Our holding, unlike the West Virginia court's holding, is not based on a categorical antiarbitration rule; it is based on common law principles governing all contracts. *Marmet* recognized the significance of common law contract defenses when it returned that case to the West Virginia court to consider the validity of the arbitration clauses under that state's common law. Moreover, *Marmet* noted that the FAA "'requires courts to enforce the bargain *of the parties* to arbitrate.'" (Emphasis added.) *Id.* at __, 132 S. Ct. at 1203 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)). Plaintiff here is not a party to the bargain to arbitrate.

[¶ 61] We agree with the decision of the courts below that plaintiff cannot be compelled to arbitrate the wrongful-death claim against defendant.

[¶ 62] CONCLUSION

[¶ 63] For the reasons stated, we affirm in part and reverse in part the judgment of the appellate

court, and remand this cause to the trial court for further proceedings.

[¶ 64] Affirmed in part and reversed in part.

[¶ 65] Cause remanded.

APPENDIX B

2011 IL App (5th) 070392-B

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Docket No. 5-07-0392

SUE CARTER, Special Adm'r of the Estate of Joyce Gott, Deceased, Appellee,

v.

SSC ODIN OPERATING COMPANY, LLC, d/b/a Odin Healthcare Center, Appellant.

Opinion filed August 18, 2011
Rehearing denied September 16, 2011

JUSTICE STEWART delivered the judgment of the court, with opinion.

Justice Goldenhersh concurred in the judgment and opinion.

Justice Spomer concurred in part and dissented in part, with opinion.

OPINION

[¶ 1] The plaintiff, Sue Carter, as the special administrator of the estate of Joyce Gott, deceased, filed a complaint against the defendant, SSC Odin Operating Company, LLC, doing business as Odin Healthcare Center, alleging that the defendant negligently provided nursing home services to Joyce that resulted in injuries to Joyce and contributed to the cause of her death. The defendant filed a motion to compel arbitration of the claim pursuant to two signed arbitration agreements. The circuit court denied the defendant's motion to compel arbitration. Initially, we affirmed the circuit court's order, holding that the arbitration agreements were void for being against the public policy set forth in the anti-waiver provisions of the Nursing Home Care Act (210 ILCS 45/3-606, 3-607 (West 2006)).[1] *Carter v. SSC Odin Operating Co.*, 381 Ill. App. 3d 717, 885 N.E.2d 1204 (2008). The supreme court reversed, holding that the Federal Arbitration Act (9 U.S.C. § 1 *et seq.* (2000)) preempted the Nursing Home Care Act. *Carter v. SSC Odin Operating Co*., 237 Ill. 2d 30, 927 N.E.2d 1207 (2010). The court remanded the cause to

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[1] Section 3-606 of the Nursing Home Care Act provides, "Any waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607, whether oral or in writing, shall be null and void, and without legal force or effect." 210 ILCS 45/3-606 (West 2006).

Section 3-607 of the Nursing Home Care Act provides, "Any party to an action brought under Sections 3-601 through 3-607 shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect." 210 ILCS 45/3-607 (West 2006).

us for consideration of the other issues raised by the parties that we did not previously address, including whether the parties' arbitration agreements evidence a transaction "involving [interstate] commerce" within the meaning of section 2 of the Federal Arbitration Act (9 U.S.C. § 2 (2000)), whether the arbitration agreements are void for a lack of mutuality, and whether the arbitration agreements apply to the plaintiff's claim under the Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 2006)). After consideration of the additional issues raised by the parties, we again affirm the order of the circuit court.

[¶ 2] BACKGROUND

[¶ 3] The defendant operates a nursing home facility in Odin, Illinois. The plaintiff alleged in her complaint that Joyce was admitted to the facility from May 20, 2005, through July 29, 2005, and again from January 12, 2006, until her death on January 31, 2006. At the beginning of Joyce's first stay at the defendant's facility, the plaintiff, as Joyce's "legal representative," executed a written "Health Care Arbitration Agreement" with the defendant. This agreement is dated May 20, 2005. Six days after Joyce's second admission to the defendant's facility, Joyce herself signed a second written "Health Care Arbitration Agreement" with the defendant, the terms of which are identical to those of the first agreement. This second agreement is dated January 18, 2006. The plaintiff's signature does not appear on the second arbitration agreement.

[¶ 4] Both arbitration agreements state that they "shall not apply to any dispute where the amount in controversy is less than two hundred thousand

($200,000.00) dollars." The agreements further provide as follows:

> "In consideration of this binding Agreement, the Facility and the Resident acknowledge that they are agreeing to a mutual arbitration, regardless of which party is making a claim; that the Facility agrees to pay the fees of the arbitrators and up to $5,000.00 of reasonable and appropriate attorney's fees and costs for the Resident in any claims against the Facility; that the Resident shall have the right to choose the location of any arbitration under this Agreement; that the parties will mutually benefit from the speedy and efficient resolution of disputes which arbitration is expected to provide; and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by all parties hereto. Intending to be legally bound, the parties expressly agree that this Agreement will be governed by the Federal Arbitration Act, 9 U.S.C. § 1-16 ('FAA'). It is the express intent of the parties to have a binding arbitration agreement and the parties further agree as follows:
>
> The parties agree that they shall submit to binding arbitration all disputes against each other and their representatives, affiliates, governing bodies, agents and employees arising out of or in any way related or connected to the Admission Agreement and all matters related thereto including matters involving the Resident's stay and care provided at the Facility, including but not limited to any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care including allegations of medical mal-

> practice; any disputes concerning whether any statutory provisions relating to the Resident's rights under Illinois law were violated; any disputes relating to the payment or non-payment for the Resident's care and stay at the Facility; and any other dispute under state or Federal law based on contract, tort, statute (including any deceptive trade practices and consumer protection statutes), warranty or any alleged breach, default, negligence, wantonness, fraud, misrepresentation or suppression of fact or inducement."

[¶ 5] The agreements further state as follows: "Each party agrees to waive the right to a trial, before a judge or jury, for all disputes, including those at law or in equity, subject to binding arbitration under this Agreement." The agreements state that the parties intend for the agreements to bind "the Resident, his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives, including the personal representative or executor of his or her estate; and the Legal Representative, his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives or executor of his or her estate."

[¶ 6] Joyce died on January 31, 2006, during her second stay at the defendant's nursing home facility. On November 22, 2006, the plaintiff filed a two-count complaint against the defendant. Count I of the complaint alleges a statutory survival action pursuant to the Probate Act of 1975 (755 ILCS 5/27-6 (West 2006)) and the Nursing Home Care Act (210 ILCS 45/1-101 *et seq.* (West 2006)) (the survival action). Count II alleges a statutory action under the Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 2006))

(the wrongful death action). In both counts, the plaintiff alleged that the defendant had failed to provide Joyce with adequate care. In the survival action, the plaintiff alleged that the defendant's acts and/or omissions resulted in Joyce suffering pain, emotional distress, and mental anguish between January 12, 2006, and January 31, 2006. In the wrongful death action, the plaintiff alleged that the defendant's acts and/or omissions resulted in Joyce's death and that, therefore, her heirs were deprived of her companionship and society.

[¶ 7] In its answer to the complaint, the defendant raised the arbitration agreements as an affirmative defense to the claims. The defendant also filed a motion to compel arbitration based on the arbitration agreements. The plaintiff contested the motion to compel arbitration, arguing that the agreements are void for being in violation of Illinois public policy, as set forth in sections 3-606 and 3-607 of the Nursing Home Care Act (210 ILCS 45/3-606, 3-607 (West 2006)), that the arbitration agreements are void due to a lack of mutuality, that the contract does not fall under the Federal Arbitration Act (9 U.S.C. § 1 *et seq.* (2000)) because the agreements are not contracts evidencing a transaction involving interstate commerce, and that the arbitration agreements did not apply to the plaintiff's claim under the Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 2006)).

[¶ 8] On June 20, 2007, the circuit court entered an order denying the defendant's motion to compel arbitration. With regard to the survival action, the circuit court concluded that the agreements were not enforceable because they were "in direct violation of

emphatically stated public policy and for lack of mutuality" and because, with regard to interstate commerce, "in the aggregate the economic activity does not represent general practice subject to federal control." With regard to the wrongful death action, the circuit court ruled that although Joyce was bound by the agreements with regard to her own claims, a plaintiff bringing a wrongful death claim on behalf of survivors was not bound by the agreements. The defendant filed a timely notice of interlocutory appeal.

[¶ 9] We affirmed the circuit court's order, holding that the arbitration agreements were void for being against the public policy set forth in the antiwaiver provisions of the Nursing Home Care Act (210 ILCS 45/3-606, 3-607 (West 2006)). *Carter v. SSC Odin Operating Co.*, 381 Ill. App. 3d 717, 885 N.E.2d 1204 (2008). In our decision, we held that the Federal Arbitration Act did not preempt the Nursing Home Care Act. Because we affirmed the circuit court's order pursuant to the antiwaiver provisions of the Nursing Home Care Act, we did not address the alternative issues raised by the parties.

[¶ 10] The defendant appealed to the supreme court, and the supreme court reversed our decision, holding that the Federal Arbitration Act preempted the Nursing Home Care Act. *Carter v. SSC Odin Operating Co.*, 237 Ill. 2d 30, 927 N.E.2d 1207 (2010). The court remanded the cause to us for consideration of the other issues raised by the parties that we did not previously address, including whether the arbitration agreements evidence a transaction "involving [interstate] commerce" within the meaning of section 2 of the Federal Arbitration Act (9 U.S.C. § 2 (2000)),

whether the arbitration agreements are void for a lack of mutuality, and whether the arbitration agreements apply to the plaintiff's claim under the Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 2006)). We now address each of these additional issues in turn.

[¶ 11] STANDARD OF REVIEW

[¶ 12] An order to compel arbitration is injunctive in nature and is appealable under Illinois Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010). *Peach v. CIM Insurance Corp.*, 352 Ill. App. 3d 691, 694, 816 N.E.2d 668, 671 (2004). Generally, an order granting or denying a motion to compel arbitration is reviewed under the abuse-of-discretion standard. *Peach*, 352 Ill. App. 3d at 694, 816 N.E.2d at 671. However, in an appeal from the denial of a motion to compel arbitration without an evidentiary hearing, the standard of review is *de novo*. *Ragan v. AT&T Corp.*, 355 Ill. App. 3d 1143, 1147, 824 N.E.2d 1183, 1186-87 (2005). In the present case, there was no evidentiary hearing. Accordingly, we will review the trial court's ruling *de novo*. This court may affirm the judgment of a trial court on any basis warranted by the record. *Evans v. Lima Lima Flight Team, Inc.*, 373 Ill. App. 3d 407, 418, 869 N.E.2d 195, 206 (2007).

[¶ 13] DISCUSSION

[¶ 14] I

[¶ 15] Contract Evidencing a Transaction Involving Interstate Commerce

[¶ 16] The first issue we address is whether the arbitration agreements are contracts evidencing a transaction involving interstate commerce. Section 2

of the Federal Arbitration Act "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). The United States Supreme Court has noted that the Federal Arbitration Act was enacted pursuant to Congress's substantive power to regulate interstate commerce and admiralty. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967). Section 2 of the Federal Arbitration Act applies only to "any maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2 (2000). "Section 2 'embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a [maritime transaction or a] contract evidencing interstate commerce,' in which case section 2 would simply not apply ***." *Fosler v. Midwest Care Center II, Inc.*, 398 Ill. App. 3d 563, 572, 928 N.E.2d 1, 10 (2009) (quoting *Perry v. Thomas*, 482 U.S. 483, 489 (1987)). The words "involving commerce" in section 2 of the Federal Arbitration Act "signal[ ] an intent to exercise Congress' commerce power to the full." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995).

[¶ 17] We believe that the record establishes that the arbitration agreements in the present case evidence a transaction involving interstate commerce. The defendant's memorandum of law in support of its motion to compel arbitration included the affidavit of the administrator of the defendant's nursing home facility in Odin, Illinois. The administrator stated in the affidavit that Joyce's nursing care was paid for by the federal Medicare program. The defen-

dant made its request for payment for Joyce's care to Mutual of Omaha, which is "a fiscal intermediary that processes Medicare claims for the federal government." The affidavit states that Mutual of Omaha's office for processing Medicare payments to the defendant is located in Nebraska. Mutual of Omaha processed the defendant's Medicare request, and the defendant received $8,667.99 in Medicare payments for Joyce's care at the defendant's facility. The affidavit further states that for the two-year period beginning in 2005 and ending in 2006, the defendant received more than $9.3 million in Medicare and Medicaid funds for nursing care provided to various patients at the defendant's Odin nursing home facility.

[¶ 18] The affidavit further establishes that the defendant received various supplies, including food, oxygen tanks, beds, maintenance, and office supplies, from several different vendors that are located in Missouri, Wisconsin, Minnesota, Nebraska, Kentucky, Georgia, Texas, Florida, Colorado, and California. The defendant provides its residents with therapy services from companies situated in Pennsylvania, Tennessee, Florida, Nevada, and Oregon, and its payroll is processed in an office located in Texas.

[¶ 19] In *Fosler*, the court held that an arbitration agreement contained within a nursing home care agreement evidenced a transaction involving interstate commerce where the nursing home facility received Medicare and Medicaid payments for services provided to approximately 15% of its residents, received out-of-state insurance payments on behalf of the plaintiff, and purchased medical equipment,

medical supplies, and over-the-counter medication from vendors outside Illinois. *Fosler*, 398 Ill. App. 3d at 578, 928 N.E.2d at 14-15. We agree with the *Fosler* court's analysis and hold that the arbitration agreements in the present case evidence a transaction involving interstate commerce.

[¶ 20] Courts from other jurisdictions have also considered similar evidence and found it sufficient to satisfy the interstate commerce requirement of the Federal Arbitration Act. In *Triad Health Management of Georgia, III, LLC v. Johnson*, 679 S.E.2d 785, 787-88 (Ga. Ct. App. 2009), the Court of Appeals of Georgia held that evidence of Medicaid and Medicare payments and out-of-state supply purchases and insurance providers was sufficient to show a contract involving interstate commerce. In *Estate of Ruszala v. Brookdale Living Communities, Inc.*, 1 A.3d 806, 817 (N.J. Super. Ct. App. Div. 2010), the Superior Court of New Jersey found the facilities' purchases of out-of-state supplies, food, medicine, and equipment left "little doubt that the residency agreements at issue *** involve interstate commerce." See also *Vicksburg Partners, L.P. v. Stephens*, 2004-CA-01345-SCT (¶ 17) (Miss. 2005) (a nursing home admissions agreement affected interstate commerce where the nursing home facility procured goods and services from out-of-state vendors, took in out-of-state residents, and received payments from out-of-state insurance carriers, including Medicare and Medicaid programs).

[¶ 21] "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would

represent 'a general practice . . . subject to federal control.'" *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003) (*per curiam*) (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)). The nursing home facility in the present case cannot function without the supplies and services procured from out-of-state merchants and businesses. It collects a substantial amount of revenue from out-of-state insurance carriers, including Medicaid and Medicare. The facility's aggregate economic activities clearly have an effect upon interstate commerce, rendering the arbitration agreements in the present case subject to the Federal Arbitration Act.

[¶ 22] II

[¶ 23] Mutuality

[¶ 24] Even though the arbitration agreements at issue in the present case are contracts evidencing interstate commerce and are subject to the Federal Arbitration Act, this conclusion does not end our analysis, because "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the Federal Arbitration Act]." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Section 2 of the Federal Arbitration Act allows a party to raise contract defenses if they are based "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000). In the present case, the plaintiff maintains that the arbitration agreements are void and are not enforceable due to a lack of mutuality.

[¶ 25] "In its most elemental sense, the doctrine of mutuality of obligation means that unless both parties to a contract are bound by its terms, neither is bound." *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 473, 809 N.E.2d 180, 193 (2004). "'[M]utuality of obligation in bilateral contracts is but another way of stating that consideration is essential.'" *Schwinder*, 348 Ill. App. 3d at 473, 809 N.E.2d at 193 (quoting 25 Richard Lord, Williston on Contracts § 67:42 at 332 (4th ed. 2002)). The parties to a contract do not have to have identical rights and obligations. *Hofmeyer v. Willow Shores Condominium Ass'n*, 309 Ill. App. 3d 380, 385, 722 N.E.2d 311, 315 (1999). "The mutuality requirement is satisfied if each party has given sufficient consideration for the other's promise." *Hofmeyer*, 309 Ill. App. 3d at 385, 722 N.E.2d at 315. "Valuable consideration for a contract consists of some right, interest, profit or benefit accruing to one party *** or undertaken by the other." *City of Chicago Heights v. Crotty*, 287 Ill. App. 3d 883, 886, 679 N.E.2d 412, 414 (1997). If each party has given adequate consideration for the other's promise, the contract does not lack mutuality merely because its obligations appear unequal or because every obligation or right is not met by an equivalent counterobligation or right in the other party. *Gordon v. Bauer*, 177 Ill. App. 3d 1073, 532 N.E.2d 855 (1988). "Mutuality becomes a nonissue when consideration has otherwise been conferred upon one of the parties." *Carrico v. Delp*, 141 Ill. App. 3d 684, 687, 490 N.E.2d 972, 975 (1986). The mutual promises of the parties must be binding if no other consideration has been transferred. *Carrico*, 141 Ill. App. 3d at 687, 490 N.E.2d at 975. In other words, "where there is no consideration independent

of the mutuality of obligation[,] then both parties to an agreement are bound or neither is bound." *Vassilkovska v. Woodfield Nissan, Inc.*, 358 Ill. App. 3d 20, 28, 830 N.E.2d 619, 625 (2005).

[¶ 26] In *Vassilkovska*, the court considered a stand-alone arbitration agreement and found mutuality to be lacking where the agreement required only one party to arbitrate. The plaintiff in *Vassilkovska* purchased a used automobile from the defendant and signed a sales contract for the purchase. In addition to the sales contract, the plaintiff also signed a separate arbitration agreement. In the arbitration agreement, the plaintiff agreed to waive her right to pursue any cause of action related to the sales agreement. The defendant, in turn, also agreed to waive the right to pursue any legal action but excluded a long list of potential claims. The plaintiff filed a complaint against the defendant, alleging fraud in the vehicle purchase, and the defendant moved to dismiss and compel arbitration pursuant to the arbitration agreement. The trial court denied the defendant's motion.

[¶ 27] In affirming the trial court's order, the *Vassilkovska* court held that the arbitration agreement was a separate contract from the contract for the sale of the car and required its own consideration. *Vassilkovska*, 358 Ill. App. 3d at 25, 830 N.E.2d at 623-24. The court stated that there must be some detriment to the defendant, or some benefit to the plaintiff, that was bargained for in exchange for the plaintiff's promise to arbitrate all disputes. *Vassilkovska*, 358 Ill. App. 3d at 26, 830 N.E.2d at 624. The court found that there was no consideration for the plaintiff's agreement to arbitrate because the arbitration

agreement did not contain a promise on the defendant's part to submit claims to arbitration. *Vassilkovska*, 358 Ill. App. 3d at 27, 830 N.E.2d at 625. Instead, the defendant exempted a host of issues from arbitration, primarily the issues involving the recoupment of money from the plaintiff. *Vassilkovska*, 358 Ill. App. 3d at 28, 830 N.E.2d at 626.

[¶ 28] The court stated as follows: "The language of the Arbitration Agreement makes clear that its purpose is to force the plaintiff to arbitrate any claim she may assert against [the defendant], while excluding [the defendant] from that same promise." *Vassilkovska*, 358 Ill. App. 3d at 27, 830 N.E.2d at 625. Therefore, the court concluded that the separate arbitration agreement "itself did not contain consideration for the plaintiff's promise in the form of a promise by [the defendant] to submit disputes to arbitration." *Vassilkovska*, 358 Ill. App. 3d at 27, 830 N.E.2d at 625. "[W]here the agreement to arbitrate is itself a separate document, purporting to bind each party to the arbitration agreement, but subsequently creates a total exclusion of one party's obligation to arbitrate, the obligation to arbitrate is illusory and unenforceable." *Vassilkovska*, 358 Ill. App. 3d at 29, 830 N.E.2d at 626.

[¶ 29] In the present case, the arbitration agreements are separate and apart from any other contracts. Accordingly, these stand-alone agreements must be supported by consideration or mutually binding agreements to arbitrate. The agreements provide that the parties agree to arbitrate their claims against the other, but the agreements exclude "any dispute where the amount in controversy is less than two hundred thousand ($200,000.00) dollars."

We agree with the plaintiff that because the arbitration agreements do not apply to claims less than $200,000, the defendant's promise to arbitrate is illusory. By excluding all claims but those $200,000 and greater from the requirements of the arbitration agreement, the defendant essentially ensured that none of its claims against Joyce would have to be arbitrated under the terms of the agreement. Instead, only Joyce's claims for personal injuries due to the defendant's improper or inadequate care would ever have to be arbitrated under the agreements. The defendant cannot offer any realistic scenario where the amount in controversy in disputes relating to the nonpayment of Joyce's care would equal or exceed $200,000. The arbitration agreements, therefore, do not contain mutually binding promises to arbitrate, but only a unilateral obligation on the part of Joyce to arbitrate her personal injury claims. The agreements, therefore, are not enforceable. See also *Gonzalez v. West Suburban Imports, Inc.*, 411 F. Supp. 2d 970, 972 (N.D. Ill. 2006) ("[A]lthough the Agreement purports to bind both parties to arbitrate disputes arising out of the transaction, the exceptions listed within the definition of 'dispute' leaves no claim that Defendant would be required to submit to arbitration. Thus, without the requisite mutual obligation to arbitrate, the agreement lacks consideration and is unenforceable.").

[¶ 30] III

[¶ 31] Wrongful Death Claim

[¶ 32] The plaintiff also argues that the arbitration agreements do not apply to her claim under the Wrongful Death Act. She correctly notes that she is

not a party to the agreements. Joyce signed one of the arbitration agreements herself, and the plaintiff signed the other agreement as Joyce's "Legal Representative." The plaintiff did not sign the arbitration agreement in her individual capacity.

[¶ 33] While a wrongful death claim is derivative of the action the decedent would have had if the death had not occurred (*Limer v. Lyman*, 220 Ill. App. 3d 1036, 1042, 581 N.E.2d 411, 415 (1991)), it is also an independent claim designed to compensate the surviving spouse and the next of kin for the pecuniary losses resulting from the decedent's death. *In re Estate of Savio*, 388 Ill. App. 3d 242, 247-48, 902 N.E.2d 1113, 1119 (2009). Claims under the Wrongful Death Act are "those of the individual beneficiaries." *Wilbon v. D.F. Bast Co.*, 73 Ill. 2d 58, 68, 382 N.E.2d 784, 788 (1978).

[¶ 34] In *Curto v. Illini Manors, Inc.*, 405 Ill. App. 3d 888, 940 N.E.2d 229 (2010), the wife of a deceased nursing home resident brought a wrongful death action against a nursing home. The wife had signed an arbitration agreement as "Resident Representative." The court held, "[The wife's] signature carries no legally binding weight regarding the arbitration of her personal claims against the nursing home under the Wrongful Death Act or the Family Expense Act." *Curto*, 405 Ill. App. 3d at 897, 940 N.E.2d at 236 (citing *Ward v. National Healthcare Corp.*, 275 S.W.3d 236 (Mo. 2009) (*en blanc* [sic]), and *Goliger v. AMS Properties, Inc.*, 19 Cal. Rptr. 3d 819 (Cal. Ct. App. 2004)). Likewise, in the present case, the agreement's use of the word "Legal Representative" under the plaintiff's signature made clear that she was not signing in her individual capacity or on her

own behalf as a potential wrongful death plaintiff. Therefore, even if the arbitration agreements were valid, the plaintiff's signature on the May 20, 2005, agreement is not binding with regard to arbitration of a wrongful death claim.

[¶ 35] CONCLUSION

[¶ 36] For the foregoing reasons, the circuit court's order denying the defendant's motion to compel arbitration is affirmed.

[¶ 37] Affirmed.

[¶ 38] JUSTICE SPOMER, concurring in part and dissenting in part.

[¶ 39] I concur in that portion of the opinion in which the majority finds that the arbitration agreements in the present case evidence a transaction involving interstate commerce, and thus, I agree that the Federal Arbitration Act applies to the arbitration agreements at issue. In addition, I agree with the majority's conclusion that the plaintiff's signature as "Legal Representative" for the decedent on the May 20, 2005, agreement does not bind her to arbitrate her independent wrongful death claim. However, I respectfully dissent from the majority's conclusion that the arbitration agreements between the decedent and the defendant are unenforceable for a lack of mutuality. In the agreements at issue, both parties agreed to arbitrate all claims where the amount in controversy is greater than $200,000. Conversely, both parties retained the right to litigate all claims where the amount in controversy is less than

$200,000. The promises made by both parties are equal.

[¶ 40] I do not find the defendant's promise to arbitrate all claims where the amount in controversy is greater than $200,000 to be illusory. This case is distinguishable from *Vassilkovska* and *Gonzalez*, cited by the majority, in which the arbitration clauses at issue excluded all types of claims that the defendants in those cases would have against the plaintiffs, regardless of the amount in controversy. *Vassilkovska*, 358 Ill. App. 3d at 28 (the defendant exempted itself from arbitration by specifically securing its rights to seek assistance in a court of law for a host of issues); *Gonzalez*, 411 F. Supp. 2d at 972 (the exceptions listed within the definition of "dispute" left no claim that the defendant would be required to submit to arbitration).

[¶ 41] Unlike *Vassilkovska* and *Gonzalez*, it is not impossible to conceive of situations where the defendant would be required to arbitrate its disputes against a signatory resident, including contract actions for unpaid bills and tort actions for personal injury or property damage where the amount in controversy exceeds $200,000. For example, in a case where a nursing home resident caused a fire, intentionally or unintentionally, the damages to the nursing home could easily exceed that amount. It is not the province of this court to determine the relative frequency of such claims but only to determine that both parties made promises to arbitrate. See *Keefe v. Allied Home Mortgage Corp.*, 393 Ill. App. 3d 226, 230 (2009) ("'A contract does not lack mutuality merely because its obligations appear unequal or because every obligation or right is not met by an

equivalent counterobligation or right in the other party.'" (quoting *Piehl v. Norwegian Old Peoples' Home Society of Chicago*, 127 Ill. App. 3d 593, 595 (1984))).

[¶ 42] For the foregoing reasons, I would affirm that portion of the circuit court's order which denied the motion to compel the arbitration of the plaintiff's wrongful death claim but would reverse that portion of the circuit court's order which denied the motion to compel the arbitration of the survival claims of the decedent, and I would remand with directions that the circuit court enter an order compelling the arbitration of those claims.

APPENDIX C

IN THE CIRCUIT COURT FOR THE
FOURTH JUDICIAL CIRCUIT
MARION COUNTY, ILLINOIS

SUE CARTER, Special Administrator, In Re The Estate of JOYCE GOTT, Deceased,	)	FILED CLERK OF THE CIRCUIT COURT
Plaintiff,	)	JUN 20 2007
vs.	)	Ronda Yates MARION COUNTY
SSC ODIN OPERATING COMPANY, LLC d/b/a ODIN HEALTHCARE CENTER,	)	SALEM ILLINOIS
Defendant.	)	No. 06-L-75

Order on Motion to Compel Arbitration

1. Concerning Count II this Court believes that *Varelis* 167 Ill 2 449 provides significant insight into the answer of the question of statutory interpretation presented by defendant. Yes, wrongful death is a statutory right appropriately limited by the legislature. Although attorneys generally refer to wrongful death actions as non-derivative, they are derivative in the sense that the ability to bring the wrongful death action is conditioned on the deceased having "had a right of action against the same person or

persons for injuries sustained." *Biddy* 374 Ill at 513-14.

The examples in *Varelis* are indeed illustrative and confirm this Court's interpretation that the legislature would consider the right to proceed to recovery via arbitration as being a right of action. We have the same defendants and the same injuries. The statutory cause of action is even the same. Only the forum is different. Perhaps the deceased would have to proceed via arbitration, but she still had a cause of action. This Court will not make the requested leap in logic suggested by defendant that deceased claim perhaps being required to be presented through arbitration, requires current plaintiffs to do the same.

2. Concerning Count I this Court believes that the series of cases presented by both plaintiff and defendant establish that state contract defenses that avoid the effect of the contract remain a defense to the enforcement of FAA application. Although not essential to this examination, it assists this Court's understanding to observe that the affirmative defenses to the contract are available. This seems all too obvious that an unenforceable contract with FAA language avoids preemption of the ancillary claims.

The underlying contract is unenforceable both because it is in direct violation of emphatically stated public policy and for lack of mutuality.

3. Defendant boldly suggests that even if Illinois law requires the voiding of the arbitration agreement for violation of public policy that "FAA preempts any contrary state law that prohibits or restricts arbitration." (memorandum filed March 5, 2007 p. 5). This issue, this Court believes, is avoided if the underly-

ing contract is unenforceable via state laws which is provided for by FAA's language.

Further, the underlying contractual relationship was between an elderly Marion County resident and a Marion County care facility. The contract was for personal care within this county. The action relates to the care provided. The state statute involved here is a public safety statute that affects the relationships between the contracting parties. This trial court believes that in the aggregate the economic activity does not represent general practice subject to federal control.

MOTION DENIED

6/20/07 s/David L. Sauer

APPENDIX D

[ARBITRATION AGREEMENT DATED MAY 20, 2005]

HEALTH CARE ARBITRATION AGREEMENT
PLEASE READ CAREFULLY

I. EXPLANATION

Under federal law two or more parties may agree in writing for the settlement by arbitration of any dispute arising between them. Arbitration is a method for resolving disputes without involving the courts. It is frequently faster and less expensive than using the court system. In these arbitration proceedings, the dispute is heard by private individuals, called arbitrators, who are selected by the Resident and/or the Resident's Legal Representative and the Facility. The decision of the arbitrators binds both parties and are [sic] final. By agreeing to binding arbitration, both parties waive the right to trial before a judge or jury.

II. AGREEMENT

The following is an agreement to arbitrate any dispute that might arise between Joyce Gott ("Resident") and/or Sue Carter ("Legal Representative") and Odin Healthcare ("Facility") ("Facility" includes the particular facility where the Resident resides, its parents, affiliates, and subsidiary companies, owners, officers, directors, medical directors, employees, successors, assigns, agents, attorney[s] and insurers). The parties expressly agree and voluntarily enter into this binding Health Care Arbitration Agreement (the "Agreement"). The Resident and the Facility have entered into an Admission Agreement and acknowledge that such Admission

Agreement constitutes the foundation of the relationship between them and all duties and obligations arising between them. The Resident and the Facility further acknowledge that said Admission Agreement evidences a transaction involving interstate commerce. The Resident and the Facility understand that the Admission Agreement involves interstate commerce because the Facility is affiliated with Mariner Health Care, Inc., which is a foreign corporation with a nationwide network of over 250 nursing facilities, all of which are fully engaged in interstate commerce by activity that includes, but is not limited to, execution of interstate contracts relating to services, management and interstate marketing, acceptance of federal funds as a significant source of income, regulation by federal statutes and the use of goods, services, employees and management personnel in multiple states. This Agreement shall not apply to any dispute where the amount in controversy is less than two hundred thousand ($200,000.00) dollars.

In consideration of this binding Agreement, the Facility and the Resident acknowledge that they are agreeing to a mutual arbitration, regardless of which party is making a claim; that the Facility agrees to pay the fees of the arbitrators and up to $5,000.00 of reasonable and appropriate attorney's fees and costs for the Resident in any claims against the Facility; that the Resident shall have the right to choose the location of any arbitration under this Agreement; that the parties will mutually benefit from the speedy and efficient resolution of disputes which arbitration is expected to provide; and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by all parties hereto.

Intending to be legally bound, the parties expressly agree that this Agreement will be governed by the Federal Arbitration Act, 9 U.S.C. §[§] 1-16 ("FAA"). It is the express intent of the parties to have a binding arbitration agreement and the parties further agree as follows:

The parties agree that they shall submit to binding arbitration all disputes against each other and their representatives, affiliates, governing bodies, agents and employees arising out of or in any way related or connected to the Admission Agreement and all matters related thereto including matters involving the Resident's stay and care provided at the Facility, including but not limited to any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care including allegations of medical malpractice; any disputes concerning whether any statutory provisions relating to the Resident's rights under Illinois law were violated; any disputes relating to the payment or nonpayment for the Resident's care and stay at the Facility; and any other dispute under state or Federal law based on contract, tort, statute (including any deceptive trade practices and consumer protection statutes), warranty or any alleged breach, default, negligence, wantonness, fraud, misrepresentation or suppression of fact or inducement.

An arbitration hearing regarding any disputes shall be held before a board of three arbitrators (selected from a nationally recognized arbitration association), one chosen by each side in the dispute with the third to be chosen by the two arbitrators previously chosen. Such hearing and all other proceedings relative to the arbitration of the claim(s) shall be con-

ducted in accordance with the applicable rules of procedure governing the selected arbitrators that do not conflict with the FAA. In rendering a decision on the merits of the claim(s), the arbitrators shall apply the substantive law of the State of Illinois.

Each party may be represented by counsel in connection with all arbitration proceedings and each party agrees to bear their own attorney fees and costs, except as expressly provided for above. Any other fees and costs associated with these arbitration proceedings shall be determined by the panel of arbitrators. In the event that any party to this Agreement refuses to go forward with arbitration, the party compelling arbitration reserves the right to proceed with arbitration, and the Resident and the Facility specifically acknowledge the applicability of the FAA allowing the aggrieved party to petition an appropriate court for enforcement of the arbitration agreement and to obtain a stay of any other proceeding. Submission of any dispute under this Agreement to arbitration may only be avoided as specifically allowed by the FAA. To the extent permitted by applicable law, any party to this Agreement who refuses to go forward with arbitration hereby acknowledges that the arbitrator will go forward with the arbitration hearing and render a binding decision without the participation of the party opposing arbitration or despite their absence at the arbitration hearing.

It is the intention of the Facility and the Resident that this Agreement shall inure to the benefit of and bind the Facility, its parents, affiliates, and subsidiary companies, owners, officers, representatives, directors, medical directors, employees, successors, assigns, agents, attorneys and insurers; the Resident,

his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives, including the personal representative or executor of his or her estate; and the Legal Representative, his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives or executor of his or her estate.

In the event that any portion of the Agreement will be determined to be invalid or unenforceable, the remainder of this Agreement will be deemed to continue to be binding upon the parties hereto in the same manner as if the invalid or unenforceable provision were not a part of the Agreement.

III. ACKNOWLEDGEMENTS

The execution of this Agreement is not a precondition to receiving medical treatment or for admission to the Facility.

The Resident/Legal Representative acknowledges that the Resident has been admitted to the Facility to receive care and services as of 5/20/05.

The Resident and/or Legal Representative understand(s) that he/she has the right to consult with an attorney of his/her choice, prior to signing this agreement, to receive explanations or clarification or any of the terms of this Agreement.

The Resident and/or Legal Representative understand(s), agree(s) to, and has received a copy of this Agreement, and acknowledges that the terms have been explained to him/her, or his/her designee, by a representative of the Facility, and that he/she has had an opportunity to ask questions about this Agreement.

Each party agrees to waive the right to a trial, before a judge or jury, for all disputes, including those

at law or in equity, subject to binding arbitration under this Agreement.

The Resident and/or Legal Representative understand(s) that this agreement may be rescinded by giving written notice to the Facility within 30 days of signature. If not rescinded within 30 days of signature, this Agreement shall remain in effect for all claims arising out of the Resident's stay at the Facility. This Agreement will continue to be valid for any stay at this Facility by this Resident, even when the Resident has been discharged and later readmitted. If the act(s) underlying the dispute is committed prior to the revocation date, this Agreement shall be binding with respect to said act or acts.

* * * * * * * * * *

AGREEMENT TO ARBITRATE HEALTH CARE NEGLIGENCE CLAIMS

NOTICE TO PATIENT

YOU CANNOT BE REQUIRED TO SIGN THIS AGREEMENT IN ORDER TO RECEIVE TREATMENT. BY SIGNING THIS AGREEMENT, YOUR RIGHT TO TRIAL BY A JURY OR A JUDGE IN A COURT WILL BE BARRED AS TO ANY DISPUTE RELATING TO INJURIES THAT MAY RESULT FROM NEGLIGENCE DURING YOUR TREATMENT OR CARE, AND WILL BE REPLACED BY AN ARBITRATION PROCEDURE.

THIS AGREEMENT PROVIDES THAT ANY CLAIMS WHICH MAY ARISE OUT OF YOUR HEALTH CARE WILL BE SUBMITTED TO A PANEL OF ARBITRATORS, RATHER THAN TO A COURT FOR DETERMINATION. THIS AGREEMENT REQUIRES ALL PARTIES SIGNING IT TO

ABIDE BY THE DECISION OF THE ARBITRATION PANEL.

_____
Signature of Resident/Date

s/Sue Carter 5/20/05
Signature of Legal Representative/Date
(if signing on behalf of Resident)

_____
Signature of Legal Representative/Date
(if signing on his or her own behalf)

s/Vicki Johnson SSD 5/20/05
Signature of Facility Representative/Date

APPENDIX E

[ARBITRATION AGREEMENT DATED JANUARY 18, 2006]

HEALTH CARE ARBITRATION AGREEMENT
PLEASE READ CAREFULLY

I. EXPLANATION

Under federal law two or more parties may agree in writing for the settlement by arbitration of any dispute arising between them. Arbitration is a method for resolving disputes without involving the courts. It is frequently faster and less expensive than using the court system. In these arbitration proceedings, the dispute is heard by private individuals, called arbitrators, who are selected by the Resident and/or the Resident's Legal Representative and the Facility. The decision of the arbitrators binds both parties and are [sic] final. By agreeing to binding arbitration, both parties waive the right to trial before a judge or jury.

II. AGREEMENT

The following is an agreement to arbitrate any dispute that might arise between Joyce Gott ("Resident") and/or _____ ("Legal Representative") and Odin Healthcare ("Facility") ("Facility" includes the particular facility where the Resident resides, its parents, affiliates, and subsidiary companies, owners, officers, directors, medical directors, employees, successors, assigns, agents, attorney[s] and insurers). The parties expressly agree and voluntarily enter into this binding Health Care Arbitration Agreement (the "Agreement"). The Resident and the Facility have entered into an Admission Agreement and acknowledge that such Admission

Agreement constitutes the foundation of the relationship between them and all duties and obligations arising between them. The Resident and the Facility further acknowledge that said Admission Agreement evidences a transaction involving interstate commerce. The Resident and the Facility understand that the Admission Agreement involves interstate commerce because the Facility is affiliated with Mariner Health Care, Inc., which is a foreign corporation with a nationwide network of over 250 nursing facilities, all of which are fully engaged in interstate commerce by activity that includes, but is not limited to, execution of interstate contracts relating to services, management and interstate marketing, acceptance of federal funds as a significant source of income, regulation by federal statutes and the use of goods, services, employees and management personnel in multiple states. This Agreement shall not apply to any dispute where the amount in controversy is less than two hundred thousand ($200,000.00) dollars.

In consideration of this binding Agreement, the Facility and the Resident acknowledge that they are agreeing to a mutual arbitration, regardless of which party is making a claim; that the Facility agrees to pay the fees of the arbitrators and up to $5,000.00 of reasonable and appropriate attorney's fees and costs for the Resident in any claims against the Facility; that the Resident shall have the right to choose the location of any arbitration under this Agreement; that the parties will mutually benefit from the speedy and efficient resolution of disputes which arbitration is expected to provide; and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by all parties hereto.

Intending to be legally bound, the parties expressly agree that this Agreement will be governed by the Federal Arbitration Act, 9 U.S.C. §[§] 1-16 ("FAA"). It is the express intent of the parties to have a binding arbitration agreement and the parties further agree as follows:

The parties agree that they shall submit to binding arbitration all disputes against each other and their representatives, affiliates, governing bodies, agents and employees arising out of or in any way related or connected to the Admission Agreement and all matters related thereto including matters involving the Resident's stay and care provided at the Facility, including but not limited to any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care including allegations of medical malpractice; any disputes concerning whether any statutory provisions relating to the Resident's rights under Illinois law were violated; any disputes relating to the payment or nonpayment for the Resident's care and stay at the Facility; and any other dispute under state or Federal law based on contract, tort, statute (including any deceptive trade practices and consumer protection statutes), warranty or any alleged breach, default, negligence, wantonness, fraud, misrepresentation or suppression of fact or inducement.

An arbitration hearing regarding any disputes shall be held before a board of three arbitrators (selected from a nationally recognized arbitration association), one chosen by each side in the dispute with the third to be chosen by the two arbitrators previously chosen. Such hearing and all other proceedings relative to the arbitration of the claim(s) shall be con-

ducted in accordance with the applicable rules of procedure governing the selected arbitrators that do not conflict with the FAA. In rendering a decision on the merits of the claim(s), the arbitrators shall apply the substantive law of the State of Illinois.

Each party may be represented by counsel in connection with all arbitration proceedings and each party agrees to bear their own attorney fees and costs, except as expressly provided for above. Any other fees and costs associated with these arbitration proceedings shall be determined by the panel of arbitrators. In the event that any party to this Agreement refuses to go forward with arbitration, the party compelling arbitration reserves the right to proceed with arbitration, and the Resident and the Facility specifically acknowledge the applicability of the FAA allowing the aggrieved party to petition an appropriate court for enforcement of the arbitration agreement and to obtain a stay of any other proceeding. Submission of any dispute under this Agreement to arbitration may only be avoided as specifically allowed by the FAA. To the extent permitted by applicable law, any party to this Agreement who refuses to go forward with arbitration hereby acknowledges that the arbitrator will go forward with the arbitration hearing and render a binding decision without the participation of the party opposing arbitration or despite their absence at the arbitration hearing.

It is the intention of the Facility and the Resident that this Agreement shall inure to the benefit of and bind the Facility, its parents, affiliates, and subsidiary companies, owners, officers, representatives, directors, medical directors, employees, successors, assigns, agents, attorneys and insurers; the Resident,

his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives, including the personal representative or executor of his or her estate; and the Legal Representative, his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives or executor of his or her estate.

In the event that any portion of the Agreement will be determined to be invalid or unenforceable, the remainder of this Agreement will be deemed to continue to be binding upon the parties hereto in the same manner as if the invalid or unenforceable provision were not a part of the Agreement.

III. ACKNOWLEDGEMENTS

The execution of this Agreement is not a precondition to receiving medical treatment or for admission to the Facility.

The Resident/Legal Representative acknowledges that the Resident has been admitted to the Facility to receive care and services as of 1-12-06.

The Resident and/or Legal Representative understand(s) that he/she has the right to consult with an attorney of his/her choice, prior to signing this agreement, to receive explanations or clarification or any of the terms of this Agreement.

The Resident and/or Legal Representative understand(s), agree(s) to, and has received a copy of this Agreement, and acknowledges that the terms have been explained to him/her, or his/her designee, by a representative of the Facility, and that he/she has had an opportunity to ask questions about this Agreement.

Each party agrees to waive the right to a trial, before a judge or jury, for all disputes, including those

at law or in equity, subject to binding arbitration under this Agreement.

The Resident and/or Legal Representative understand(s) that this agreement may be rescinded by giving written notice to the Facility within 30 days of signature. If not rescinded within 30 days of signature, this Agreement shall remain in effect for all claims arising out of the Resident's stay at the Facility. This Agreement will continue to be valid for any stay at this Facility by this Resident, even when the Resident has been discharged and later readmitted. If the act(s) underlying the dispute is committed prior to the revocation date, this Agreement shall be binding with respect to said act or acts.

* * * * * * * * * *

AGREEMENT TO ARBITRATE HEALTH CARE NEGLIGENCE CLAIMS

NOTICE TO PATIENT

YOU CANNOT BE REQUIRED TO SIGN THIS AGREEMENT IN ORDER TO RECEIVE TREATMENT. BY SIGNING THIS AGREEMENT, YOUR RIGHT TO TRIAL BY A JURY OR A JUDGE IN A COURT WILL BE BARRED AS TO ANY DISPUTE RELATING TO INJURIES THAT MAY RESULT FROM NEGLIGENCE DURING YOUR TREATMENT OR CARE, AND WILL BE REPLACED BY AN ARBITRATION PROCEDURE.

THIS AGREEMENT PROVIDES THAT ANY CLAIMS WHICH MAY ARISE OUT OF YOUR HEALTH CARE WILL BE SUBMITTED TO A PANEL OF ARBITRATORS, RATHER THAN TO A COURT FOR DETERMINATION. THIS AGREEMENT REQUIRES ALL PARTIES SIGNING IT TO

ABIDE BY THE DECISION OF THE ARBITRATION PANEL.

s/Joyce Gott 1-18-06
Signature of Resident/Date

Signature of Legal Representative/Date
(if signing on behalf of Resident)

Signature of Legal Representative/Date
(if signing on his or her own behalf)

s/[illegible] 1-18-06
Signature of Facility Representative/Date

APPENDIX F

IN THE CIRCUIT COURT FOR THE
FOURTH JUDICIAL CIRCUIT
MARION COUNTY, ILLINOIS

SUE CARTER, Special Administrator, In Re The ESTATE OF JOYCE GOTT, Deceased,	)	FILED CLERK OF THE CIRCUIT COURT
Plaintiff,	)	NOV 22 2006
vs.	)	Ronda Yates MARION COUNTY SALEM ILLINOIS
SSC ODIN OPERATING COMPANY, LLC d/b/a ODIN HEALTHCARE CENTER,	)	NO. 06-L-75
Defendant.	)	

C O M P L A I N T

COUNT I
(STATUTORY ACTION-
NURSING HOME CARE ACT)

Comes now plaintiff, SUE CARTER, Special Administrator of the ESTATE OF JOYCE GOTT, Deceased, by and through her attorneys, Staci M. Yandle and The Rex Carr Law Firm, and for her cause of action against defendant, SSC ODIN OPERATING COMPANY LLC d/b/a ODIN HEALTHCARE CENTER, states as follows:

1. SUE CARTER is the duly-appointed Special Administrator of the Estate of Joyce Gott, who died January 31, 2006. She has been appointed Special Administrator by the Circuit Court for the Fourth Judicial Circuit, Marion County, Illinois.

2. At all times relevant herein, JOYCE GOTT, Deceased, was a resident of ODIN HEALTHCARE CENTER, Odin, Marion County, Illinois.

3. At all times relevant herein, defendant, SSC ODIN OPERATING COMPANY LLC d/b/a ODIN HEALTHCARE CENTER, was a limited liability company which operated a long-term nursing care facility known as ODIN HEALTHCARE CENTER, and which held itself out to the public as a nursing and rehabilitation center which provides nursing care for aging persons.

4. At all times relevant herein, there was in full force and effect, a statute known as "The Nursing Home Care Act", as amended (The "Act"), 210 ILCS 45/1-101 et. [sic] seq. and the facility operated by SSC ODIN OPERATING COMPANY LLC was a "facility" as defined by 45/1-113 of the Act and was subject to the requirements of the Act and the regulations of the Illinois Department of Public Health promulgated pursuant to the Act.

5. At all times relevant herein, the facility, received payment from Medicare to provide JOYCE GOTT nursing home care, treatment and related services, and was subject to the requirements of 42 USC Section 1396r (1990) et. [sic] seq., as amended by the Omnibus Budget Reconciliation Act of 1987 ("OBRA") and Volume 42, Code of Federal Regulations, Part 483 setting forth Medicare and Medicaid

requirements for long-term facilities ("OBRA Regulations"), as effective on October 1, 1990.

6. At all times relevant herein, the facility operated by defendant was a "nursing facility" as defined by 42 USC, Section 1396r.

7. Throughout the time JOYCE GOTT was a resident of the facility, defendant was the licensee of the facility.

8. The defendant, through its agents, servants and employees, had a duty not to violate the rights of any resident of the facility including the duty not to neglect any resident as provided by 210 ILCS 45/2-107 and 210 ILCS 45/1-117.

9. Notwithstanding the aforementioned duty, the defendant, by and through its agents, servants and employees and during the period between January 12, 2006 through January 31, 2006, violated the Act as follows:

a. In violation of 77 Ill. Admin. Code, Ch. I, Section 300.1210(a), failed to provide adequate and properly supervised care as needed by JOYCE GOTT in that it failed to conduct INR testing on JOYCE GOTT who was receiving anti-coagulant therapy;

b. In violation of Section 483.75(b) of the OBRA Regulations, failed to operate its facility and provide services in compliance with all applicable federal, state, local laws, regulations and codes and within accepted professional standards and principles that apply to professionals providing serves in such facility.

10. As a direct and proximate result of one or more of defendant's statutory violations, JOYCE

GOTT sustained injuries including, but not limited to gastrointestinal bleeding, anemia and respiratory failure.

11. As a further direct and proximate result of one or more of defendant's statutory violations, JOYCE GOTT suffered pain and suffering, emotional distress and mental anguish between January 12, 2006 through January 31, 2006.

12. This is a survivorship action brought pursuant to 755 ILCS 5/27-6 for JOYCE GOTT's personal injuries sustained prior to her death as a result of defendant's statutory violations.

WHEREFORE, plaintiff, SUE CARTER, Special Administrator of the Estate of JOYCE GOTT, deceased, demands judgment against defendant, SSC ODIN OPERATING COMPANY, LLC d/b/a ODIN HEALTHCARE CENTER, in an amount in excess of $50,000.00, attorneys fees and costs as provided for by statute.

PLAINTIFF DEMANDS A TRIAL BY JURY.

COUNT II

(WRONGFUL DEATH)

Comes now plaintiff, SUE CARTER, Special Administrator of the Estate of JOYCE GOTT, Deceased, by and through her attorneys, Staci M. Yandle and The Rex Carr Law Firm, and for her cause of action against defendant, SSC ODIN OPERATING COMPANY, LLC d/b/a ODIN HEALTHCARE CENTER, states as follows:

1 - 3. Plaintiff repeats and re-allege [sic] the allegations contained in Paragraphs 1 though 3 of Count I as Paragraphs 1 - 3 of Count II.

4. In providing nursing home services to JOYCE GOTT, defendant, through its agents, servants and employees, had a duty to exercise ordinary care in the provision of care and treatment to JOYCE GOTT.

5. Notwithstanding the aforementioned duty, defendant, by and through its agents, servants and employees and during the period January 12, 2006 through January 31, 2006, was guilty of one or more of the following negligent acts or omissions:

a. Negligently and carelessly failed to provide adequate and properly supervised care as needed by JOYCE GOTT in that it failed to conduct INR testing on JOYCE GOTT who was on anti-coagulant therapy;

b. Negligently and carelessly failed to operate its facility and provide services in compliance with all applicable federal, state, local laws, regulations and codes and within accepted professional standards and principles that apply to professionals providing services in such facility.

6. As a direct and proximate result of one or more of the negligent acts or omissions of the defendant, JOYCE GOTT sustained injuries including, but not limited to, gastrointestinal bleeding, anemia and respiratory failure, all of which caused or contributed to cause her death on January 31, 2006.

7. As a further direct and proximate result of the negligence of this defendant, the heirs of JOYCE GOTT have been deprived of her companionship and society.

WHEREFORE, plaintiff, SUE CARTER, Special Administrator of the Estate of JOYCE GOTT, Deceased, demands judgment against defendant, SSC

ODIN OPERATING COMPANY, LLC d/b/a ODIN HEALTHCARE CENTER in an amount in excess of $50,000.00, plus costs of this suit.

PLAINTIFF DEMANDS A TRIAL BY JURY.

THE REX CARR LAW FIRM, LLC

BY: s/Staci M. Yandle

STACI M. YANDLE #06196436
412 Missouri Avenue
East St. Louis, IL 62201
(618) 274-0434
(618) 274-8369/Facsimile
ATTORNEYS FOR PLAINTIFF

CLERK TO ISSUE SUMMONS ACCORDING TO LAW.

APPENDIX G

IN THE CIRCUIT COURT FOR THE
FOURTH JUDICIAL CIRCUIT
MARION COUNTY, ILLINOIS

IN THE MATTER OF	)	NO. 06-P-49
THE ESTATE OF JOYCE	)	Filed May 10, 2006
GOTT, Deceased.	)	

PETITION FOR APPOINTMENT OF SPECIAL ADMINISTRATOR

Comes now the petitioner, Sue Carter, by and through her attorneys, Staci M. Yandle and The Rex Carr Law Firm, LLC, and for her Petition for Appointment of Special Administrator pursuant to 740 ILCS 180/2.1 states as follows:

1. The decedent, Joyce Gott, died on January 31, 2006, while she was a patient at St. Mary's Hospital in Centralia, Marion County, Illinois.

2. At the time of her death, Joyce Gott, was survived by her daughter, Sue Carter, son, Richard Patterson, son, Donald Patterson, and son, Gary Patterson.

3. The names and Post Office Addresses of the deceased's heirs or legatees are:

(a) Sue Carter, [Address Redacted]

(b) Richard Patterson, [Address Redacted]

(c) Donald Patterson, [Address Redacted]

(d) Gary Patterson, [Address Redacted]

4. A Probate Estate has never been opened; therefore, no Petition for Letters of Administration relating to the same has ever been filed.

5. The assets of the decedent's estate are solely a wrongful death cause of action accruing as a result of her injuries and death.

6. It is the intention of the decedent's next of kin, through Sue Carter, to file a wrongful death action.

7. Sue Carter is qualified, willing and able to act as Special Administrator of the Estate of Joyce Gott, deceased.

8. That Notice of Hearing on this Petition was provided to said heirs or legatees pursuant to 740 ILCS 180/2.1, or said heirs and legatees have filed an Entry of Appearance, Consent to the Appointment of Sue Carter as Special Administrator and Waiver of Notice of Hearing on said Petition.

WHEREFORE, in accordance with 740 ILCS 180/2.1, Sue Carter hereby requests that this Court order that she be appointed Special Administrator of the Estate of Joyce Gott, deceased in order to pursue a wrongful death cause of action on behalf of the next of kin arising from her injuries and death.

s/Sue Carter
SUE CARTER

[NOTARIZATION OMITTED]

APPENDIX H

IN THE CIRCUIT COURT FOR THE
FOURTH JUDICIAL CIRCUIT
MARION COUNTY, ILLINOIS

IN THE MATTER OF	)	NO. 06-P-49
THE ESTATE OF JOYCE	)	Filed June 6, 2006
GOTT, Deceased.	)	

ORDER APPOINTING
SPECIAL ADMINISTRATOR

This cause coming on the verified Petition of Sue Carter for Appointment as Special Administrator of the Estate of Joyce Gott, deceased, pursuant to 740 ILCS 180/2.1, and the Court having been advised in this matter and reviewing this matter; the Court finds as follows:

1. That on or about January 31, 2006, Joyce Gott died.

2. That no Petition for Letters of Office for her estate has been filed.

3. That the only asset of the deceased's estate is a cause of action arising under the Illinois Wrongful Death Statute, 740 ILCS 180/1, et. [sic] seq.

4. The names and post office addresses of the deceased's heirs or legatees are:

(a) Sue Carter
[Address Redacted]

(b) Richard Patterson
[Address Redacted]

(c) Donald Patterson
[Address Redacted]

(d) Gary Patterson
[Address Redacted]

5. That a Special Administrator must be appointed for the deceased for the purpose of prosecuting the cause of action arising under the Illinois Wrongful Death Statute, 740 ILCS 180/1, et. [sic] seq.

6. That the Petitioner, Sue Carter, as daughter of the deceased is qualified, able and willing to act as Special Administrator of the Estate of Joyce Gott, deceased.

7. That Notice of Hearing on this Petition was provided to said heirs or legatees pursuant to 740 ILCS 180/2.01 and that said heirs or legatees have filed an Entry of Appearance, Consent to the Appointment of Sue Carter as Special Administrator of the Estate of Joyce Gott, deceased and Waiver of Notice of Hearing of said Petition.

IT IS THEREFORE ORDERED THAT Sue Carter is hereby appointed as Special Administrator for the Estate of Joyce Gott, deceased, for the purpose of prosecuting the cause of action arising under [the] Illinois Wrongful Death Statute, 740 ILCS 180/1, et. [sic] seq.

ENTERED ON THIS 6th DAY OF June, 2006.

s/[illegible]
JUDGE