No. _____

# In The
# Supreme Court of the United States

DANIEL E. TAYLOR and WILLIAM TAYLOR, as Co-Executors of the Estate of Anna Marie Taylor, deceased,

*Petitioners,*

v.

THE EXTENDICARE HEALTH FACILITIES, INC. d/b/a HAVENCREST NURSING CENTER; EXTENDICARE HOLDINGS, INC.; EXTENDICARE HEALTH FACILITY HOLDINGS, INC.; EXTENDICARE HEALTH SERVICES, INC.; EXTENDICARE REIT; EXTENDICARE, L.P.; and EXTENDICARE, INC.,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

A longstanding Pennsylvania rule of general applicability requires courts to consolidate wrongful-death and survival claims. But in attempting to comply with this Court's precedent, the Pennsylvania Supreme Court treated Respondents' arbitration agreement unlike it would any other contract. To ensure enforcement under the Federal Arbitration Act ("FAA"), the court preempted Pennsylvania law, even though it meant disrupting the state's ability to effectively manage its courts – one of many adverse consequences.

Does the FAA or the "federal policy favoring arbitration" require courts to discriminate in favor of arbitration agreements? Does it require courts to preempt neutral state laws that merely have a disproportionate impact on the enforcement of arbitration agreements?

If the answer to either question is "yes," does that violate basic principles of federalism?

## PARTIES TO THE PROCEEDINGS

The following individuals and entities were the parties in the Pennsylvania Supreme Court below:

Daniel E. Taylor and William Taylor, As Co-Executors of the Estate of Anna Marie Taylor, deceased (collectively "Petitioners").

The Extendicare Health Facilities, Inc. d/b/a Havencrest Nursing Center; Extendicare Holdings, Inc.; Extendicare Health Facility Holdings, Inc.; Extendicare Health Services, Inc.; Extendicare REIT; Extendicare, L.P.; and Extendicare, Inc. (collectively "Respondents").

Neither Jefferson Medical Center nor The Residence participated in the appeal below.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

## OPINIONS BELOW

The Pennsylvania Supreme Court's Opinion, Pet. App. 1-57, is reported at 147 A.3d 490. The Pennsylvania Superior Court's decision, Pet. App. 58-79, is reported at 113 A.3d 317. The Court of Common Pleas of Washington County's Opinion and Order, Pet. App. 80-84, is unreported.

## JURISDICTION

The Pennsylvania Supreme Court's Opinion was entered on September 28, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, 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.

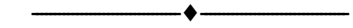
The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amend. X.

Section 2 of the FAA, 9 U.S.C. § 2, provides in pertinent part:

> 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, . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.



## STATE STATUTES AND RULES INVOLVED

Pennsylvania's Wrongful Death Act, codified at 42 Pa. C.S.A. § 8301, states:

> (a) General rule. – An action may be brought, under procedures prescribed by general rules, to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages

claimed in the wrongful death action was obtained by the injured individual during his lifetime and any prior actions for the same injuries are consolidated with the wrongful death claim so as to avoid a duplicate recovery.

(b) Beneficiaries. – Except as provided in subsection (d), the right of action created by this section shall exist only for the benefit of the spouse, children or parents of the deceased, whether or not citizens or residents of this Commonwealth or elsewhere. The damages recovered shall be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy and without liability to creditors of the deceased person under the statutes of this Commonwealth.

(c) Special damages. – In an action brought under subsection (a), the plaintiff shall be entitled to recover, in addition to other damages, damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death.

(d) Action by personal representative. – If no person is eligible to recover damages under subsection (b), the personal representative of the deceased may bring an action to recover damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death.

Pennsylvania Rule of Civil Procedure No. 213 states:

> Rule 213. Consolidation, Severance and Transfer of Actions and Issues within a County. Actions for Wrongful Death and Survival Actions
>
> (a) In actions pending in a county which involve a common question of law or fact or which arise from the same transaction or occurrence, the court on its own motion or on the motion of any party may order a joint hearing or trial of any matter in issue in the actions, may order the actions consolidated, and may make orders that avoid unnecessary cost or delay.
>
> (b) The court, in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order a separate trial of any cause of action, claim, or counterclaim, set-off, or cross-suit, or of any separate issue, or of any number of causes of action, claims, counterclaims, set-offs, cross-suits, or issues.
>
> (c), (d) Rescinded June 23, 1975, imd. effective.
>
> Note: Subdivisions (c) and (d) have been rendered unnecessary in view of the abolition of the former Municipal Court of Philadelphia and the County Court of Allegheny County by the Constitution of 1968.

For transfer of actions from counties of improper venue, see Rule 1006(e).

(e) A cause of action for the wrongful death of a decedent and a cause of action for the injuries of the decedent which survives his or her death may be enforced in one action, but if independent actions are commenced they shall be consolidated for trial.

(1) If independent actions are commenced or are pending in the same court, the court, on its own motion or the motion of any party, shall order the actions consolidated for trial.

(2) If independent actions are commenced in different courts, the court in which the second action was commenced, on its own motion or the motion of any party, shall order the action transferred to the court in which the first action was commenced.

(3) If an action is commenced to enforce one cause of action, the court, on its own motion or the motion of any party, may stay the action until an action is commenced to enforce the other cause of action and is consolidated therewith or until the commencement of such second action is barred by the applicable statute of limitation.

(f) When an action is commenced in a court which has no jurisdiction over the subject matter of the action it shall not be dismissed

> if there is another court of appropriate jurisdiction within the Commonwealth in which the action could originally have been brought but the court shall transfer the action at the cost of the plaintiff to the court of appropriate jurisdiction. It shall be the duty of the prothonotary or clerk of the court in which the action is commenced to transfer the record together with a certified copy of the docket entries to the prothonotary or clerk of the court to which the action is transferred.

## INTRODUCTION

September 28, 2016, significantly impacted nursing home residents throughout the country, but for two very different reasons. That day, the federal Centers for Medicare & Medicaid Services ("CMS") announced new rules – now codified at 42 C.F.R. § 483.70(n)(1) – that were designed to prohibit the use of binding, pre-dispute arbitration clauses in any nursing home that receives federal funding.

Leading news outlets recognized these changes as momentous.[1] The AARP proclaimed:

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[1] Rebecca Hersher, *New Rule Preserves Patients' Rights to Sue Nursing Homes in Court*, NPR (Sept. 29, 2016), http://www.npr.org/sections/thetwo-way/2016/09/29/495918132/new-rule-preserves-patients-rights-to-sue-nursing-homes-in-court; Jessica Silver-Greenburg & Michael Corkery, *U.S. Just Made It a Lot Less Difficult to Sue Nursing Homes*, N.Y. Times (Sept. 28, 2016), http://www.nytimes.com/2016/09/29/business/dealbook/arbitration-nursing-homes-elder-abuse-harassment-claims.html.

> Good news for consumers: Starting this month [November 2016], long-term care facilities that receive federal funding can't force new residents to use arbitration for claims related to elder abuse, sexual harassment or wrongful death.

*New Federal Rules Bar Mandatory Arbitration*, AARP Bulletin, Nov. 2016, at 6, *available at* http://pubs.aarp.org/aarpbulletin/201611?pg=6#pg6. But that celebration was short lived.[2]

Ironically, on the same day that the CMS rules were announced, the Pennsylvania Supreme Court resurrected a pre-dispute nursing home arbitration agreement that had been rendered ineffective under Pennsylvania law. *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 512-13 (Pa. 2016). In a 4-to-2 decision, the Court found that preemption of state law was required under the FAA. Although the Court was sharply divided, both the Majority and Dissent agreed that their decision will ultimately: (1) hinder

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[2] After the new CMS rules were announced, the American Health Care Association and four other plaintiffs filed a lawsuit in a Mississippi federal court seeking to halt implementation of the rule. They argued that the United States Department of Health and Human Services overstepped its legal authority and violated the FAA, and the district court agreed. *See American Health Care Association v. Burwell*, No. 3:16-CV-00233, ___ F.Supp.3d ___, 2016 WL 6585295 (N.D. Miss. Nov. 7, 2016) (reluctantly enjoining defendants from enforcing a new rule enacted by CMS that would effectively bar nursing homes receiving federal funds from entering into new pre-dispute arbitration agreements with their residents, starting November 28, 2016).

the efficiency of the Pennsylvania court system; (2) increase the costs of litigation; (3) increase the likelihood of duplicative recoveries; (4) possibly strip citizens of their constitutional and statutory rights; and (5) jeopardize access to justice and the rule of law.

Even with these harsh consequences, the Majority felt powerless to come to any other conclusion. After considering U.S. Supreme Court precedent and the FAA, the Majority reluctantly struck down a long-standing Pennsylvania rule of law – a neutral rule requiring the mandatory consolidation of wrongful-death and survival claims. In so ruling, it described the FAA as a "preemption juggernaut," with the power to "eradicate any state law that 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA." *Id.* at 502 (internal citations omitted). According to the Majority's reading of the law, the main objective of the FAA is to "ensure the enforcement of arbitration agreements," regardless of the consequences. *Id.* at 506.

The Dissent took issue with the Majority's "overzealous effort to give the FAA its due force," noting:

> [I]t is incorrect to focus the analysis on the dispensability of Pennsylvania Rule of Civil Procedure 213(e) under the pressure of the herculean FAA. . . . Although the Majority may be correct in its apocalyptic recitation of existing United States Supreme Court precedent, the FAA does not and cannot deprive a citizen of this Commonwealth of the right to pursue a cause of action.

*Id.* at 513 (Donohue, J., dissenting). In sum, the Majority held that state laws must always yield to the FAA in order to enforce an agreement to arbitrate, while the Dissent took a less absolutist reading of FAA jurisprudence.

Despite their divergent conclusions, the Majority and the Dissent shared many of the same concerns. Like CMS, the Court was troubled by the fact that signatories are often unaware that they are waiving their right to a jury trial.[3] *Id.* at 508. Although the Majority "sympathize[d] with the position of the AARP as *amicus curiae*," the court felt that its hands were tied by this Courts' precedent:

> [N]ursing home defendants have reaped significant benefits from channeling medical malpractice claims into arbitration to the detriment of medical malpractice victims. We cannot, however, disregard or defy controlling precedent from the United States Supreme

[3] Many others have voiced this and other concerns. *See* Michael Corkery & Stacy Cowley, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, N.Y. Times (Dec. 7, 2016), http://www.nytimes.com/2016/12/06/business/dealbook/wells-fargo-killing-sham-account-suits-by-using-arbitration.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&_r=2; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a "Privatization of the Justice System*," N.Y. Times (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0.

> Court in order to redress these inequities and deficiencies.

*Id.* at 512 (citing *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015)).

More likely than not, the Majority misinterpreted the law that it felt bound by. Accordingly, this Court should clarify its precedent to counteract the rampant over-enforcement of arbitration agreements. Among other things, it should explicate the correct interpretation of the "equal-footing" principle presented in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404 (1967) and, more recently, in *DIRECTV, Inc.*, 136 S. Ct. at 471.

Alternatively, if the Majority's interpretation was correct, then this Court should reconsider its precedent to allow for a different outcome in this case. Not only is this type of favoritism anathema to the equal-footing principle, but it also eviscerates federalist principles of state sovereignty. If existing precedent instructs courts to discriminate by making arbitration agreements more enforceable than all other contracts, that authority should be modified accordingly.



## STATEMENT

### I. Brief Overview

After undergoing surgery for a fractured hip, Anna Marie Taylor was admitted to a skilled nursing facility ("Facility"), which is owned and operated by

Extendicare ("Respondents"), a large nursing home chain. The night before she was admitted, co-Petitioner William Taylor ("William") went to the Facility to sign his mother's admission papers. R. 296a-297a, 300a, 308a.[4] Without explaining the contents of these documents, the admission coordinator directed William to sign at various points throughout the stack, which totaled over 50 pages. R. 304a, 307a, 312a. Buried within these admissions papers was a standardized, pre-dispute arbitration agreement ("ADR Agreement").

Acting as power of attorney, William signed the various admissions papers on behalf of his mother. When he signed the ADR Agreement, which was not a precondition for admission, William believed that he was making a "healthcare" decision. R. 87a. This language appeared directly underneath the signature line, so it was the last thing that William read before signing his name:

*/s/ William Taylor*

_____

Signature of Legal Representative for Healthcare Decisions[5]

R. 87a.

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[4] "R. _a" refers to the Reproduced Record below.

[5] By presenting an agreement to arbitrate legal disputes under the guise of a "healthcare decision," Respondents took advantage of an already inequitable situation. *Primmer v. Healthcare Indus. Corp.*, 43 N.E.3d 788, 795 (Ohio Ct. App. 2015) ("The decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement.").

Despite its problems, the ADR Agreement is clear in at least two respects: First, it states that "[a]ll claims" – including survival and wrongful-death claims – must be resolved in a "single" arbitral proceeding. R. 84a. Second, the purpose of this single-forum requirement is to ensure "speed, efficiency and cost-effectiveness." R. 83a.

Ms. Taylor died soon after she was admitted to the Facility. William Taylor and his brother, Daniel, brought wrongful-death and survival claims against Respondents and two other defendants (Jefferson Medical Center and The Residence),[6] alleging that their combined negligence caused Ms. Taylor's injuries and death.

Respondents moved to compel all claims against them to arbitration, but later conceded that the wrongful-death claim must be tried in court. *See Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651 (Pa. Super. 2013), *appeal denied*, 86 A.3d 233 (Pa. 2014), *cert. denied*, 134 S. Ct. 2890 (2014).[7] To salvage their ADR Agreement, Respondents then asked the court to sever the wrongful-death and survival claims into separate

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[6] "Neither Jefferson Medical Center nor The Residence participated in the appeal [below], because they were not parties to the ADR Agreement." *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 496 n.4 (Pa. 2016).

[7] In *Pisano*, the Superior Court of Pennsylvania held that because the wrongful death claim is separate from, and not derivative of, the Estate's claim under the Survival Act, a decedent's agreement to mandatory arbitration is not binding on wrongful-death beneficiaries.

proceedings. Specifically, they sought to (1) bifurcate one of three survival claims from the wrongful-death claims, and (2) compel arbitration of the survival claim, while keeping all of the other claims in court.

The trial court denied the motion, and the Superior Court affirmed. Both courts found that they were required to keep those claims together under Pennsylvania Rule of Civil Procedure 213(e) and the Wrongful Death Act, 42 Pa. C.S.A. § 8301(a).[8] *Taylor v. Extendicare Health Facilities, Inc.*, 113 A.3d 317, 328 (Pa. Super. 2015) (affirming trial court order). The Superior Court rejected Respondent's arguments that Rule 213(e) and the Wrongful Death Act were preempted by the FAA.

To support its decision, the Superior Court engaged in a conflict preemption analysis, and it found that Rule 213(e) did not prohibit the arbitration of wrongful death and survival claims. *Taylor*, 113 A.3d at 325. It noted that Pennsylvania's mandatory-consolidation rule is "neutral regarding arbitration generally, and the arbitration of wrongful death and survival actions specifically." *Id.* It also made clear that both actions can proceed together in arbitration, but

[8] For the better part of a century, this has been the law in Pennsylvania. *Pezzulli v. D'Ambrosia*, 26 A.2d 659, 662 (Pa. 1942) ("whenever two actions are brought by the personal representative of the deceased, one under the death acts and the other under the survival statute, they must be consolidated and tried together. . . ."); *Borror v. Sharon Steel Co.*, 327 F.2d 165, 173 (3d Cir. 1964) (characterizing Pennsylvania's wrongful death and survival actions as "creat[ing] a kind of legal hybrid, Siamese twins of the Pennsylvania law, joined together by the nexus of damages.").

only when all of the parties – including the wrongful-death beneficiaries – have consented. *Id.* In this case, none of the beneficiaries had consented to arbitration. *Id.* at 326. Hence only one claim was potentially subject to the ADR agreement – Petitioners' survival claim against Respondents. *Id.*

Ultimately, the Superior Court found that the beneficiaries' constitutional right to trial-by-jury and the state's interest in consolidation required all claims to proceed in court. *Id.* at 328. The court considered its holding to be consistent with one of the primary objectives of arbitration, *i.e.*, "to achieve streamlined proceedings and expeditious results." *Id.* (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011)).

Thereafter, the Pennsylvania Supreme Court granted review to consider the following questions:

> (1) Does the Superior Court's decision, which refused to compel arbitration of the arbitrable survival claim, violate the Federal Arbitration Act requirement that arbitration agreements "shall be valid, irrevocable and enforceable save upon [such] grounds as exist at law or in equity for the revocation of any contract?"
>
> (2) Does the Superior Court's conclusion that the Pennsylvania Rules of Civil Procedure, Rule 213(e), require the consolidation of the otherwise arbitrable survival action with the non-arbitrable wrongful death action on grounds of efficiency violate the Federal Arbitration Act as it has been interpreted by the

> United States Supreme Court which has consistently ruled that arbitration is required when there is an agreement to arbitrate even when compelling arbitration results in duplication and piecemeal litigation?

*Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 498 (Pa. 2016).

Despite its serious misgivings, the Pennsylvania Supreme Court reversed. Based on its reading of FAA jurisprudence, the Court felt powerless to find otherwise:

> The Supreme Court has made clear that bifurcation and piecemeal litigation is the tribute that must be paid to Congressional intent. . . . We need not like this result. It is what the Supremacy Clause commands.

*Id.* at 510, 510 n.29 (internal citations omitted).

## II. Construing (or Misconstruing) the Equal-Footing Principle

Central to this appeal is the equal-footing principle, which ensures that arbitration agreements are "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). Respondents have a history of challenging this principle. For example, in 2014, the same Extendicare Respondents as those at bar, through their amici supporters, argued that "[t]he FAA's purpose is to give ***preference*** (instead of mere equality) to

arbitration provisions."[9] (original emphasis omitted) (internal quotations omitted). At the time, Extendicare gained no traction with this argument. *See Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651 (Pa. Super. 2013), *appeal denied*, 86 A.3d 233 (Pa. 2014), *cert. denied*, 134 S. Ct. 2890 (2014). But this time around, Respondents had more luck before the Pennsylvania Supreme Court.

In seeking reversal, Respondents claimed that the equal-footing principle was nullified – or at least called into question – by *Moses H. Cone Memorial Hospital. v. Mercury Construction Corp.*, 460 U.S. 1 (1983). They argued:

> The imperative, established in [*Moses H. Cone*], to determine questions of arbitrability with a healthy regard for the federal policy favoring arbitration calls into question, or at the very least provides a counterbalance to the language from *Prima Paint* . . . to the effect that arbitration agreements are "as enforceable as other contracts, but not more so."[10]

(internal citations omitted) (quotations omitted).

According to Respondents, the equal-footing principle does not simply prohibit courts from discriminating against arbitration agreements; rather, it requires

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[9] Brief of Genesis Healthcare LLC et al. as Amici Curiae Supporting Petitioners, *Extendicare Homes, Inc. v. Pisano*, 134 S. Ct. 2890 (2014), No. 13-1423, 2014 WL 2875524, at *7.

[10] Brief of Appellants, *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490 (Pa. 2016), No. 19 WAP 2015, 2015 WL 10818710, at *13 n.5.

enforcement. As they previously argued, "all courts ***must try to find a way*** to refer claims to arbitration" under the FAA.[11] (emphasis added).

Petitioners could not disagree more. In 1925, Congress enacted the FAA to counteract widespread judicial hostility to arbitration. It provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Drawing upon the FAA's legislative and textual purpose, this Court has repeatedly "place[d] arbitration agreements '***upon the same footing*** as other contracts.'" *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924) (emphasis added)).

Nevertheless, courts across this country often presume that they must always favor enforcing arbitration based upon oft-quoted dicta in *Moses H. Cone*, 460 U.S. at 24-25. For several decades, the seemingly contradictory language in this Court's opinions has created confusion. It would often cite *Moses H. Cone*, asserting that "ambiguities in the language of the agreement should be resolved in favor of arbitration." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002). Then, sometimes in the same paragraph, it would claim that the FAA places "arbitration agreements on equal footing with other contracts[.]" *Id.*

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[11] Brief of Genesis Healthcare LLC et al. as Amici Curiae Supporting Petitioners, *Extendicare Homes, Inc. v. Pisano*, 134 S. Ct. 2890 (2014), No. 13-1423, 2014 WL 2875524, at *7-*8.

Arguably, some of this confusion was resolved in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). Writing for the Majority, Justice Stephen Breyer seems to narrow this Court's construction of the FAA. The Majority's opinion begins and ends by instructing courts to place arbitration agreements on "an equal footing" with other contracts. *Id.* at 468, 471. Importantly, this Court's language went "no further" than this "equal footing" principle. *Id.* at 471.

Representing a shift in tone and substance, Justice Breyer dropped some of the sweeping language that had appeared in earlier preemption opinions. *See generally AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (Scalia, J.) (plurality opinion) (Breyer, J., dissenting). And unlike the Court's earlier decisions, *DIRECTV* does not cite to, let alone quote from, the *Moses H. Cone* decision.[12] As a result, *DIRECTV* reinforces the original scope and purpose of the FAA: to make arbitration agreements equal to – but not greater than – other contracts.

A number of scholars disagree, though, and consider *DIRECTV* "far from neutral." *Federal Arbitration*

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[12] This Court's "policy favoring arbitration over litigation stems from its proclamation in *Moses H. Cone.*" Cory Tischbein, *Animating the Seventh Amendment in Contemporary Plaintiffs' Litigation: The Rule, or the Exception?*, 16 U. Pa. J. Const. L. 233, 250 (2013). *See also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting) (objecting to the Court's reliance on its pro-arbitration policy decisions to support its interpretation of the FAA and concluding that "the Court is standing on its own shoulders when it points to" its own cases to support that policy).

*Act-Directv, Inc. v. Imburgia*, 130 Harv. L. Rev. 457, 462 (2016). Some suggest that while this Court may have narrowed its language, it failed to narrow its approach. *Id.* at 462-64. Nonetheless, Petitioners believe that *DIRECTV* represents at least a subtle retreat from earlier precedent. It suggests that this Court is interested in reining in the trend toward FAA overreach. But as demonstrated by the outcome in *Taylor*, many courts are not reading *DIRECTV* in this light.

## III. The Pennsylvania Supreme Court's Decision

From the Majority's perspective, it had no choice but to preempt 213(e) under the FAA. After reviewing this Court's precedent, the Majority noted that: "All the major anti-arbitration arguments have been swept aside by the Supreme Court. . . ." *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 503 n.16 (Pa. 2016) (quoting Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 Wake Forest L. Rev. 1, 36 (1996)).

According to the Majority, this Court has "provide[d] little guidance as to what laws might survive a preemption challenge." *Id.* at 509 n.28. It further observed that "[i]n recent years the Supreme Court's preemption juggernaut has gathered momentum," crushing everything in its path. *Id.* at 504. The Majority noted that the Supreme Court "has been on a bit of a pro-arbitration tear recently, upholding evermore draconian dispute resolution clauses inserted in

standard-form contracts against all sorts of legal and policy-based challenges." *Id.* at 504 n.20 (quoting Myriam Gilles, *Individualized Injunctions and No-Modification Terms: Challenging "Anti-Reform" Provisions in Arbitration Clauses*, 69 U. Miami L. Rev. 469 (2015)). Also, the Majority was well aware that this Court has repeatedly "chastised" other state courts for "misreading and disregarding the precedents of this Court interpreting the FAA." *Id.* at 509 (quoting *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1202 (2012)).

To avoid a similar fate, the Majority erred on the side of enforcement. In support of its decision, the Majority trained its focus on *Concepcion*, which "defined the 'overarching purpose' of the FAA as twofold: to ensure 'the enforcement of arbitration agreements according to their terms,' and 'to facilitate streamlined proceedings.'" *Id.* at 505 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)). Although no actual conflict occurred between these two purposes in *Concepcion*, the Majority in *Taylor* concluded that if the purposes were to conflict, "enforcement trumps efficiency." *Id.* at 506.

It is not clear, however, how the Majority reached this conclusion. If anything, Justice Scalia made clear that even though efficiency does not necessarily trump enforcement, it is nonetheless a fundamental attribute of arbitration not to be overshadowed by enforcement. *Concepcion*, 563 U.S. at 345. One scholar even states that if Justice Scalia had to choose between the two, "he would pick efficient and speedy dispute resolution."

Anthony J. Sebok, *The Unwritten Federal Arbitration Act*, 65 DePaul L. Rev. 687, 702 (2016).

Nevertheless, after mischaracterizing *Concepcion*, the Majority felt "bound by the Supreme Court's directive to favor enforcement over efficiency" no matter the cost, circumstance, or consequence.[13] *Taylor*, 147 A.3d at 510 (citations omitted). And for this reason, it preempted a neutral state law that was designed to (1) "control case flow," (2) promote the "efficient judicial resolution of survival and wrongful death claims," and (3) avoid "duplicative recoveries." *Id.* at 500, 511.[14]

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[13] To make this point, the Majority also relied on *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), but that case is inapposite. There, this Court explained that "the [FAA] was motivated first and foremost by a Congressional desire to enforce agreements into which parties had entered." *Id*. at 220. Whereas here, Respondents asked the state court to enforce the agreement as they would like it to be rewritten by the court. Further, the agreement in *Dean Witter* solely impacted two sophisticated business parties; while the ruling below impacts Pennsylvania's entire court system.

[14] The Majority also held that Rule 213(e) cannot preclude enforcement because it does not fall under the FAA's "savings clause," which allows arbitration agreements to be set aside for "generally applicable contract defenses[.]" *Id.* at 503 (internal citations omitted). The Majority is wrong. Rule 213(e) and the Wrongful Death Act serve as the ***source*** of generally applicable contract defenses that render this agreement unenforceable.

Under Pennsylvania law, "[a] contract whose performance is criminal, tortious, or otherwise opposed to public policy is illegal" – regardless of whether the law is statutory or developed by the courts. 16 Summ. Pa. Jur. 2d Commercial Law § 4:2 (2d ed.) (internal citations omitted); *see also* Restatement (Second) of Contracts § 178 (1981) (same principle of law). " 'Where the enforcement of private agreements would be violative of [public] policy, it

The Majority fully understood the ramifications of its decision. In its view, the FAA has evolved into "what one commentator has characterized as 'a redefinition of civil justice, a modification of the Bill of Rights, and the implicit emendation of the U.S. Constitution.'" *Id.* at 502 (quoting Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 Clev. St. L. Rev. 233, 246 (2008)). The Majority found that "we are now at a unique point in our legal history: one that portends, quite literally, the end of doctrinal development in entire areas of the law." *Id.* at 500 n.12 (quoting Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. Ill. L. Rev. 371, 372 (2016)).

If courts are now required to enforce arbitration agreements at all costs, these disputes will be "shunted into the hermetically-sealed vault of private arbitration, where there is no public, transparent decision-making process, much less stare decisis, or common law development." *Id.* Entire categories of cases will be sealed within this vault, which, the Majority warned, "quite literally, represents the end of law." *Id.*

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is the obligation of courts to refrain from such exertions of judicial power.'" *Cosby v. Am. Media, Inc.*, ___ F.Supp.3d ___, No. CV 16-508, 2016 WL 3901012, at *4 (E.D. Pa. July 15, 2016) (quotation omitted). Here, bifurcation would require Petitioner to violate longstanding Pennsylvania law and policy as codified in Rule 213(e) and the Pennsylvania Wrongful Death Act. *See* footnote 8, *supra*. Thus these provisions serve as the ***source*** of generally applicable contract defenses, including illegality.

The Dissent did not dispute the Majority's "apocalyptic recitation of existing United States Supreme Court precedent." *Id.* at 513 (Donohue, J., dissenting). It also shared many, if not all, of the Majority's concerns. *Id.* at 515-16. But in the end, it could not support the Majority's preemption ruling, stating: "This result is absurd."[15] *Id.* at 515.

## REASONS TO GRANT THIS PETITION

### I. "Super Contract" or "Equal-Footing"?

Courts across the country are conflicted in their application of the equal-footing precedent. Though there are pockets of resistance, most courts now place "adhesive arbitration agreements . . . not 'upon the same footing as other contracts,' but on sacrosanct grounds, enabling corporations to use these agreements to bar consumers from accessing the courts." Cory Tischbein, *Animating the Seventh Amendment in Contemporary Plaintiffs' Litigation: The Rule, or the Exception?*, 16 U. Pa. J. Const. L. 233, 248 (2013).

For example, in *Tigges v. AM Pizza, Inc.*, the court found that "[t]he FAA does not place arbitration agreements on a 'pedestal' on which all other legal rights are to be sacrificed; rather, the FAA merely ensures that

[15] The consequences of this "absurd" result are further detailed in *Tuomi v. Extendicare, Inc.*, 119 A.3d 1030 (Pa. Super. 2015), *rev'd*, No. 281 WAL 2015, (Pa. Nov. 15, 2016) (reversed pursuant to the Pennsylvania Supreme Court's decision in *Taylor*). *See* Pet. App. 102-03.

arbitration agreements . . . are placed on an 'equal footing' with contracts." No. CV 16-10136-WGY, 2016 WL 4076829, at *14 (D. Mass. July 29, 2016) (quotation omitted). By comparison, the *Mortensen v. Bresnan Communications, LLC* court held: "The FAA's purpose is to give preference (instead of mere equality) to arbitration provisions." 722 F.3d 1151, 1160 (9th Cir. 2013). *See also MetLife Securities, Inc. v. Holt*, No. 2:16-CV-32, 2016 WL 3964459, at *9 (E.D. Tenn. July 21, 2016) (noting that courts differ on whether the pro-arbitration FAA presumption should be applied in various circumstances).[16] To be sure, "[c]ourts and scholars have been wrestling for decades over what this 'pro-arbitration policy' actually means." Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards A Preemptive Federal Arbitration Procedural Paradigm?*, 42 Sw. L. Rev. 131 (2012).

Although rarely articulated by courts, "arbitration agreements are not just enforced but rigorously enforced to a degree unknown in other contracting contexts." Hiro N. Aragaki, *Does Rigorously Enforcing Arbitration Agreements Promote "Autonomy"?*, 91 Ind.

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[16] Comparing various cases including *JPD, Inc., v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393 (6th Cir. 2008) ("The strong presumption in favor of arbitration works against finding waiver in cases other than those with the most compelling fact patterns"), with *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) ("In determining whether a waiver has occurred, the court is not to place its thumb on the scales; the federal policy favoring arbitration is . . . merely a policy of treating such clauses no less hospitably than other contractual provisions.").

L.J. 1143, 1144-45 (2016). "This has led many commentators to claim that arbitration agreements are a type of 'super contract.'" *Id.* at 1145 (quotation omitted). "By reading the federal policy favoring arbitration broadly to confer special status on arbitration clauses," courts are "over-enforcing arbitration clauses" and depriving litigants of their right to seek redress in court. Richard Frankel, *The Arbitration Clause as Super Contract*, 91 Wash. U. L. Rev. 531, 553-54 (2014) (collecting cases from around the country that discriminate in favor of arbitration agreements).

The case at bar is no exception.

## II. Pennsylvania Courts Feel Compelled to Discriminate in Favor of Enforcing Arbitration Agreements

Pennsylvania courts are bending over backwards to enforce nursing-home arbitration agreements. Three recent cases demonstrate this reality.

### A. *Taylor*

This case involves multiple claims between multiple parties. All parties agree that the survival claim against Respondents falls within the scope of the ADR agreement. Because there are no ambiguities here, any presumption for construing ambiguities in favor of arbitration would not apply.[17] Consequently, unless there

[17] Only one potential exception exists with regard to the equal-footing doctrine. If such a presumption exists, that presumption "applies ***only*** where an arbitration agreement is ambiguous about whether it covers the dispute at hand." *CardioNet, Inc.*

is some other applicable FAA presumption, the ADR agreement must be placed on equal footing with all other contracts. But that did not happen here – quite the opposite.

To enforce the arbitration agreement, the Majority severed the wrongful-death and survival claims, thereby preempting Rule 213(e). ***But no court would have ever reached this conclusion for any other private contract.*** To help demonstrate this point, Petitioners presented the following hypothetical to the Pennsylvania Supreme Court below:

> Bob was a resident of Delaware County, Pennsylvania. While driving through Philadelphia, Bob is struck and killed by a negligent motorist. Bob's wife, Mary, files suit in Delaware County, setting forth both survival and wrongful death actions. When Bob's adult son, Joe, learns of this lawsuit, he insists that the case be transferred to Philadelphia County. Mary refuses to transfer the case. Unable to resolve their differences, Joe and Mary execute a duly notarized contract, signed by all parties to the lawsuit, whereby the survival action remains

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*v. Cigna Health Corp.*, 751 F.3d 165 (3d Cir. 2014) (emphasis added) (citing *Granite Rock Co. v. International Board of Teamsters*, 561 U.S. 287, 298 (2010)). But this presumption "disappears when the parties dispute the existence of a valid arbitration agreement." *Dumais v. American Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir. 2002). In the case at bar, everyone agrees that "[a]ll claims," including survival and wrongful-death claims, must be resolved in a "single" process. R. 84a. Since there is no disagreement as to the scope of the ADR agreement, there is no applicable presumption.

> in Delaware County, while the wrongful death action is sent to be tried in Philadelphia – notwithstanding any Pennsylvania rules to the contrary [*i.e.*, Rule 213(e) or the Wrongful Death Act]. Upon presenting their contractual "severance agreement" to the presiding Delaware County judge, Mary and Joe are summarily laughed out of court. Why, then, should Defendants expect to receive preferential treatment not available to other contracting parties?[18]

Neither the Majority nor Respondents attempted to answer this question, and for good reason: There is "no scenario (real or hypothetical) in which any other contract could allow litigants to circumvent mandatory rules of general applicability such as Rule 213(e) or the Wrongful Death Act." *Id.* at *28.

Despite this, Respondents continued to argue that the FAA requires piecemeal litigation to enforce arbitration agreements, even if that was never contemplated by the agreement. While completely ignoring the terms of their own contract, Respondents argued to the Pennsylvania Supreme Court that

> the FAA requires that the arbitrable survival claim be arbitrated even if arbitrating the survival claim will result in inefficiency, duplication of effort and piecemeal litigation.

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[18] Brief of Appellees, *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490 (Pa. 2016), No. 19 WAP 2015, 2016 WL 2732216, at *27.

> Accordingly, this Court must reverse the order of the Superior Court. . . . [19]

Contrary to Respondents' assertion, the FAA only requires the court to sever claims "***when necessary*** to give effect to an arbitration agreement." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 120 (1983) (emphasis added). Severance is not "necessary" to give effect to this agreement. If anything, piecemeal litigation would undermine the parties' main intent. The agreement itself states that all disputes "shall" be resolved in a "single" forum, and that:

> The Parties agree that the speed, efficiency and cost-effectiveness of the ADR process, together with their mutual undertaking to engage in that process, constitute good and sufficient consideration for the acceptance and enforcement of this Agreement.

R. 83a.

In summary, courts should "not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). But in this case, the Pennsylvania Supreme Court did just that. Here the court deviated from the FAA's basic purpose by

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[19] Brief of Appellants, *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490 (Pa. 2016), No. 19 WAP 2015, 2015 WL 10818710, at *10.

giving this arbitration agreement protections that do not exist for other contracts.

### B. Other recent decisions in Pennsylvania

*Taylor* is not the only example of Pennsylvania courts enforcing arbitration agreements at all costs. In deference to the FAA, courts have even altered Pennsylvania's longstanding principles of unconscionability to create new standards that are more favorable to arbitration agreements.

In *MacPherson v. Magee Memorial Hospital for Convalescence*, 128 A.3d 1209 (Pa. Super. 2015) (en banc), *appeal denied*, 700 EAL 2015 (Pa. Nov. 17, 2016),[20] a divided nine-member panel of the Superior Court reversed the trial court's decision to strike down a nursing home arbitration agreement. In so ruling, the Majority chastised the trial court for failing "to recognize, no less apply, the liberal policy favoring arbitration" contained in the FAA. *Id.* at 1219. To rectify the situation, the *MacPherson* Majority undertook its own analysis, ultimately deviating from black-letter law. Applying its view of FAA precedent, it created a new, arbitration-specific unconscionability standard that would never be applied to any other type of contract.

[20] Not so coincidently, the Pennsylvania Supreme Court denied review of *MacPherson* within two weeks of its *Taylor* ruling. *See* Pet. App. 104-05.

The court did note that the resident was a bedridden paraplegic, "covered with blisters, scars[,] wounds, necrotic tissue, and lesions." *Id.* at 1220. But it only considered these ailments as they related to his mental capacity – an issue that no party raised below.[21]

After concluding that the resident had sufficient mental capacity, the court began its so-called unconscionability analysis. It reprinted the arbitration agreement in full, but gave short shrift to its one-sided provisions.[22] And the court quickly concluded that "the Agreement should not be invalidated on the basis of procedural or substantive unconscionability." *Id.* at 1222. Notably, this was determined without considering the facts or circumstances surrounding the signing – including the resident's unequal bargaining power. To the extent that the court performed a procedural unconscionability analysis, it either did not go beyond the "four corners" of the agreement, or it conflated unconscionability with mental capacity. Either way, the court effectively raised the standard for procedural unconscionability to mental incapacitation.[23] And now,

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[21] The Dissent criticized the Majority for engaging "in its own factfinding based on the decedent's medical records" to resolve an issue that had never been raised. *Id.* at 1228 n.1 (Mundy, J., dissenting).

[22] One provision states that if a party unsuccessfully challenges the enforcement of the arbitration agreement, he/she will be responsible for the successful parties' attorney fees. *Id.* at 1217. Given the unlikelihood that the nursing home would challenge the enforcement of its own agreement, the provision could only benefit the facility at the residents' expense (pun intended).

[23] This analysis is contrary to *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), which provides the

under *MacPherson*, a nursing home resident's physical and mental infirmities are irrelevant under the FAA so long as the resident is not incapacitated.

The plaintiffs in *MacPherson* petitioned the Pennsylvania Supreme Court to review this holding. Because the Supreme Court was in the process of deciding *Taylor* at the time, it stayed the petition pending the outcome of *Taylor*. *See* Pet. App. 100-01. The court's order signaled that its decision hinged, in large part, on the outcome of *Taylor*. And once *Taylor* was decided, the *MacPherson* petition was denied two weeks later. *See* Pet. App. 104-05. The case was remanded to the trial court, which is now bound to follow these flawed rulings.

Lower courts will continue to apply *MacPherson* to other nursing home neglect and abuse cases, as was done in *Garcia v. HCR ManorCare LLC*, 1742 MDA 2014, 2016 WL 127514 (Pa. Super. Jan. 12, 2016) (non-precedential).[24] There, the nursing home facility moved to compel arbitration. The trial court concluded

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foundational basis for unconscionability in Pennsylvania and elsewhere. *See, e.g.*, *Witmer v. Exxon Corp.*, 434 A.2d 1222, 1228 (Pa. 1981). Unconscionability requires unfair or one-sided contract terms and "an absence of meaningful choice." *Id.* (quoting *Williams*, 350 F.2d at 449). "Whether a meaningful choice is present in a particular case can only be determined by consideration of ***all the circumstances*** surrounding the transaction." *Williams*, 350 F.2d at 451 (emphasis added).

[24] *Garcia* is a non-precedential decision, but it illustrates how *MacPherson* is being interpreted by Pennsylvania courts.

that the agreement could not be enforced due to unconscionability, but that decision was quickly reversed by the Superior Court.

The *Garcia* court used *MacPherson* as a template to author its decision. To start, the court similarly rebuked the trial court for relying on "erroneous policy arguments" and ignoring the FAA's "emphatic" policies favoring arbitration. *Id.* at *1, *5. The court then performed a cursory unconscionability analysis similar to *MacPherson*'s. It did not claim that the agreement was wholly neutral or unbiased. It simply listed a number of neutral provisions, never addressing those that were unfair or one-sided. Immediately following this listing, it concluded that the agreement was "neither procedurally nor substantively unconscionable," without discussing any facts beyond the four corners of the agreement. *Id.* at *8.

Like *MacPherson*, the *Garcia* court only discussed the facts of the case to evaluate mental capacity. After applying the FAA "presumption" in favor of arbitration, the court concluded that the "age, education level, and business acumen [of the signatory] . . . are ***immaterial*** to the enforceability of the terms of the Agreement." *Id.* n.10 (emphasis added). And it reached this conclusion even though the unconscionability defense is intended to protect those "most subject to exploitation," such as consumers "who lack sophistication and business acumen." *Germantown Manufacturing Co. v. Rawlinson*, 491 A.2d 138, 145 (Pa. Super. 1985) (internal citation omitted); *Vasilis v. Bell of Pa.*, 598 A.2d 52, 54 (Pa. Super. 1991).

These problems are sure to continue. Just yesterday (December 21st), a Pennsylvania trial court was forced to bifurcate wrongful-death and survival claims in another nursing home abuse and neglect case. *See Gurganus v. Saucon Valley Manor Inc.*, No. C-48-CV-2016-311 (Pa. Com. Pl. Dec. 21, 2016); Pet. App. 106-10. The court emphasized that *Taylor* "makes clear that the grounds upon which a state court can invalidate an arbitration agreement are exceedingly narrow." *Id.* at 2. Left with no choice but to sever the underlying claims, the court recognized that this "clearly results in inefficiencies and is not in the interest of judicial economy, [but] it is the result compelled by the court in *Taylor*." *Id.* at 4.

## III. Federalism's Demise

Of course, the arbitrate-at-all-costs trend extends beyond Pennsylvania, emboldening courts to set aside any state law that might possibly interfere with enforcement. The resulting FAA "juggernaut," as interpreted by the court below, threatens state sovereignty and violates bedrock principles of federalism.

Normally, courts presume that a state law is not preempted absent a violation of the "clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). This presumption against preemption is appropriate in areas traditionally governed by the states. Yet recent FAA jurisprudence ignores this presumption. And, as exemplified here, courts are willing to cast aside a neutral state law when it ***incidentally*** impacts an arbitration agreement. If these courts are

correct, then federalism is dead. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting) (preemption offers "the true test of federalist principle").

*Concepcion* sets the stage for this new normal. There, a generally applicable state law was invalidated not because it conflicted with federal law, but because "the rule would have a ***disproportionate impact*** on arbitration agreements." *Concepcion*, 563 U.S. at 350 (emphasis added).[25] In doing so, this Court seems to have created a uniquely broad form of preemption. *See* Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 Fla. L. Rev. 711 (2015). Under this "strange, unorthodox mode of preemption analysis," a facially neutral state law can be preempted if it tangentially affects the enforcement of a single arbitration agreement. Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 Nev. L.J. 326 (2007). This reading means that an actual conflict is not necessary to find preemption; rather, a potential impact will suffice. This contradicts

[25] Much like the equal-footing principle, lower courts are inconsistently applying this precedent as well. *Compare Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151, 1159 (9th Cir. 2013) ("We take *Concepcion* to mean what its plain language says: Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA"), *with Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 202 (Cal. 2013) ("a facially neutral state-law rule is not preempted simply because its evenhanded application 'would have a disproportionate impact on arbitration agreements.' ") (quoting *Concepcion*, 563 U.S. at 342), *cert. denied*, 134 S. Ct. 2724 (2014). Sooner or later, this conflict must be resolved.

prior precedent. *See Rice v. Norman Williams Co*., 458 U.S. 654, 659 (1982) (the existence of a hypothetical or potential conflict is insufficient to warrant preemption). *Silkwood v. Kerr-McGee Corp*., 464 U.S. 238, 256 (1984) (the fact that there may be some tension between federal and state law is not enough to establish conflict preemption).

This case offers a sobering example of FAA overreach, which is already wreaking havoc on states' ability to maintain an efficient judicial system. In *Johnson v. Fankell*, this Court recognized that respect for federalism "is at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts." 520 U.S. 911, 922 (1997). But now, states feel compelled to do just that.

Petitioners ask for a return to the equal-footing principle; a return to traditional norms of conflict preemption; and a return to federalism.

## IV. The Issues in This Case are Particularly Important to Nursing Home Residents

By displacing core federalist principles, "[t]he Court's accumulation of power . . . comes at the expense of the people" – in this case, senior citizens and the disabled. *Obergefell v. Hodges*, 136 S. Ct. 2584, 2624 (2015) (Scalia, J., dissenting). This population is more susceptible to the real-world dangers caused by the FAA's expansion. As one court recently noted:

> 1) Many nursing homes will obtain signatures from residents in spite of grave doubts about their mental competency, or, more often, they will choose to have relatives of the residents sign the agreements, even when no power of attorney has been executed;
>
> 2) Many of these same nursing homes will later file motions to compel arbitration on the basis of those suspect arbitration agreements; and
>
> 3) The litigation of these arbitration actions can only be resolved in time-consuming litigation, which serves as a very significant incentive against filing suit in the first place.

*American Health Care Association v. Burwell*, No. 3:16-CV-00233, ___ F.Supp.3d ___, 2016 WL 6585295, *2 (N.D. Miss. Nov. 7, 2016).

No other form of litigation "provides as effective a tool for pure delay, while not advancing the underlying litigation, as nursing home arbitration litigation." *Id.* at *3. And even though the *Burwell* court expressed serious "doubts about the efficiency and fairness of the nursing home arbitration system," it still issued a preliminary injunction against CMS due, in large part, to this Court's "pro-arbitration FAA policies." *Id.* at *3, *7.[26]

[26] *See* footnote 2, *supra*, and its corresponding text.

To be clear, Petitioners are ***not*** arguing that nursing home residents should be afforded extra rights. But as demonstrated, most courts feel compelled to afford arbitration agreements preferential treatment due, in large part, to this Court's "pro-arbitration" jurisprudence. By granting this Petition, this Court can take this opportunity to clarify those policies and, if need be, reconsider its precedent.

## CONCLUSION

As one federal court recently noted:

> Today, forced arbitration bestrides the legal landscape like a colossus, effectively stamping out the individual's statutory rights wherever inconvenient to the businesses which impose them. What is striking is that, other than the majority of the Supreme Court whose questionable jurisprudence erected this legal monolith, no one thinks they got it right – no one, not the inferior federal courts, not the state courts, not the Equal Employment Opportunity Commission, and certainly not the academic community.
>
> * * *
>
> The cumulative effect of the Supreme Court's jurisprudence on arbitration has been to produce an unconstitutional system that undermines both the legitimacy of arbitration and the functions of courts.

*In re Nexium*, 309 F.R.D. 107, 146-48 (D. Mass. 2015) (internal citations omitted) (quotations omitted).

After voicing this concern, the court made the following plea to anyone who might be listening:

> Do you care about any of this?
>
> Does it concern you?
>
> It should.

*Id*. at 149.

To address these questions and concerns, this Court should return to the true purpose and scope of the FAA – a law designed to preempt only those laws that are purposefully hostile to arbitration agreements. It should repudiate blanket preemptions placed on all state laws that ***might*** interfere with the enforcement of an arbitration agreement. And it should reject any type of preemption "test" that solely relies upon a "disproportionate impact" analysis.

Regardless of judicial philosophy, arbitration agreements should not be given more "protection" than what this Court has been willing to afford to the historically oppressed.[27] If that is the current state of the law, then that must change.

Respectfully submitted,

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[27] Discrimination analysis always goes beyond mere impact. For example, under the Equal Protection Clause, this Court has rejected "the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." *Washington v. Davis*, 426 U.S. 229, 239 (1976).

147 A.3d 490
Supreme Court of Pennsylvania.

Daniel E. Taylor and William Taylor,
as Co-executors of the Estate
of Anna Marie Taylor, Deceased

v.

Extendicare Health Facilities, Inc. d/b/a Havencrest Nursing Center; Extendicare Holdings, Inc.; Extendicare Health Facility Holdings, Inc.; Extendicare Health Services, Inc.; Extendicare Reit; Extendicare, L.P.; Extendicare, Inc.; Mon Vale Non Acute Care Service, Inc. d/b/a the residence at Hilltop; Mon-vale Health Resources, Inc.; Jefferson Health Services, d/b/a Jefferson Regional Medical Center
Appeal of: Extendicare Health Facilities, Inc., d/b/a Havencrest Nursing Center, Extendicare Holdings, Inc., Extendicare Health Facility Holdings, Inc., Extendicare Health Services, Inc., Extendicare Reit, Extendicare, L.P. and Extendicare, Inc.

Appeal of: Extendicare Health Facilities, Inc., d/b/a Havencrest Nursing Center, Extendicare Holdings, Inc., Extendicare Health Facility Holdings, Inc., Extendicare Health Services, Inc., Extendicare Reit, Extendicare, L.P. and Extendicare, Inc.

No. 19 WAP 2015
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ARGUED: April 5, 2016
|
DECIDED: SEPTEMBER 28, 2016

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SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, JJ.

**OPINION**

JUSTICE WECHT

The Federal Arbitration Act ("FAA") provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Pennsylvania Rule of Civil Procedure 213(e) requires the consolidation of survival and wrongful death actions for trial. A representative of Extendicare Health Facilities, Inc., d/b/a Havencrest Nursing Center ("Extendicare"), executed an arbitration agreement with Anna Marie Taylor ("Decedent") requiring the arbitration of claims arising from Decedent's stay at the

Extendicare facility. Following Decedent's death, Daniel and William Taylor ("the Taylors") brought wrongful death claims on behalf of themselves as wrongful death beneficiaries and survival claims on behalf of Decedent's estate against Extendicare and two other defendants. Extendicare moved to bifurcate the wrongful death and survival actions, and to compel arbitration of Decedent's survival claim pursuant to the arbitration agreement and the FAA.

The trial court relied upon Rule 213(e) to deny Extendicare's motion to bifurcate, and the Superior Court affirmed. We granted review to determine whether the FAA preempts the lower courts' application of Rule 213(e) under the facts presented. Upon review, we conclude that the FAA preempts the application of Rule 213(e), and requires arbitration of the survival claim against Extendicare. We therefore reverse the Superior Court, and we remand to the trial court for further proceedings.

In 2010, Decedent was admitted to Mon-Vale Non-Acute Care Service, Inc., d/b/a The Residence at Hilltop ("The Residence"), a nursing home facility where, on February 1, 2012, she fell and fractured her right hip. Decedent underwent surgery at Jefferson Health Services, d/b/a Jefferson Regional Medical Center ("Jefferson Medical Center"). Following surgery, Decedent was admitted to one of Extendicare's skilled nursing facilities. On February 9, 2012, as part of the admissions paperwork and pursuant to a power of attorney authorizing him to act on Decedent's behalf, William Taylor executed the Alternative Dispute Resolution Agreement ("ADR Agreement") that is central to this

appeal. The ADR Agreement, to which only Decedent (by William Taylor) and Extendicare are parties, provides that any covered disputes arising between the parties are to be submitted to binding arbitration:

> *Voluntary Agreement to Participate in ADR.* The Parties agree that the speed, efficiency and cost-effectiveness of the ADR process, together with their mutual undertaking to engage in that process, constitutes good and sufficient consideration for the acceptance and enforcement of this Agreement. The Parties voluntarily agree that any disputes covered by this Agreement ([hereinafter] referred to as "Covered Disputes") that may arise between the Parties shall be resolved exclusively by an ADR process that shall include mediation and, where mediation does not successfully resolve the dispute, binding arbitration. . . . The Parties' recourse to a court of law shall be limited to an action to enforce a binding arbitration decision or mediation settlement agreement entered in accordance with this Agreement or to vacate such a decision based on the limited grounds set forth in [the Uniform Arbitration Act, 42 Pa.C.S. §§ 7301, *et seq.*]

Reproduced Record ("R.R.") at 83a-84a. The ADR Agreement purported to require the resolution of all disputes in a single arbitral forum as follows:

> *Covered Disputes.* This Agreement applies to any and all disputes arising out of or in any way relating to this Agreement or to [Decedent's] stay at [Extendicare's facility] that would constitute a legally cognizable cause of

> action in a court of law sitting in the Commonwealth of Pennsylvania and shall include, but not be limited to, all claims in law or equity arising from one Party's failure to satisfy a financial obligation to the other Party; a violation of a right claimed to exist under federal, state, or local law or contractual agreement between the Parties; tort; breach of contract; fraud; misrepresentation; negligence; gross negligence; malpractice; death or wrongful death and any alleged departure from any applicable federal, state, or local medical, health care, consumer or safety standards. . . . All claims based in whole or in part on the same incident, transaction or related course of care or services provided by [Extendicare] to [Decedent] shall be addressed in a single ADR process.

R.R. at 84a.

Following her admission into the Extendicare facility, Decedent quickly developed numerous medical complications. She died on April 3, 2012. On October 15, 2012, the Taylors, as co-executors of Decedent's estate, commenced this litigation, ultimately filing a complaint asserting wrongful death and survival claims against Extendicare, The Residence, and Jefferson Medical Center.[1] The Taylors alleged that the combined negligence of the three defendants caused or contributed to Decedent's injuries and death.

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[1] The Superior Court has explained the distinction between survival and wrongful death causes of action as follows:

In response, Extendicare filed preliminary objections in the nature of a motion to compel arbitration of the Taylors' wrongful death and survival claims, arguing that both claims should be submitted to binding arbitration pursuant to the ADR Agreement. In support of its motion, Extendicare asserted that the Taylors' wrongful death claim was derivative of the survival claim and, because the survival claim was within the scope of the ADR Agreement, both claims must be submitted to arbitration.

On November 20, 2013, the trial court heard oral argument on Extendicare's motion. Although Extendicare maintained that the ADR Agreement required the court to compel arbitration of both of the Taylors'

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> The survival action has its genesis in the decedent's injury, not his death. The recovery of damages stems from the rights of action possessed by the decedent at the time of death. . . . In contrast, wrongful death is not the deceased's cause of action. An action for wrongful death may be brought only by specified relatives of the decedent to recover damages on their own behalf, and not as beneficiaries of the estate. . . . This action is designed only to deal with the economic effect of the decedent's death upon the specified family members.

*Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 658-59 (Pa. Super. 2013) (quoting *Frey v. Pa. Elec. Co.*, 414 Pa.Super. 535, 607 A.2d 796, 798 (1992)).

In this case, the survival action against Extendicare was brought on Decedent's behalf by the Taylors as her co-executors, while the wrongful death action against Extendicare was brought on behalf of the Taylors as the statutory wrongful death beneficiaries. *See* 42 Pa.C.S. § 8301 (providing that a wrongful death action exists only for the benefit of "the spouse, children or parents of the deceased").

claims against it, Extendicare conceded that the Superior Court recently had held that an arbitration agreement signed only by a decedent did not bind the decedent's wrongful death beneficiaries. *See Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660-61 (Pa. Super. 2013). Shifting its litigation strategy to account for *Pisano*, Extendicare requested for the first time the bifurcation of the Taylors' two causes of action against it, and an order compelling arbitration just of the survival claim, while the wrongful death claim remained pending for judicial resolution.

Following argument, the trial court overruled Extendicare's preliminary objections. It agreed with Extendicare and the Taylors that, in accord with *Pisano*, the Taylors could not be compelled to arbitrate their wrongful death claim against Extendicare because they, as wrongful death beneficiaries, were not parties to the ADR Agreement. Trial Ct. Op., 1/29/2014, at 3; *see Pisano*, 77 A.3d at 660-61 (holding that because wrongful death actions are not derivative of the decedent's rights, the wrongful death beneficiaries were not bound by an arbitration agreement executed by the decedent); *see also E.E.O.C. v. Waffle House*, 534 U.S. 279, 293, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) (holding that, notwithstanding the federal policy favoring arbitration agreements, the FAA does not require parties to arbitrate when they have not agreed to do so).

The trial court also refused Extendicare's request to sever the survival action from the wrongful death action in order to send the former to arbitration. The trial court explained that it found no authority within the FAA to support severance. To the contrary, the trial

court opined that severance would not advance the purpose of the FAA, which, it explained, was "to ease the burden of litigation on the parties and this Court's docket." Trial Ct. Op., 1/29/2014, at 3-4 (citing *Joseph Muller Corp. Zurich v. Commonwealth Petrochem., Inc.*, 334 F.Supp. 1013, 1019 (S.D.N.Y. 1971)). Examining Rule 213(e) of the Pennsylvania Rules of Civil Procedure, the trial court held that it was required to consolidate for trial the wrongful death and survival actions. Pa.R.C.P. 213(e).[2]

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[2] Rule 213(e) provides as follows:

(e) A cause of action for the wrongful death of a decedent and a cause of action for the injuries of the decedent which survives his or her death may be enforced in one action, but if independent actions are commenced they shall be consolidated for trial.

(1) If independent actions are commenced or are pending in the same court, the court, on its own motion or the motion of any party, shall order the actions consolidated for trial.

(2) If independent actions are commenced in different courts, the court in which the second action was commenced, on its own motion or the motion of any party, shall order the action transferred to the court in which the first action was commenced.

(3) If an action is commenced to enforce one cause of action, the court, on its own motion or the motion of any party, may stay the action until an action is commenced to enforce the other cause of action and is consolidated therewith or until the commencement of such second action is barred by the applicable statute of limitation.

Pa.R.C.P. 213(e).

Extendicare appealed to the Superior Court, which affirmed.[3] *Taylor v. Extendicare Health Facilities, Inc.*, 113 A.3d 317 (Pa. Super. 2015).[4] The Superior Court rejected Extendicare's argument that the Taylors' wrongful death action is dependent upon the rights that Decedent possessed before she died, and that the wrongful death and survival claims together must be submitted to arbitration. The court relied upon *Pisano* to hold that "an arbitration agreement signed by the decedent or his or her authorized representative is not binding upon non-signatory wrongful death beneficiaries, and they cannot be compelled to litigate their claims in arbitration." *Taylor*, 113 A.3d at 320-21.

Turning to Extendicare's alternative argument that the trial court should have bifurcated the two claims and compelled arbitration of the survival action pursuant to the ADR Agreement, the Superior Court recognized that this was an issue of first impression in Pennsylvania. The court relied upon Rule 213(e) to hold that the wrongful death and survival actions could not be bifurcated, but must be consolidated for trial. The Superior Court explained that the General Assembly had considered the overlap between wrongful death and survival actions, as well as the potential for duplicative awards, and made the legislative policy decision to require consolidation. *Taylor*, 113 A.3d at

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[3] *See* 42 Pa.C.S. § 7320(a)(1) (providing that an appeal may be taken from "[a] court order denying an application to compel arbitration").

[4] Neither Jefferson Medical Center nor The Residence participated in the appeal, because they were not parties to the ADR Agreement.

322 (citing the Wrongful Death Statute, 42 Pa.C.S. § 8301(a)[5]). The Superior Court recognized that Rule 213(e) implemented this policy decision by detailing how and where such claims must be consolidated. *Taylor*, 113 A.3d at 325.

Attempting to avoid consolidation, Extendicare relied upon the FAA, which was "intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 3, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). Extendicare argued that the FAA preempted Rule 213(e), and relied upon *Marmet Health Care Ctr., Inc. v. Brown*, ___ U.S. ___, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012) for support. In *Marmet*, the Supreme Court of the United States held that the FAA preempted a state law which precluded the enforcement of pre-dispute arbitration agreements in nursing home disputes involving personal injury or death. *See id.* at 1204 (observing that West Virginia's prohibition was "a categorical rule prohibiting arbitration of a particular type of claim," and therefore was contrary to the requirements of the FAA). According to Extendicare, the FAA likewise preempted Rule 213(e) to the extent that

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[5] Section 8301(a) provides as follows:

> (a) General rule. – An action may be brought, under procedures prescribed by general rules, to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime and any prior actions for the same injuries are consolidated with the wrongful death claim so as to avoid a duplicate recovery.

42 Pa.C.S. § 8301(a).

the rule purported or operated to bar the arbitration of a claim otherwise subject to an arbitration agreement.

Engaging in a conflict preemption analysis,[6] the only form of preemption implicated in this case, the Superior Court disagreed with Extendicare. According to the court, Rule 213(e) did not prohibit the arbitration of wrongful death and survival claims, rendering this case distinct from the categorical prohibition struck down in *Marmet*. Rather, the Superior Court viewed the procedural rule as "neutral regarding arbitration generally, and the arbitration of wrongful death and survival actions specifically." *Taylor*, 113 A.3d at 325. The Superior Court further observed that wrongful death and survival actions may proceed together in arbitration when all of the parties, including the

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[6] As the Superior Court recognized, there are several types of preemption. Express preemption is implicated when the federal law contains a provision expressly preempting state law. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm.*, 461 U.S. 190, 204, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983). The second form of preemption is field preemption, where the federal statute "reflects a Congressional intent to occupy the entire field" of law. *Taylor*, 113 A.3d at 323 (quoting *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). "Finally, 'a state enactment will be preempted where a state law conflicts with a federal law.' " *Stone Crushed P'ship v. Kassab Archbold Jackson & O'Brien*, 589 Pa. 296, 908 A.2d 875, 881 (2006) (quoting *Office of Disciplinary Counsel v. Marcone*, 579 Pa. 1, 855 A.2d 654, 664 (2004)). Conflict preemption may be found when it is impossible to comply with both federal and state law, *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

wrongful death beneficiaries, have agreed to arbitration. *Id.*

In this case, however, the Superior Court found no agreement to arbitrate the wrongful death claim, or to arbitrate the survival actions against The Residence or Jefferson Medical Center. *Id.* at 326. Rather, the court observed, the only claim subject to an agreement to arbitrate is the Taylors' survival claim against Extendicare. *Id.* The court observed that the piecemeal disposition Extendicare sought involved "wholly redundant proceedings with a potential for inconsistent verdicts and duplicative damages." *Id.* The Superior Court held that the wrongful death beneficiaries' constitutional right to a jury trial and the state's interest in litigating wrongful death and survival actions in one proceeding required that all claims proceed in court. *Id.* at 328. The court viewed its holding as consistent with one of the primary objectives of arbitration, i.e., "to achieve streamlined proceedings and expeditious results," *id.* (citing *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 346, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011)), and affirmed the trial court order overruling Extendicare's preliminary objection seeking to compel arbitration.[7]

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[7] Neither the trial court nor the Superior Court addressed the Taylors' alternative arguments against the ADR Agreement's enforcement, including mistake, lack of consideration, frustration of purpose, impracticability, and unconscionability. These arguments were raised before the trial court in response to Extendicare's request for bifurcation. Because the trial court denied Extendicare's motion to bifurcate, it was unnecessary for it to resolve these alternative arguments.

Extendicare sought discretionary review in this Court. We granted review as to the following issues:

> Does the Superior Court's decision, which refused to compel arbitration of the arbitrable survival claim, violate the [FAA] requirement that arbitration agreements "shall be valid, irrevocable[,] and enforceable[,] save upon [such] grounds as exist at law or in equity for the revocation of any contract"?
>
> Does the Superior Court's conclusion that [Pa.R.C.P. 213(e)] require[s] the consolidation of the otherwise arbitrable survival action with the non-arbitrable wrongful death action on grounds of efficiency violate the [FAA] as it has been interpreted by the United States Supreme Court which has consistently ruled that arbitration is required when there is an agreement to arbitrate even when compelling arbitration results in duplication and piecemeal litigation?

*Taylor v. Extendicare Health Facilities, Inc.*, ___ Pa. ___, 122 A.3d 1036, 1037 (2015) (*per curiam*). Because these are questions of law, our standard of review is *de novo*, and our scope of review is plenary. *See Wert v. Manorcare of Carlisle Pa.*, ___ Pa. ___, 124 A.3d 1248 (2015).

Extendicare concedes that, pursuant to *Pisano*, the Taylors' wrongful death claim must be litigated in the trial court. Extendicare contests only the trial court's refusal to sever the arbitrable survival claim from the non-arbitrable wrongful death claim. Relying upon the FAA's directive that arbitration agreements

"shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, Extendicare argues that the United States Supreme Court has interpreted this language as expressing a national policy favoring arbitration that preempts any state law that stands in the way of an agreement to arbitrate.[8]

Extendicare criticizes the Superior Court for premising its decision upon notions of expediency and efficiency. In this respect, Extendicare relies upon a line of cases establishing that the FAA's pro-arbitration mandate trumps litigation efficiency. *See KPMG LLP v. Cocchi*, ___ U.S. ___, 132 S.Ct. 23, 26, 181 L.Ed.2d 323 (2011) ("[W]hen 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.'"

[8] *See*, *e.g.*, *Marmet*, 132 S.Ct. at 1204 (holding that "a categorical rule" prohibiting the arbitration of personal injury or wrongful death claims was contrary to the FAA); *Concepcion*, 563 U.S. at 341, 131 S.Ct. 1740 ("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."); *Southland*, 465 U.S. at 10, 104 S.Ct. 852 ("In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.").

(internal citation omitted)); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) ("[T]he [FAA] requires district 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."); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("[The FAA] requires piecemeal resolution when necessary to give effect to an arbitration agreement.").

Extendicare observes that state and federal court decisions in Pennsylvania currently differ regarding the issue presented herein. While the Superior Court in this case relied upon Rule 213(e) to refuse to compel arbitration of an arbitrable claim, the federal courts sitting in Pennsylvania uniformly have rejected *Taylor* or its rationale.[9] According to these federal courts, whenever Rule 213(e) would prevent the operation of a valid arbitration agreement by prohibiting the bifurcation of an arbitrable survival claim from a

[9] *See*, *e.g.*, *Golden Gate Nat'l Senior Care LLC v. Sulpizio*, 2016 WL 1271333 (M.D. Pa. March 31, 2016); *Clouser v. Golden Gate Nat'l Senior Care, LLC*, 2016 WL 1179214 (W.D. Pa. March 23, 2016); *Erie Operating, L.L.C. v. Foster*, 2015 WL 5883658 (W.D. Pa. Oct. 8, 2015); *Hartman v. Sabor Healthcare Group*, 2015 WL 5569148 (M.D. Pa. Sept. 21, 2015); *Golden Gate Nat'l Senior Care, LLC v. Beavens*, 123 F.Supp.3d 619 (E.D. Pa.2015); *THI of Pa. at Mountainview, LLC v. McLaughlin ex rel. McLaughlin*, 2015 WL 2106105 (W.D. Pa. May 6, 2015); *N. Health Facilities v. Batz*, 993 F.Supp.2d 485 (M.D. Pa. 2014).

non-arbitrable wrongful death claim, it is preempted by the FAA.

In response, the Taylors argue that the trial court's and Superior Court's rulings are not contrary to the FAA or any controlling authority. According to the Taylors, the FAA preempts only state laws or rules that expressly prohibit certain arbitration proceedings. *See*, *e.g.*, *Marmet*, 132 S.Ct. 1201; *Perry v. Thomas*, 482 U.S. 483, 491, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). The Taylors argue that Rule 213(e), conversely, is arbitration-neutral. Because the rule does not target arbitration, the Taylors perceive no conflict between the rule and the FAA for purposes of preemption. Indeed, the Taylors echo the Superior Court by asserting that Rule 213(e) is only implicated in this case because Extendicare failed to procure signatures from the wrongful death beneficiaries. According to the Taylors, had Extendicare obtained the appropriate signatures on the ADR Agreement, both the survival and wrongful death claims would be subject to arbitration.

The Taylors also advance alternative arguments that the ADR agreement is unenforceable under state law for reasons that include mistake, lack of consideration, impracticability, frustration of purpose, and unconscionability. Recognizing that the lower courts did not consider these arguments, the Taylors urge this Court either to address them or to remand them to the trial court for resolution.

With these arguments in mind, we begin our analysis by reviewing federal preemption doctrine, which

springs from the Supremacy Clause.[10] Federal law is paramount, and state laws that conflict with federal law are "without effect." *Dooner v. DiDonato*, 601 Pa. 209, 971 A.2d 1187, 1193 (2009) (quoting *Altria Group, Inc. v. Stephanie Good*, 555 U.S. 70, 76, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008)). Although federal preemption of state laws may be found in any of three ways, *see supra*, n.6; *Stone Crushed P'ship v. Kassab Archbold Jackson & O'Brien*, 589 Pa. 296, 908 A.2d 875, 881 (2006), Extendicare advocates solely for a finding of conflict preemption. *See Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."). Conflict preemption typically arises where compliance with both federal and state law is impossible, or when the state law stands as an obstacle to the accomplishment of the full purposes and objectives of the United States Congress. *Holt's Cigar Co. v. City of Philadelphia*, 608 Pa. 146, 10 A.3d 902, 918 n.4 (2011); *see Volt*, 489 U.S. at 477, 109 S.Ct. 1248.

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[10] The Supremacy Clause of the United States Constitution provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.

U.S. Const. art. VI, cl. 2.

Turning first to the relevant state law, Rule 213(e) is a rule of compulsory joinder, providing that wrongful death and survival actions "may be enforced in one action, but if independent actions are commenced they shall be consolidated for trial." Pa.R.C.P. 213(e).[11] If independent actions are filed or pending in the same court, or are commenced in different courts, the trial courts "shall" order them to be consolidated. *Id.* This procedural rule facially addresses scenarios where the litigants seek to resolve survival and wrongful death claims in court, mandates a single judicial action, and expresses the Commonwealth's interest in the efficient judicial resolution of survival and wrongful death claims and the avoidance of duplicative recoveries. *See Pezzulli v. D'Ambrosia*, 344 Pa. 643, 26 A.2d 659, 662 (1942) ("[T]here is an important limitation on the right to bring actions under both the death acts and the survival statute, namely, that it must not work a duplication of damages."). Rule 213(e) is silent regarding arbitration, because it does not contemplate the scenario where one claim that is subject to compulsory joinder is also subject to arbitration due to the contractual agreement of the parties.

The FAA is in tension with Rule 213(e). It is neither exaggeration nor hyperbole to characterize the rise of arbitration over the last century as revolutionizing the rule of law and access to justice.[12] Prior to

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[11] Both of the parties have, at this juncture, confined their arguments solely to the application of Rule 213(e).

[12] *See*, *e.g.*, Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 Clev. St. L. Rev. 233, 233 (2008) (opining

that "[t]he development of a 'strong federal policy favoring arbitration' cast aside traditional acceptations about law and adjudication," and arguing that the rule of law which the human civilization has associated with law and the legal process "has been profoundly, perhaps irretrievably, altered by the rise of arbitration") (citing *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 290, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002)); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 Fordham L. Rev. 761, 782-83 (2002) ("[D]enial of access to a court of law in most cases means exactly that – denial of access not merely to a court, or even to a jury, but to the law itself."); Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 Wake Forest L. Rev. 1, 1 (1996) ("One of the most striking recent developments in the civil justice arena is the emergence of commercial arbitration as a viable alternative to traditional litigation.").

> Indeed, Professor Myriam Gilles recently opined that, as a result of the anti-lawsuit movement that nurtured the shift to arbitration over the last thirty years:
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> > [W]e are now at a unique point in our legal history: one that portends, quite literally, the end of doctrinal development in entire areas of the law. Companies, anxious to avoid . . . exposure . . . are highly motivated to insert confidential, one-on-one arbitration mandates into the standard form agreements that, over these same thirty years, have come to govern their relationships with employees, consumers, direct purchasers, and all manner of counterparties. As a result, all disputes under these agreements – whether they would have otherwise been brought as class or individual claims – will now be shunted into the hermetically-sealed vault of private arbitration, where there is no public, transparent decision-making process, much less stare decisis, or common law development. For entire categories of cases

the 1925 enactment of the FAA, courts across the country disparaged arbitration as a renegade form of adjudication, and refused to enforce private arbitration agreements. *See* Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 Clev. St. L. Rev. 233, 244 (2008); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (discussing the historical background of the FAA); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (same). During this time, when arbitration occurred primarily in the commercial context between businesses of equal bargaining power, *see* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As A Dispute Resolution Process*, 77 Neb. L. Rev. 397, 400 (1998), the business interests that favored the enforcement of private arbitration agreements began to lobby state governments and Congress for legislation compelling the courts to enforce their bargains. Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 63 (2005). Congress answered the call by enacting

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> that are ushered into this vault – from consumer law, to employment law, to much of antitrust law – common law doctrinal development will cease. This, quite literally, represents the end of law.

Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. Ill. L. Rev. 371, 372 (2016).

the FAA, 9 U.S.C. §§ 1-14, in 1925 as modest legislation to rehabilitate arbitration, Carbonneau, *The Revolution*, 56 Clev. St. L. Rev. at 245, and to "reverse centuries of judicial hostility to arbitration agreements by placing them on equal footing with other contracts." *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 225-26, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987).[13]

The FAA was intended by Congress "first and foremost" to ensure judicial enforcement of arbitration agreements into which parties had entered. *Dean Witter*, 470 U.S. at 220, 105 S.Ct. 1238. Although Congress was not "blind to the potential benefit of [the FAA] for expedited resolution of disputes," *id.* at 219, 105 S.Ct. 1238, the Supreme Court has rejected "the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims." *Id.* To address its preeminent concern, Section 2 of the FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.[14] The

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[13] *See also Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740 (explaining that "[t]he FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); *Volt Info. Sci.*, 489 U.S. at 474, 109 S.Ct. 1248; *Dean Witter*, 470 U.S. at 220, 105 S.Ct. 1238 (explaining that when Congress passed the FAA, it was motivated by a desire to change the existing anti-arbitration climate); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 415, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).

[14] Section 2 provides, in its entirety, as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce

text of this section not only embodies Congress' intent to ensure that private arbitration agreements are enforced like any other contract, but also includes the FAA's so-called "savings clause," by which courts may refuse to enforce agreements to arbitrate under state laws that "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry*, 482 U.S. at 492 n.9, 107 S.Ct. 2520.

Originally, the FAA was perceived to be a procedural statute applicable only in federal courts. *See* Lyra Haas, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B. U. L. Rev. 1419, 1424 (2014). From these humble origins, however, the FAA has evolved through the Supreme Court's application of conflict preemption into what one commentator has characterized as "a redefinition of civil justice, a modification of the Bill of Rights, and the implicit emendation of the U.S. Constitution." Carbonneau, *The Revolution*, 56 Clev. St. L. Rev. at 246. According to some, the Supreme Court has interpreted the FAA as a "preemption juggernaut," Lisa Tripp & Evan R. Hanson, *AT & T v. Concepcion: The Problem of A False*

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> to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

*Majority*, 23 Kan. J. L. & Pub. Pol'y 1, Fall 2013, defining the contours of the FAA to eradicate any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA. *Concepcion*, 563 U.S. at 352, 131 S.Ct. 1740 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)); McGuinness & Karr, *California's "Unique" Approach*, 2005 J. Disp. Resol. at 65 ("The Court has broadly interpreted the FAA provisions that direct courts to enforce arbitration agreements, while narrowly construing those provisions that limit the reach of the FAA".).

Beginning with *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), the Supreme Court established the doctrinal underpinnings for transforming the FAA into a "preemption juggernaut" by holding that federal courts sitting in diversity jurisdiction were obligated to apply the FAA. Tripp & Hanson, *AT & T v. Concepcion: The Problem of A False Majority*, 23 Kan. J. L. & Pub. Pol'y, at 1. Twenty years later, in *Moses H. Cone*, the Court relied upon the Supremacy Clause to hold that the FAA established "a body of federal substantive law of arbitrability." 460 U.S. at 24, 103 S.Ct. 927. Shortly thereafter, the Court held that state and federal courts are bound by the FAA, and that Congress intended to preclude state attempts to undermine the enforceability of arbitration agreements. *Southland*, 465 U.S. at 10, 104 S.Ct. 852 ("[i]n enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to

require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . ."); *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (stating that the question of whether claims are arbitrable must be decided with a "healthy regard for the federal policy favoring arbitration").[15]

Since federalizing arbitration in *Southland*, the Supreme Court has continued to reaffirm its commitment to arbitration by striking down conflicting state laws.[16] In much of its FAA preemption jurisprudence

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[15] In *Southland*, the Court elevated the preemptive effect of the FAA above any countervailing concerns for federalism. *Southland*, 465 U.S. at 19, 104 S.Ct. 852 (Stevens, J., concurring in part and dissenting in part) ("The existence of a federal statute enunciating a substantive federal policy does not necessarily require the inexorable application of a uniform federal rule of decision notwithstanding the differing conditions which may exist in the several States and regardless of the decisions of the States to exert police powers as they deem best for the welfare of their citizens."); *id.* at 36, 104 S.Ct. 852 (O'Connor, J., dissenting) ("Today's decision is unfaithful to congressional intent, unnecessary, and, in light of the FAA's antecedents and the intervening contraction of federal power, inexplicable.").

[16] *See* Lyra Haas, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B. U. L. Rev. 1419, 1425-26 (2014) ("Over time the Court has expanded the reach of these substantive provisions, placing the FAA in a position to preempt a vast swath of state law on arbitration."); Hayford, *A Sea Change*, 31 Wake Forest L. Rev. at 36 ("All of the major anti-arbitration arguments have been swept aside by the Supreme Court, leaving without succor parties that contract to arbitrate future disputes and subsequently decide they would prefer to adjudicate in court.").

pre-dating *Concepcion*, the Supreme Court appeared to hold that it was only when a state law expressed an anti-arbitration policy that it was preempted by the FAA. For example, in *Doctor's Assoc., Inc. v. Casarotto*, the Court held that the FAA preempted a state statute that conditioned the enforceability of an arbitration clause upon a specific notice requirement. 517 U.S. 681, 688, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (explaining that the national policies embodied in the FAA are "antithetical to threshold limitations placed specifically and solely on arbitration provisions"). *Casarotto* clarified that, although states generally may regulate contracts, they may not decline to enforce arbitration agreements solely because they are arbitration agreements.[17]

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[17] *See Allied-Bruce*, 513 U.S. at 272-73, 115 S.Ct. 834 (confronting an Alabama law that made predispute arbitration agreements invalid and unenforceable, and rejecting the argument that the FAA carved out "an important statutory niche in which a State remains free to apply its antiarbitration law or policy"); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (holding that when the parties in court proceedings include claims that are subject to an arbitration agreement, the FAA requires that agreement to be enforced even if a state statute or common-law rule would otherwise exclude that claim from arbitration); *Volt Info. Sci.*, 489 U.S. at 477, 109 S.Ct. 1248 (providing that a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" should be preempted); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (finding no basis in the FAA "for disfavoring agreements to arbitrate statutory claims").

By striking down state laws targeting arbitration agreements, the Supreme Court has limited the role of state courts to regulating contracts to arbitrate under general contract law principles in accord with the savings clause, under which it has held that only "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Casarotto*, 517 U.S. at 687, 116 S.Ct. 1652; *see Allied-Bruce*, 513 U.S. at 281, 115 S.Ct. 834; *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483-84, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987); *Perry*, 482 U.S. at 492 n.9, 107 S.Ct. 2520 (explaining that "[s]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally").[18] These cases instruct that courts are obligated to enforce arbitration agreements as they would enforce any other contract, in accordance with their terms, and may not single out arbitration agreements for disparate treatment.[19]

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[18] *See also Borough of Ambridge Water Auth. v. Columbia*, 458 Pa. 546, 328 A.2d 498, 500 (1974) ("Contracts that provide for arbitration are valid, enforceable and irrevocable, save upon such grounds as exists in law or in equity for the revocation of any other type of contract.").

[19] Consequently, in the realm of arbitration, state law exists solely to determine whether a valid contract exists. Myriam Gilles, *Opting Out of Liability: The Forthcoming,Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 394-95

But the prerogatives of state courts to regulate arbitration agreements even in accord with generally applicable contract defenses such as unconscionability have been called into question. Indeed, in recent years the Supreme Court's preemption juggernaut has gathered momentum.[20] In *Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, the Court held that the FAA preempted California's common-law rule of unconscionability (the "*Discover Bank* Rule"), which it viewed as an obstacle to the accomplishment and execution of the purposes and objectives of the FAA. In *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76,113 P.3d 1100 (2005), the California Supreme Court had applied the California Code, which allowed courts to refuse to enforce any contract found to be unconscionable at the time it was made, to conclude that class action waivers are unconscionable and void under certain circumstances.[21] The *Discover Bank* rule was facially neutral,

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(2005) ("While it remains . . . for courts to determine whether a valid contract requiring arbitration exists, all other issues concerning the scope of arbitration agreements are now for arbitrators to decide."); *see* Kristopher Kleiner, *AT & T Mobility L.L.C. v. Concepcion: The Disappearance of the Presumption Against Preemption in the Context of the FAA*, 89 Denv. U. L. Rev. 747, 751 (2012).

[20] *See*, *e.g.*, Myriam Gilles, *Individualized Injunctions and No-Modification Terms: Challenging "Anti-Reform" Provisions in Arbitration Clauses*, 69 U. Miami L. Rev. 469 (2015) (providing that "the United States Supreme Court has been on a bit of a pro-arbitration tear recently, upholding ever-more draconian dispute resolution clauses inserted in standard-form contracts against all sorts of legal and policy-based challenges").

[21] The *Discover Bank* court explained the rule as follows:

> [W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve

and applied to class action waivers in arbitration as well as litigation.

The Concepcions had responded to an advertisement by AT & T for a free phone, and had entered into an agreement for the sale and servicing of the phone. When they were billed $30.22 in sales tax based upon the phone's retail value, they attempted to sue AT & T in federal court. *Concepcion*, 563 U.S. at 336-37, 131 S.Ct. 1740. Their action later was consolidated with a putative class action alleging that AT & T had engaged in false advertising and fraud. *Id.* at 337, 131 S.Ct. 1740. However, the Concepcions and other members of the class were met with AT & T's attempt to compel arbitration under the contract. *Id.* The Concepcions opposed the motion, arguing that the arbitration agreement was unconscionable and unlawful under the *Discover Bank* Rule because it disallowed class actions. *Id.* at 338, 131 S.Ct. 1740. The district court denied

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> small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

30 Cal.Rptr.3d 76, 113 P.3d at 1110.

AT & T's motion, and the Ninth Circuit Court of Appeals affirmed pursuant to the *Discover Bank* Rule, which it held was not preempted by the FAA. *Id.*

In a 5-4 decision authored by the late Justice Antonin Scalia, the United States Supreme Court reversed. The Court held that the FAA's savings clause did not protect the *Discover Bank* Rule from preemption. According to the Court, "[w]hen 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*, 563 U.S. at 341, 131 S.Ct. 1740 (citing *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008)). The inquiry is more complex, however, when a generally applicable doctrine, such as unconscionability, is alleged to have been applied in a manner hostile to arbitration. *Id.* The Supreme Court reiterated that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot." *Id.* at 341, 131 S.Ct. 1740 (citing *Perry*, 482 U.S. at 493 n.9, 107 S.Ct. 2520). Although the FAA, through Section 2's savings clause, preserves generally applicable contract defenses, the Court held that it did not suggest "an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343, 131 S.Ct. 1740. In this respect, the Court held that the *Discover Bank* Rule, by requiring the availability of class-wide arbitration,

interfered with the "fundamental attributes of arbitration" and therefore was "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FAA. *Id.* at 344, 352, 131 S.Ct. 1740.

The Supreme Court defined the "fundamental attributes of arbitration" as "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Concepcion*, 563 U.S. at 348, 131 S.Ct. 1740. The Court further defined the "overarching purpose" of the FAA as twofold: to ensure "the enforcement of arbitration agreements according to their terms," and "to facilitate streamlined proceedings." *Id.* at 344, 131 S.Ct. 1740. In *Concepcion*, the majority found that these two goals did not conflict. *Id.* at 345, 131 S.Ct. 1740. Acknowledging that the state rule was arbitration-neutral, the Court focused upon the rule's practical effect rather than its text. The rule's application, according to the Court, interfered with the fundamental attributes of arbitration, and thus was preempted. *Id.* at 344, 131 S.Ct. 1740. In reaching this conclusion, the majority rejected the argument that class-arbitration waivers shield corporations from numerous, low-value claims, which can either be brought as a class action or not at all, explaining that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 351, 131 S.Ct. 1740.

Justice Clarence Thomas concurred, providing the fifth vote for the Supreme Court's preemption holding,

based not upon the purposes and objectives of the FAA, but upon a textual analysis of the statute.[22] In Justice Thomas's opinion, the savings clause, by referring to "revocation," suggested that it applied only to defenses that relate to the formation of the contract, rather than to general contract defenses. *Concepcion*, 563 U.S. at 354, 131 S.Ct. 1740 (Thomas, J., concurring). For Justice Thomas, the only question presented in *Concepcion* was whether the *Discover Bank* Rule pertained to the making of a contract. *Id.* at 356, 131 S.Ct. 1740. Because the *Discover Bank* Rule was premised upon public policy, rather than a defense related to contract formation, Justice Thomas did not believe it was a ground for revocation under Section 2's savings clause. *Id.* at 356-57, 131 S.Ct. 1740.

*Concepcion* is relevant to our analysis not only because it limited application of state law under the savings clause, but also because it defined the "overarching purpose" of the FAA as twofold: to ensure the

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[22] Justice Thomas explained that although he preferred to engage in a textual analysis of the savings clause, the parties did not develop arguments along those lines. He therefore joined the Majority opinion, but took the opportunity to explain his preferred approach. Moreover, any suggestion that *Concepcion* resulted in a plurality decision was put to rest in *DIRECTV, Inc. v. Imburgia*, ___ U.S. ___, 136 S.Ct. 463, 468, 193 L.Ed.2d 365 (2015), in which the Supreme Court, in a clear majority, applied *Concepcion* to set aside a California court's refusal to enforce an arbitration agreement. Although the Court acknowledged that *Concepcion* was "a closely divided case," it held that the states were obligated to apply it. *DIRECTV*, 136 S.Ct. at 468 ("The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.").

enforcement of arbitration agreements according to their terms, and to facilitate streamlined proceedings. Although the Court held that the arbitration agreements at issue in *Concepcion* could be enforced according to their terms, and that doing so would facilitate streamlined proceedings, when these two purposes conflict, the Court has mandated that enforcement trumps efficiency.

In *Moses H. Cone*, for example, the hospital plaintiff in a state court proceeding, who resisted arbitration, filed claims against two defendants. 460 U.S. at 5, 103 S.Ct. 927. The claims against one defendant, Mercury, were subject to an arbitration agreement. *Id.* Before the Supreme Court, the plaintiff argued that if it was forced to arbitrate its claims against Mercury, it would be forced to resolve its related disputes in separate forums. *Id.* at 19-20, 103 S.Ct. 927. The Court did not share the plaintiff's concern for avoiding piecemeal resolution of its claims:

> That misfortune . . . occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement. Under the [FAA], an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement. If the dispute between Mercury and the Hospital is arbitrable under the Act, then the Hospital's two disputes will be resolved separately – one in arbitration, and the other (if at all) in state-court litigation.

*Id.* at 20, 103 S.Ct. 927.

Similarly, in *Dean Witter*, 470 U.S. 213, 105 S.Ct. 1238, the Court examined how to proceed in a lawsuit against a single defendant in which the plaintiff raised a non-arbitrable federal claim (premised upon federal securities law) and a pendent, arbitrable state law claim. The lower court had observed that the denial of arbitration is justified when the facts supporting all of the claims are intertwined, because arbitration could produce results that would bind the judicial forum through issue preclusion. *Byrd v. Dean Witter Reynolds, Inc.*, 726 F.2d 552, 554 (9th Cir. 1984). The Supreme Court reversed, holding that, under such circumstances, upon the motion of one of the parties, the FAA requires district courts to compel arbitration of the arbitrable claims, "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter*, 470 U.S. at 217, 105 S.Ct. 1238. Examining the mandatory language of Section 2 of the FAA, the Court found that the district court had no discretion not to compel arbitration of an arbitrable claim. *Id.* at 218, 105 S.Ct. 1238 (quoting 9 U.S.C. § 2 (providing that arbitration agreements "shall be valid, irrevocable, and enforceable")). The Court further rejected the efficiency argument that, by declining to compel arbitration, "the court avoids bifurcated proceedings and perhaps redundant efforts to litigate the same factual questions twice." *Id.* at 217, 105 S.Ct. 1238. Rather, the Court expressly elevated Congress' intent to enforce arbitration agreements over any concern it bore for efficiency, and held that any conflict between the FAA's two goals must be resolved in favor of enforcement. *Id.* at 221, 105 S.Ct.

1238 ("The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute.").

Subsequently, in *KPMG*, 132 S.Ct. 23, nineteen plaintiffs sued three defendants, raising, *inter alia*, five claims against KPMG, two of which were subject to an arbitration agreement. The state trial court refused to compel arbitration of any of the claims, and the state appellate court affirmed. *Id.* at 24. In a brief *per curiam* opinion, the Supreme Court summarily reversed. Relying upon *Dean Witter*, the Court held that state courts must "examine with care" complaints seeking to invoke their jurisdiction to sever arbitrable from non-arbitrable claims, and "may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration." *Id.*[23]

Collectively, *Moses H. Cone*, *Dean Witter* and *KPMG* instruct that the prospect of inefficient, piecemeal litigation proceeding in separate forums is no impediment

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[23] *See also Nationwide Mut. Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 308 (3d Cir. 2009) (recognizing that arbitration agreements must be enforced notwithstanding the presence of persons who are parties to the underlying dispute, but not to the arbitration agreement, and explaining that "the FAA has a policy in favor of [piecemeal litigation], at least to the extent necessary to preserve arbitration rights").

to the arbitration of arbitrable claims. Indeed, where a plaintiff has multiple disputes with separate defendants arising from the same incident, and only one of those claims is subject to an arbitration agreement, the Court requires, as a matter of law, adjudication in separate forums.

Moreover, while state courts have attempted to reconcile their state law contract defenses and public policy protections with the preemptive effect of the FAA, *see*, *e.g.*, *Concepcion*, 563 U.S. at 342, 131 S.Ct. 1740 (recognizing that "the judicial hostility toward[] arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy"), the United States Supreme Court has endeavored to compel judicial acceptance of private agreements to arbitrate.[24] The FAA is now perceived as applying to almost every arbitration agreement, although the savings clause envisions a limited role for state law. In this respect, arbitration has come a long way from its origin as a mutually agreed-upon method of dispute resolution by two business entities of equal bargaining power, and now is employed in a variety of contracts, many of which are contracts of adhesion.[25] As arbitration

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[24] *See* Hayford, *A Sea Change*, 31 Wake Forest L. Rev. at 36 ("The contemporary Supreme Court is intolerant of legal maneuvers and other machinations, whatever their origin, intended to avoid the arbitration bargain or delay the commercial arbitration process.").

[25] "Frequently, one cannot purchase a car, apply for a credit card, open a checking or savings account in a bank, purchase stock on a major stock exchange, or take a cruise trip on a major cruise

clauses proliferate, individuals will ever more broadly exchange their right to a jury trial for basic consumer products or nursing home care.

One of the striking consequences of the shift away from the civil justice system and toward private adjudication is that corporations are routinely stripping individuals of their constitutional right to a jury trial. *See* U.S. Const. amend. VII (preserving the right to a trial by jury); Pa. Const. art. 1, § 6 (same). While one's right to a jury trial may be waived, it is not at all apparent that signatories to arbitration agreements are aware that they waive their right to a jury trial upon the execution of an arbitration agreement.[26]

The West Virginia Supreme Court of Appeals highlighted this constitutional concern in *Brown et al. v. Marmet Health Care Ctr. et al.*, 228 W.Va. 646, 724 S.E.2d 250 (2011). Relying in part upon the state constitution's provision of the right to a jury trial, W. Va.

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line without having to accept a non-negotiable contract that contains an arbitration clause mandating the arbitration of any and all disputes arising out of that contract." Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and A Proposal for Change*, 53 Ala. L. Rev. 789, 791 (2002); *see* Myriam Gilles, *Operation Arbitration: Privatizing Medical Malpractice Claims*, 15 Theoretical Inquiries L. 671, 678 (2014). Indeed, as Justice Scalia observed in *Concepcion*, "the times in which consumer contracts were anything other than adhesive are long past." *Concepcion*, 563 U.S. at 346, 131 S.Ct. 1740.

[26] *See*, *e.g.*, Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 Cal. L. Rev. 1203, 1208 (2002).

Const. art. III, § 13, the West Virginia court criticized the Supreme Court's decisions granting the FAA sweeping preemptive effect. *Brown*, 724 S.E.2d at 278 ("With tendentious reasoning, the United States Supreme Court has stretched the application of the FAA from being a procedural statutory scheme effective only in the federal courts, to being a substantive law that preempts state law in both the federal and state courts."). Based upon its belief that Congress did not intend for all arbitration agreements to be governed by the FAA, the state court held that the FAA did not apply to predispute agreements to arbitrate negligence claims in nursing home contracts. *Id.* at 291-92 ("[A]s a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in personal injury or death, shall not be enforced to compel arbitration of a dispute concerning the negligence.").

On appeal, the Supreme Court was unsympathetic to the state court's concern for the right to a jury trial. In a cursory *per curiam* opinion, the Supreme Court reversed, and chastised the West Virginia court for "misreading and disregarding the precedents of this Court interpreting the FAA." *Marmet*, 132 S.Ct. at 1202. The Court held that the state's public policy rationale constituted "a categorical rule prohibiting arbitration of a particular type of claim," which the Court held was "contrary to the terms and coverage of the FAA" and, therefore, preempted. *Id.* at 1204; *see Nitro-Lift Tech., L.L.C. v. Howard*, ___ U.S. ___, 133 S.Ct. 500,

501, 184 L.Ed.2d 328 (2012) (*per curiam*) (invalidating a state law that required the validity of non-compete provisions in employment contracts to be resolved judicially).[27]

With this Supreme Court jurisprudence in mind, and solicitous of our obligation to consider questions of arbitrability with a "healthy regard for the federal policy favoring arbitration," *Moses H. Cone*, 460 U.S. at 20, 103 S.Ct. 927, we observe that Section 2 of the FAA binds state courts to compel arbitration of claims subject to an arbitration agreement. 9 U.S.C. § 2 (providing that arbitration agreements "shall be valid, irrevocable, and enforceable"). This directive is mandatory, requiring parties to proceed to arbitration on issues subject to a valid arbitration agreement, even if a state law would otherwise exclude it from arbitration. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995).

The only exception to a state's obligation to enforce an arbitration agreement is provided by the savings clause, which permits the application of generally applicable state contract law defenses such as fraud, duress, or unconscionability, to determine whether a valid contract exists. *Casarotto*, 517 U.S. at 687, 116

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[27] Interestingly, upon remand from the Supreme Court, the West Virginia Supreme Court of Appeals again declared that the arbitration agreements at issue could be invalid, this time based upon common-law grounds of unconscionability, and remanded for the development of a record to assess these common-law arguments. *Brown et al. v. Marmet Health Care Ctr. et al.*, 229 W.Va. 382, 729 S.E.2d 217, 223 (2012).

S.Ct. 1652; *Volt*, 489 U.S. at 476, 109 S.Ct. 1248; *Perry*, 482 U.S. at 492 n.9, 107 S.Ct. 2520.[28] Pursuant to the savings clause, the compulsory joinder mandate of Rule 213(e) could bar the trial court from bifurcating the Taylors' arbitrable survival action from its pending litigation in state court only if it qualifies as a generally applicable contract defense. Rule 213(e), however, is not a substantive defense, but a procedural mechanism to effectuate the state's interest in the efficient resolution of wrongful death and survival actions in one judicial forum. Thus, it does not fall within the savings clause.

Moreover, even if Rule 213(e) was a generally applicable contract defense, it would fail the test established in *Concepcion*. There, the Supreme Court instructed that although the savings clause may save a state law from FAA preemption, it will not do so when a state law prohibits outright the arbitration of a particular type of claim, when a generally applicable contract defense is applied in a manner hostile to arbitration, or when the state rule stands as an obstacle to the accomplishment of the FAA's objectives. *Concepcion*, 563 U.S. at 341-43, 131 S.Ct. 1740.

As noted, the FAA's objectives are to ensure the enforcement of arbitration agreements and facilitate

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[28] The Supreme Court's case law, though, provides little guidance as to what state laws might survive a preemption challenge, because it consistently has held that the FAA preempts state law. *See Concepcion*, 563 U.S. at 344, 131 S.Ct. 1740; *Doctor's Assocs.*, 517 U.S. at 688, 116 S.Ct. 1652; *Perry*, 482 U.S. at 491-92, 107 S.Ct. 2520; and *Southland*, 465 U.S. at 10, 104 S.Ct. 852.

streamlined proceedings. Arbitration of a single claim under the facts presented herein, with multiple plaintiffs and defendants and several causes of action remaining in state court, likely will not lower costs or enhance efficiency. Therefore, the scenario that we are addressing arguably presents a conflict between the two objectives of the FAA, where enforcing the ADR Agreement between Decedent and Extendicare will satisfy the enforcement objective at the expense of efficiency. Under such circumstances, we are bound by the Supreme Court's directive to favor enforcement over efficiency. *See Moses H. Cone*, 460 U.S. at 20, 103 S.Ct. 927; *Dean Witter*, 470 U.S. at 217, 105 S.Ct. 1238; *KPMG*, 132 S.Ct. at 24. The Supreme Court has made clear that bifurcation and piecemeal litigation is the tribute that must be paid to Congressional intent. *Dean Witter*, 470 U.S. at 217, 105 S.Ct. 1238.

In reaching this conclusion, we focus upon the application of Rule 213(e) in practice rather than upon its text or its purpose. *See Concepcion*, 563 U.S. at 344, 131 S.Ct. 1740. Whether one characterizes Rule 213(e) as a contract defense or as an arbitration-neutral procedural rule, it was applied in this case to defeat arbitration of the survival claim that Extendicare and Decedent (through her legal representative) agreed to submit to arbitration. Like the *Discover Bank* Rule that the Supreme Court held was preempted in *Concepcion*, the application of Rule 213(e) herein "stands as an obstacle" to achieving the objectives of Congress in enacting the FAA, as interpreted by the Supreme Court. *Concepcion*, 563 U.S. at 352, 131 S.Ct. 1740.

Thus, as applied herein, Rule 213(e) conflicts with the FAA, and is preempted.

We recognize that Rule 213(e) is a procedural mechanism to control case flow, and does not substantively target arbitration. However, the Supreme Court directed in *Concepcion* that state courts may not rely upon principles of general law when reviewing an arbitration agreement if that law undermines the enforcement of arbitration agreements. We cannot require a procedure that defeats an otherwise valid arbitration agreement, contrary to the FAA, even if it is desirable for the arbitration-neutral goal of judicial efficiency. *See Concepcion*, 563 U.S. at 351, 131 S.Ct. 1740 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). Declining to bifurcate the wrongful death and survival actions against Extendicare in the interest of efficiency would nullify the ADR Agreement, a result not permitted by the Supreme Court's FAA jurisprudence.[29]

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[29] The dissent speculates that we have interpreted the FAA to divest wrongful death beneficiaries of their statutorily created right to bring a claim in this Commonwealth. The dissent asserts that, under our analysis, a wrongful death action based upon facts which also led to an arbitrable survival action cannot be maintained in court because the wrongful death beneficiaries will not be able to establish that "any prior actions for the same injuries are consolidated with the wrongful death claim so as to avoid a duplicate recovery." Dissenting Opinion at 514(quoting 42 Pa.C.S. § 8301(a)). This novel interpretation of Subsection 8301(a) has not been advanced by the parties in this case, is beyond the scope of our grant of review, and is not before us.

Moreover, we differ with the dissent's reading of Subsection 8301(a). First, once there is a valid arbitration agreement, the claims that are encompassed within that agreement are transferred to a private arbitration forum for deliberation, and no longer are pending in court. There is, therefore, no legal action for the plaintiff to consolidate with the wrongful death claim. Second, once an issue has been referred to arbitration, any judicial proceeding involving that issue is stayed pending the outcome of arbitration. 42 Pa.C.S. § 7304(d). Therefore, the survival claim arbitration will be resolved before the wrongful death action can proceed in the court of common pleas. Thus, the court hearing the wrongful death action may account for any damages awarded in the survival arbitration and "avoid duplicate recovery" as required by Subsection 8301(a). Nothing in this opinion suggests a willingness to countenance duplicative damages. Finally, although the dissent, unlike the parties, has focused upon the Wrongful Death Act rather than Rule 213(e), our preemption analysis herein applies equally to the consolidation requirement of the Wrongful Death Act.

The dissent's interpretation of Subsection 8301(a) to bar the arbitration of a claim subject to a valid arbitration agreement is precisely the sort of obstacle to the accomplishment of the FAA's objectives that the United States Supreme Court has repeatedly rejected. In the face of this controlling authority, the dissent would nonetheless permit a party to avoid a contractual agreement to arbitrate a survival action by adding a wrongful death claim under Subsection 8301(a). The dissent's novel jurisprudence would allow state legislatures to invalidate or nullify federal law simply by including a requirement that is inconsistent with arbitration as an element of a statutory cause of action by, for example, requiring all related issues to be filed in the court of common pleas. The Supreme Court of the United States repeatedly has struck down attempts by state courts to relieve parties of their obligation to

In its decision that Rule 213(e) barred bifurcation, the Superior Court expressed concern for the wrongful death beneficiaries' constitutional right to a jury trial. We share the Superior Court's concern, which appears to derive from the potential preclusive effect of arbitration upon the wrongful death beneficiaries in the judicial proceedings, through application of the doctrine of collateral estoppel.[30] However, the preclusive effect of an arbitration award upon judicial proceedings is not presently before this Court. Moreover, although the appellate courts of the Commonwealth have held that "a judicially confirmed private arbitration award will

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> arbitrate by relying upon state substantive and procedural laws. We need not like this result. It is what the Supremacy Clause commands.

[30] As we have explained, collateral estoppel, or issue preclusion, "forecloses re-litigation in a later action, of an issue of fact or law which was actually litigated and which was necessary to the original judgment." *Hebden v. W.C.A.B. (Bethenergy Mines, Inc.)*, 534 Pa. 327, 632 A.2d 1302, 1304 (1993) (quoting *City of Pittsburgh v. Zoning Bd. of Adjustment of Pittsburgh*, 522 Pa. 44, 559 A.2d 896, 901 (1989)). Collateral estoppel will preclude relitigation of an issue determined in a previous action if five criteria are met:

> (1) the issue decided in the prior case is identical to the one presented in the later action; (2) there was a final adjudication on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment.

*Office of Disciplinary Counsel v. Kiesewetter*, 585 Pa. 477, 889 A.2d 47, 50-51 (2005).

have collateral estoppel effect, even in favor of non-parties to the arbitration, if the arbitrator actually and necessarily decided the issue sought to be foreclosed and the party against whom estoppel is invoked had full incentive and opportunity to litigate the matter," *Frog, Switch & Mfg. Co. v. Pa. Human Relations Comm'n*, 885 A.2d 655, 661 (Pa. Cmwlth. 2005),[31] we have not addressed this question. Notably, when the United States Supreme Court considered whether courts should resolve arbitrable pendent claims when a non-arbitrable claim is before it, in order to avoid the possible collateral estoppel effect of the arbitration proceeding in a subsequent court proceeding, the Court acknowledged that the preclusive effect of arbitration proceedings in such circumstances was not well-settled. *Dean Witter*, 470 U.S. at 222, 105 S.Ct. 1238 (observing that "[t]he full-faith-and-credit statute requires that federal courts give the same preclusive effect to a State's judicial proceedings as would the courts of the State rendering the judgment, and since arbitration is not a judicial proceeding, . . . the statute does not apply to arbitration awards"); *see McDonald v. W. Branch*, 466 U.S. 284, 287-88, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984) (refusing to accord an arbitration ruling collateral estoppel effect because "arbitral fact-finding is generally not equivalent to judicial factfinding"); *Barrentine v. Ark.-Best Freight Sys.*, 450 U.S. 728,

[31] *See also Dyer v. Travelers*, 392 Pa.Super. 202, 572 A.2d 762, 764 (1990); *Ottaviano v. Southeastern Pa. Trans. Auth.*, 239 Pa.Super. 363, 361 A.2d 810, 814 (1976).

101 S.Ct. 1437, 67 L.Ed.2d 641 (1981). Thus, the preclusive effect of arbitration in judicial proceedings is uncertain.[32]

We sympathize with the position of the AARP as *amicus curiae* in support of the Taylors that "[t]he prevalence of abuse and neglect in nursing facilities . . . make[s] it imperative that victims and their families have fair access to complementary remedial measures available through the civil justice system-particularly when the bad conduct results in the suffering and death of a vulnerable person." *Amicus Curiae* Brief of AARP at 4; *id.* at 7 (detailing the evidence of significant levels of abuse and neglect in nursing home facilities). As AARP observes, the contract formation process that attends nursing facility admission can be a crisis-driven, stress-laden event involving the superior bargaining power of one party over the other. *Id.* at 14-15. Indeed, nursing home defendants

[32] One academic has observed that special problems arise when arbitral collateral estoppel is applied in cases involving nonarbitrable claims. G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. Rev. 623, 655 (1988) ("Even if all the requisites of collateral estoppel are met in such cases, there still remains the question of whether the findings of arbitrators ought to have preclusive, perhaps dispositive, effects on a nonarbitrable claim, *i.e.*, a claim that the arbitrators are not permitted to hear."). Professor Shell opines that the differences between arbitration and court litigation make the rationales for applying judicial preclusion inapplicable to arbitral preclusion, particularly because of the differences in the social and institutional interests implicated, the relative modes of fact-finding utilized in each forum, and because arbitration awards are frequently unexplained and difficult to interpret. *Id.* at 659-60.

have reaped significant benefits from channeling medical malpractice claims into arbitration to the detriment of medical malpractice victims.[33] We cannot, however, disregard or defy controlling precedent from the United States Supreme Court in order to redress these inequities and deficiencies. *DIRECTV, Inc. v. Imburgia*, ___ U.S. ___, 136 S.Ct. 463, 468, 193 L.Ed.2d 365 (2015) (observing that the "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source"); *Marmet*, 132 S.Ct. at 1202 (chastising the state court for misreading and disregarding controlling federal authority).

To the extent the Taylors have presented generally applicable contract defenses to this Court, we decline to address them at this juncture. Because of the trial court's decision not to bifurcate the Taylors' claims, and Extendicare's immediate appeal of that issue, the Taylors have not had the opportunity to present these issues in the lower courts. Nor has Extendicare had the opportunity to respond to them. Moreover, we did not grant allowance of appeal to resolve them. Upon remand to the trial court, the parties will have the opportunity to litigate whether there is a valid and enforceable arbitration contract in accord with generally

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[33] *See*, *e.g.*, Myriam Gilles, *Operation Arbitration: Privatizing Medical Malpractice Claims*, 15 Theoretical Inquiries L. 671, 673-74 (2014) (examining studies to conclude that long-term-care facilities generally fare better in arbitration than in litigation).

applicable contract defenses and the FAA's savings clause.

Accordingly, we reverse the Superior Court's order affirming the trial court, and remand to the trial court for the resolution of the Taylors' outstanding issues. Jurisdiction relinquished.

Chief Justice Saylor and Justices Baer and Dougherty join the opinion.

Chief Justice Saylor files a concurring opinion in which Justice Baer joins.

Justice Donohue files a dissenting opinion in which Justice Todd joins.

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CHIEF JUSTICE SAYLOR, CONCURRING

I join the majority's holding and analysis, although I do not fully support some of the collateral descriptions suggestive of social policy judgments.

Justice Baer joins this concurring opinion.

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JUSTICE DONOHUE, DISSENTING

I respectfully dissent from the Majority's conclusion that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, mandates the severance of the wrongful death action in this case from the survival action so as to allow the latter to proceed to arbitration. For the reasons

that follow, I conclude that it is incorrect to focus the analysis on the dispensability of Pennsylvania Rule of Civil Procedure 213(e) under the pressure of the herculean FAA. Instead, the pinpoint question is whether the FAA can divest wrongful death heirs of their statutorily created right to bring a wrongful death action in this Commonwealth. Because 42 Pa.C.S.A. § 8301 (the "Wrongful Death Act") preconditions the maintenance of heirs' claims on their joinder with any claim pursuant to 42 Pa.C.S.A. § 8302 (the "Survival Act"), severance defeats the heirs' right to recover under the statutorily created cause of action. Although the Majority may be correct in its apocalyptic recitation of existing United States Supreme Court precedent, the FAA does not and cannot deprive a citizen of this Commonwealth of the right to pursue a cause of action.

If no recovery for personal injuries is obtained by an injured person during her life, Pennsylvania law allows for the bringing of two distinct actions after her death. The Pennsylvania legislature created the first of these actions by enacting what is now 42 Pa.C.S.A. § 8301, authorizing certain enumerated relatives of a person killed by another's negligence to sue for damages. *Tulewicz v. Se. Pa. Transp. Auth.*, 529 Pa. 588, 606 A.2d 427, 431 (1992) (explaining that a wrongful death action was unknown at common law); *see* 42 Pa.C.S.A. § 8301.[1] The second of these actions "merely continues

[1] Section 8301 provides, in relevant part:

(a) General rule – An action may be brought, under procedures prescribed by general rules, to recover damages for the death of an individual caused by the

in the [decedent's] personal representative the right of action which accrued to the deceased at common law because of the tort." *Tulewicz*, 606 A.2d at 431; *see* 42 Pa.C.S.A. § 8302. In the case of the Wrongful Death Act, the current statute requires, in pertinent part, that the action be brought (1) "under procedures prescribed by general rules" and (2) only so long as "any prior actions for the same injuries are consolidated with the wrongful death claim so as to avoid a duplicate recovery." *See* 42 Pa.C.S.A. § 8301.

Wrongful Death Act damages are measured by "the pecuniary loss [the statutory relatives] have sustained as a result of the death of the decedent" and include "the present value of the services the deceased would have rendered to the family, had she lived, as well as funeral and medical expenses." *Kiser v. Schulte*, 538 Pa. 219, 648 A.2d 1, 4 (1994). Survival Act damages are measured by the pecuniary loss sustained by the decedent, and therefore by her estate, as a result of the negligent act that caused her death. *Id.* They also include the decedent's pain and suffering prior to death.

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> wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime and any prior actions for the same injuries are consolidated with the wrongful death claim so as to avoid duplicate recovery.

42 Pa.C.S.A. § 8301. The Editors' Notes provide that Section 8301 is "substantially a reenactment of act of April 15, 1851 (P.L. 669), § 19 (12 P.S. § 1601), act of April 26, 1855 (P.L. 309), § 1 (12 P.S. § 1602) and act of May 13, 1927 (P.L. 992) (No. 480), § 1 (12 P.S. § 1604)."

*Id.* The potential for overlapping damages is obvious. In a foundational case involving a Wrongful Death Act claim and a Survival Act claim which had been consolidated and tried together, this Court emphasized that while "there is nothing novel or unusual in the law giving a right or redress to two or more persons for the infliction of a single personal injury," it is imperative that the two actions not "result in a duplication of damages." *See Pezzulli v. D'Ambrosia*, 344 Pa. 643, 26 A.2d 659, 661 (1942).

Indeed, in *Pezzulli*, we recognized that "there is an important limitation on the right" to bring a wrongful death action, "namely, that it must not work a duplication of damages" where a survival action is also brought. *Id.* at 662. We determined that "whenever [these] two actions are brought . . . they must be consolidated and tried together." *Id.* Accordingly, we directed the promulgation of Pennsylvania Rule of Civil Procedure 213(e)[2] which reiterates and implements

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[2] Pa.R.C.P. 213 provides:

(e) A cause of action for the wrongful death of a decedent and a cause of action for the injuries of the decedent which survives his or her death may be enforced in one action, but if independent actions are commenced they shall be consolidated for trial.

(1) If independent actions are commenced or are pending in the same court, the court, on its own motion or the motion of any party, shall order the actions consolidated for trial.

(2) If independent actions are commenced in different courts, the court in which the second action was commenced, on its own motion or the motion of any party,

the aforementioned requirement, pursuant to *Pezzulli* and apparent on the face of the current Wrongful Death Act, that "if independent wrongful death and survival actions are commenced, they **must** be consolidated for trial." *Tulewicz*, 606 A.2d at 431 (emphasis in original); *Pezzulli v. D'Ambrosia*, 26 A.2d at 662. As Appellees argue, "the mandatory consolidation and joint trial of wrongful death and survival actions in Pennsylvania has not only been an unshakeable procedural rule for the better part of a century," but is also a requirement of the cause of action codified at Section 8301. *See* Appellees' Brief at 33.[3] It is incorrect to label

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> shall order the action transferred to the court in which the first action was commenced.
>
> (3) If an action is commenced to enforce one cause of action, the court, on its own motion or the motion of any party, may stay the action until an action is commenced to enforce the other cause of action and is consolidated therewith or until the commencement of such second action is barred by the applicable statute of limitation.

Pa.R.C.P. 213 (amended on October 1, 1942, just six months after our decision in *Pezzulli*, to add paragraph (e)).

This Court's power to promulgate rules of procedure is derived from Article V, Section 10 of the Pennsylvania Constitution which provides, in relevant part, that "the Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose." Pa. Const. art. V, § 10.

[3] The Majority states that both parties "have, at this juncture, confined their arguments solely to the application of Rule

the consolidation requirement embedded in the Wrongful Death Act (as implemented in Rule 213(e)) as a procedure to promote judicial efficiency. The mandate is a substantive requirement imposed by the legislature to prevent a duplication of damages as a result of the statutorily created cause of action.

As a general and indisputable proposition, in order to maintain a cause of action, a plaintiff must comply with the dictates of the statute setting forth his right to sue. *Cf. Frazier v. Oil Chem. Co.*, 407 Pa. 78, 179 A.2d 202, 204-05 (1962) (acknowledging that the right to sue under the Wrongful Death Act is cabined by the terms granted by the legislature, because no such right existed at common law); *accord Rich v. Keyser*, 54 Pa. 86, 90 (1867) (explaining that for a landlord "to obtain the statutory remedy [of possession], performance of the statutory conditions is necessary, and hence the three months' notice. And as it is a necessity that grows out of the statute it must be regulated by the very terms of the statute"). Yet in holding that the FAA preempts Rule 213(e) – because the Rule "was applied in this

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213(e)." Majority Op. at 500 n. 11. This is incorrect. As noted, supra, Appellees explicitly posit that both Rule 213(e) and the Wrongful Death Act require consolidation and argue that the Superior Court's decision, which also discussed both the rule and the statute, does not offend the Federal Arbitration Act. See Appellees' Brief at 18, 33. As Appellees point out, only Appellants have confined their arguments solely to the application of Rule 213(e): "despite the Superior Court's reliance upon both procedural and statutory law, [Appellants] completely ignore the Wrongful Death Act's application to this case. *See Taylor v. Extendicare Health Facilities, Inc.*, 113 A.3d 317, 322 (Pa. Super. 2015). Accordingly, they have waived any argument regarding the same." *Id.* at n. 26.

case to defeat arbitration of the survival claim" and therefore "stands as an obstacle to achieving the objectives of Congress in enacting the FAA, as interpreted by the United States Supreme Court" – the Majority makes it impossible for the wrongful death beneficiaries to comply with a core statutory condition, i.e. the consolidation requirement, and effectively deprives them of their cause of action. *See* 42 Pa.C.S.A. § 8301; *Tulewicz*, 606 A.2d at 431; *Pezzulli*, 26 A.2d at 662. This result is absurd.

I do not dispute that United States Supreme Court precedent mandates FAA preemption with respect to "state substantive or procedural policies" that disfavor arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). And I do not dispute that the FAA preempts "state laws which require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," *see Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984)), or which stand as an obstacle to the accomplishment of the FAA's objectives. *See AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 343, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (holding that FAA preempted California's common law unconscionability rule). But Rule 213(e) does none of these things. To the extent it is procedural at all, *see* Majority Op. at 500, 510, Rule 213(e) is procedural in name only. In substance, it is a surrogate for the

Wrongful Death Act, a cause of action through which the legislature chose to vest a legal right in certain statutory relatives to bring suit, but only so long as their action is consolidated with any survival action that has also been initiated. *See* 42 Pa.C.S.A. § 8301; *see also Pezzulli*, 26 A.2d at 662.

To my knowledge, the United States Supreme Court has never concluded that the FAA is powerful enough to deprive a state court plaintiff of the substantive right to bring a statutory cause of action, nor would it. To the contrary, the Supreme Court has repeatedly recognized that a statutory cause of action is a property right protected by the Due Process Clause.[4] *See, e.g.*, *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 209, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) (reading a Federal Rule of Civil Procedure in light of the "property" protections of the Due Process Clause and concluding that there are "constitutional limitations upon the power of courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause"); *Martinez v. State of Cal.*, 444 U.S.

[4] The Due Process Clause, found in the Fifth and Fourteenth Amendments of the United States Constitution, establishes that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." See 10 U.S. Const. amend. V; *see id.* amend. XIV, § 1 ("[N]o state shall . . . deprive any person of life, liberty, or property, without due process of law."). The Pennsylvania Constitution additionally provides that "[a]ll courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Pa. Const. art. I, § 11.

277, 281-82, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980) (acknowledging the likelihood that a state's statutorily created cause of action for wrongful death is a constitutionally protected "species of 'property' "); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (recognizing that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause"); *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 485, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) (noting, in reference to a cause of action for an unpaid bill, that "[l]ittle doubt remains that such an intangible interest is property protected by the Fourteenth Amendment"). Accordingly, I would hold that the FAA does not, indeed cannot, preempt Rule 213(e). The Majority's conclusion to the contrary amounts to an unconstitutional deprivation of the wrongful death beneficiaries' property rights.

In addition, it bears noting that the law is clear that when a party agrees to arbitrate a statutory claim, it "does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum." *Preston v. Ferrer*, 552 U.S. 346, 359, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). The Majority, in an overzealous effort to give the FAA its due force, instead produces this patently improper outcome, i.e., that the wrongful death beneficiaries, who did not agree to arbitrate at all, are themselves forced to forgo a substantive right, because, absent joinder with the survival action, their claim for wrongful death cannot be maintained.

Finally, in the alternative, I would conclude that even if Rule 213(e) is preempted, bifurcation of the Wrongful Death Act claims and the Survival Act claims is unwarranted. Absent Rule 213(e), the Wrongful Death Act's consolidation requirement would remain intact on the face of Section 8301. As there is simply no support in the FAA preemption cases to conclude that the federal policy favoring arbitration agreements can supplant a statutory cause of action, consolidation of the claims in a single judicial proceeding should nonetheless be ordered.

I respectfully dissent.

Justice Todd joins this dissenting opinion.

113 A.3d 317
Superior Court of Pennsylvania.

Daniel E. TAYLOR and William Taylor,
as Co-Executors of the Estate of
Anna Marie Taylor, Deceased, Appellees

v.

EXTENDICARE HEALTH FACILITIES, INC. d/b/a Havencrest Nursing Center; Extendicare Holdings, Inc.; Extendicare Health Facility Holdings, Inc., Extendicare Health Services, Inc., Extendicare Reit; Extendicare, L.P.; Extendicare, Inc., Mon-Vale Non Acute Care Service, Inc. d/b/a The Residence at Hilltop; Mon-Vale Health Resources, Inc.; Jefferson Health Services, d/b/a Jefferson Regional Medical Center, Appeal of Extendicare Health Facilities, Inc., d/b/a Havencrest Nursing Center, Extendicare Holdings, Inc., Extendicare Health Facility Holdings, Inc., Extendicare Health Services, Inc., Extendicare Reit, Extendicare, L.P. and Extendicare, Inc.

Argued Dec. 9, 2014.
|
Filed April 2, 2015.

**Attorneys and Law Firms**

Mark J. Golen, II, Pittsburgh, for appellants.

Stephen Trzcinski, Philadelphia, for appellees.

BEFORE: BENDER, P.J.E., BOWES, and ALLEN, JJ.

**Opinion**

OPINION BY BOWES, J.:

Extendicare Health Facilities, Inc., d/b/a Havencrest Nursing Center, together with the other Extendicare entities (collectively "Extendicare"), appeals from the November 20, 2013 order overruling preliminary objections in the nature of a motion to compel arbitration of Co-Executors' wrongful death and survival claims.[1] After thorough review, we affirm.

The underlying case involves negligence claims against Extendicare, Mon-Vale Non-Acute Care Service, Inc. d/b/a The Residence at Hilltop ("The Residence"), and Jefferson Health Services d/b/a Jefferson Regional Medical Center ("Jefferson Medical Center"), for injuries culminating in the April 3, 2012 death of Co-Executors' decedent, Anna Marie Taylor ("Decedent"). According to the complaint, on June 30, 2011, while the Decedent resided at The Residence, she became unresponsive and required a brief hospitalization. One month later, she was treated for dehydration. On February 1, 2012, she fell at The Residence, fractured her right hip, and underwent surgery to repair the fracture at Jefferson Medical Center. During that

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[1] In *Midomo Co. v. Presbyterian Hous. Dev. Co.*, 739 A.2d 180, 183 (Pa.Super.1999), this Court noted that Pa.R.A.P. 311(a)(8) permits an interlocutory appeal from any order that is made appealable by statute. The Uniform Arbitration Act, 42 Pa.C.S. §§ 7301 et seq., provides that an appeal may be taken from "[a] court order denying an application to compel arbitration. . . ." 42 Pa.C.S. § 7320(a)(1).

hospitalization, the Decedent was noted to have a skin tear and redness on her coccyx, but no pressure ulcer.

Upon her release from Jefferson Medical Center on February 9, 2012, the Decedent was admitted to the Extendicare skilled nursing facility known as Havencrest Nursing Center. A skin assessment upon admission noted three pressure ulcers. Within a week, the Decedent gained approximately fifteen pounds, and a subsequent chest x-ray revealed cardiac issues. Her pressure ulcer on her coccyx had increased in size and the drainage was purulent. By March, the wound was a Stage IV and the Decedent was noted to have pitting edema in her lower extremities. The Decedent was admitted to the Monongahela Valley Hospital on March 9, 2012, treated, and discharged to home with continuing wound care. She was subsequently transferred to the Cedars of Monroeville for hospice care, where she died.

On October 15, 2012, Co-Executors filed a *praecipe* for writ of summons against Extendicare, Jefferson Medical Center, and The Residence, and subsequently, a complaint asserting wrongful death and survival claims. Co-Executors alleged therein that the combined negligence of the Defendants caused or contributed to the injuries and death of Decedent. Extendicare filed preliminary objections to the complaint averring that the claims against it should be submitted to binding arbitration governed by the Pennsylvania Uniform Arbitration Act, 42 Pa.C.S. § 7301 *et seq.*, as provided in an arbitration agreement executed on Decedent's behalf by William Taylor pursuant to a power of attorney.

The trial court overruled the preliminary objections, and relied upon *Pisano v. Extendicare Homes, Inc.* 77 A.3d 651 (Pa.Super.2013), for the proposition that the arbitration agreement did not bind the wrongful death beneficiaries. The court also refused to sever the survival action against Extendicare and send it to arbitration, finding that Pa.R.C.P. 213(e) required consolidation of wrongful death and survival actions for trial and that severance would not advance the stated purpose of the Federal Arbitration Act, "that being to ease the burden of litigation on the parties and this Court's docket." Trial Court Opinion, 1/29/14, at 3-4.

Extendicare timely appealed to this Court,[2] and presents two issues for our review:

I. Did the Trial Court commit an error of law by refusing to submit Appellees' Survival Claim to arbitration where the Federal Arbitration Act, requiring that all arbitrable claims be arbitrated, is controlling?

II. Did the Trial Court commit an error of law by refusing to submit Appellees' Wrongful Death Claim to arbitration where, under Pennsylvania law, a wrongful death plaintiff's right of action is derivative of, and therefore dependent upon, the decedent's rights immediately preceding death?

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[2] Neither Jefferson Medical Center nor The Residence is participating in the within appeal.

Appellants' brief at 4. We will address the issues in reverse order, as our disposition of the second issue affects our analysis of the first issue.

We review a claim that the trial court improperly overruled a preliminary objection in the nature of a motion to compel arbitration for an abuse of discretion and to determine whether the trial court's findings are supported by substantial evidence. *Pittsburgh Logistics Systems, Inc. v. Professional Transportation and Logistics, Inc.*, 803 A.2d 776, 779 (Pa.Super.2002). In doing so, we employ a two-part test to determine whether the trial court should have compelled arbitration. The first determination is whether a valid agreement to arbitrate exists. The second factor we examine is whether the dispute is within the scope of the agreement. *Pisano*, *supra* at 654; *see also Elwyn v. DeLuca*, 48 A.3d 457, 461 (Pa.Super.2012) (quoting *Smay v. E.R. Stuebner, Inc.*, 864 A.2d 1266, 1270 (Pa.Super.2004)).

Extendicare contends that the wrongful death action is derivative of a tort committed during the lifetime of the decedent, and that it is necessarily dependent upon the rights that the decedent possessed immediately prior to death. It follows then, according to Extendicare, that since the Decedent agreed to arbitrate any disputes, the Decedent's beneficiaries are limited to claims that Decedent could have pursued during her lifetime and that all claims must be submitted to arbitration.

This precise contention was addressed and rejected by this Court in *Pisano*, *supra*, and it is controlling herein. We held in *Pisano* that a wrongful death action is a separate action belonging to the beneficiaries. While it is derivative of the same tortious act, it is not derivative of the decedent's rights. *Id.* Thus, an arbitration agreement signed by the decedent or his or her authorized representative is not binding upon nonsignatory wrongful death beneficiaries, and they cannot be compelled to litigate their claims in arbitration.

We turn now to Extendicare's remaining issue: that the trial court erred in refusing to compel arbitration of the survival action. The gist of Extendicare's claim is that, even if the arbitration agreement is not binding upon the wrongful death beneficiaries, it must be enforced against Co-Executors who stand in the shoes of the Decedent for purposes of the survival action. It insists that the trial court should have bifurcated the wrongful death and survival actions and compelled arbitration of the latter.[3]

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[3] We note at the outset that Extendicare fails to specify whether the trial court's alleged error consisted of its failure to compel arbitration of the entire survival action, which involves claims of joint liability for negligence against The Residence and Jefferson Medical Center, or just the survival action against Extendicare. Since these other entities did not agree to arbitrate, they cannot be compelled to proceed in arbitration on the survival claim. Hence, the survival claims against The Residence and Jefferson Medical Center, the alleged joint tortfeasors, would remain in court. The splitting of the survival claim between two forums would result either in empty chairs at the arbitration, where an arbitrator would allocate responsibility for negligence among the Defendants, or these parties would be pressured to participate in

Co-Executors respond that Pa.R.C.P. 213(e) and this Court's decision in *Pisano* require the consolidation of wrongful death and survival actions, and since the wrongful death beneficiaries cannot be compelled to arbitrate the wrongful death actions, both actions must remain in court. Pa.R.C.P. 213 provides in relevant part:

> (e) A cause of action for the wrongful death of a decedent and a cause of action for the injuries of the decedent which survives his or her death may be enforced in one action, but if independent actions are commenced they shall be consolidated for trial.

Pa.R.C.P. 213(e). Extendicare counters that the severance issue was not addressed in *Pisano*.

Although the trial court in *Pisano* retained jurisdiction over both the wrongful death and survival actions pursuant to Pa.R.C.P. 213(e), Extendicare is correct that this Court did not rule on the propriety of severance in *Pisano*. The parties simply acquiesced in the trial court's application of Rule 213 by failing to challenge it on appeal. Thus, the issue of whether wrongful death and survival actions must be bifurcated to permit arbitration of the survival action is a question of first impression for the appellate courts of this Commonwealth.

In support of its position that bifurcation is required, Extendicare first argues that the consolidation

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arbitration to protect their rights. Either scenario subverts the policies favoring arbitration.

provision of Pa.R.C.P. 213(e) is inapplicable on the facts herein. It maintains that the issue is jurisdictional and that Pa.R.C.P. 213(e) only speaks to the consolidation of wrongful death and survival actions that are properly pending in court. Furthermore, Extendicare argues that consolidation under that rule is permissive and discretionary. It adds that by construing Pa.R.C.P. 213 as mandating consolidation, one runs afoul of Pa.R.C.P. 128, which provides that in ascertaining the Supreme Court's intent in promulgating a rule, "no rule shall be construed to confer a right to trial by jury where such right does not otherwise exist." Pa.R.C.P. 128(f).

Co-Executors counter that Pa.R.C.P. 213(e) is applicable as arbitration agreements do not divest a court of jurisdiction over the dispute, as demonstrated by the fact that when a matter is referred to arbitration, the trial action is stayed, not dismissed. *See Schantz v. Dodgeland*, 830 A.2d 1265, 1266-67 (Pa.Super.2003); *see also* 42 Pa.C.S. § 7304(d) ("An action or proceeding, allegedly involving an issue subject to arbitration, shall be stayed if a court order to proceed with arbitration has been made or an application for such an order has been made under this section."). They also direct our attention to the fact that the trial court in *Pisano* retained jurisdiction over both the wrongful death and survival actions pursuant to Pa.R.C.P. 213(e), and maintain that a court has jurisdiction if it is competent to hear or determine controversies of the general nature of the matter involved.

*See Aronson v. Sprint Spectrum, L.P.*, 767 A.2d 564, 568 (Pa.Super.2001).

We agree with Co-Executors that jurisdiction does not preclude consolidation of these actions. Nor does Pa.R.C.P. 213(e) provide the only support for consolidating the wrongful death and survival actions.[4] In the wrongful death statute, 42 Pa.C.S. § 8301(a), the legislature acknowledged the overlap in the wrongful death and survival actions and the potential for duplicate recovery, and mandated consolidation of the actions:

> (a) General rule. – An action may be brought, under procedures prescribed by general rules, to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime **and any prior actions for the same injuries are consolidated with the wrongful death claim so as to avoid a duplicate recovery**.

[4] Pa.R.C.P. 1020(d)(1) is also implicated herein. It provides for the mandatory joinder in separate counts of all causes of action against the same person arising from the same transaction or occurrence to avoid waiver. The basis for both Rule 213 and Rule 1020 "is the avoidance of multiple trials and proceedings involving common facts or issues or arising from the same transaction or occurrence. The avoidance of duplication of effort is a benefit to both the parties and the courts." 1990 Explanatory Comments to Pa.R.C.P. 213.

42 Pa.C.S. § 8301(a) (emphasis added). We find both the rule and the statute applicable.

Extendicare counters that the Federal Arbitration Act ("FAA"), which is "intended to foreclose state legislative attempts to undercut the enforceability of arbitrations agreements," pre-empts state statutes and rules that conflict with that policy, including Pa.R.C.P. 213(e). *Southland Corp. v. Keating*, 465 U.S. 1, 16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *see Marmet Health Care Ctr., Inc. v. Brown*, ___ U.S. ___, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012). It cites *Moscatiello v. J.J.B. Hilliard*, 595 Pa. 596, 939 A.2d 325 (2007), for the proposition that the FAA pre-empts state procedural rules that stand in the way of the FAA's function, and argues that to the extent Rule 213(e) compels that these causes of action be consolidated for disposition in court, it is pre-empted.[5]

In support of preemption herein, Extendicare relies upon *Marmet Health Care Ctr., Inc. v. Brown*, ___ U.S. ___, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012), in which the United States Supreme Court held that the FAA pre-empted West Virginia's policy precluding enforcement of pre-dispute arbitration clauses in nursing home cases involving personal injury or death. The Supreme Court granted *certiorari* after West Virginia's highest court ruled in *Brown v. Genesis Healthcare*

[5] The Pennsylvania Supreme Court held in *Moscatiello v. Hilliard*, 595 Pa. 596, 939 A.2d 325, 326, (2007), that Pennsylvania's thirty-day time limit for challenging arbitration awards was not pre-empted by the three-month FAA time limit in 9 U.S.C. § 12, as it did not undermine the goal of the latter statute.

*Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011), a decision involving three cases, "that as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence." The Supreme Court applied *AT & T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740, 1747, 179 L.Ed.2d 742 (2011), in which it opined that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Marmet*, *supra* at 1204. The *Marmet* Court noted 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.* The Court remanded two of the cases for a determination as to whether the arbitration clauses were "unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA." *Id.*

Co-Executors counter that the FAA does not preempt Pa.R.C.P. 213(e), as the rule was not intended to and does not operate as a blanket prohibition of arbitration in nursing home cases involving personal injury or wrongful death, which was at issue in *Marmet*.[6]

[6] Co-Executors also argued that Extendicare waived the preemption argument. We decline to find waiver as the trial court

Furthermore, the rule does not prohibit the arbitration of wrongful death cases. Moreover, the rule applies in all wrongful death and survival actions regardless of whether an arbitration agreement is present. Thus, Co-Executors contend, the rule is not intended to undermine the enforceability of arbitration agreements in particular. Appellees' brief at 30. We agree with Co-Executors on both counts.

Preemption stems from the Supremacy Clause of the United States Constitution, Article VI, cl. 2, which provides that federal law is paramount, and that laws in conflict with federal law are without effect. *Altria Group, Inc. v. Good*, 555 U.S. 70, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008). There are several types of preemption, one being express preemption, where the federal law contains a provision announcing its intention to supplant state law. There is also field preemption, where the federal statute "reflect[s] a Congressional intent to occupy the entire field" of law. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 477, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). The Federal Arbitration Act does not contain an express preemption provision and Congress did not intend to occupy the field of arbitration. *Id.*

However, as this Court noted in *Trombetta v. Raymond James Fin. Servs.*, 907 A.2d 550, 564 (Pa.

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interrupted counsel for Extendicare before he could advance that argument. The issue was articulated in Extendicare's Pa.R.A.P. 1925(b) statement.

Super.2006), "[e]ven when Congress has not completely displaced state regulation in an area, . . . state law may nonetheless be pre-empted to the extent that it conflicts with federal law; that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Trombetta*, 907 A.2d at 564 (quoting *Volt*, 489 U.S. at 477, 109 S.Ct. 1248). This concept is known as conflict preemption, and may arise in two contexts. First, a conflict occurs when compliance with both state and federal law is an impossibility. *Holt's Cigar Co. v. City of Philadelphia*, 608 Pa. 146, 10 A.3d 902, 918, (2011). Second, conflict preemption may be found when state law "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." *Id.; Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996). It is this type of conflict preemption that Extendicare contends is applicable herein.

Pennsylvania applies a presumption against federal preemption of state law. *Dooner v. DiDonato*, 601 Pa. 209, 971 A.2d 1187 (2009) (citing *Altria Group, Inc.*, *supra* at 77, 129 S.Ct. 538) (When addressing questions of express or implied preemption, we begin our analysis "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). This presumption flows from the existence of "dual jurisdiction" and arises "from reasons of comity and mutual respect between the two judicial systems that form the framework" of our

federalist system. *Kiak v. Crown Equipment Corp.*, 989 A.2d 385, 390 (Pa.Super.2010).

With these principles in mind, we turn to the federal law that Extendicare contends pre-empts state law herein, the FAA. The FAA was promulgated because the judiciary was reluctant to enforce arbitration agreements, and the act was intended to place arbitration agreements on the same footing as other contracts. *Volt*, *supra.* The Supreme Court reiterated in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985), that "the overriding goal of the Arbitration Act was [not] to promote the expeditious resolution of claims," but to "ensure judicial enforcement of privately made agreements to arbitrate." Although the *Dean Witter* Court downplayed the notion that a desire for efficiency motivated the passage of the FAA, the House Report on the FAA, quoted therein, suggests that efficiency, both temporal and financial, played a role in the passage of the FAA. The Report stated, "It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." H.R.Rep. No. 96, 68th Cong., 1st Sess., 2 (1924).

Consistent with the goal of ensuring that arbitration agreements are enforced, however, the FAA does not require parties to arbitrate absent an agreement to do so. *See Prima Paint Corp. v. Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270

(1967) (construing the Act as designed "to make arbitration agreements as enforceable as other contracts, but not more so"). Pennsylvania has a well-established public policy that favors arbitration, and this policy aligns with the federal approach expressed in the FAA. *Gaffer Ins. Co. v. Discover Reinsurance Co.*, 936 A.2d 1109, 1113 (Pa.Super.2007). However, as this Court stated in *Pisano*, "compelling arbitration upon individuals who did not waive their right to a jury trial" infringes upon a constitutional right conferred in Pa. Const. art. 1, § 6 ("Trial by jury shall be as heretofore, and the right thereof remain inviolate."). *See Bruckshaw v. Frankford Hospital of City of Philadelphia*, 619 Pa. 135, 58 A.3d 102, 108-109 (2012) (recognizing constitutional right to jury trial in both civil and criminal cases). We added in *Pisano* that denying wrongful death beneficiaries their right to a jury trial "would amount to this Court placing contract law above that of both the United States and Pennsylvania Constitutions." *Pisano*, *supra* at 660-61.

Extendicare maintains that the survival claim against it must be severed and enforced in arbitration, and that state law to the contrary is pre-empted. We disagree. Neither Pa.R.C.P. 213 nor 42 Pa.C.S. § 8301 prohibits the arbitration of wrongful death and survival claims. Thus, the instant case does not mirror the categorical prohibition of arbitration of wrongful death and survival actions that the *Marmet* Court viewed as a clear conflict between federal and state law. *See also e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 356, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008) (FAA pre-empts state law

granting state commissioner exclusive jurisdiction to decide issue the parties agreed to arbitrate); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (FAA pre-empts state law requiring judicial resolution of claims involving punitive damages); *Perry v. Thomas*, 482 U.S. 483, 491, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) (FAA pre-empts state-law requirement that litigants be provided a judicial forum for wage disputes); *Southland Corp.*, *supra* (FAA pre-empts state financial investment statute's prohibition of arbitration of claims brought under that statute).

The rule and statute are neutral regarding arbitration generally, and the arbitration of wrongful death and survival actions specifically. They are not anti-arbitration as was the statute in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (Alabama statute making written, predispute arbitration agreements invalid and unenforceable), nor do they invalidate arbitration agreements under state law contract principles applicable only to arbitration. *See Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 686-87, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (Montana statute that rendered arbitration agreements unenforceable unless they contained bold notice conflicted with the FAA because such a notice requirement was not applicable to contracts generally).

The statute focuses on the consolidation of wrongful death and survival claims as a means to avoid inconsistent verdicts and duplicative damages in

overlapping claims. Rule 213 details how and where such claims will be consolidated. There is nothing in either the statute or rule that precludes wrongful death and survival actions from proceeding together in arbitration when all of the parties, including the wrongful death beneficiaries, agree to arbitrate. In the situation where the decedent or his representative has entered an enforceable agreement to arbitrate, and the wrongful death action is one brought by the personal representative pursuant to 42 Pa.C.S. § 8301(d) for the benefit of the decedent's estate, there would not appear to be any impediment to the consolidation of the actions in arbitration. The statute and rule are even-handed and designed to promote judicial efficiency and avoid conflicting rulings on common issues of law and fact.

In the instant case, the Arbitration Agreement contains a choice of law provision. It expressly provides that Pennsylvania's Uniform Arbitration Act, 42 Pa.C.S. § 7301, *et seq.*, applies, and Extendicare acknowledges that Pennsylvania law governs. *See* Brief in Support of Defendants' Preliminary Objections to Plaintiffs' Complaint Raising Issues of Fact, at 5. The instant lawsuit consists of both survival and wrongful death claims, and there is no agreement to arbitrate the wrongful death claims. Additionally, there is no agreement to arbitrate survival claims involving The Residence or Jefferson Medical Center. The only claim that is subject to arbitration is Co-Executors' survival act claim against Extendicare, one of three alleged

joint tortfeasors whose combined negligence allegedly caused Decedent's death.

Pennsylvania's wrongful death statute requires that wrongful death and survival actions be consolidated, as does Pa.R.C.P. 213(e). We are unaware of any United States Supreme Court decisions pre-empting state law regarding consolidation of claims where the law does not require that consolidation take place in a judicial forum. Admittedly, the United States Supreme Court has sanctioned piecemeal litigation in order to effectuate enforcement of arbitration agreements. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (recognizing conflict between two goals of FAA: enforcing private agreements and encouraging efficient and speedy dispute resolution, and rejecting that the latter goal trumps and ordering arbitrable pendant claims to arbitration). However, the piecemeal disposition Extendicare seeks herein does not involve discrete issues that can be litigated incrementally, but wholly redundant proceedings with a potential for inconsistent verdicts and duplicative damages.

The appellate courts of this Commonwealth have addressed litigation involving multiple parties and identical claims, and an agreement to arbitrate some of the claims. In *Thermal C/M Servs. v. Penn Maid Dairy Prods.*, 831 A.2d 1189 (Pa.Super.2003), there were multiple actions pending in the same county that involved common questions of law and fact arising

from the same construction contract and the same occurrence. Penn Maid was among the plaintiffs in an action filed against Thermal, and Thermal was a named defendant in both that court action and an arbitration proceeding involving the same issue. The contractor's motion to compel an owner to join arbitration proceedings brought by subcontractors was denied by the trial court and affirmed on appeal. We recognized that "litigating the two actions at the same time would be a waste of judicial resources, and it would promote a race to judgment[,]" and concluded it was "more efficient to address the issue in a single disposition rather than have parallel actions in independent forums with potentially different results." *Id.* at 1193. Despite the fact that some claims were allegedly subject to arbitration, we invoked Pa.R.C.P. 213(a) and affirmed the order denying the petition to compel arbitration "in order to uphold judicial efficiency, maintain the consistency of the verdicts, and save the parties from the expenses associated with duplicative litigation." *Id.* As noted, litigation efficiency is also a goal of the FAA.

Similarly, the dispute in *School Dist. of Philadelphia v. Livingston-Rosenwinkel, P.C.*, 690 A.2d 1321 (Pa.Cmwlth.1997), involved an arbitration provision and some parties who were not subject to the arbitration process, and issues that fell outside the scope of the arbitration agreement. The Commonwealth Court reasoned that requiring the defendant to arbitrate its claims against the additional defendant and relitigate the same liability and damage issues in two separate forums before two different factfinders, would be

uneconomical for the court as well as the parties. Our sister court found that arbitration would not serve its purpose as it "would not promote the swift and orderly resolution of claims" but "engender a protracted, piecemeal disposition of the dispute." *Id.* at 1323. It concluded that, "public policy interests are best served by joinder, which would allow for resolution of the involved disputes at one time with all parties present." *Id.* Although this decision is not controlling, we find the court's reasoning compelling.

A federal district court in *Scott v. LTS Builders LLC*, 2011 WL 6294490, 2011 U.S. Dist. LEXIS 144626 (M.D.Pa.2011), arrived at a similar conclusion. Therein, only one defendant was a signatory to an arbitration agreement; there were ten other defendants, five of whom insisted on a judicial resolution of their claims. The court reasoned, based upon *School District of Philadelphia*, *supra*, that sending the case against the sole signatory to arbitration would not satisfy Pennsylvania's public policy of enforcing arbitration agreements "as a means of promoting swift and orderly disposition of claims." *Scott*, *supra* at *5, 2011 U.S. Dist. LEXIS 144626, at *14.

The propriety of severing wrongful death and survival actions to permit arbitration of the latter was recently considered by a federal district court in *Northern Health Facilities v. Batz*, 993 F.Supp.2d 485, 496-497 (M.D.Pa.2014). The district court relied upon United States Supreme Court precedent interpreting the FAA as "requir[ing] piecemeal resolution when necessary to give effect to an arbitration agreement."

*Moses*, *supra* at 20, 103 S.Ct. 927. In determining the enforceability of an arbitration agreement similar to the one at issue herein, the court concluded that it was "necessary to divide the wrongful death/survival action Complaint for resolution" where the wrongful death claims were not subject to arbitration under *Pisano*, and the defendant failed to provide any "colorable reason why the Survival Action claims . . . cannot be arbitrated." *Batz*, *supra* at 497. We are not bound by *Batz*, nor do we find it persuasive as the court did not discuss Pennsylvania's wrongful death statute, Pa.R.C.P. 213, or the consequences of severing these actions.

Extendicare contends that since the wrongful death and survival actions are distinct, and the damages, claims and potential beneficiaries are different, judicial economy would not be hindered by severing the survival action and submitting it to arbitration. We disagree. The issues are identical in the two actions. Litigation in two forums increases the potential for inconsistent liability findings between the wrongful death and survival actions. Furthermore, the damages overlap. Although lost earnings are generally recoverable in the survival action, they may take the form of lost contributions to the decedent's family, which are wrongful death damages. Lost earnings includes loss of retirement and social security income. *See Thompson v. City of Philadelphia*, 222 Pa.Super. 417, 294 A.2d 826 (1972). Generally, hospital, nursing, and medical expenses are recoverable under either the wrongful death or survival act. *See Skoda v. West Penn Power*

*Co.*, 411 Pa. 323, 191 A.2d 822 (1963).[7] Given the potential for inconsistent liability and duplicative damage determinations, we do not believe this to be the type of piecemeal, "possibly inefficient" litigation, which the Supreme Court sanctioned in *Concepcion*, *supra* at 1758.

The statute and rule at issue are not "aimed at destroying arbitration" and do not demand "procedures incompatible with arbitration." *Concepcion*, *supra* at 1747-48. Nor are they so incompatible with arbitration as to "wholly eviscerate arbitration agreements." *Id.* On the facts herein, the wrongful death beneficiaries' constitutional right to a jury trial and the state's interest in litigating wrongful death and survival claims together require that they all proceed in court rather than arbitration. In so holding, we are promoting one of the two primary objectives of arbitration, which is "to achieve streamlined proceedings and expeditious results." *Concepcion*, *supra* at 1742. For these reasons, we affirm the trial court's order overruling Extendicare's preliminary objection seeking to compel arbitration.

Order affirmed.

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[7] In wrongful death and survival actions governed by the MCARE Act, 40 P.S. § 1303 *et seq.*, past medical expenses may only be recoverable only [sic] under the wrongful death act.

2014 WL 5816620 (Pa.Com.Pl.Civil Div.) (Trial Order)
Court of Common Pleas of Pennsylvania.
Civil Division
Washington County

Daniel E. TAYLOR and William Taylor, as Co-Executors of the Estate of Anna Marie Taylor, deceased, Plaintiffs, v. EXTENDICARE HEALTH FACILITIES, INC. d/b/a Haventcrest [sic] Nursing Center, et al., Defendants.

No. 2012-6878.
January 29, 2014.

**Opinion in Support or** [sic] **Order**

Debbie O'Dell-Seneca, Judge.

Defendants Extendicare Health Facilities, Inc. d/b/a Havencrest Nursing Center, Extendicare Holdings, Inc., Extendicare Health Facility Holdings, Inc., Extendicare Health Services, Inc., Extendicare REIT, Extendicare, L.P., and Extendicare, Inc. (collectively "the Extendicare Defendants") have appealed to the Superior Court of Pennsylvania from this Court's Order of November 20, 2013, overruling the Extendicare Defendants' Preliminary Objections to the Plaintiffs' Complaint. The Extendicare Defendants allege error by this Court in three respects:

I. In failing to compel arbitration where there exists a valid enforceable arbitration agreement;

II. In failing to compel arbitration of the Plaintiffs' Wrongful Death Action where same is derivative

of and limited by the decedent's rights immediately preceding death; and

III. In refusing to sever the Wrongful Death Action from the Survival Action and compelling the latter to be submitted to arbitration.

The Extendicare Defendants contend that the matter should be submitted to arbitration pursuant to the Alternative Dispute Resolution Agreement ("ADR Agreement") entered into by Extendicare Health Services, Inc. and Anna Taylor, the Plaintiffs' decedent, on February 9, 2012, contemporaneous with her admission to the Extendicare facilities. The ADR Agreement was executed on decedent's behalf by her son, Plaintiff William Taylor, operating under power of attorney. It provides that any covered disputes arising between the parties are to be submitted to arbitration. Only decedent and Extendicare Health Services, Inc. are named parties.

Plaintiffs have brought a Survival Action and a Wrongful Dead [sic], Action against the Extendicare Defendants, alleging negligence in the care of decedent which resulted in her eventual death. The Extendicare Defendants based their Preliminary Objections on the ADR Agreement which, they argued, required that the claims be submitted to arbitration, thus depriving this Court of jurisdiction. They maintain that the Wrongful Death Action is derivative of the Survival Action, and because the Survival Action is within the scope of the ADR Agreement, both must be submitted to arbitration pursuant to its terms.

This position is contrary to the Superior Court of Pennsylvania's recent decision in the case of *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651 (Pa. Super. 2013). The facts of *Pisano* are remarkably similar to those in the case *sub judice*. There, Extendicare Homes, Inc. appealed from a trial court's denial of its preliminary objections, brought on the basis that an alternative dispute resolution agreement entered into by it and a deceased former resident deprived the trial court of jurisdiction. *Pisano*, 77 A.3d at 653. There, as here, a child of the decedent had executed the agreement on behalf of the decedent pursuant to a power of attorney. *Id.* There, as here, Extendicare Homes, Inc. maintained that the plaintiffs wrongful death action fell within the scope of the arbitration agreement because it was derivative of the survival action. *Id.*

The Superior Court of Pennsylvania disagreed, and held that although both actions are creatures of statute, they are distinct in terms of the underlying event which creatures [sic] them. A survival action is a continuation of the rights which exist in a decedent at the time of death, and which arise from an injury occurring during the decedent's life. *Id.* at 658 (citing *Moyer v. Rubright*, 651 A.2d 1139 (Pa.Super.1994)). A wrongful death action, as the name suggests, requires the death of the decedent to come into being, and is a right possessed by certain relatives of the decedent for their loss. *Id.* at 658-59. The Court stated that "wrongful death actions are derivative of decedents' injuries but are not derivative of decedents' rights." *Id.* at 660. Consequently, though the facts underlying both claims

might otherwise fall within the scope of an arbitration agreement, a wrongful death claimant cannot be held to an arbitration agreement which it never entered into, and a decedent cannot agree to give up a right which it never possessed. Mat 661-62 [sic].

This Court is bound by the holding of the Superior Court of Pennsylvania. Thus, the Extendicare Defendants' Preliminary Objections to compel arbitration of the Plaintiffs' Survival and Wrongful Death Actions were overruled.

The Extendicare Defendants' allegation that this Court committed error by refusing to sever the Survival Action from the Wrongful Death Action, and sending at least the former to arbitration, is similarly without merit. Such a severance is not demanded by the *Fisano* [sic] decision, and no authority within the Federal Arbitration Act has been provided to support same. The issue of severance remains within the sound discretion of this Court. Pa.R.C.P. 213(b). Further, this Court is actually required to consolidate for trial survival actions and wrongful death actions, brought separately, which arise from the same conduct. Pa.R.C.P. 213(e). A severance would not advance the stated purpose of the Federal Arbitration Act, that being to ease the burden of litigation on the parties and this Court's docket, because the Plaintiffs would retain the right to bring their Wrongful Death Action in this forum. *See Pisano*, 77 A.3d at 660 (quoting *Joseph Muller Corporation Zurich v. Commonwealth Petrochemicals, Inc.*, 334 F. Supp. 1013, 1019 (S.D.N.Y. 1971) (internal citations omitted)). Pursuant to the Pennsylvania Rules of

Civil Procedure, and for judicial economy, this Court denied the request to sever.

Accordingly, this Court's Order of November 20, 2013 overruling the Extendicare Defendants' Preliminary Objections should be affirmed.

BY THE COURT:

<<signature>>

Debbie O'Dell-Seneca, President Judge

IN THE COURT OF COMMON PLEAS OF
WASHINGTON COUNTY, PENNSYLVANIA
CIVIL ACTION

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DANIEL E. TAYLOR and
WILLIAM TAYLOR, as
Co-Executors of the Estate of
ANNA MARIE TAYLOR, deceased,

No. 2012-6878

Plaintiff,

vs.

EXTENDICARE HEALTH FACILITIES, INC. d/b/a HAVENCREST NURSING CENTER; EXTENDICARE HEALTH FACILITY HOLDINGS, INC.; EXTENDICARE HEALTH SERVICES, INC; EXTENDICARE HOLDINGS, INC.; EXTENDICARE REIT; EXTENDICARE, L.P.; EXTENDICARE, INC; MON VALE NON ACUTE CARE SERVICE, INC d/b/a THE RESIDENCE AT HILLTOP; MON-VALE HEALTH RESOURCES, INC.; JEFFERSON HEALTH SERVICES d/b/a JEFFERSON REGIONAL MEDICAL CENTER,

Defendants.

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**ORDER OF COURT**

AND NOW, to wit, this 20th day of November, 2013, upon consideration of the Extendicare Defendants' Preliminary Objections to Plaintiffs' Complaint

Raising Factual Issues, it is hereby ordered, adjudged and decreed that the same are [redacted] DENIED. Any and all remaining preliminary objections are overruled.

BY THE COURT

/s/ Debbie O'Dell Seneca J.

IN THE COURT OF COMMON PLEAS OF
WASHINGTON COUNTY, PENNSYLVANIA

| | |
|---|---|
| DANIEL E. TAYLOR and WILLIAM TAYLOR, as Co-Executors of the Estate of ANNA MARIE TAYLOR, deceased, | CIVIL DIVISION 2012-6878 |
| Plaintiff, | |
| v. | |
| EXTENDICARE HEALTH FACILITIES, INC. d/b/a HAVENCREST NURSING CENTER; EXTENDICARE HEALTH FACILITY HOLDINGS, INC. EXTENDICARE HEALTH SERVICES, INC.; EXTENDICARE HOLDINGS, INC.; EXTENDICARE REIT; EXTENDICARE, L.P.; EXTENDICARE, INC.; MON VALE NON ACUTE CARE SERVICE, INC. d/b/a THE RESIDENCE AT HILLTOP; MON-VALE HEALTH RESOURCES, INC.; JEFFERSON HEALTH SERVICES d/b/a JEFFERSON REGIONAL MEDICAL CENTER, | |
| Defendants. | |

**ORDER OF COURT**

AND NOW, to-wit, upon consideration of the Defendant's Preliminary Objections to Plaintiffs' Complaint and any briefs in support or opposition, it is hereby ORDERED, ADJUDGED and DECREED that

said Objections are [redacted] Overruled.

By the Court

/s/ Debbie O'Dell Seneca J.

11-20-13

Effective July 1, 2009
Revised August 17, 2009, March 2011

**Alternative Dispute Resolution Agreement – Pennsylvania**

**(SIGNING THIS AGREEMENT IS NOT A CONDITION OF ADMISSION TO OR CONTINUED RESIDENCE IN THE CENTER)**

1. ***Parties to the Agreement.*** This Alternative Dispute Resolution ("ADR") Agreement (hereinafter referred to as the "Agreement") is entered into by Extendicare Health Services, Inc. on behalf of its patents, affiliates and subsidiaries including *Havencrest* Nursing Center (hereinafter referred to as the "Center"), a nursing facility, and *Anna Taylor*, a Resident at the Center (hereinafter referred to as "Resident"). It is the intent of the Parties that this Agreement shall inure to the benefit of, bind, and survive the Parties, their heirs, successors, and assigns.

2. ***Definitions.***

   a. *Center* as used in this Agreement shall refer to the nursing facility, its employees, agents, officers, directors, affiliates and any parent, affiliate and/or subsidiary of Center and its medical director acting in his/her capacity as medical director.

   b. *Resident* as used in this Agreement shall refer to the Resident, all persons whose claim is or may be derived through or on behalf of the Resident, all persons entitled to bring a claim on behalf of the Resident, including any personal representative, responsible party,

guardian, executor, administrator, legal representative, agent or heir of the Resident, and any person who has executed this Agreement on behalf of the Resident.

c. *Party* shall refer to the Center or the Resident, and the term Parties shall refer to both the Center and Resident.

d. *Alternative Dispute Resolution* ("ADR") is a specific process of dispute resolution used instead of the traditional court system. **Instead of a judge and/or jury determining the outcome of a dispute, a neutral third party ("Mediator"), who is chosen by the Parties, may assist the Parties in reaching settlement.** If the matter proceeds to arbitration, the neutral third party "arbitrator" renders a decision, which becomes **binding** on the Parties. When mandatory the ADR becomes the only legal process available to the Parties.

e. *State Law* shall mean the laws and regulations applicable in the Commonwealth of Pennsylvania.

f. *Neutral* shall mean the Mediator or Arbitrator conducting ADR under this Agreement.

**3.** ***Voluntary Agreement to Participate in ADR.*** The Parties agree that the speed, efficiency and cost-effectiveness of the ADR process, together with their mutual undertaking to engage in that process, constitute good and sufficient consideration for the acceptance and enforcement of this Agreement. The Parties voluntarily agree that any

disputes covered by this Agreement (herein after referred to as "Covered Disputes") that may arise between the Parties shall be resolved exclusively by an ADR process that shall include mediation and, where mediation does not successfully resolve the dispute, binding arbitration. The relief available to the Parties under this Agreement shall not exceed that which otherwise would be available to them in a court action based on the same facts and legal theories under the applicable federal, state or local law. All limitations or other provisions regarding damages that exist under Pennsylvania law at the time of the request for mediation are applicable to this Agreement.

The Parties' recourse to a court of law shall be limited to an action to enforce a binding arbitration decision or mediation settlement agreement entered in accordance with this Agreement or to vacate such a decision based on the limited grounds set forth in 42 Pa. Cons. Stat. § 7301 et. seq.

**4.** ***Covered Disputes.*** This Agreement applies to any and all disputes arising out of or in any way relating to this Agreement or to the Resident's stay at the Center that would constitute a legally cognizable cause of action in a court of law sitting in the Commonwealth of Pennsylvania and shall include, but not be limited to, all claims in law or equity arising from one Party's failure to satisfy a financial obligation to the other Party; a violation of a right claimed to exist under federal, state, or local law or contractual agreement between the Parties; tort; breach of contract; fraud; misrepresentation; negligence; gross negligence; malpractice; death or wrongful death and any alleged

departure from any applicable federal, state, or local medical, health care, consumer or safety standards. Covered Dispute shall include the determination of the scope of or applicability of this Agreement to mediate/arbitrate. Covered Dispute shall not include (1) involuntary discharge actions initiated by the Center; (2) guardianship proceedings resulting from Resident's alleged incapacity; and (3) disputes involving amounts less than $2,000.00.

Nothing in this Agreement, however, shall prevent the Resident from filing a grievance or complaint with the Center or appropriate government agency, from requesting an inspection of the Center from such agency, or from seeking a review under any applicable federal, state or local law of any decision to discharge or transfer the Resident.

All claims based in whole or in part on the same incident, transaction or related course of care or services provided by the Center to the Resident shall be addressed in a single ADR process. A claim that arose and was reasonably discoverable by the Party initiating the ADR process shall be waived and forever bared if it is not included in the Party's Request for ADR ("Request"). Additionally, any claim that is not brought within the statute of limitations period that would apply to the same claim in a court of law in the Commonwealth of Pennsylvania shall be waived and forever barred. Issues regarding whether a claim was reasonably discoverable shall be resolved in the ADR process by the Neutral.

**5.** ***Governing Law.*** Except as may be otherwise provided herein, this Agreement shall be governed by the terms of the Pennsylvania Uniform Arbitration Act which is set forth at 42 Pa. Cons. Stat. §§7301 et seq. If for any reason there is a finding that Pennsylvania law cannot support the enforcement of this Agreement, then the Parties agree to resolve their disputes by arbitration (and not by recourse to a court of law) pursuant to the Federal Arbitration Act (9 U.S.C. Sections 1-16) and the Federal Arbitration Act shall apply to this Agreement and all arbitration proceedings arising out of this Agreement, including any action to compel, enforce, vacate or confirm any proceeding and award or order of an arbitrator. The mediation and/or arbitration location shall occur in the Commonwealth of Pennsylvania, in the county in which the Center is located unless otherwise agreed by the Parties.

**6.** ***Administration.*** ADR under this Agreement shall be conducted by a Neutral and administered by an independent, impartial entity that is regularly engaged in providing mediation and arbitration services (hereinafter the "Administrator"). The Request for ADR shall be made in writing and may be submitted to DJS Administrative Services, Inc., ("DJS"), P.O. Box 70324, Louisville, KY 40270-0324, (877) 586-1222, www.djsadministrativeservices.com by regular mail, certified mail, or overnight delivery.

If the Parties choose not to select DJS or if DJS is unable to or unwilling to serve as the Administrator the Parties shall select an alternative independent and impartial entity that is regularly

engaged in providing mediation and arbitration services to serve as Administrator.

**7.** ***Process.*** Regardless of the entity chosen to be Administrator, unless the Parties mutually agree otherwise in writing, the ADR process shall be conducted in accordance with and governed by the Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure ("Rules of Procedure") then in effect. A copy of the Rules of Procedure may be obtained from the Center's Administrator or from DJS at the address or website listed in Section 6 of this Agreement.

**8.** ***Mediation.*** The Parties agree that any claim or dispute relating to this Agreement or to the resident's stay at the Center that would constitute a legally cognizable cause of action in a court of law shall first be subject to mediation. The Parties agree to engage in limited discovery of relevant information and documents before and during mediation in accord with Rule 3.02 of the Rules of Procedure. Any disputes which the Parties cannot resolve regarding the scope and limits of discovery shall be resolved as described in Rule 3.02 of the Rules of Procedure. The Parties shall cooperate with each other, the mediator and DJS prior to and during the mediation process. Claims where the demand is less than $50,000 shall not be subject to mediation and shall proceed directly to arbitration, unless one of the Parties requests mediation, in which case, all Parties shall mediate in good faith. Mediation shall convene within one hundred twenty (120) days after the request for mediation. The Mediator shall be selected as described in Rule 2.03 of the Rules of Procedure.

9. ***Arbitration.*** Any claim or controversy that remains unresolved after the conclusion or termination of mediation (e.g., impasse) shall proceed to binding arbitration in accordance with the terms of this Agreement. Arbitration shall convene not later than sixty (60) days after the conclusion or termination of mediation or as otherwise specified in Rule 5.02 of the Rules of Procedure. The Arbitrator shall be selected as described in Rule 2.03 of the Rules of Procedure.

10. ***Costs and Fees.*** The Center shall pay the Neutral's fees and other reasonable costs associated with the mediation process. The Center shall pay the arbitrator's fees and other reasonable costs associated with the arbitration process up to and including five (5) days of arbitration. Absent an agreement by the Parties, or as required by a ruling by the Neutral to the contrary, the Parties shall share equally the Arbitrator's fees and costs associated with arbitration days beyond day five (5). The Parties shall bear their own costs and attorney's fees except in cases where the Neutral awards a successful Party such costs and/or fees under a provision of Pennsylvania law, if any that expressly authorizes such an award.

11. ***Severability.*** If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable in whole or in part the remainder of this Agreement, including all valid and enforceable parts of the provision in question, shall remain valid, enforceable, and binding on the Parties.

12. ***Proof of Agreement.*** The Parties agree and stipulate that the original of this Agreement, including the signature page, may be scanned and/or stored in a computer database or similar device, and that any printout or other output readable by sight, the reproduction of which is shown accurately to reproduce the original of this document, may be used for any purpose just as if it were the original, including proof of the content of the original writing.

13. ***Right of Rescission.*** The Resident **may revoke this Agreement by providing notice to the Center within thirty (30) days of signing it; and this Agreement, if not revoked within that time frame, shall remain in effect for all care and services rendered to the Resident at or by the Center regardless of whether the Resident is subsequently discharged and readmitted to the Center without renewing, ratifying, or acknowledging this Agreement.** Any notice of rescission of this ADR Agreement may be provided by the Resident either orally or in writing to a member of the management team of the Center.

14. ***Resident's Understanding.*** The Resident understands that he/she has the right to seek advice of legal counsel and to consult with a Center representative concerning this Agreement. The Resident understands that this Agreement is not a condition of admission to or continued residence in the Center.

**THE PARTIES UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT BY ENTERING**

**INTO THIS AGREEMENT THEY ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE THEIR DISPUTES DECIDED BY A COURT OF LAW OR TO APPEAL ANY DECISION OR AWARD OF DAMAGES RESULTING FROM THE ADR PROCESS EXCEPT AS PROVIDED HEREIN. THIS AGREEMENT GOVERNS IMPORTANT LEGAL RIGHTS. YOUR SIGNATURE BELOW INDICATES YOUR UNDERSTANDING OF AND AGREEMENT TO THE TERMS SET OUT ABOVE. PLEASE READ IT COMPLETELY, THOROUGHLY AND CAREFULLY BEFORE SIGNING.**

Initials: /s WT Resident
/s JR Center

*Signature Page Follows*

**BY SIGNING THIS AGREEMENT, the Parties acknowledge that (a) they have read this Agreement; (b) have had an opportunity to seek legal counsel and to ask questions regarding this Agreement; and (c) they have executed this Agreement voluntarily intending to be legally bound there to this 9th day of February, 2012 (the "Effective Date").**

If signed by a Legal Representative, the representative certifies that the Center may reasonably rely upon the validity and authority of the Representative's signature based upon actual, implied or apparent authority to execute this Agreement as granted by the Resident

| **FOR THE RESIDENT:** | **FOR THE CENTER:** |
|---|---|
| | /s J. Rippel |
| Signature of Resident | Signature of Center's Representative |
| Anna Taylor | J. Rippel AL |
| Print Name of Resident | Print Name and Title of Center's Representative |
| | 2/9/12 |
| Date | Date |

/s William Taylor
Signature of Legal Representative for Healthcare Decisions

William Taylor P.O.A.
Print Name and Relationship or Title (Guardian, Conservator, Power of Attorney, Proxy)

2-9-12
Date

Signature of Legal Representative for Financial Decisions

Print Name and Relationship or Title (Guardian, Conservator, Power of Attorney, Proxy)

Date

**If Resident signs with an "x" or mark, two witnesses must also sign.**

| | |
|---|---|
| Signature of Witness Date | Signature of Witness Date |
| Print Name of Witness | Print Name of Witness |

**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

| | |
|---|---|
| PATRICK J. MACPHERSON, EXECUTOR OF THE ESTATE OF RICHARD MACPHERSON, DECEASED,<br><br>Petitioner<br><br>v.<br><br>THE MAGEE MEMORIAL HOSPITAL FOR CONVALESCENCE D/B/A/ MAGEE REHABILITATION HOSPITAL, JEFFERSON HEALTH SYSTEM, INC., TJUH SYSTEM, MANOR CARE OF YEADON PA, LLC, D/B/A MANORCARE HEALTH SERVICES – YEADON, HCR MANOR CARE, INC., MANORCARE, INC., HCR HEALTHCARE, LLC, HCR II HEALTHCARE, LLC, HCR III HEALTHCARE, LLC,<br><br>Respondents | : No. 700 EAL 2015<br>: Petition for Allowance of Appeal from the Order of the Superior Court |

**ORDER**

**PER CURIAM**

**AND NOW**, this 29th day of March, 2016, the Petition for Allowance of Appeal is **RESERVED** pending *Taylor v. Extendicare*, 19 WAP 2015.

Justice Donohue and Justice Wecht did not participate in the consideration or decision of this matter.

**IN THE SUPREME COURT OF PENNSYLVANIA**
**WESTERN DISTRICT**

| | |
|---|---|
| DONALD E. TUOMI, ADMINISTRATOR OF THE ESTATE OF MARGARET C. TUMOI [sic], DECEASED<br><br>v.<br><br>EXTENDICARE, INC., EXTENDICARE HEALTH FACILITIES, INC., D/B/A HAVENCREST NURSING CENTER, EXTENDICARE HEALTH FACILITY HOLDINGS, INC., EXTENDICARE HEALTH SERVICES, INC., EXTENDICARE HEALTH NETWORK, INC., EXTENDICARE HOLDINGS, INC., KATHLEEN GASTAN, AN INDIVIDUAL; KENRIC MANOR FAMILY LIMITED PARTNERSHIP D/B/A/ KENRIC MANOR<br><br>PETITION OF: EXTENDICARE, INC., EXTENDICARE HEALTH FACILITIES, INC., D/B/A HAVENCREST NURSING CENTER, EXTENDICARE HEALTH FACILITY HOLDINGS, INC., | No. 281 WAL 2015<br><br>Petition for Allowance of Appeal from the **Published Opinion and Order** of the Superior Court at No. 865 WDA 2014, at 119 A.3d 1030 (Pa. Super. 2015) entered on June 18, 2015, **affirming** the Order Entered of the Washington County Court of Common Pleas at No. 2013-1583 entered on April 24, 2014 |

| | |
|---|---|
| EXTENDICARE HEALTH | : |
| SERVICES, INC., EXTEND- | : |
| ICARE HEALTH NET- | : |
| WORK, INC., | : |
| EXTENDICARE HOLD- | : |
| INGS, INC. | : |

**ORDER**

**PER CURIAM**

**AND NOW**, this 15th day of November, 2016, the Petition for Allowance of Appeal is **GRANTED**. The Superior Court's order is **VACATED**, and the matter is **REMANDED** for reconsideration in light of *Taylor v. Extendicare Health Facilities, Inc*., ___ A.3d ___, 2016 WL 5630669 (Pa. Sept, 28, 2016).

Justice Wecht did not participate in the consideration or decision of this matter.

**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

| | |
|---|---|
| PATRICK J. MACPHERSON, EXECUTOR OF THE ESTATE OF RICHARD MACPHERSON, DECEASED,<br>Petitioner<br>v.<br>THE MAGEE MEMORIAL HOSPITAL FOR CONVALESCENCE D/B/A MAGEE REHABILITATION HOSPITAL, JEFFERSON HEALTH SYSTEM, INC., TJUH SYSTEM, MANOR CARE OF YEADON PA, LLC, D/B/A MANORCARE HEALTH SERVICES-YEADON, HCR MANOR CARE, INC., MANORCARE, INC., HCR HEALTHCARE, LLC, HCR II HEALTHCARE, LLC, HCR III HEALTHCARE, LLC,<br>Respondents | No. 700 EAL 2015<br>Petition for Allowance of Appeal from the Order of the Superior Court |

**ORDER**

**PER CURIAM**

**AND NOW**, this 17th day of November, 2016, the Petition for Allowance of Appeal is **DENIED**.

Justice Donohue, Justice Wecht and Justice Mundy did not participate in the consideration or decision of this matter.

A True Copy
As Of 11/17/2016

Attest: /s/ John W. Person, Jr.
John W. Person, Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA CIVIL DIVISION – LAW**

| | | |
|---|---|---|
| **KELLY GURGANUS, as Executrix of the Estate Of BRIDGET T. DISKIN, deceased,** | : | |
| **Plaintiff** | : | |
| **v.** | : | **No C-48-CV-2016-311** |
| **SAUCON VALLEY MANOR, INC., d/b/a SAUCON VALLEY MANOR; NIMITA KAPOOR-ATIYEH,** | : | |
| **Defendants** | : | |

## ORDER AND REASONS

(Filed Dec. 21, 2016)

**AND NOW**, this 21 day of December, 2016, upon consideration of the Motion to Compel Arbitration by Defendants, it is hereby **ORDERED** and **DECREED** that Defendants' Motion is **GRANTED** as to Plaintiffs medical negligence/survival claims arising after November 17, 2014.

## STATEMENT OF REASONS

1. This matter was assigned to the Honorable F.P. Kimberly McFadden on the November 8, 2016 argument list.

2. Plaintiff filed Writ of Summons on January 12, 2016, followed by a Complaint on May 4, 2016, asserting causes of action for medical negligence, wrongful death and survival, arising out of the alleged improper treatment and neglect of Decedent, Bridget Diskin, by Defendants.

3. Defendants filed a Motion to compel arbitration, and a brief in support thereof, on April 18, 2016.

4. Plaintiff filed an Answer and a brief in opposition on May 5, 2016.

5. Following a discovery period, Defendants filed an additional brief in support of their Motion on November 2, 2016.

6. Plaintiff filed a supplemental brief on November 2, 2016, and a second supplemental brief on November 21, 2016.

7. Defendants contend that the Resident Agreement which Plaintiff and Decedent both signed following Decedent's admission to Defendant's facility included an arbitration provision which requires "all claims and disputes" arising between the parties to be submitted to binding arbitration.

8. A party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Even where the agreement is deemed valid, the underlying claims must also fall within the scope of the arbitration clause. *Setlock v. Pinebrook Personal Care and Retirement Center*, 56

A.3d 904 (Pa. Super. 2012). Nonetheless, we note that the Pennsylvania Supreme Court's recent decision in *Taylor v. Extendicare Health Facilities, Inc*., 147 A.3d 490 (Pa. Sept. 28. 2016), makes clear, that the grounds upon which a state court can invalidate an arbitration agreement are exceedingly narrow.

9. Here, the parties do not dispute that Plaintiff signed the arbitration agreement at issue. However, Plaintiff avers that the arbitration provision is unconscionable.

10. Specifically, Plaintiff contends that the agreement is procedurally unconscionable as a contract of adhesion which was "buried" within 60 pages of admission documents. "[P]rocedural unconscionability refers specifically to 'the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language.'" *Zimmer v. CooperNeff Advisiors Inc*., 523 F.3d 224, 228 (3d Cir. 2008). However, Plaintiff had a responsibility to thoroughly read and review the documents she was signing, particularly where Decedent was admitted to the facility on November 11, 2014 and the arbitration agreement was not signed until November 17, 2014. In the instant case, it is unclear whether Plaintiff had any meaningful choice regarding the arbitration agreement, as she signed it without question.

11. Plaintiff further contends that the agreement is substantively unconscionable. Substantive unconscionability relates to the unfair or one-sided

consequences of entering into a contract. *See Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999). While we agree with Plaintiff that there are valid public policy concerns regarding arbitration agreements in this context, we are nonetheless bound by the precedential rulings on this issue. As the Pennsylvania Supreme Court stated:

> [t]he prevalence of abuse and neglect in nursing facilities . . . make[s] it imperative that victims and their families have fair access to complementary remedial measures available through the civil justice system-particularly when the bad conduct results in the suffering and death of a vulnerable person . . . the contract formation process that attends nursing facility admission can be a crisis-driven, stress-laden event involving the superior bargaining power of one party over the other. Indeed, nursing home defendants have reaped significant benefits from channeling medical malpractice claims into arbitration to the detriment of medical malpractice victims. We cannot, however, disregard or defy controlling precedent from the United States Supreme Court in order to redress these inequities and deficiencies.

*Taylor*, *supra*, at 512 (internal citations omitted).

12. Consequently, we are constrained to find that Plaintiff's medical negligence/survival action must proceed to arbitration.

13. However, we agree with Plaintiff that the arbitration agreement cannot be retroactively applied to any claims arising prior to the execution of the agreement, i.e. November 17, 2014.[1] Furthermore, the wrongful death claims of the Decedent's remaining beneficiaries cannot be compelled to arbitration and may be litigated separately. *See Pisan v. Extendicare Homes, Inc* 77 A. 3d 651, 661 (Pa. Super. 2013). While this result clearly results in inefficiencies and is not in the interest of judicial economy, it is the result compelled by the Court in *Taylor*, *supra* at 510 (although bifurcation of claims would not likely lower costs or enhance efficiency, court was bound to favor arbitration over judicial inefficiency, and declining to bifurcate wrongful death and survival actions in interest of efficiency would impermissibly nullify arbitration agreement).

**BY THE COURT:**

**/s/ FP Kimberly McFadden**
**F.P. KIMBERLY MCFADDEN, J.**

[1] See Deposition of Jennifer Alraei at p. 62; Deposition of Kelly Gurganus at p. 106.