No. 129067

IN THE

SUPREME COURT OF ILLINOIS

NANCY CLANTON as Independent Administrator of the Estate of LAUREL J. JANSEN, Deceased, Plaintiff-Appellee, v. OAKBROOK HEALTHCARE CENTRE, LTD., an Illinois corporation, d/b/a OAK BROOK CARE; LANCASTER, LTD.; an Illinois Corporation, and MAY FLOR ANDORA, RN, Defendants-Appellants.	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0984 There Heard on Appeal from the Circuit Court of Cook County Illinois, Law Division, No. 2020-L-006460 The Honorable Patricia O. Sheahan, Judge Presiding

REPLY BRIEF OF THE DEFENDANTS-APPELLANTS

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ORAL ARGUMENT REQUESTED

E-FILED
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CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF POINTS AND AUTHORITIES

ARGUMENT

I. The Arbitration Agreement Survived the Death of Laurel Jansen as this Supreme Court Established in *Carter v. SSC Odin Operating Co., LLC* – the basis of a Survival Action Accrues Prior to Death and is Subject to Arbitration

A. The Termination Clause and the Arbitration Clause do not conflict

It is a well-established principle in the law of contracts that a construction should be adopted "which harmonizes all the various parts so that no provision is deemed conflicting with, or repugnant to, or neutralizing of any other." *Zannis v. Lake Shore Radiologists, Ltd.*, 73 Ill. App. 3d 901, 906 (1st Dist.1979) citing *Coney v. Rockford Life Insurance Co.*, 67 Ill.App.2d 395, 399 (3rd Dist. 1966). Discharge of one's contractual obligations because of death is "in the nature of a defense" that negates the alleged cause of action when the person who died was the one required to render the personal performance. *In re Est. of Bajonski*, 129 Ill. App. 3d 361, 365 (1st Dist. 1984). Thus, in the case of a personal service contract, the contract terminates upon the death of the party required to render the services. *Id.* at 366, citing *C.L. Smith v. Preston*, 170 Ill. 179, 184–85 (1897).

Plaintiff admits in her own brief that as a general rule, a contract survives death. R. A83. Plaintiff further argues that there are exceptions to this general rule. Specifically, Plaintiff alleges that the Oakbrook Contract was a personal services contract, and because it was a contract for services, it terminated upon the death of Ms. Jansen. Plaintiff misinterprets the law on this. According to the *Bajonski* Case, a case Plaintiff relies on, a personal services contract terminates upon the death of the party required to render the services. *In re Est. of Bajonski*, at 366-367.

Section E(1) of the Oakbrook Contract clearly states, "all civil claims arising in any way out of this Agreement . . . shall be resolved exclusively through mandatory mediation, and, if such mediation does not resolve the dispute, through binding arbitration…." R. C69. The *Zannis* court stated all parts of a contract should be constructed harmoniously, so as not to have any conflicting provisions. *Zannis v. Lake Shore Radiologists, Ltd*. at 906. That is the case here. Plaintiff is attempting to pick apart portions of the Contract. Ms. Jansen's death terminated the Contract, meaning there were to be no additional personal services provided to Ms. Jansen going forward. However, when the provisions of the Contract are read as one, it is clear that there is no intention of the Defendant to waive the Arbitration Provision, as it clearly states that ALL civil claims arising out of the Agreement will be resolved through mediation and/or arbitration. R. C69. Plaintiff is suing Defendant under the Illinois Nursing Home Care Act, the Survival Act and the Wrongful Death Act, all of which are civil claims arising from the care that Oakbrook was contracted to provide to Ms. Jansen.

Further, the principal objective in construing a contract is to determine and give effect to the intention of the parties at the time they entered into the contract. *Wolff v. Bethany N. Suburban Group*, 2021 IL App (1st) 191858, ¶ 37. To determine the intent of the parties, the court must look to the instrument itself, its purpose, and the surrounding circumstances of its execution and performance. *Id*. Ms. Jansen's death did not render the Arbitration Provision unenforceable. Ms. Jansen's death ended the personal services that Oakbrook was contracted to provide. The exceptions offered by Plaintiff to the general rule that a contract survives death do not apply to our facts. As support for her argument,

Plaintiff relies on a series of cases that have no binding authority on this Court and are not even remotely similar to the present case.

The cases relied on by the Plaintiff involve the continuation of a service after the death of the party who was supposed to render the service. In *Vogel*, the contract was a shareholder agreement, which the Court held was terminated after death. *Vogel v. Melish*, 31 Ill. 2d 620, 626 (1964). This is different from our case in that a shareholder agreement restricted the right to sell, even after the death of one of the shareholders. *Id*. Plaintiff also relies on the *Aldrich* case. *Aldrich v. Aldrich*, 260 Ill. App. 333, 344–45 (1931). In *Aldrich*, the contract contained a provision that was binding on the parties' heirs, executors and administrators to "furnish financial assistance." *Id*. at 337. Specifically, a lawyer contracted with another lawyer for a loan and used the potential proceeds of the lawsuit he was working on as collateral. *Id*. That lawyer then conveyed his rights under the contract to a third party under a trust. *Id.* at 338. The facts of the *Aldrich* case are clearly not on par with the facts of the present case.

Additionally, Plaintiff relies on a series of cases that have no binding authority on this Court. Specifically, Plaintiff relies on cases from Arkansas, Kentucky, New Jersey and Maryland to argue that the Oakbrook Contract did not survive Ms. Jansen's death. Plaintiff relies on *Reg'l Care of Jacksonville, LLC*, an Arkansas case. *Reg'l Care of Jacksonville, LLC v. Henry*, 2014 Ark. 361 (2014). Not only does *Reg'l Care* not have any binding authority on this Court, but it also fails to be persuasive. The *Reg'l Care* case also involves mutuality of contract and notice of arbitration terms, where the court held the arbitration clause in this instance lacked mutuality. *Id.* Lack of mutuality is clearly not an issue in the instant action, further, that is not what the Plaintiff is arguing. Plaintiff relies on an

additional Arkansas case, *Elcare, Inc. v. Gocio*. *Elcare, Inc. v. Gocio*, 267 Ark. 605, 609 (1980). In *Elcare*, the decedent signed up for lifetime housing and medical services at Concordia Life Care. One contract was entitled "Care Agreement" and the other, "Contract for the Sale of Life Estate in Living Unit." *Id*. at 606. Decedent attempted to cancel the latter contract, prior to his death, however, the Care Agreement contained a provision stating that 120-day notice is required for cancellation. *Id.* The only question before the court was whether the clause in the Care Agreement also governed cancellation of the Contract for Sale. *Id. Elcare* is overwhelmingly distinct from our present case, as we are not dealing with two separate contracts, but an arbitration clause contained in a single contract, where the language is clear – Oakbrook no longer has to provide personal services to Ms. Jansen, and all civil claims arising out of the care received under the contract are subject to arbitration.

Lastly, Plaintiff relies on a Maryland case, which again, has no binding authority. In *Burka v. Patrick*, the court addressed one issue, does the death of a party to a contract to purchase realty constitute legally excusable impossibility of performance. *Burka v. Patrick*, 34 Md. App. 181, 182 (1976). *Burka* could not be any more different from the present case, as our case does not deal with a contract for sale.

The Appellate Court and the Plaintiff were/are critical of the Contract drafters, and the Appellate Court noted "the drafters of the contract could quite easily have used other language to indicate the more limited interpretation of the termination provision that defendants now seek." *Clanton v. Oakbrook Healthcare Ctr., Ltd.* 2022 IL App (1st) 210984 at ¶ 61. However, as Defendants have argued and continue to argue, it is well settled law in Illinois that Wrongful Death matters are not subject to arbitration, just as it

is well settled law in Illinois that Survival Actions are subject to arbitration. Though Plaintiff argues that Defendants offer no support for this "well settled law," Plaintiff fails to acknowledge that this Supreme Court in *Carter* set this clear precedent. *Carter v. SSC Odin Operating Co., LLC*. 2012 IL 113204, ¶ 34, 57. If the drafters of the Contract believed that Survival Actions would be barred from arbitration, surely, they would have included language addressing this potential issue, or some sort of survival clause. However, the legal expectation was not that Survival Claims would be barred. Additionally, the Arbitration Clause in the Contract clearly states that all civil claims arising from the contract are subject to mediation and/or arbitration. (R. C69).

Defendants are not asking this Supreme Court to look beyond the plain and unequivocal language of the Termination Clause. Defendants are asking this Supreme Court to view the plain and unequivocal language of the Contract as a whole, and to acknowledge and hold that the Survival Actions accrued to Ms. Jansen prior to her death, when she contracted with the nursing home for personal services.

B. The *Mason* case is the only clear precedent regarding the arbitrability of a Survival Act claim when the Contract contains an arbitration clause and a termination at death provision.

None of the cases relied on by the Plaintiff address the applicability of an arbitration clause to a claim that accrued prior to the party's death but was brought after death. Additionally, none of the cases that Plaintiff relies on deal with claims brought pursuant to the Illinois Survival Act. The only precedent is the *Mason* case.

The Plaintiff in *Mason*, like the Plaintiff here asserted claims under the Illinois Nursing Home Care Act, the Survival Act and the Wrongful Death Act. *Mason v. St. Vincent's Home, Inc.*, 2022 IL App (4th) 210458. The contract in *Mason* contained both

an arbitration provision as well as a termination at death provision. *Id.* at ¶10. Additionally, the plaintiff in *Mason* relied upon this Supreme Court's holding in *Carter* and argued that *Carter* set the precedent for enforcement of the arbitration agreement to claims that accrued before the decedent's death. *Id.* at ¶45 (*citing* Carter *v. SSC Odin Operating Co., LLC*. 2012 IL 113204). In analyzing this Supreme Court's decision in *Carter*, the *Mason* court explained that based on *Carter*:

> "[t]he Survival Act allows an action (such as a claim under the *** Care Act) to survive the death of the injured person." *Carter*, 2012 IL 113204, ¶ 34. While the Wrongful Death Act (740 ILCS 180/0.01 et seq. (West 2006)) created a new cause of action that did not accrue until death, the Survival Act allowed the decedent's representative to maintain those statutory or common law actions that had already accrued prior to the decedent's death. *Carter*, 2012 IL 113204, ¶ 34. In reaching its holding the plaintiff was not bound by the decedent's agreement to arbitrate for the wrongful death claim, the supreme court noted the plaintiff was bound to arbitrate the claim that alleged a violation of the Care Act by the defendant brought under the Survival Act. *Carter*, 2012 IL 113204, ¶ 34. The supreme court explained that claim had already accrued to the decedent prior to death and the claim was brought for the benefit of the decedent's estate. *Carter*, 2012 IL 113204, ¶ 34."

Mason, 2022 IL App (4th) 210458, at ¶ 44. The *Mason* court further acknowledged that this Supreme Court in *Carter* did not suggest that "the arbitration agreement was part of another contract with a termination upon death clause like the one in this case." *Id.* at ¶ 45. However, the *Mason* court also understood that this connection was unnecessary and held that "even with a termination upon death clause, the contract including the arbitration provision would still have been valid when the cause of action accrued." *Id*. The *Mason* court reasoned that "[T]he language of the arbitration clause does not suggest it is inapplicable to claims that accrued before the resident's death but were brought after the resident's death." *Id*. The same is true here. The Arbitration Clause within the Contract does not suggest that it does not apply to claims that accrued prior to Ms. Jansen's death.

The *Mason* court's analysis was on point with this Supreme Court's clear precedent – the basis of a survival action accrues prior to the death and its arbitrability is governed by the contract as it existed before the resident's death. *Carter,* 2012 IL 113204 at ¶ 34. Therefore, the survival cause(s) of action accrued prior to Jansen's death, rendering the Arbitration Clause entered into before death enforceable.

II. Plaintiff's Argument Regarding the CMS Regulation is Waived, However, if this Supreme Court allows this Argument, the Regulation does not Invalidate the Agreement to Arbitrate

Plaintiff's argument regarding the CMS Regulation should not be considered by this Supreme Court because the argument is waived. In *Daniels v. Anderson*, this Supreme Court held that parties may not raise arguments for the first time on appeal. *Daniels v. Anderson* 162 Ill.2d 47 (1994). This Supreme Court reasoned that to do so weakens the adversarial process and would likely prejudice the other party, who did not present relevant evidence and argument on that issue at trial. *Daniels,* 162 Ill.2d at 59.

Here, the Plaintiff did not argue the CMS Regulation in the trial court, nor did she mention it in her appellate brief. Instead, Plaintiff filed a motion 6 days prior to oral argument before the Appellate Court and requested leave to cite additional authority. R. A60 – A66. As the Plaintiff explained in her response brief, the amended regulation was published on July 18, 2019. The Appellate Court allowed Plaintiff leave to cite the CMS Regulation, however, Defendants believe this was done in error as this regulation was equally available to Plaintiff both in the trial and appellate courts, yet it is not mentioned anywhere in her briefs.

In *Hansen v. Baxter Healthcare Corp.*, this Supreme Court was faced with the same issue – whether or not a party failed to preserve an issue for review. *Hansen v. Baxter*

Healthcare Corp., 198 Ill. 2d 420, 429 (2002). In *Hansen*, defense counsel failed to challenge the sufficiency of Plaintiff's expert opinions and also failed to raise it in the appellate court. *Id.* at 429. In fact, similar to our situation, the first time the argument was presented in a brief was in this Supreme Court. Ultimately, this Supreme Court in *Hansen*, agreed that counsel waived his argument, because it was not presented in the trial or appellate courts. *Id.* Defendants are asking this Supreme Court to do the same here. Plaintiff's counsel should not have been granted leave to cite the CMS Regulation, as it was equally available to him at the time he filed his briefs. He should not get a second bite at the apple.

An agreement to arbitrate a dispute may "be *invalidated* by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Northport Health Services of Arkansas, LLC v. U.S. Dep't of Health & Human Services*, 14 F.4th 856, 868 (8th Cir. 2021)(emphasis added) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). Should this Supreme Court allow Plaintiff to argue the CMS Regulation, Defendants contend that the CMS Regulation does not invalidate the Contract or the Arbitration Clause. Plaintiff is not arguing in this Supreme Court that the Arbitration Clause itself is invalid, but rather that the person signing it had no authority, and that it somehow violates a CMS Regulation that was not in effect at the time the Contract was signed. Plaintiff is attempting to bolster her argument with baseless support, as she admits that the Contract does not fall squarely into the Regulation because of the date the Contract was signed. R. A97 – A98.

Additionally, the Revised CMS Regulation does not invalidate or render unenforceable any arbitration agreement. *Northport Health Services*, at 868. *See* 84 Fed. Reg. at 34,718 ("This final rule does not purport to regulate the enforcement of any arbitration agreement ...."); *See* 84 Fed. Reg. at 34,729 ("CMS does not have the power to annul valid contracts."); *see id.* at 34,732 ("This rule in no way would prohibit two willing and informed parties from entering voluntarily into an arbitration agreement."). *Northport Health Services*, at 868. Here, we have two "willing" and "informed" parties voluntarily entering into an arbitration agreement. Plaintiff argues that we should just assume that Ms. Jansen had two Power of Attorney's (hereinafter "POA") because she wanted matters involving litigation to be handled separately. However, Plaintiff offers absolutely no basis and no support for this speculation. Surely the Plaintiff does not know Ms. Jansen's reasoning in having both of her children act as POAs, nor has the Plaintiff offered anything from herself or Debbie Kotalik supporting the alleged presumption of Ms. Jansen's intentions. Her assertion is purely speculative.

With Defendants original Motion to Dismiss and Compel Arbitration, Defendants included the affidavit of the Oakbrook Admissions Coordinator, Paula Park. C36-C64. In Ms. Park's affidavit, she clearly states that she explained every portion of the Contract to Ms. Jansen's POA, and further emphasized that by signing, the POA agreed to the "terms and conditions of this contract." *Id*. The Agreement to Arbitrate comprises Section "E" of the Contract. Ms. Jansen's POA signed the Contract. To date, Plaintiff has failed to provide any sort of counter affidavit explaining that the POA misunderstood or could not appreciate any portion of the Contract, or that she did not want to enter into an arbitration agreement. In order to refute evidentiary facts contained in a defendant's supporting affidavit, the

plaintiff must provide a counter affidavit. *Piser v. State Farm Mut. Auto. Ins. Co.,* 405 Ill.App.3d 341, 353 (2010). If a plaintiff fails to do so, the facts of the defendant's affidavit are deemed admitted. *Id*. at 353. As such, the facts contained in Ms. Park's affidavit are deemed admitted.

Lastly, as explained in *Northport Healthcare*, the case Plaintiff relied on, the arbitration agreement would nonetheless be enforceable, absent a showing of "generally applicable contract defenses, such as fraud, duress, or unconscionability," *Northport Health Services*, at 868, (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740); *see* 9 U.S.C. § 2. The *Northport Healthcare* court explained that "CMS would simply enforce the regulation through a combination of administrative remedies." *Northport Health Services*, at 868 (citing *Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740; *see* 9 U.S.C. § 2.

Plaintiff does not have the proper foundation to now argue the amended CMS Regulation. However, should this Supreme Court allow Plaintiff to do so, it does not invalidate the agreement to arbitrate, as CMS does not have the authority to invalidate a valid contract.

III. Debbie Kotalik as the Healthcare Power of Attorney had the Authority to Bind

Next, Plaintiff misstates the law regarding Health Care POA's and the authority of a Healthcare POA by offering disjointed arguments, and inapplicable case law in claiming that the signatory on the Contract, Debbie Kotalik did not have the authority to bind Ms. Jansen.

A person authorized by a health care power of attorney may bind a principal to an arbitration agreement as part of a contract to receive nursing home care if the arbitration

provision is integral to the entire agreement and required for admission. *Taylor v. UDI #4, LLC*, 2021 IL App (4th) 210057-U, ¶ 43, citing *Fiala v. Bickford Senior Living Group, LLC*, 2015 IL App (2d) 141160, ¶ 45. Plaintiff also relied on *Fiala*, however, she misinterprets the law. A principal will not be bound by an arbitration agreement signed by an agent under a health care power of attorney if the agreement is separate from the contract for services and not required for admission. *Id*. The *Fiala* Court clearly required two things to determine whether a person is bound to an arbitration agreement. A party is not bound if:

- The agreement is separate from the contract for services; **and**
- not required for admission. *Id.*

There is no dispute that the Mediation/Arbitration Clause that comprises Section E(1) of the Contract is part of the Contract as a whole. As such, Plaintiff's reliance on *Testa* is completely baseless, as the arbitration agreement in that case was an entirely separate agreement. *Testa Testa v. Emeritus Corp.*, 168 F. Supp. 3d 1103, 1110 (N.D. Ill. 2016). Plaintiff next argues that the Contract was not required for admission, however, this argument is deceptive. Defendants note that on August 9, 2019, Ms. Jansen became a private pay patient and pursuant to applicable law, a new contract was required to be executed. *See* ILCS 45/2-202. Further, sections C(4) and F(3) of the Contract, clearly state that the Contract is required for admission. *See* Section C(4) at R. C69 and Section F(3) at R. C70. Section C(4) of the Contract states that if the source of payment for the resident's care changes, the resident shall execute a new written contract. R. C69. In addition, section F(3) of the Contract states that not signing is a basis for voluntary discharge under the Nursing Home Care Act. R. C70. Plaintiff's argument that the Contract was not required for admission is blatantly unsupported by every single page of the Contract, where at the

top in large bold letters it states, "A CONTRACT IS REQUIRED BY FEDERAL AND STATE REGULATIONS." R. C65-C71. Ms. Kotalik had the authority to sign the Contract and bind these claims to arbitration as a healthcare POA, because the Mediation/Arbitration Clause is not separate from the Contract itself, and the Contract was required for admission, and continued admission.

As stated above, the *Mason* case is the only clear precedent. In *Mason* the Healthcare POA also signed the admission contract. *Mason v. St. Vincent's Home, Inc.*, at ¶ 38. In *Mason*, the arbitration clause was part of the nursing home contract, it was not a separate document. *Id.* at ¶ 13. The same is true here. R. C65-C71. In *Mason*, the person signing the contract did not directly ask if agreeing to arbitration was required for admission. *Mason v. St. Vincent's Home, Inc.* at ¶¶ 25, 40. In our case the same is true. Plaintiff has offered no counter affidavit explaining that the POA felt compelled to agree to arbitration or that she did not understand the Arbitration Agreement. The *Mason* court held that the trial court did not abuse its discretion by finding that the POA had the authority based on the healthcare POA to agree to arbitration. *Id.* at ¶ 41. Per the *Mason* court:

> "The contract for services contained the arbitration clause, and it was a standard form indicating arbitration was required for admission or continued admission into the Nursing Home. The evidence shows the arbitration clause was not optional or freestanding. Thus, we find the circuit court did not abuse its discretion by finding plaintiff had the authority based on the power of attorney for health care to agree to arbitration on decedent's behalf." *Id.*

Similar to our case, there is implied and apparent authority that Debbie Kotalik, as the healthcare POA had the authority to sign the Contract which contained an arbitration clause. As such, the agreement to arbitrate is a valid agreement.

CONCLUSION

For the foregoing reasons, Defendants Oakbrook Healthcare Centre, Ltd., Lancaster, Ltd., and May Flor Andora, RN, respectfully requests that the Honorable Supreme Court vacate the decision of the First District and remand for proceedings consistent with the *Carter* and *Mason* cases.

Respectfully submitted,

KOREY RICHARDSON LLP

By: /s/ Chaniece M. Hill

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 13 pages.

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By: /s/ Chaniece M. Hill

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APPENDIX

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No. 1-21-0984

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NANCY CLANTON, as independent administrator of the Estate of LAUREL J. JANSEN, deceased,	)	
Plaintiff-Appellee,	)	
vs.	)	No. 2020 L 006460
OAKBROOK HEALTHCARE CENTRE, LTD., an Illinois corporation, d/b/a OAK BROOK CARE; LANCASTER, LTD., an Illinois corporation; and MAY FLOR ANDORA, RN,	)	Hon. Patricia O. Sheahan, Judge Presiding.
Defendants-Appellants.	)	

MOTION FOR LEAVE TO CITE ADDITIONAL AUTHORITY BEFORE ORAL ARGUMENT

Plaintiff-Appellee Nancy Clanton, as independent administrator of the estate of Laurel J. Jansen, deceased, by her attorney Michael W. Rathsack, moves this Court for entry of an order granting leave to cite 42 C.F.R. § 483.70(n)(1) in response to Defendants' statement at page eight of their reply brief that federal law requires nursing homes to have contracts with residents, and in support states:

1. This matter is briefed and set for argument on June 8, 2022.

2. At page eight of their reply, addressing Plaintiff's contention that agreeing to arbitration was not a prerequisite to admission, Defendants pointed out that federal regulations require a residential contract. Plaintiff believes Defendants meant that because federal regulations require a contract, and because the contract contained an arbitration provision, that meant that agreeing to arbitration was a prerequisite to admission. That would in turn

empower the holder of a healthcare power of attorney to bind the resident to arbitration.

3. Plaintiff's point was that agreeing to arbitration was not a prerequisite to admission here, regardless of what else was in their contract. Pl. br. at 8. In support of that contention, Plaintiff cites 42 C.F.R. § 483.70(n)(1) which provides:

> (1) The facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility and must explicitly inform the resident or his or her representative of his or her right not to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility.

4. CMS (Centers for Medicare and Medicaid Services) has thus barred nursing homes from requiring that persons seeking admission to their facilities first agree to arbitration. That rule was effective at the time the agreement here was signed. That means the contract at issue could not have made arbitration a prerequisite to admission, regardless of whether regulations require a residential contract.

5. Counsel apologizes for not bringing this to the court's attention sooner, but believes the court would want to be aware of this regulation regardless of which party it may benefit.

Wherefore, Plaintiff-Appellee requests leave to cite 42 C.F.R. § 483.70(n)(1) in response to Defendants statement at page eight of their reply that federal law requires nursing homes to have contracts with their residents.

/s/ ***Michael W. Rathsack***

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No. 1-21-0984

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FIRST JUDICIAL DISTRICT

NANCY CLANTON, as independent administrator of the Estate of LAUREL J. JANSEN, deceased,	)	
Plaintiff-Appellee,	)	
vs.	)	No. 2020 L 006460
OAKBROOK HEALTHCARE CENTRE, LTD., an Illinois corporation, d/b/a OAK BROOK CARE; LANCASTER, LTD., an Illinois corporation; and MAY FLOR ANDORA, RN,	)	Hon. Patricia O. Sheahan, Judge Presiding.
Defendants-Appellants.	)	

AFFIDAVIT

1. Affiant is the attorney in charge of prosecuting this matter on appeal.

2. The statements in the attached motion are true and correct.

/s/ *Michael W. Rathsack*

Under penalties as provided by law pursuant to Section 5/1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ *Michael W. Rathsack*

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No. 1-21-0984

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vs.	)	No. 2020 L 006460
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Defendants-Appellants.	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that Plaintiff's Motion for Leave to Cite Additional Authority was electronically submitted to the Clerk of the Appellate Court for the First District via the court's e-filing system on June 3, 2022. A copy of said document is attached hereto and served upon you.

/s/ *Michael W. Rathsack*

CERTIFICATE OF SERVICE

Under penalties as provided by law, pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies the statements set forth in this instrument are true and correct. Michael W. Rathsack, an attorney, certifies that on June 3, 2022, he electronically submitted to the Clerk of the Appellate Court for the First District the foregoing Plaintiff's Motion for Leave to Cite Additional Authority, and that on the same date he served the aforementioned document on the attorney(s) of record listed above via the court's e-filing system and via Odyssey File and Serve Illinois.

/s/ *Michael W. Rathsack*

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No. 1-21-0984

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Defendants-Appellants.	)	

ORDER

This matter coming to be heard on the motion of Plaintiff-Appellee for leave to cite 42 C.F.R. § 483.70(n)(1) as additional authority, due notice having been given, and the Court being advised in the premises:

IT IS HEREBY ORDERED that the motion of Plaintiff-Appellee for leave to cite 42 C.F.R. § 483.70(n)(1) as additional authority be and is hereby:

_____ granted. _____ denied.

_____
JUSTICE

_____
JUSTICE

_____
JUSTICE

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No. 129067

In the

Supreme Court of Illinois

NANCY CLANTON, as independent administrator of the Estate of LAUREL J. JANSEN, deceased,

Plaintiff-Appellee,

vs.

OAKBROOK HEALTHCARE CENTRE, LTD., an Illinois corporation d/b/a OAK BOOK CARE; LANCASTER, LTD., an Illinois corporation, and MAY FLOR ANDORA, RN,

Defendants-Appellants.

On Leave to Appeal from the Illinois Appellate Court,
First Judicial District, No. 1-21-0984.
There Heard On Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 2020 L 006460.
The Honorable **Patricia O'Brien Sheahan**, Judge Presiding.

BRIEF AND SUPPLEMENTAL APPENDIX OF APPELLEE NANCY CLANTON, as Administrator of the Estate of Laurel J. Jansen, deceased

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NATURE OF THE CASE

Oakbrook Healthcare Center admitted Laurel Jansen as a resident in 2019. Her daughter, Debbie Kotalik, acting pursuant to a power of attorney for health care, signed the nursing home's residency agreement. That contract included an arbitration clause—it provided that all civil disputes other than claims for unpaid bills or involuntarily discharge were to be arbitrated. A separate clause terminated the contract on the resident's death.

A series of falls left Laurel with fractures, resulting in her death on September 30, 2019. Another daughter, Nancy Clanton, acting as administrator, brought claims against Oakbrook Healthcare Center, Lancaster, Ltd., and nurse May Flor Andora under the Survival Act and the Wrongful Death Act, alleging violation of the Nursing Home Care Act (210 ILCS 45/3-602) and common law negligence. Defendants, citing the contract's arbitration provision, moved to compel arbitration of the Nursing Home Care Act and Survival Act claims and to stay the Wrongful Death claims. Plaintiff raised various defenses.

The trial court declared the nursing home's contract substantively unconscionable, ruling that its limit on punitive damages limited Plaintiff's statutory right to recover fees under the Nursing Home Care Act. It declined to sever the offending language from the remaining part of the arbitration clause, and denied arbitration.

The appellate court affirmed for a different reason. *Clanton v. Oakbrook Healthcare Ctr., Ltd.*, 2022 IL App (1st) 210984; App. at A1 (slip opinion).[1] Relying on the provision terminating the contract upon the death of the resident, the court found that Laurel Jansen's death terminated the agreement including its arbitration provision. There was therefore no basis for arbitration.

No questions are raised on the pleadings.

[1] As of the date of this brief, Westlaw shows only the original decision, not the decision as modified upon denial of rehearing on September 30, 2022.

ISSUES PRESENTED FOR REVIEW

The nursing home claims the appellate court erred when it enforced the contract provision terminating the agreement upon the death of the resident. The question is whether the arbitration provision survived the termination of the contract despite its termination-on-death clause.

The alternative issue, a ground for affirmance even if the Court reverses and finds that the termination-on-death clause did not terminate the entire contract, is whether the arbitration clause was unenforceable because the holder of a healthcare power of attorney cannot bind the resident to arbitration unless agreeing to arbitration was a prerequisite to admission.

.

STATEMENT OF FACTS

Laurel Jansen became a resident of the Oak Brook Care nursing home in July of 2019. C21. The nursing home presented Debbie Kotalik, one of Laurel's daughters, with a Contract Between Resident and Facility on August 9, 2019, and Debbie and the home signed it. C74; App. at A1 (contract); A6 (signature page). Debbie signed it pursuant to a power of attorney for health care that her mother executed in 2009. C102.

Laurel had also executed a separate power of attorney for property—it appointed another daughter, Nancy Clanton, as her agent for that purpose. C108. For purposes of this appeal, the relevant power in that power of attorney for property was the agent's power over claims and litigation. C109.

The nursing home's form residency contract included an arbitration clause. App. at A4. It provided that "all civil claims arising in any way out of this Agreement, other than claims by Facility to collect unpaid bills for services rendered, or to involuntary discharge Resident" were to be resolved by binding arbitration. JAMS was designated as the arbitrator. This provision also said the parties agreed:

> "to seek only actual damages in any such mediation or arbitration, and that neither of them will pursue any claim for punitive damages, treble damages or any other type of damages the purpose of which are to punish one party in an amount greater than the actual damages allegedly caused by the other party."

Finally, relevant to the basis for the appellate court's ruling, the contract provided that it terminated on the death of the resident:

> "This Contract shall initiate on the day it is signed by the resident or authorized representative and shall end under the following conditions:
>
> 1. If the resident is compelled by a change in physical or mental health to leave the facility, this Contract shall terminate on 7 days' notice or immediately upon the resident's death. * * * * *"

App. at A5.

The nursing home's representative testified her custom and practice was to explain the document to the resident or representative and ask if they had questions. C63.

Laurel suffered several unwitnessed falls, resulting in compression fractures and rib fractures that ultimately led to her death in September of 2019. C23-24. Nancy Clanton, acting as administrator of Laurel's estate, brought claims under the Survival Act and the Wrongful Death Act, alleging violation of the Nursing Home Care Act (210 ILCS 45/3-602) and common law negligence. C20.

Defendants Oakbrook Healthcare Centre, Lancaster LLC, and May Flor Andora, a nurse, (collectively the nursing home) moved to compel arbitration of the Nursing Home Care Act and Survival Act claims, and to stay the Wrongful Death claims pending arbitration. C9. They relied on the arbitration clause in the nursing home contract.

Plaintiff responded that the nursing home forfeited arbitration because it had participated in the litigation before filing its motion to compel. C86. Plaintiff also contended the agreement was not enforceable because Debbie

Kotalik held only a health care power of attorney, and that does not authorize the holder to bind the principal to arbitration unless the residency contract requires consent to arbitration as a prerequisite to admission. Plaintiff Nancy Clanton pointed out that she held the power of attorney for property, and thus only she had the right to enter into agreements for claims and litigation. Plaintiff also contended the clause was substantively and procedurally unconscionable.

The nursing home replied that they undertook discovery before seeking arbitration only because they had not located the contract at that point, due to the pandemic. C144. It also relied on the contract's severability clause, arguing that even if the punitive damage section was unconscionable, arbitration should proceed because that section was severable. Finally, the home argued its contract was not unconscionable because it provided for attorney fees through JAMS rules (JAMS was the designated arbitrator). Those rules give consumers the right to statutory remedies. C152.

Trial and appellate court rulings

The trial court found that Defendants' participation in the litigation process did not waive their right to seek arbitration, and also rejected procedural unconscionability. C4. However, it found the arbitration provision substantively unconscionable because its denial of punitive damages limited Plaintiff's ability to recover attorney fees, based on a case holding that a court may consider attorney fees as an element of punitive damages. C6. It also

denied the home's request to sever the punitive damages restriction from the arbitration clause. It denied the motion to compel.

Defendants appealed pursuant to Supreme Court Rule 307(a)(1). An order compelling or staying arbitration is deemed injunctive in nature and subject to interlocutory appeal under that rule. *Kero v. Palacios*, 2018 IL App (1st) 172427, ¶18. The appellate court affirmed, in a decision originally issued July 18, 2022. Defendants filed a petition for rehearing, and the court issued its modified opinion on September 30, 2022. App. at A12.

The court reasoned that the contract's explicit language terminated the contract upon the death of Laurel Jansen. The court rejected Defendants' contention that the nursing home did not intend to terminate the entire contract upon the resident's death and that lawsuits arising from care remained enforceable under the contract's terms even after the resident's death. Op. at ¶ 56. The court held that Defendants' position was undermined "by the unambiguous and unequivocal language of the termination provision."

The contract said it terminated "immediately upon the resident's death." *Id.* The court found that language "clear and unambiguous," and pointed out that the nursing home did not dispute that description. Op. at ¶ 58. The court then said it would apply that provision's plain meaning. The termination provision applied "without limitation." Op at ¶ 59. Its plain language indicated the resident's death terminated "all contractual provisions." *Id.* The

court rejected the home's request to read into the document limitations or exceptions "simply not present" in their contract. Op. at ¶ 60.

As a further ground for affirmance, the court relied on the presumption against provisions that could easily have been included. Op. at ¶ 61. It pointed out the nursing home could have drafted its contract to state that "the death of a resident extinguished obligations for future performance of services, but did not extinguish the parties' agreement to arbitrate claims that accrued during a resident's lifetime." The court said it could not know why the nursing home used a "broad termination provision," but held that the home could not "avoid the effect of the plain meaning of its language."

The court also rejected the home's contention that enforcement of its termination-on-death clause would violate the rule that courts should attempt to harmonize contractual provisions. Op. at ¶ 62. The court explained that it was not neutralizing the arbitration provision—it remained in effect prior to termination. Rather, its holding gave effect to both the arbitration provision and the termination provision. The parties were obligated to arbitrate disputes during a resident's lifetime, but the arbitration provision along with the rest of the contract terminated upon the resident's death.

The court acknowledged the conflict with *Mason v. St. Vincent's Home, Inc.*, 2022 IL App (4th) 210458, where the court refused to enforce a termination-on-death provision. Op. at ¶ 63. The *Mason* court in turn relied on *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶ 34, 976 N.E.2d

344, 354, even though *Carter* did not involve a termination-on-death clause. The appellate court here noted *Carter* ruled only that a Nursing Home Care Act claim brought under the Survival Act was covered by the home's arbitration clause because the claim accrued before the resident's death. The Survival Act governed such claims.

But *Carter* concluded that by contrast, the contract did not require the wrongful death claim to be arbitrated because it was a new cause of action, accruing to the resident's beneficiaries after the resident's death. The heirs who brought the Wrongful Death Claim were not parties to the residential contract and its arbitration clause, and were therefore not bound by it.

The appellate court here said *Mason* incorrectly extrapolated from *Carter* to conclude that *Mason's* termination-on-death clause did not preclude arbitration of claims accruing before the resident's death. Op. at ¶ 67. The First District disagreed with *Mason's* conclusion "for multiple reasons." Op. at ¶ 68. It first noted that, as the *Mason* court acknowledged, nothing in *Carter* showed the arbitration agreement contained a termination-on-death provision.[2] Therefore, the *Carter* court had no occasion to decide whether a termination-on-death clause would affect the validity of the arbitration provision.

The appellate court here further pointed to what it described as a fundamental deficiency in *Mason's* analysis. It pointed out that *Mason* did not

[2] In *Carter*, the arbitration agreement was a separate document.

attempt to address the parties' intent, an intent reflected in the contract's "plain and unequivocal language" terminating the entire agreement upon the resident's death. Op. at ¶ 69. The court said *Mason* instead focused on the lack of limitation in the arbitration provision. *Mason* reasoned the arbitration clause did not say it did not apply to claims accruing during the resident's life but brought after the resident's death. Because the arbitration clause did not say it did not apply to cases brought after the resident's death, *Mason* concluded the parties intended that the clause not be affected by the termination-on-death clause.

The *Mason* court thus actually created an exception to the termination clause—it held the termination-on-death clause did not apply where the claims arose before the resident's death. But those words were not in that agreement—the *Mason* court added them. The First District therefore concluded that *Mason's* analysis "did not give effect to the clear and unequivocal language of the termination provision." *Id.*

The appellate court also considered the nursing home's petition for rehearing. The home had argued there that *Carter's* recognition of an administrator's right to maintain an action for injury sustained before the resident's death meant that whether such claims are subject to arbitration must also be decided by the contract provisions in effect before the death. Op. at ¶ 70. The nursing home claimed the termination-on-death clause was inapplicable to claims accruing before death. In the same vein, the home

claimed that because the arbitration clause was valid when the cause of action accrued, it must therefore remain valid regardless of when the claim was brought, despite the termination clause, because the estate stood in the shoes of the decedent.

The court explained the nursing home's position this way. The home presumed *Carter* resolved the question of the arbitrability of Survival Act claims where the contract provided that it terminated on the resident's death. App. at A23 (¶ 72). But the court said that was not the issue in *Carter*. The fact the estate stands in the shoes of the decedent as to claims that may be asserted (those accruing during the decedent's life) did not mean the *Carter* court was construing "other aspects of the contract as they operated when the decedent was still alive." *Id.*, paraphrasing the nursing home's petition for rehearing.

The appellate court reaffirmed that *Carter* did not address the application of a termination provision like the one at issue. The court refused to read into *Carter* an implicit holding that the arbitrability of Survival Act claims is governed by the contract as it existed before the resident's death even in the face of a termination-on-death clause. The court said that would wrongly render irrelevant the termination-upon-death clause, contrary to the contract's plain meaning.

The court then addressed the nursing home's contention that the home's failure to provide that the arbitration clause remained effective despite the

demise of the rest of the instrument upon the resident's death was somehow excusable. The home had argued that it had not limited the reach of the termination clause in that fashion because it was well settled that Survival Act claims are subject to arbitration. *Id.* at 73. The home claimed they could not foresee that a provision terminating the entire contract would be read to terminate an arbitration clause in that contract.

The First District rejected that contention because the nursing home did not cite authority. The court said, "there is no support for defendants' suggestion that it was 'well-settled' that such claims may be arbitrated *where the contract elsewhere specifies that it terminates upon resident's death*." (emphasis in original). The court said if the home wanted the arbitration clause to survive the termination provision, "it was incumbent upon them to add language to that effect." *Id.* It held "the arbitration agreement terminated with the rest of the contract upon decedent's death." *Id.* at ¶ 74.

ARGUMENT

I. The court properly concluded that the residency agreement's termination-on-death clause terminated the entire agreement, including its arbitration provision, when Laurel Jansen died. Defendants therefore had no basis for their arbitration demand.

The nursing home's residency agreement by its own language terminated on the death of Lauren Jansen. It provided:

> "This Contract shall initiate on the day it is signed by the resident or authorized representative and shall end under the following conditions:
>
> 1. If the resident is compelled by a change in physical or mental health to leave the facility, this Contract shall terminate on 7 days' notice *or immediately upon the resident's death*. * * * "

App. at A5 (emphasis added).

Consequently, when Laurel Jansen died, the entire contract, including its arbitration clause, died with her. Without an enforceable arbitration provision, the nursing home had no grounds for its arbitration demand, as the appellate court ruled.

Contracts usually survive the death of a party, but this is not one of those instances.

As Plaintiff acknowledged in the appellate court, the general rule is that a contract survives the death of a party. *In re Estate of Bajonski*, 129 Ill. App. 3d 361, 366–67, 472 N.E.2d 809, 813 (1984). But there are instructive exceptions. For example, there is an exception for personal service contracts. An agreement that calls for services over a period of time involving special skills or judgment is characterized as a contract for personal service. Such

contracts require a relationship of cooperation and trust between its parties. *Zannis v. Lake Shore Radiologists, Ltd.*, 73 Ill. App. 3d 901, 904–05, 392 N.E.2d 126, 129 (1979). The rule in Illinois is that such contracts terminate upon the death of the person.

Thus, where a personal service contract is involved, it terminates upon the death of the party required to render the services. *In re Estate of Bajonski*, 129 Ill. App. 3d 361, 365–66, 472 N.E.2d 809, 812–13 (1984). In that situation, even contract language providing that the contract bound the parties' heirs after the death of a party does not operate to prevent the contract's demise. *Id.*; *Vogel v. Melish*, 31 Ill. 2d 620, 626–27, 203 N.E.2d 411, 414 (1964) (although a paragraph of a shareholder agreement said it was binding upon and inured to the benefit of heirs, it terminated upon the death of a party to the agreement).

In a further situation instructive by analogy, a court held that the rule terminating a contract on the death of a party applies where the death occurs after a matter has been submitted to arbitration: the arbitrator loses all power upon the death of a party. *Aldrich v. Aldrich*, 260 Ill. App. 333, 344–45 (1931).

If the termination-on-death exception to the general rule of survivability applies in those circumstances, it surely controls here where the nursing home included an explicit termination-on-death provision in its contract. The contract did not survive Laurel's death because the parties agreed it terminated at that time. The nursing home drafted the contract and could

have included language excluding the arbitration clause from the reach of the termination clause if it desired.

If the nursing home wanted the arbitration clause to survive the death of the resident despite the termination-on-death clause, it should have said so.

Nursing homes understand the need to specifically address this kind of situation if they want the arbitration provision to survive the resident's death. That is seen in *Reg'l Care of Jacksonville, LLC v. Henry*, 2014 Ark. 361, 3–4, 444 S.W.3d 356, 358 (2014). Unlike the nursing home's contract here, that home included a provision providing that the arbitration clause remained effective notwithstanding the death of the nursing home resident.

There are also examples of nursing home contracts restricting the reach of termination-on-death clauses, where the nursing home proactively drafted the agreement to provide that certain contract obligations continued to exist even if a party died. For example, in *Grand Lodge of Kentucky Free & Accepted Masons v. City of Taylor Mill*, 2015-CA-001617-MR, 2017 WL 541077, at *1 (Ky. Ct. App. Feb. 10, 2017), the contract terminated on the death of the resident, but the nursing home was obligated to refund part of the original entrance fee. In an Illinois case, *Wolff v. Bethany N. Suburban Group*, 2021 IL App (1st) 191858, ¶ 10, 197 N.E.3d 77, 82, the deceased resident's legal representative could terminate the residential contract on the death of the resident, but the contract also provided that the estate would remain liable for the monthly service fee during the period when notice could be given.

Similarly, in *Bower v. The Estaugh*, 146 N.J. Super. 116, 119, 369 A.2d 20, 22 (App. Div. 1977), the residential agreement provided that all obligations terminated on the death of the resident ". . . other than those relating to burial and to removal of personal property."

Those are examples where the nursing home appreciated it had to include an exception in the residency agreement if it wanted the resident's estate to remain liable for certain contractual obligations after a termination-on-death clause was triggered.

That a contract with a termination-on-death clause terminates upon the death of a party is also illustrated by the discussion in *Burka v. Patrick*, 34 Md. App. 181, 185, 366 A.2d 1070, 1072–73 (1976). That court explained that unless the contract is for personal services *or by its express provisions terminates upon the death of a party*, it survives the death of a party. In that sentence, that court implicitly recognized that a contract does not survive the death of a party if it says it does not. That is further authority for the proposition that a contract like this, expressly stating it terminates on the death of a party, means what it says and terminated the entire agreement.

If the nursing home wanted the arbitration clause to fall outside the termination-on-death clause, the burden was on it to say that.

Another nursing home case, *Elcare, Inc. v. Gocio*, 267 Ark. 605, 609, 593 S.W.2d 159, 161 (1980), illustrates both that nursing homes not only appreciate what a termination-on-death clause does, but also that the burden of drafting a limiting provision is on them if they want an arbitration clause to

remain effective despite broad termination-on-death language. The agreement there included a provision terminating the contract "upon death of Resident," although that was not the appellate issue. The issue was whether a cancellation provision contained in only one of two documents controlled both documents.

After finding it did not, the court added the reasoning that is instructive with respect to drafting contracts. It explained, "The appellant, the proponent of the contracts, was in a better position to prevent any ambiguities by easily expressing its intent in plain English by reiterating the 120 days' cancellation notice in the cancellation provision of the Contract for Sale." *Id.* at 161.

Those cases illustrate how intellectually well-disciplined parties secure a desired right where they want to preserve that right in the face of a broad termination-on-death provision. They reflect what the nursing home should have done here if it wanted the arbitration clause to survive the resident's death. If it intended the clause to survive the death of the resident despite the agreement's termination-on-death clause, it could easily have prevented this situation by saying just that. It did not, and that bars any right to argue that the termination-on-death clause somehow left the arbitration provision surviving. There is a strong presumption against adding provisions the parties could have easily included but did not. *Peterson v. Residential Alternatives of Illinois, Inc.*, 402 Ill. App. 3d 240, 245, 932 N.E.2d 1, 6 (2010).

The nursing home is bound by the clear meaning of its termination-on-death clause.

The nursing home is bound by its contract's plain termination language because if a contract is clear and unambiguous, a court must enforce it as written. *Thompson v. Gordon*, 241 Ill. 2d 428, 441, 948 N.E.2d 39, 47 (2011) (clear and unambiguous words in a contract are to be given their plain and ordinary meaning); *J.M. Beals Enterprises, Inc. v. Indus. Hard Chrome, Ltd.*, 194 Ill. App. 3d 744, 748, 551 N.E.2d 340, 342 (1990). This contract said it terminated upon the death of the resident. Nothing could be plainer. Consequently, the court's duty to enforce it as written could not be plainer.

Enforceability also follows from the reasoning in cases addressing arguments by insurance carriers that their policies excluded coverage for the claim at issue. Courts hold that an insurer's failure to use available language to exclude certain types of coverage gives rise to an inference that the parties did not intend to limit coverage. *Fireman's Fund Ins. Companies v. Atl. Richfield Co.*, 94 Cal. App. 4th 842, 852, 115 Cal. Rptr. 2d 26 (2001). More simply put, if an insurer does not intend to insure against a risk necessarily incident to the insured business, it should specifically exclude that risk, especially where it would have been easy to accomplish that. *Triple-X Chem. Laboratories, Inc. v. Great Am. Ins. Co.*, 54 Ill. App. 3d 676, 679, 370 N.E.2d 70, 72 (1977). That same logic controls here.

The nursing home included blanket termination-on-death language without excluding that language's effect on the contract's arbitration component. That gives rise to an inference that it did not intend the arbitration provision to survive the resident's death. Echoing the court's rationale in *Fireman's Fund*, Plaintiff emphasizes that it would have been easy for the nursing home to exclude the arbitration clause from the scope of the termination-on-death clause. Its failure to take that simple step when drafting its agreement precludes it from making that change now.

The nursing home's primary authority was decided incorrectly.

The nursing home relies on *Mason v. St. Vincent's Home, Inc.*, 2022 IL App (4th) 210458, ¶ 44, for its contention that the arbitration clause survives the contract's termination. Def. br. at 5. The *Mason* court did refuse to enforce a termination-on-death provision. However, it relied only on *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶ 34, 976 N.E.2d 344, 354, a case that is inapposite because it did not involve or address a termination-on-death clause.

As the appellate court here explained (Op. at ¶ 63, et seq.), *Mason* concluded the termination-on-death clause in the contract left the arbitration clause surviving the resident's death only because the court incorrectly extrapolated such a rule from the general discussion in *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204. As noted, *Carter* did not involve a termination-on-death clause. The only issues in *Carter* were the sufficiency of

the consideration for the contract and, if the consideration was deemed sufficient to support arbitration of the Survival Act claim, whether the arbitration provision also applied to the Wrongful Death Act claim. The nursing home does not disagree with all that—it acknowledges this Court "had no occasion to discuss contract termination issues in *Carter* . . . ." Def. br. at 6.

The *Carter* opinion began by comparing wrongful death and survival claims. *Id.* at ¶ 34. In that discussion, the court unremarkably observed that the Survival Act allows an estate representative to maintain actions accruing to a person prior to that person's death. *Id.* That is, of course, the purpose of that act. *Mason's* mistake, as the appellate court explained, is that it incorrectly extrapolated from that general discussion of Survival Act claims to a conclusion that a termination-on-death clause did not terminate the contract's arbitration provision. Op. at ¶ 67.

The appellate court here declined to follow *Mason* because *Carter*, the sole basis for *Mason's* decision on this issue, did not involve a termination-on-death provision. The premise for *Mason's* extrapolation from Carter's discussion of survival claims to *Mason's* ultimate conclusion was thus invalid. Op. at ¶ 68. As the appellate court explained, *Mason* did not address the clear intent of a termination-on-death clause—that the contract terminated on the death of a party. Instead, *Mason* actually improperly created an exception to the contract's termination provision. *Mason* held that despite the fact the

entire agreement, including its arbitration clause, terminated by its own terms on the resident's death, the arbitration clause nonetheless continued in effect and governed claims against the home. Op. at ¶ 69.

In other words, the *Mason* court added an exception to the agreement, one the nursing home had not put there. In *Mason's* version, the termination clause now read that the agreement *except its arbitration clause* terminated on the resident's death. That was contrary to the legion of cases directing that courts not add terms to contracts that the parties did not include. If the nursing home wanted claims accruing prior to the resident's death to survive the termination clause, it should have said so.

The nursing home cannot explain why claims brought after a resident's death are governed by a contract that ceased to exist at death.

The *Mason* court and the nursing home conflate the question in *Carter* of whether particular claims, i.e., survival and wrongful death, were arbitrable under the agreement, with the separate question of whether an entire residency agreement is terminated by the death of the resident where it includes a termination-on-death clause.

The Survival Act "allows a representative of the decedent to maintain those statutory or common law actions that had already accrued to the decedent prior to death." *Carter v. SSC Odin Operating Co.*, LLC, 2012 IL 113204, ¶ 34, 976 N.E.2d 344, 354. That is not relevant here because the nursing home does not quarrel with Plaintiff's right to bring the claim.

However, it argues that if an administrator can "step into the shoes of the decedent at the time the action accrued, for the benefit of the estate, then the same should apply to the contract." Def. br. at 7-9. The home does not explain what it means by "the same should apply to the contract," and cites no authority for that proposition.

Next, and again without authority, the home argues it would be inequitable to allow an administrator to act on behalf of the decedent "at that time," but to find that a contract valid "at that time" is now "somehow" invalid.

Finally, it says the termination-on-death provision was not triggered when the survival action accrued (because of course the resident had not yet died), as if that had something to do with the separate question of whether the termination-on-death provision terminated the entire contract or instead terminated everything except the arbitration provision.

An administrator does not act on behalf of the decedent-resident when the cause of action accrues; a person cannot become a person's administrator until the resident dies. Once a resident dies, the administrator becomes the plaintiff in actions for injuries to the resident preceding death. But the question of who is the proper party plaintiff at a given time has nothing to do with the appropriate forum for the action, and the latter is the issue here. The choice of forum is controlled by the Code of Civil Procedure and whatever exceptions to the Code the parties create. Here, the parties as part of their agreement contracted to use arbitration as the forum, but only until the point

at which the resident died. Then, under their agreement's plain language, that agreement including its forum provision ceased to exist. That left the court as the only available forum.

The nursing home correctly argues the obvious—that the termination-on-death provision was not triggered when the cause of action accrued. Def. br. at 7. But that is not the relevant consideration. As noted, what rights exist and who may bring them is separate from the question of the appropriate forum. The relevant consideration, and the key to the issue here, is that the termination-on-death clause was triggered before the claim was brought. That meant the only available forum (absent some post-event extracontractual agreement—there was none) was a court.

The nursing home concludes with an argument that public policy favors preserving the arbitration provision after the resident's death despite the contract's plain language to the contrary. Def. br. at 10. But public policy comes into play only if an agreement is ambiguous. As the appellate court emphasized, the language in the nursing home's termination-on-death clause was clear and unambiguous.

Alternative grounds for affirmance

II. The arbitration clause was not enforceable because the residency agreement was signed under a healthcare power of attorney. The holder of a healthcare power of attorney is not authorized to execute an agreement submitting a resident to arbitration unless that was a prerequisite to admission, and that was not the case.

Plaintiff argued in the trial court that the contract including its arbitration clause were not enforceable because Debbie Kotalik, the daughter who signed the residency agreement with that clause, was not authorized to execute a document requiring that claims by her mother against the institution would go to arbitration. Debbie held only a healthcare power of attorney. That does not authorize its holder to bind a resident to arbitration where, as here, agreeing to arbitration was not a prerequisite to admission. Because Debbie was not authorized to bind her mother to arbitration, the arbitration clause was unenforceable.

The trial court did not address that issue, and the appellate court similarly did not reach that issue. Both found for Plaintiff on other grounds. If this Court should reverse the appellate court, Plaintiff requests affirmance on this alternative ground.

An appellee may raise any point in support of the judgment even though it was not addressed by the trial court, as long as the factual basis for the issue is contained in the record. *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 312–13, 751 N.E.2d 1150, 1156–57 (2001) (trial court made no findings on an issue and the appellate court did not address it, but this Court addressed

it); *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 491, 771 N.E.2d 357, 363 (2002) (the appellee in the appellate court may raise any ground in Supreme Court to sustain the trial court, even though not presented to the appellate court, as long as there is a factual basis for it in the record).[3]

Debbie Kotalik, Laurel's daughter, signed the nursing home's contract on behalf of her mother. She did that pursuant to a power of attorney for healthcare, executed by Laurel in 2009. C102. However, Laurel Jansen had executed a separate power of attorney for property, appointing a different daughter, Nancy Clanton, as her agent for that purpose. C108. The latter included a provision specifically giving Nancy the right to address claims and litigation. C109. Agreeing to arbitrate claims, rather than litigating them, self-evidently involves claims and litigation, the subject of Nancy's power of attorney. Such claims do not fall under the powers held by a person like Debbie with a healthcare power of attorney.[4]

That Laurel gave Debbie had only a healthcare power of attorney is significant because a healthcare power of attorney authorized Debbie to bind her mother to arbitration only if the mother had to agree to arbitration as a prerequisite to gaining admission to the long-term-care facility. *Fiala v.*

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[3] This is not a procedural situation like that in *Boatmen's Nat. Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 107, 656 N.E.2d 1101, 1109–10 (1995), where the Court said it could not pass upon questions raised by the appellant in the appellate court but not addressed there.

[4] The fact Laurel Jansen designated separate persons to handle the two powers of attorney further illustrates she intended the powers to be treated separately.

Bickford Senior Living Group, LLC, 2015 IL App (2d) 141160, ¶ 44, 32 N.E.3d 80, 92; *Testa Testa v. Emeritus Corp.*, 168 F. Supp. 3d 1103, 1110 (N.D. Ill. 2016). That was not the situation, and Debbie could therefore not bind her mother to arbitration.

Testa explained the reasoning underlying that rule. The holder of a healthcare power of attorney is only authorized to make healthcare decisions. Agreeing to arbitration is part of the healthcare decision to admit a person to a nursing home only if such an agreement is a prerequisite to admission. The logic is that if arbitration is not a prerequisite to admission, the decision to agree to arbitration is not related to the resident's health. *Testa* said, "[w]hen an arbitration clause is a necessary part of the facility's main residency-establishment contract, then the decision to enter into the arbitration clause is "part and parcel" of a healthcare decision rather than a separate financial decision." *Id.* That puts it in the wheelhouse of the holder of the healthcare power of attorney.

But if that is not the case, the arbitration provision is a separate financial decision, one beyond a power of attorney solely for healthcare. If the arbitration agreement is not a prerequisite to making the decision to place a person in a nursing home, an agent armed with only a healthcare power of attorney who nonetheless agreed to arbitration would be acting beyond the scope of his or her authority. The agent would not be authorized to agree to

arbitration, and consequently the resident cannot be bound by the agent's action. *Id.*

Here, the nursing home did not show it would have denied admission to Laurel if her representative had refused to agree to arbitration. Further, as the nursing home explained (C11), Laurel was already a resident. This new contract was required only because her payment status changed. Given that she was already a resident, one could assume that agreeing to arbitration at this later date could not have been a prerequisite for continued residency.

There is also reason to conclude that the institution intentionally did not put in its contract that agreeing to arbitration was required for admission. Nursing homes have not made arbitration a prerequisite because of regulations promulgated by CMS (Centers for Medicare & Medicaid Services) for nursing homes that accept Medicare patients. Oakbrook Healthcare is such a facility. C30 (¶ 14 and 15 of complaint). Its status as a Medicare facility is presumably why it obtained an assignment of Laurel Jansen's Medicare benefits. C76.[5]

Nursing homes have not required arbitration for admission because CMS has barred such requirements. The agreement here does not fall squarely within that bar because of the date of the contract and the procedural journey

[5] At oral argument, the nursing home raised a question about the resident being private pay, but the residency agreement provides that private pay simply means a resident not receiving payment from Medicaid. C68 (¶ 1(a)). The agreement shows Medicaid was not involved. C76.

of that CMS regulation. The regulation's relevant history is described in *Northport Health Services of Arkansas, LLC v. U.S. Dep't of Health & Human Services*, 14 F.4th 856, 864–65 (8th Cir. 2021).

CMS originally barred nursing homes from requiring residents to sign arbitration agreements, but a district court stayed that regulation. *Id.* at 865 (explaining that case). The CMS amended the regulation, effective September 16, 2019. *Id.* at 865; 42 C.F.R. § 483.70 (n). The relevant amended regulation provides that nursing homes cannot require residents to sign arbitration agreements as a condition of admission or a condition of continuing to receive care. *Id.* at 865. A home's failure to comply subjects it to severe penalties.

The contract here was entered into on August 9, 2019, and the effective date of the amendment to the regulation was September 16. But the amended regulation had been published before the date of the contract, on July 18, 2019. 84 Fed. Reg. 34,718, 34,718 (July 18, 2019). Thus, the nursing home was aware of the regulation and its pending application to this resident. It presumably did not require arbitration as a condition of admission because it did not want to run afoul of that regulation.

Finally, if there was any question about whether the residency contract did or did not require acquiescence to all its terms including arbitration before allowing Lauren to remain there, any such ambiguity is construed against the nursing home as the drafter. *Int'l Minerals & Chem. Corp. v. Liberty Mut. Ins. Co.*, 168 Ill. App. 3d 361, 370–71, 522 N.E.2d 758, 764 (1988) (ambiguity is

construed against the carrier as the drafter and in favor of coverage). In the same vein and as noted above, there is a presumption against adding a provision, like making arbitration a prerequisite to admission, that could easily have been included in the contract but was not. *Peterson v. Residential Alternatives of Illinois, Inc.*, 402 Ill. App. 3d 240, 245, 932 N.E.2d 1, 6 (2010).

For that additional reason, the contract including its arbitration provision is not enforceable.

CONCLUSION

For the reasons stated, Plaintiff-Appellee Nancy Clanton, independent administrator of the estate of Laurel Jansen, deceased, requests that the decision of the appellate court be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under penalties as provided by law, pursuant to Section 1-109 of the Code of Civil Procedure, I certify that this document conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 6,687 words.

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IN THE

SUPREME COURT OF ILLINOIS

NANCY CLANTON as Independent Administrator of the Estate of LAUREL J. JANSEN, Deceased, Plaintiff-Appellee, v. OAKBROOK HEALTHCARE CENTRE, LTD., an Illinois corporation, d/b/a OAK BROOK CARE; LANCASTER, LTD.; an Illinois Corporation, and MAY FLOR ANDORA, RN, Defendants-Appellants.	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0984 There Heard on Appeal from the Circuit Court of Cook County Illinois, Law Division, No. 2020-L-006460 The Honorable Patricia O. Sheahan, Judge Presiding

CERTIFICATE OF SERVICE

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The undersigned, a non-attorney, certifies under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, that on this 18th day of April 2023, I served the foregoing Notice of Filing and **REPLY BRIEF OF THE DEFENDANTS-APPELLANTS UNDER RULE 315(h)** upon above-listed counsels of record by e-mail at the e-mail addresses listed above.

/s/ Grecia Torres

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SUPREME COURT OF ILLINOIS

NANCY CLANTON as Independent Administrator of the Estate of LAUREL J. JANSEN, Deceased, Plaintiff-Appellee, v. OAKBROOK HEALTHCARE CENTRE, LTD., an Illinois corporation, d/b/a OAK BROOK CARE; LANCASTER, LTD.; an Illinois Corporation, and MAY FLOR ANDORA, RN, Defendants-Appellants.	Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0984 There Heard on Appeal from the Circuit Court of Cook County Illinois, Law Division, No. 2020-L-006460 The Honorable Patricia O. Sheahan, Judge Presiding

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PLEASE TAKE NOTICE THAT on this 18th day of April 2023, the undersigned caused to be electronically filed with the Clerk of the Supreme Court of Illinois, **REPLY BRIEF OF THE DEFENDANTS-APPELLANTS UNDER RULE 315(h)**, a true and correct copy of which is hereby served upon you.

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct and that on this 18th day of April 2023, I served the foregoing Notice of Filing and **REPLY BRIEF OF THE DEFENDANTS-APPELLANTS UNDER RULE 315(h)** upon above-listed counsels of record by e-mail at the e-mail addresses listed above.

/s/ Grecia Torres

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