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.

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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.

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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.

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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:

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> "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

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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

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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

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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

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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.

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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

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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

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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.

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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

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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

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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.

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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

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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).

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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.

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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

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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

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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.

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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

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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.

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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

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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.

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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

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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.

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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

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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,

/s/ *Michael W. Rathsack*

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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.

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

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APPENDIX

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Contract Between Resident and Facility

(A CONTRACT IS REQUIRED BY FEDERAL AND STATE REGULATIONS)

JANSEN, LAUREL ("Resident") and **OAK BROOK HEALTHCARE & REHABILITATION CENTRE, LTD.** ("Facility") agree as follows:

In this contract: "Facility Standards" means the Rules and Regulations of the Illinois Department of Public Health for Long Term Care Facilities, applicable federal rules and regulations and, if the resident's care is funded by Medicaid, regulations of the Illinois Department of Human Services and the Illinois Department of Healthcare and Family Services.

A. Facility Agreement

1. The facility shall offer personal care, room, board, dietary services and laundry services. The facility will also offer nursing care, activities, restorative and rehabilitative services and psychosocial care as identified in the resident's Plan of Care established by the facility ("Plan of Care") to the extent required by the facility Standards and in accordance with the policies of the facility.
2. Medicines, treatments or special diets will be offered to the resident if ordered by physician, the facility Medical Director, or any other physician approved by either of them or the resident ("Physician" means any of the foregoing).
3. The facility will offer equipment required under Facility Standards. If any Physician orders special equipment not required under Facility Standards it will be offered at the resident's expense. Residents must have consent of the facility to bring special equipment; use of such equipment is at the resident's risk.
4. The facility will exercise reasonable care toward the resident. However, the facility is not an insurer of the resident's welfare or safety and assumes no such liability.
5. The facility may change the resident's roommate. The facility will notify the resident before such change is made, and will try to accommodate the resident's preferences.

B. Resident's Rights and Obligations

1. The resident acknowledges receipt of the written items identified in **Supplement D: Admissions Checklist**, and acknowledges that each item has been explained in language that the resident understands.
2. All items identified and checked in **Supplement D: Admissions Checklist** are incorporated into this contract. The resident will abide by all rules and regulations of the facility and will cooperate in the carrying out of the resident's Plan of Care.

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Contract Between Resident and Facility

(A CONTRACT IS REQUIRED BY FEDERAL AND STATE REGULATIONS)

B. Resident's Rights and Obligations (Continued)

1. No food, liquids or medicines will be brought into the facility without permission of the Administrator or nurse in charge. Food must be sealed in containers. No medication will be kept in the resident's room or possession unless in accordance with a Plan of Care.
2. The facility may use, at the resident's cost, the pharmacist, laboratory, and other outside service providers recommended by the facility. If the resident prefers to use any other provider, it will be at the resident's cost. To compensate the facility for costs of monitoring such services, the resident will pay to the facility an amount to be set by the facility not to exceed $75.00 per month.
3. The resident will be responsible for damage to any property or injury to any person caused by the resident.
4. The resident will be responsible to comply with the facility's smoking policies.
5. The resident has the right to manage his or her financial affairs and need not deposit personal funds with the facility.
6. The resident will provide his or her own spending money.
7. Upon the resident's written authorization, the facility will hold the resident's personal funds in a Trust Account as further described in the **"Resident Trust Fund Policy Notification and Agreement."**
8. The facility is not responsible for money, valuables, or personal effects of the resident unless delivered to the Administrator for safekeeping.

C. Financial Agreement

1. **Charges for Services:**

   (a) Basic Rate. The Basic Rate includes personal care, laundry, room, board, and nursing care as required by Facility Standards. If a resident is paying privately, the resident will pay monthly in advance as set out in **Supplement A: The Basic Rates.**

   (b) Costs for Specified Supplemental Services and Products. The resident may also be charged for services of the type stated in **Supplement B: Additional Charges.** In addition to the Basic Rate, the resident agrees to pay for the Services and Products set out on the attached Facility Price List.

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(c) Additional Costs. The resident is liable for any special treatment, services or supplies ordered by any Physician or requested by the resident and which is not covered in paragraphs C(1)(a) or C(1)(b). These costs cannot be determined in advance.

(d) Changes in Charges. The above charges may be changed at any time subject to notice under paragraph 4 of Section G.

2. **Residents Paying Privately:**

(a) Definition. A "Resident Paying Privately" is a resident for whom the facility does not receive payment from the Medicaid or from the Veteran's Administration. A Resident Paying Privately may be covered by Medicare.

(b) Agreement and Undertaking. The resident paying privately represents to the facility that charges incurred by or on behalf of the resident will be paid from all available income, assets, benefits, and other resources. Persons with access to resident resources must sign **Supplement C: Income and Personal Resource Statement.**

(c) Pending Public Aid Approval. If the resident applies for Medicaid funding, the resident will be responsible to pay all charges through the date Medicaid authorizes the billing for the resident's care. The parties further agree that the facility may require a deposit or assurance of payment from the resident prior to approval of Medicaid eligibility for nursing home care. To the extent that the deposit covers time after the date Medicaid payments are authorized, the deposit shall be returned to the depositor within 30 days of the date of such authorization except as such deposits may be drawn upon in accordance with Medicaid requirements.

(d) Billing. The resident shall be billed monthly, payable within 7 days of billing. Delivery of a bill shall be deemed demand for payment. If any sum of money due to the facility under this contract is not paid when due, then the resident shall pay to the facility interest on such sum at the rate of nine percent (9%) per year and reasonable costs of collection, including reasonable attorney's fees.

3. **Residents Receiving Public Assistance:**

The facility accepts Medicaid Recipients. Making application for Medicaid or veteran's coverage and appeals of any decision are solely the responsibility of the resident. If the resident is a Medicaid Recipient, payment shall be in accordance with Medicaid regulations. The facility may require a deposit and the resident shall pay charges for services to the extent Medicaid determines that the resident pay from the

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resident's sources. If eligibility for Medicaid payments is terminated, the resident shall pay all charges thereafter as a Resident Paying Privately.

4. If the source of payment for the resident's care changes from private to public or public to private funds, or if the consent for the resident's Veteran's Administration funded care is terminated, the resident shall execute a new written contract with the facility substantially the same as this Contract. If the change is to private funds, the resident will pay all charges as a Resident Paying Privately after the change and all other terms of this Contract shall remain in effect until the new contract is signed.

D. Transfer or Discharge

The facility may transfer or discharge the resident in compliance with Facility Standards:

1. If necessary for the resident's health, safety or welfare or if the safety or health of other individuals in the facility would otherwise be endangered.
2. If the resident's health has improved sufficiently so the resident no longer needs the facility's services.
3. If the resident fails to pay any charges when due.

E. Dispute Resolution/Punitive Damages

1. Civil Disputes Subject To This Paragraph. Resident and Facility agree 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 involuntarily discharge Resident, shall be resolved exclusively through mandatory mediation, and, if such mediation does not resolve the dispute, through binding arbitration using the commercial mediation and arbitration rules and procedures of JAMS/Endispute in its Chicago, Illinois office.
2. Punitive/Treble Damages Waived. Resident and Facility also agree that both Resident and Facility shall 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.

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F. Term and Termination

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. The resident may terminate the Contract on 30 days' notice to the facility.
2. The resident's absence from the facility for 30 consecutive days (except for therapeutic home leave, or hospitalization) shall be deemed a voluntary termination of this Contract by the resident and shall be a basis for involuntary discharge proceedings under the Nursing Home Care Act. Notice shall be served on the resident by mailing to the resident's last known address.
3. The resident's refusal upon 7 days' notice to execute a new contract when required shall be deemed voluntary termination of this Contract by the resident and shall be a basis for voluntary discharge proceedings under the Nursing Home Care Act.
4. The facility may change any charge on 30 days' written notice to the resident or to the person executing this Contract for the resident. The resident or the person executing this Contract for the resident may elect to terminate this Contract and to transfer from the facility by giving the facility notice within such 30 days. The written notice to the resident shall become an addendum to this Contract and the Contract as so modified shall be in force if the resident does not terminate the Contract.
5. All other terms of this Contract shall remain in effect from termination until the resident is transferred from the facility.

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Contract Between Resident and Facility

(A CONTRACT IS REQUIRED BY FEDERAL AND STATE REGULATIONS)

G. General

1. **(Optional: There is no Resident's Representative unless designated in writing.)**

   The Resident's Representative is . The resident may cancel or change the "Resident's Representative" in writing at any time.

2. If any part of this Contract is ruled invalid by a court or is in violation of any applicable law, such part shall be deleted and the balance of this Contract shall remain in full force and effect.

3. If any law hereafter requires changes or additions to this Contract, such changes or additions shall be part hereof from the effective date.

4. This Contract may be assigned by the facility to any successor in ownership or operation of the facility.

THE UNDERSIGNED RESIDENT HAS RECEIVED A COPY AND HAS READ AND AGREES TO THE TERMS AND CONDITIONS OF THIS CONTRACT.

For the Facility:

Paula Park

Signature of Facility Representative

8-9-19

Date of Signature

Administrator

Title of Facility Representative

For the Resident:

K. Rush Katalish (POA)

Resident, Resident's Guardian, Resident's agent under a Power of Attorney executed pursuant to the Illinois Power of Attorney Act or a member of Resident's immediate family

Date of Signature

Specify Capacity if Signer is not the Resident

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Contract Between Resident and Facility

Supplement A: Basic Rates

Patient Name: **JANSEN, LAUREL**

OAK BROOK HEALTHCARE & REHABILITATION CENTRE, LTD.

Effective: **8/9/2019**

Daily Private Room Rate:
Daily Two-Bed Room Rate: [redacted]
Daily Three-Bed Room Rate:
Daily Four-Bed Room Rate:

The above charges are subject to change with 30 days written notice

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Contract Between Resident and Facility

Supplement B: Additional Charges

The following list provides examples of common charges that may be incurred during a stay at the facility, and are not included in the facility's Basic Rate.

Residents of this facility will be charged for the following services/products:

- Clothing
- Shoes
- Beautician or barber
- Special outings (field trips)
- Optical care, including glasses
- Podiatric care not covered under Medicare Part B
- Hospice services not covered by Medicare Part A
- Pharmacy for items not covered by Medicaid or Medicare

Residents MAY also be charged for the following, if not covered by resident payor source:

- Pharmacy services and medications
- Laboratory services
- Physician services
- Routine dental care
- Radiological (x-ray) services
- Ambulance services
- Oxygen tank usage
- Medical supplies
- Isolation care
- Tracheostomy care
- Incontinence care
- Therapies
- Other similar items

Actual charges cannot be given because of market fluctuations, and/or until the nature of the service is known.

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Contract Between Resident and Facility

Supplement C: Income and Personal Resource Statement

Agreement and Undertaking

I hereby agree as follows:

- I hereby represent to the facility that I have access to the resident's income and resources available to pay for care provided by the facility as follows:
- I shall pay such income and resources of the resident or funds I receive from the resident to the facility when and to the extent needed for payment for the resident's care at the facility.
- I shall not use such income and resources for any purposes other than the foregoing or for the resident's benefit.
- I shall assign such income and resources to the facility at the facility's request to the extent necessary to pay for the resident's care at the facility.

This agreement and Undertaking is limited to the resident's income and resources to which I have access and does not bind me to make any payment for the resident from my personal assets.

X Peter R. Potaski (POA) 8-9-2019

Signature(s) of Person or Persons with Access to the Resident's Funds — Date

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Contract Between Resident and Facility

Supplement D: Admissions Checklist

Care Issues

☑ **Residents' Rights Handbook**	• Provide One Copy to Resident/Authorized Representative
☑ **Choice of Physician and Physician Policy Notification**	• Complete Form and Obtain Signatures • Provide One Copy to Resident/Authorized Representative • Keep One Copy for Facility Records
☑ **Admission Information on Advance Directives and Potential Health Care Surrogate**	• Complete Form and Obtain Signatures • Provide One Copy to Resident/Authorized Representative • Keep One Copy for Facility Records
☑ **Statement of Facility Policy To Our Residents: Advance Directives and Life Sustaining Treatment and the Statement of Illinois Law on Advance Directives**	• Provide One Copy of each to Resident/Authorized Representative
☑ **State and Federal Notification Requirements**	• Complete Form • Provide One Copy To Resident/Authorized Representative
☑ **Transfer / Identified Offender Notification Criminal Hx Background Checks**	• Provide One Copy to Resident/Authorized Representative
☑ **Notice of Facility Privacy Practices Privacy Act Statement – Health Care Records Privacy Act Statements**	• Obtain Signatures • Provide One Copy to Resident/Authorized Representative • Keep Original for Facility Records
☑ **Consent for Release of Information (HIPAA)**	• Complete Form • Provide One Copy to Resident/Authorized Representative • Keep Original for Facility Records
☑ **Authorization and Release for Pneumococcal Vaccine / Vaccine Information Sheet**	• Complete Form and Obtain Signatures • Provide One Copy to Resident/Authorized Representative • Keep One Copy for Facility Records
☑ **Authorization and Release for Influenza Vaccine / Vaccine Information Sheet**	• Obtain Signatures • Provide One Copy to Resident/Authorized Representative • Keep Original for Facility Records
☑ **Resident and Visitor Smoking Policy Notification**	• Complete Form • Provide One Copy To Resident/Authorized Representative
☑ **Consideration of a Funeral Home**	• Complete Form • Provide One Copy to Resident/Authorized Representative • Keep Original for Facility Records

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Contract Between the Resident and Facility

Supplement D: Admissions Checklist

Lifestyle Issues

☒ **Bed Reserve Policy Notification**	• Enter Facility Bed Reserve % • Provide One Copy to Resident/Authorized Representative
☒ **Resident Trust Fund Policy Notification and Authorization**	• Complete Form and Obtain Signatures • Provide One Copy to Resident/Authorized Representative • Keep Original for Facility Records
☒ **Laundry Services**	• Complete Form • Provide One Copy to Resident/Authorized Representative • Keep Original for Facility Records
☒ **Notification of Facility Policy Regarding Personal Property**	• Provide One Copy to Resident/Authorized Representative
☐ **Authorization to Inspect and Open Official Correspondence**	• Complete Form and Obtain Signatures • Provide One Copy to Resident/Authorized Representative • Keep Original for Facility Records
☒ **Special Notifications:** • **Resident Council** • **Care Plan Conferences** • **Participation in Resident Field Trips** • **Special Notice to Families and Visitors**	• Provide One Copy to Resident/Authorized Representative
☒ **Audio, Video and Photographic Release Form**	• Complete Form and Obtain Signatures • Provide One Copy to Resident/Authorized Representative • Keep Original for Facility Records

Financial Notifications and Information

☒ **Assignment of Medicare Benefits and Authorization for Release of Information**	• Obtain Information and Signatures
☒ **Your Benefits Under Medicare**	• Provide One Copy to Resident/Authorized Representative
☐ **Your Benefit Rights and Eligibility Information Under Medicaid**	• Choose the Appropriate Form, For Single Individuals or Married Couples With One Person in the Community) • Provide One Copy to Resident/Authorized Representative
☐ **Medicaid Services and Supplies Covered By the Illinois Medical Assistance Program**	• Provide One Copy to Resident/Authorized Representative

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2022 IL App (1st) 210984
No. 1-21-0984

FIRST DIVISION
July 18, 2022
Modified upon denial of rehearing September 30, 2022

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 2020 L 006460 Honorable Patricia O. Sheahan, Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court, with opinion.
Presiding Justice Hyman and Justice Walker concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff Nancy Clanton, as administrator for the estate of decedent Laurel Jansen, filed an eight-count complaint against defendants Oakbrook Healthcare Centre, Ltd., d/b/a Oak Brook Care (Oakbrook); Lancaster, Ltd. (Lancaster); and May Flor Andora, RN, alleging defendants' negligence while decedent was a resident of a skilled nursing facility. Defendants subsequently moved to compel mediation or arbitration with respect to the counts against Oakbrook and

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Andora, premised on the Nursing Home Care Act (210 ILCS 45/1-101 *et seq.* (West 2018)) (count I) and the Survival Act (755 ILCS 5/27-6 (West 2018)) (counts II, VI, and VIII). Defendants relied on the arbitration provision of the "Contract Between Resident and Facility," executed by Debbie Kotalik, a daughter of decedent who purportedly was the holder of decedent's healthcare power of attorney. Defendants moved to stay the remaining counts of the complaint, which consisted of counts under the Wrongful Death Act (740 ILCS 180/0.01 *et seq.*(West 2018)) against Oakbrook and Andora (counts III and VII), as well as the counts against the remaining defendant, Lancaster, under the Survival Act and Wrongful Death Act (counts IV and V). The circuit court denied defendants' motion in its entirety, finding that the contract provision regarding arbitration was substantively unconscionable.

¶ 2 On appeal, defendants argue that the trial court erred in finding the contract unconscionable and that even if a portion of the contract was unenforceable, it was severable from the arbitration agreement. Plaintiff argues that defendants waived the ability to rely on the contract, the circuit court correctly found the arbitration provision was substantively unconscionable, and that the arbitration provision is otherwise unenforceable on a number of other grounds. Among these, plaintiff contends for the first time on appeal that since the contract stated that it terminated "immediately upon the resident's death," the arbitration agreement therein also terminated and was ineffective after decedent's death.

¶ 3 For the following reasons, we conclude that although defendants' litigation conduct did not waive its right to invoke the arbitration provision, the agreement was no longer enforceable, given the contract's explicit language that it terminated upon decedent's death. For that reason, we affirm the trial court's denial of defendants' motion to compel arbitration with respect to the Nursing Home Care Act count against Oakbrook (count I) as well as the negligence-based

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Survival Act counts against Oakbrook and Andora (counts II, VI and VIII). As defendants have no right to compel arbitration, we also affirm the denial of their request to stay the Wrongful Death Act counts against Oakbrook and Andora (counts III and VII) pending arbitration. As defendants raise no argument regarding the trial court's denial of defendants' separate request to stay the two remaining counts against Lancaster (counts IV and V), we also affirm that portion of the trial court's order.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff Clanton is decedent's daughter. The underlying lawsuit arises out of decedent's stay at a skilled nursing facility allegedly owned and operated by defendants Oakbrook and Lancaster. Defendant Andora was allegedly employed as a nurse at the facility and was allegedly "in charge of" decedent's care and treatment.

¶ 6 According to plaintiff's complaint, decedent, who was born in 1931, resided at the facility from "approximately July 19, 2019 through September 17, 2019 exclusive of intermittent hospitalizations." Decedent allegedly had a number of unwitnessed falls in August 2019, after which her condition deteriorated, and she was hospitalized. Decedent died on September 30, 2019.

¶ 7 Plaintiff filed the complaint on June 16, 2020. Plaintiff pleaded four counts against Oakbrook. Count I pleaded a violation of the Nursing Home Care Act (210 ILCS 45/1-101 (West 2018)). Count II asserted a negligence claim under the Survival Act, under which "actions to recover damages for an injury to the person" survive that person's death. 755 ILCS 5/27-6 (West 2018)). Count III asserted a negligence claim under the Wrongful Death Act (740 ILCS 180/1 *et seq.* (West 2018). Count VIII asserted a "res ipsa loquitur" negligence claim against Oakbrook, which also specified that it was brought under the Survival Act. In addition

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to these four counts against Oakbrook, the complaint also included Survival Act and Wrongful Death counts against both Lancaster (counts IV and V) and Andora (counts VI and VII).

¶ 8 Defendants' counsel filed an appearance on September 24, 2020, and moved for extension of time to answer.[1] Plaintiff served discovery requests, including requests for documents, on October 13, 2020. On October 15, 2020, the court entered a case management order that required Rule 213 interrogatories and Rule 214 document requests to be issued by December 16, 2020, and for such discovery to be completed by April 16, 2021.

¶ 9 Defendants filed their answer and affirmative defenses on November 17, 2020. Defendants subsequently issued interrogatories and document requests to plaintiff. The record reflects that on May 10, 2021, Oakbrook served its answers to plaintiff's interrogatories and produced documents.

¶ 10 On May 20, 2021, defendants' counsel produced additional documents to plaintiff's counsel, including the "Contract Between Resident and Facility" (the contract), whose provisions are at issue in this appeal. Defense counsel provided a letter with the production, stating that the contract was provided to defense counsel by Oakbrook two days earlier. However, defense counsel did not include an affidavit from any Oakbrook manager or representative, explaining how the contract was found or why it was not located earlier. Defense counsel's letter informed plaintiff's counsel that the contract contained an "arbitration agreement" and that defendants planned to "file a motion to enforce the arbitration agreement."

[1]The same law firm represented Oakbrook, Lancaster, and Andora in the circuit court and represents all three defendants in this appeal.

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¶ 11 A. The Contract

¶ 12 The contract reflects that it was entered into by the decedent as "Resident" and Oak Brook Healthcare & Rehabilitation Centre, Ltd. as the "Facility." The signature block for the contract reflects that it was signed by Paula Park, as "Facility Representative" on August 9, 2019. The contract was signed on behalf of decedent by "Debbie Kotalik (POA)." According to plaintiff's submissions, in 2009, decedent executed a statutory short form healthcare power of attorney (POA) appointing Kotalik.[2]

¶ 13 The terms of the contract are set forth in a number of sections. Of particular relevance to this appeal, section "E" of the contract states as follows:

> "E. Dispute Resolution/Punitive Damages
>
> 1. Civil Disputes Subject To This Paragraph. Resident and Facility agree 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 involuntarily discharge Resident, shall be resolved exclusively through mandatory mediation, and, if such mediation does not resolve the dispute, through binding arbitration using the commercial mediation and arbitration rules and procedures of JAMS/Endispute in its Chicago, Illinois office.
>
> 2. Punitive/Treble Damages Waived. Resident and Facility also agree that both Resident and Facility shall 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

[2]In the trial court, plaintiff submitted a copy of the healthcare POA in response to defendants' motion to compel arbitration, but defendants did not submit any affidavit from Kotalik attesting that the healthcare POA was authentic or that she had executed the contract as the holder of decedent's healthcare POA. In any event, the authenticity of the healthcare POA need not be resolved to decide this appeal.

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other type of damages the purpose of which are to punish one party in an amount greater than the actual damages caused by the other party."

Section "F" of the contract sets forth circumstances that terminate the contract. Among these, it specifies that "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."

¶ 14 B. Defendants' Motion

¶ 15 On May 28, 2021 (eight days after the contract was produced), defendants filed a "Motion to Compel Mediation and/or Arbitration And Dismiss with Prejudice Counts I, II, VI, and VIII and to Stay Prosecution of Plaintiff's Wrongful Death Claims." Defendants argued that the contract required mediation or arbitration of the complaint's counts against Oakbrook and Andora, with the exception of the Wrongful Death Act claims. Defendants acknowledged that, pursuant to our supreme court's decision in *Carter v. SSC Odin Operating Co.*, 2012 IL 113204, the contract's arbitration provision did not apply to Wrongful Death Act claims, as such claims are brought on behalf of the decedent's relatives and not for the benefit of the decedent's estate. Defendants argued that the Wrongful Death Act counts against Oakbrook and Andora should be stayed pending mediation or arbitration of the other claims.

¶ 16 Defendants' motion separately sought to stay the two counts against Lancaster (counts IV and V), maintaining that discovery would show that Lancaster "did not own, operate, or manage" the facility. Defendants averred that once "appropriate discovery" had been completed, Lancaster "intends to address such non-involvement and seek dismissal of Counts IV and V." Defendants further argued that since Lancaster's "non-involvement may be

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addressed at mediation and/or arbitration" a stay of the counts against Lancaster would promote judicial economy.

¶ 17 The motion thus included two separate stay requests with respect to different defendants and on different grounds. First, defendants requested a stay of the Wrongful Death Act counts against Oakbrook and Andora (counts III and VII) on the basis that the other claims against those two parties should be mediated or arbitrated. Second, defendants separately requested a stay of both counts asserted against Lancaster (counts IV and V) on the basis that Lancaster had no involvement in the factual allegations underlying the complaint.

¶ 18 Elsewhere in the motion, defendants argued that they had not waived their right to invoke the arbitration provision of the contract, since they had "not submitted any arbitrable issue to the Court for decision." They asserted that the delay in filing the motion was not due to any lack of diligence, but was due to the recent production of the contract by Oakbrook to defense counsel.

¶ 19 In support of the motion to compel arbitration, defendants submitted the affidavit of Jina Lebert-Davies, an administrator of the facility. She averred that, when she learned of plaintiff's lawsuit in August 2020, "the facility was in the midst of responding to the COVID crisis and my attention was focused on keeping the facility's residents and employees safe and responding to the pandemic." She stated that the contract was "inadvertently omitted from the documents originally provided to counsel" but was provided to counsel on May 17, 2021, "immediately" after she located it.

¶ 20 Plaintiff's response opposed the motion on several grounds. First, plaintiff urged that defendants had waived their right to arbitrate because they had "extensively participated" in the litigation for nearly one year. Plaintiff noted that defendants had answered the complaint,

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"filed multiple sets of discovery," and issued subpoenas. Plaintiff claimed that defendants "waited until after the Plaintiff had answered all written discovery to try to enforce the arbitration contract."

¶ 21 Second, plaintiff argued that Kotalik lacked authority to execute an arbitration agreement on decedent's behalf. Plaintiff asserted that decedent executed a POA for health care, appointing Kotalik, but that decedent separately appointed Clanton (plaintiff herein) as POA for property. As exhibits, plaintiff attached a copy of an "Illinois Statutory Short Form Power of Attorney for Health Care" appointing Kotalik and a copy of an Illinois Statutory Short Form Power of Attorney for Property" appointing Clanton, which reflected that the documents were both executed in January 2009. Plaintiff argued that the separate POAs indicated that decedent wished to divide responsibilities between her daughters and that Kotalik's authority to make healthcare decisions did not include "authority to bind [decedent] to an arbitration agreement."

¶ 22 Plaintiff separately urged that the arbitration provision was procedurally unconscionable because Kotalik lacked bargaining power and "had no opportunity to participate in the agreement's drafting." Plaintiff also contended that the arbitration provision was substantively unconscionable because it sought to deprive residents of their statutory right to recover attorney fees for violations of the Nursing Home Care Act. See 210 ILCS 45/3-602 (West 2020).

¶ 23 In their reply, defendants maintained that they had not taken any actions inconsistent with an intent to arbitrate, that they had promptly produced the contract once it was discovered, and that they otherwise acted in good faith in responding to plaintiff's discovery requests. Defendants otherwise argued that Kotalik had authority to execute the contract and that Kotalik was given the opportunity to ask questions about the contract before signing it. Defendants disputed that the arbitration provision sought to extinguish plaintiff's ability to recover attorney

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fees and costs under the Nursing Home Care Act. On this point, defendants noted that JAMS rules permit an arbitrator to "grant any remedy or relief allowed by the Parties' Agreement or law" and that an award "may allocate attorneys' fees and expenses *** if provided by the Parties' Agreement or allowed by applicable law."

¶ 24 C. The Trial Court Denies Defendants' Motion

¶ 25 On July 14, 2021, the trial court issued an order denying defendant's motion. In explaining its reasoning, the court first rejected plaintiff's contention that defendants waived the ability to seek arbitration or mediation. The court acknowledged that defendants had answered the complaint, served interrogatories, and responded to written discovery, yet it found those actions were not "inconsistent with defendants' right to rely on the mediation and/or arbitration clause." The court also noted that it was "sympathetic to the impact the Covid-19 pandemic had on nursing home facilities." The court emphasized that, only two days after receiving the contract, defense counsel produced it and notified plaintiff of their intent to file the motion to compel arbitration.

¶ 26 The court also rejected the plaintiff's argument that the arbitration provision was procedurally unconscionable. The court noted that the relevant language was "in the same font and size of the other clauses of the contract" and that its language was "clear and unambiguous."

¶ 27 The court also found that Kotalik had the "opportunity to ask questions before signing the contract."

¶ 28 The trial court nonetheless held that the arbitration provision was "unenforceable as substantively unconscionable." Citing the Fifth District's decision in *Glass v. Burkett*, 64 Ill. App. 3d 676, 683 (1978), the trial court found that "[b]y limiting plaintiff's ability to recover

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punitive damages, the provision effectively limits plaintiff's ability to recover attorney's fees." The court found the arbitration provision was "an attempt to nullify the primary reason for the attorneys' fees provision of the Illinois Nursing Home Care Act," *i.e.*, to "give residents incentive to bring claims to police nursing homes." The court thus found the arbitration clause substantively unconscionable because it attempted to extinguish the statutory right to attorney fees.

¶ 29 The trial court proceeded to state that, "in its discretion," it declined to sever the limitation on damages from the rest of the arbitration agreement. That is, the court held that "the offending provision renders the entirety of the mediation and/or arbitration clause unenforceable." The court thus denied the motion to compel mediation or arbitration of any of counts I, II, VI, or VIII. The court also denied as moot the defendants' request to stay any of the remaining counts.

¶ 30 On August 13, 2021, defendants filed a notice of interlocutory appeal from the denial of the motion.

¶ 31 II. ANALYSIS

¶ 32 On appeal, defendants raise two lines of argument to challenge the court's denial of their motion to compel arbitration. First, they contend that the trial court erred in concluding that the contract's language on punitive damages was substantively unconscionable as a bar against the recovery of attorney fees pursuant to the Nursing Home Care Act. That is, defendants claim that the language regarding "punitive damages" did *not* affect the statutory right to recover attorney fees, as they are distinct from punitive damages.

¶ 33 Defendants alternatively argue that, even assuming the limitation on damages was substantively unconscionable, the trial court erred in finding that it rendered the entire

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arbitration provision unenforceable. That is, they argue that the court should have severed the purportedly offending limitation on damages but otherwise enforced the language compelling mediation or arbitration.

¶ 34 In response, plaintiff suggests a number of grounds upon which we should affirm the denial of the defendants' motion, including grounds not discussed in the trial court's order. First, plaintiff maintains the trial court correctly found the contract's language on punitive damages was substantively unconscionable because it limited the right to recover statutory attorney fees.

¶ 35 Plaintiff otherwise argues that defendants' participation in the litigation waived their right to rely on the arbitration provision. Plaintiff further contends that, apart from the damages limitation, the arbitration provision is otherwise substantively unconscionable because it is "one-sided" as to which claims are subject to arbitration. Plaintiff independently argues that we may affirm because (1) the arbitration clause was procedurally unconscionable, (2) Kotalik lacked authority to enter into the arbitration agreement, or (3) the arbitration agreement was unenforceable because the entire contract terminated upon the decedent's death.

¶ 36 For the following reasons, we agree with defendants that their participation in litigation did not waive their right to move to compel the arbitration. However, we conclude that the arbitration provision was unenforceable, albeit for a different reason than that relied on by the trial court. Specifically, the contract unequivocally provided that it would terminate "immediately upon the resident's death." In turn, the entire contract, including the arbitration agreement, was no longer enforceable by the time this action was commenced. For that reason, we will affirm the denial of defendants' request to compel arbitration with respect to counts I, II, VI, and VIII against Oakbrook and Andora, as well as the denial of the request to stay the Wrongful Death Act counts against those defendants (counts III and VII). Finally, as

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defendants do not raise any argument with respect to the trial court's denial of the request to stay the counts against Lancaster (counts IV and V), we affirm that portion of the order.

¶ 37 A. Appellate Jurisdiction

¶ 38 We note that we have jurisdiction pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2017), which permits a party to appeal from an interlocutory order of the circuit court "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." "An injunction is a judicial process requiring a party to do a particular thing or refrain from doing a particular thing." *Herns v. Symphony Jackson Square LLC*, 2021 IL App (1st) 201064, ¶ 14 (citing *In re A Minor*, 127 Ill. 2d 247, 261 (1989)). "An order granting or denying a motion to compel arbitration is injunctive in nature and is appealable under Rule 307(a)(1)." *Id.*

¶ 39 B. Standard of Review

¶ 40 "A motion to compel arbitration is essentially a section 2-619(a)(9) motion to dismiss or stay an action in the trial court based on an affirmative matter, the exclusive remedy of arbitration. [Citation.]" *Sturgill v. Santander Consumer USA, Inc.*, 2016 IL App (5th) 140380, ¶ 21. "Section 2-619(a)(9) allows for a dismissal where the claim is barred by an affirmative matter that avoids the legal effect of or defeats the claim. (735 ILCS 5/2-619(a)(9) (West 2010))." *Id.*

¶ 41 "In an appeal from the denial of a motion to compel arbitration without an evidentiary hearing, our review is *de novo*." *Id.* ¶ 20 (citing *Hollingshead v. A.G. Edwards & Sons, Inc.*, 396 Ill. App. 3d 1095, 1099 (2009)). This is consistent with the principle that issues of contractual interpretation, including with respect to arbitration provisions, are reviewed *de novo. Fiala v. Bickford Senior Living Group, LLC*, 2015 IL App (2d) 141160, ¶ 17 ("We review *de novo* the trial court's decision on a motion to dismiss pursuant to section 2-619.

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[Citation.] Likewise, the scope of [an] arbitration provision presents a question of contract interpretation, and this is also reviewed *de novo*."); *Coe v. BDO Seidman, L.L.P.*, 2015 IL App (1st) 142215, ¶ 12 ("An agreement to arbitrate is a matter of contract, and the interpretation of a contract is a question of law subject to *de novo* review."). Thus, *de novo* review applies, to the extent the trial court's conclusions involved issues of contract interpretation rather than findings of fact.

¶ 42 A different standard applies with respect to the trial court's determination as to whether defendants waived their contractual right to arbitrate. "A number of decisions from the First District of this court have determined an abuse of discretion standard applies to a review of the circuit court's decision regarding waiver of arbitration rights. [Citation.]" *Bovay v. Sears, Roebuck & Co.*, 2013 IL App (1st) 120789, ¶ 24; see also *Woods v. Patterson Law Firm, P.C.*, 381 Ill. App. 3d 989 (2008) (applying abuse of discretion review to whether defendants waived right to compel arbitration); *Glazer's Distributors of Illinois, Inc. v. NWS-Illinois, LLC*, 376 Ill. App. 3d 411, 423-24 (2007) (following First District precedent applying abuse of discretion standard). Application of deferential review stems from recognition that the circuit court must " 'engage in a factual inquiry to determine if a party's actions constitute waiver.' " *Glazer's*, 376 Ill. App. 3d at 423 (quoting *Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1093 (2001)).

¶ 43 In sum, "in interlocutory appeals of orders denying a motion to compel arbitration, questions of law are reviewed *de novo*, while any findings of fact are reviewed for an abuse of discretion in light of a proper understanding of the law." *Bovay*, 2013 IL App (1st) 120879, ¶ 26. "An abuse of discretion occurs only when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. [Citations.]" *Id.*

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¶ 44 C. Whether Defendants Waived the Right to Rely on the Arbitration Provision

¶ 45 Before addressing the parties' arguments regarding the content of the contract, we first address plaintiff's contention that defendants waived the right to invoke the arbitration clause because they did not move to compel arbitration until approximately 11 months after plaintiff's complaint was filed. Plaintiff points out that defendants' answer and affirmative defenses filed on November 2020 did not reference arbitration and that in the ensuing months defendants issued subpoenas and served discovery requests. Plaintiff maintains that such actions were inconsistent with a right to arbitrate and indicated defendants' abandonment of any such contractual right.

¶ 46 "While arbitration is a favored method of settling disputes in Illinois, a party may waive its contractual right to arbitration. [Citation.]" *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1174 (2008). However, "Illinois courts are reluctant to find a party waived its contractual right to arbitration. [Citation.]" *Id.*

¶ 47 "Although disfavored, waiver will be found where 'a party conducts itself in a manner inconsistent with the arbitration clause, thereby demonstrating an abandonment of that right.' " *Koehler v. The Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶ 22 (quoting *Northeast Illinois Regional Commuter R.R. Corp. v. Chicago Union Co.*, 358 Ill. App. 3d 985, 996 (2005)). In deciding whether there was waiver, the " 'crucial inquiry' " is " 'whether the party has acted inconsistently with its right to arbitrate.' " *Id.* (quoting *Glazer's*, 376 Ill. App. 3d at 42). "A party acts inconsistently with its right to arbitrate when it submits arbitrable issues to a court for decision. [Citation.]" *TSP-Hope, Inc.*, 382 Ill. App. 3d at 1174. "[T]he operative distinction between judicial filings and actions that constitute a waiver of the right to compel arbitration and those that do not is whether, prior to seeking to compel arbitration, the party has placed

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substantive issues before the court." *Watkins v. Mellen*, 2016 IL App (3d) 140570, ¶ 15. First District precedent does not explicitly require prejudice to the other party to find waiver, although it may be considered. See *Woods*, 381 Ill. App. 3d at 994 ("Illinois courts also consider the delay in a party's assertion of its right to arbitrate and any prejudice the delay caused the plaintiff. [Citation.]"[3]).

¶ 48 Keeping in mind that the trial court's determination is reviewed for an abuse of discretion (*Glazer's*, 376 Ill. App. 3d at 424) here, we cannot say that the trial court abused its discretion in determining that defendants did not waive their right to rely on the arbitration provision. Although defendants answered the complaint and conducted some discovery, they did not "submit[ ] arbitrable issues to a court for decision. [Citation.]" *TSP-Hope, Inc.*, 382 Ill. App. 3d at 1223. Before filing the motion to compel arbitration, defendants did not ask the court to rule on any substantive issue. *Cf. Midland Funding LLC v. Hilliker*, 2016 IL App (5th) 160038, ¶ 29 (finding waiver where party "repeatedly sought a substantive judicial determination of a disputed issue and a judicial termination of the litigation"). Defendants' actions were clearly responsive to the complaint and in compliance with the trial court's case management order. It was not unreasonable for the trial court to conclude that such actions were not inconsistent with defendants' reliance on the arbitration provision. Moreover, as the trial court noted, the record reflects that defendants promptly asserted their right to arbitrate after the discovery of the contract. The trial court apparently found that defendants had not abandoned the right to arbitrate but diligently pursued it once the contract was discovered.

[3]We note that the United States Supreme Court recently held that federal courts cannot condition a waiver of the right to arbitrate on a showing of prejudice, as the Federal Arbitration Act (9 U.S.C. § 3 (2018)) does not authorize federal courts to create an arbitration-specific procedural rule. *Morgan v. Sundance, Inc.*, ___ U.S. ___, 142 S. Ct. 1708 (2022).

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¶ 49 We note plaintiff's claims that she suffered prejudice because (1) plaintiff answered interrogatories, which are not contemplated by JAMS rules, and (2) defendants' delay prevented a "speedy resolution" of the dispute. Plaintiff's prejudice arguments do not convince us that the trial court was unreasonable in deciding that defendants' conduct did not amount to waiver. We note that plaintiff does not articulate how she was prejudiced by responding to the interrogatories. Moreover, the interrogatories and plaintiff's responses are not in the record on appeal, which limits our ability to evaluate the claim of prejudice.

¶ 50 We are also not convinced that the delay resulting from defendants' motion, filed 11 months after the complaint, is so prejudicial that it was unreasonable for the trial court not to find waiver. Our precedent indicates that the relevant inquiry is not simply the length of prior litigation or the number of prior filings by the party seeking arbitration, but whether that party put substantive issues before the trial court. See, *e.g.*, *Bishop v. We Care Hair Development Corp.*, 316 Ill. App. 3d 1182, 1192 (2000) (defendants' two-year delay in seeking arbitration did not establish waiver where they "did not submit any substantive questions to the trial court for determination").

¶ 51 In this case, the record reflects that defendants did not ask the court to make any determination on the merits before moving to compel arbitration. Further, their submissions reflect that the delay in filing the motion was due to Oakbrook's inadvertent failure to discover the contract earlier. Once it was discovered, defendants promptly produced the contract and filed their motion. On this record, the trial court could reasonably find that defendants' actions were not inconsistent with asserting a right to arbitration. We thus decline to find that the trial court erred in finding defendants had not waived their right to seek arbitration. Nevertheless,

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as explained below, we proceed to conclude that the arbitration provision was ineffective after decedent's death, by operation of the contract's termination provision.

¶ 52 D. The Contract Expressly Terminated Upon Decedent's Death, Rendering the Arbitration Provision Unenforceable

¶ 53 Although plaintiff asserts a number of arguments for why we should find the arbitration provision unenforceable, we only need discuss one of them to resolve this appeal. Specifically, we agree with plaintiff that section F of the contract—which provides that the contract shall terminate "immediately upon the resident's death"—is dispositive. That is, the entire contract, including the arbitration agreement, terminated upon decedent's death.

¶ 54 Plaintiff did not raise this argument in the trial court, yet that does not preclude us from considering it.

> "While an appellant who fails to raise an issue in the trial court waives that issue, an appellee may raise an issue on review that was not presented to the trial court in order to sustain the judgment, as long as the factual basis for the issue was before the trial court. [Citation.]" *DOD Technologies v. Mesirow Insurance Services, Inc.*, 381 Ill. App. 3d 1042, 1050 (2008).

Further, "[w]e can affirm the trial court on any basis that appears in the record, regardless of whether the trial court relied upon such ground." (Internal quotation marks omitted.) *Cooney v. Magnabosco*, 407 Ill. App. 3d 264, 268 (2011). We will thus consider the merits of this argument.

¶ 55 Plaintiff acknowledges that "the general rule is that a contract survives the death of a party," subject to certain exceptions, such as contracts requiring performance from a particular person. Plaintiff does not argue that the instant contract is a personal performance contract but asserts that

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"the contract did not survive [decedent's] death because the parties agreed it terminated upon her death." That is, defendants have "nothing to enforce because the arbitration clause ceased to exist" upon decedent's death.

¶ 56 In response, defendants assert that plaintiff's interpretation violates the principle that "all parts of a contract should be constructed harmoniously" to avoid conflicting provisions, and that there was "no intention for the entire contract to terminate" upon a resident's death. According to defendant, the proper application of the termination provision is that "Oakbrook no longer has to provide services to [decedent], however, lawsuits arising from the care [decedent] received while at Oakbrook remain enforceable under the Oakbrook Contract." We find that defendants' position is undermined by the unambiguous and unequivocal language of the termination provision.

¶ 57 As both parties acknowledge, "[t]he general rule is that a contract survives the death of a party [citation] except *** when the contract requires the continued existence of a particular person or thing for its performance." *In re Estate of Bajonksi*, 129 Ill. App. 3d 361, 366-67 (1984). Regardless of the general rule, we must consider the effect of the clause that the contract shall terminate "immediately upon the resident's death," including whether it renders the arbitration provisions unenforceable after a resident's death. We apply these well-settled principles of contract interpretation:

> "In construing a contract, the primary objective is to give effect to the intention of the parties. [Citation.] The court will first look to the language of the contract itself to determine the parties' intent, and the contract must be construed as a whole, viewing each provision in light of the other provisions. [Citation.] The parties' intent is not determined by viewing a clause or provision in isolation, or in looking at detached portions of the

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> contract. [Citation.] If the words in the contract are clear and unambiguous, they must be given their plain, ordinary and popular meaning. [Citation.] A court will not interpret a contract in a manner that would nullify or render provisions meaningless, or in a way that is contrary to the plain and obvious meaning of the language used." (Internal quotation marks omitted.) *Insurance Benefit Group, Inc. v. Guarantee Trust Life Insurance Co.*, 2017 IL App (1st) 162808, ¶ 38.

¶ 58 In this case, Section F. 1 stated, "this Contract shall terminate on 7 days' notice or immediately upon the resident's death." We find (and defendants do not dispute) that this language is clear and unambiguous. Thus, we must apply the provision's plain meaning. That is, the entire contract terminated upon decedent's death in 2019. In turn, we agree with plaintiff that there was no longer any enforceable arbitration agreement when the instant action commenced.

¶ 59 Defendants argue "it is clear that there is no intention for the entire contract to terminate upon death of a resident," yet that is precisely what the plain language of the termination provision reflects. "The best indication of the parties' intent is found in the plain and ordinary meaning of the language of the contract." *St. Paul Mercury Insurance v. Aargus Security Systems, Inc.*, 2013 IL App (1st) 120784, ¶ 59. The termination provision states, without limitation, that "This Contract" terminates upon a resident's death. Thus, it indicates that the resident's death applies to terminate all contractual provisions.

¶ 60 By urging that we should not read the termination provision so broadly, defendants essentially ask us to assume or read into the agreement limitations or exceptions that are simply not present. However, "[w]e will not 'alter, change, or modify existing terms of a contract, or

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add new terms or conditions to which the parties do not appear to have assented.' " *Id.* (quoting *Thompson v. Gordon*, 241 Ill. 2d 428, 449 (2011)).

¶ 61 Moreover, " 'there is a presumption against provisions that easily could have been included in a contract but were not.' " *Id.* (quoting *Thompson*, 241 Ill. 2d at 449). Here, 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. Rather than broadly stating that "this Contract" (*i.e.*, the whole contract) would terminate upon the resident's death, the drafters could have specified which provisions would remain in effect. For instance, the contract could have stated 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. Or the termination provision could have simply included a carve-out to preserve the arbitration provision, for example, by stating that "this Contract, *other than the arbitration agreement in Section E*, shall terminate" upon the resident's death. While we cannot know why the drafters inserted such a broad termination provision, defendants cannot avoid the effect of the plain meaning of its language.

¶ 62 We also note defendants' reliance on the proposition that we should attempt to harmonize contractual provisions. See *Wolfensberger v. Eastwood*, 382 Ill. App. 3d 924, 934 (2008) ("When possible, courts should construe a contract so that different provisions are harmonized, not conflicting with one another. [Citation.]"); *Zannis v. Lake Shore Radiologists, Ltd.*, 73 Ill. App. 3d 901, 906 (1979) (citing the "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' " (quoting *Coney v. Rockford Life Insurance Co.*, 67 Ill. App. 2d 395, 399 (1966)). Contrary to defendants'

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suggestion, our conclusion does not violate this principle. We are not neutralizing the arbitration provision, which remains in effect prior to termination. That is, our construction gives effect to both the arbitration and termination provisions. Read together, the provisions indicate that, while the parties may be obligated to arbitrate claims during a resident's lifetime, the arbitration agreement (like every other part of the contract) terminates upon the resident's death. Our application of the broad termination provision does not conflict with the arbitration provision, any more than a termination provision affects every other provision in the agreement. We are simply giving effect to the contract's unequivocal language that all of its provisions terminate upon the resident's death.

¶ 63 We recognize that our conclusion conflicts with *Mason v. St. Vincent's Home, Inc.*, 2022 IL App (4th) 210458, which appears to be the only appellate court precedent addressing such a situation. However, we are not bound to follow the Fourth District's decision. See *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008) ("[T]he opinion of one district, division, or panel of the appellate court is not binding on other districts, divisions, or panels. [Citation.]"). Although *Mason* presented similar facts, we disagree with its reasoning.

¶ 64 Similar to this case, the plaintiff in *Mason* asserted negligence claims under the Nursing Home Care Act, Wrongful Death Act, and Survival Act against a nursing home following the death of plaintiff's mother, a nursing home resident. *Mason*, 2022 IL App (4th) 210458, ¶¶ 4-6. The governing contract provided that " '[i]n the event of Resident's death, this Contract terminates automatically.' " *Id.* ¶ 4. Elsewhere, the contract contained an arbitration provision stating that " 'any action, dispute, claim, or controversy related to the quality of health care services provided pursuant to this Contract *** now existing or hereafter arising between

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Resident and [nursing home] *** shall be resolved by binding arbitration.' " *Id.* ¶ 21. After defendant moved to compel arbitration, plaintiff argued, *inter alia*, that the contract was unenforceable because it terminated upon decedent's death. *Id.* ¶ 10. The trial court granted the motion to compel arbitration but stayed the Wrongful Death Act counts. *Id.* ¶ 13.

¶ 65 Upon plaintiff's appeal, one of plaintiff's arguments was that "the contract, including the arbitration clause, terminated by its own terms on decedent's death." *Id.* ¶ 43. In response, defendants relied on our supreme court's decision in *Carter*, 2012 IL 113204, to argue that "the arbitration agreement applies to plaintiff's claims brought pursuant to the Survival Act." *Mason*, 2022 IL App (4th) 210458, ¶ 43.

¶ 66 The Fourth District in *Mason* agreed with defendants that *Carter* supported enforcement of the arbitration agreement to claims that accrued before decedent's death. *Mason* explained that our supreme court in *Carter* addressed whether a plaintiff could be compelled to arbitrate a wrongful death claim pursuant to an arbitration agreement between the plaintiff's decedent and a defendant nursing home. *Id.* ¶ 44. Our supreme court explained that "[w]hile the Wrongful Death Act [citation] 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*." *Id.* (Emphasis in original.) (citing *Carter*, 2012 IL 113204, ¶ 34). Thus, the *Carter* plaintiff was not obligated to arbitrate a wrongful death claim but was bound to arbitrate the Nursing Home Care Act claim brought under the Survival Act, as that claim had "already accrued to the decedent prior to death." *Id.* (citing *Carter*, 2012 IL 113204, ¶ 34).

¶ 67 The Fourth District in *Mason* extrapolated from *Carter* to conclude that the termination clause did not preclude arbitration of claims that accrued before decedent's death:

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> "While the facts in *Carter* do not suggest the arbitration agreement was part of another contract with a termination upon death clause like the one in this case, the supreme court's analysis is instructive. The supreme court noted a cause of action brought pursuant to the Survival Act accrued prior to the death of the decedent. *Carter*, 2012 IL 113204, ¶ 34. Thus, even with a termination upon death clause, the contract including the arbitration provision would still have been valid when the cause of action accrued. The 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." *Mason*, 2022 IL App (4th) 210458, ¶ 45.

Mason proceeded to affirm the circuit court's conclusion that plaintiff was bound to arbitrate claims other than those under the Wrongful Death Act.

¶ 68 We disagree with *Mason*'s analysis for multiple reasons. First, *Mason*'s reliance on *Carter* to assess the effect of a termination clause is questionable. As *Mason* acknowledged, nothing in *Carter* indicates that the contract in that case included a similar termination clause. *Id.* ¶ 44 ("the facts [in *Carter*] did not state whether the arbitration agreement had a provision the agreement terminated upon the decedent's death"). Although *Carter* recognized that Survival Act claims on behalf of a deceased resident could be subject to arbitration, the supreme court had no occasion to decide whether a termination upon death clause would affect the validity of an arbitration agreement.

¶ 69 More fundamentally, the *Mason* court's analysis did not attempt to discuss the intent reflected by the termination clause's plain and unequivocal language that " 'In the event of Resident's death, this Contract terminates automatically.' " *Id.* ¶ 21. Rather than discussing the meaning of that broad termination clause, the *Mason* court elected to focus on the lack of

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limitation in the arbitration provision. See *id.* ¶ 45 (reasoning 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"). In this manner, the *Mason* court essentially created an exception to the termination provision, in order to allow arbitration claims that accrued before resident's death. In our view, the *Mason* court's approach did not give effect to the clear and unequivocal language of the termination provision. Thus, we decline to follow that decision.

¶ 70 At this point, we respond to defendants' petition for rehearing, which urges that we erred in our interpretation of *Carter* and *Mason*. Defendants argue that, since our supreme court in *Carter* recognized that a decedent's representative may maintain actions accruing before the decedent's death, whether such claims are subject to arbitration must also be decided by contractual provisions in effect before the death. Defendants urge that if a plaintiff may "step into the shoes of the decedent at the time the causes of action accrued, for the benefit of the estate, then the same should apply with the contract," such that Survival Act claims "relate back to the period when the contract was valid." As applied here, defendants reason that because the termination-on-death clause "was not triggered at the time the Survival Act causes of action *** accrued," it does not preclude arbitration of such claims. Under defendants' logic, *Carter* leads to the conclusion that the termination provision is inapplicable to claims that accrued before death.

¶ 71 Defendants similarly claim we have "overlooked" *Mason*'s reasoning. They emphasize *Mason*'s stated rationale 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." *Mason*, 2022 IL App (4th) 210458, ¶ 45. Defendants argue that *Mason* did not "carve

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out an exception to the termination clause" but found that the clause was "irrelevant" to the arbitrability of Survival Act claims, as such claims put the estate "in the shoes of the decedent at the time the cause of action accrued." They urge that the Fourth District in *Mason* properly found that "if a facility is being sued for claims that accrued prior to the decedent's death, the contract *** is still valid as to those claims."

¶ 72 In sum, the petition suggests that our holding conflicts with *Carter*'s recognition that Survival Act claims accruing during a decedent's life may be asserted by estate. However, we believe that defendants' interpretation of *Carter* (like that of the *Mason* court) presumes that the supreme court resolved an issue that was not before it—the arbitrability of Survival Act claims *when the contract specifically provides that it terminates upon death*. Defendants suggest that, because the estate stands in decedent's shoes as to the types of claims that may be asserted (*i.e.*, those that accrued during decedent's life), courts must construe other aspects of the contract as they operated when decedent was still alive. However, *Carter* simply does not address the application of a termination provision such as that in this case. We will not read into our supreme court's decision an implicit holding that the arbitrability of Survival Act claims is governed by the contract as it existed before the resident's death, rendering irrelevant a termination upon death clause. Instead, we must apply the plain meaning of the contract's terms, giving effect to each provision without reading into it exceptions or limitations. Here, the termination provision said unequivocally that "this Contract shall terminate *** immediately upon the resident's death." We are bound to give effect to the plain meaning of that provision.

¶ 73 In this regard, defendants' petition suggests we should not criticize the contract's drafters for failing to specify whether or how the termination clause would impact the arbitration

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agreement. They maintain that the drafters would have included additional language if they had reason to believe that the termination provision could be read to preclude arbitration, but that "the legal expectation was not that Survival Claims would be barred" because it is "well settled law in Illinois that Survival Actions are subject to arbitration." Defendants suggest the contract's drafters were entitled to assume that the arbitration clause would remain enforceable, notwithstanding their decision to include a broad provision indicating that the entire contract would terminate upon the resident's death. Defendants cite no case to justify that assumption. Although *Carter* confirmed that a Survival Act claim is subject to an arbitration agreement entered into by a decedent (2021 IL 113204, ¶ 57), 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*. As discussed, if the drafters wanted to ensure that the arbitration agreement would survive the termination provision, it was incumbent upon them to add language to that effect.

¶ 74 In summary, we agree with plaintiff that the termination upon death provision is dispositive with respect to defendants' attempt to compel arbitration. That is, the arbitration agreement terminated with the rest of the contract upon decedent's death. As we affirm on that basis, we need not discuss whether the trial court correctly found that the arbitration provision was substantively unconscionable due to its punitive damages clause. Nor do we need to discuss plaintiff's alternative arguments, including whether the contract was otherwise substantively or procedurally unconscionable or whether Kotalik as healthcare POA lacked authority to bind decedent to the arbitration agreement.

¶ 75 Having found the arbitration provision unenforceable by operation of the termination clause, we affirm the trial court's denial of the motion to compel arbitration or mediation with

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respect to the counts against Oakbrook and Andora that are not based on the Wrongful Death Act (counts I, II, VI, and VIII). As defendants were not entitled to arbitration, we also affirm the denial of their request to stay the Wrongful Death Act counts against Oakbrook and Andora (counts III and VII) pending arbitration.

¶ 76 E. Defendants Do Not Challenge the Order with Respect to the Counts Against Lancaster

¶ 77 Finally, we recognize that defendants' motion also sought to stay the counts against Lancaster, which consist of a Survival Act count (count IV) and a Wrongful Death Act count (count V). In the trial court, defendants asserted that Lancaster was not involved in the events underlying the complaint and that after, "appropriate discovery," Lancaster would separately "seek dismissal of Counts IV and V by way of motion practice."

¶ 78 Defendants' brief does not raise any argument challenging the trial court's order, to the extent it denied the request to stay the counts against Lancaster. Thus, defendants have forfeited any challenge to that aspect of the order. Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020). ("Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). In any event, the record is insufficient to determine whether there is merit to Lancaster's contention that it had no involvement in the underlying events. Thus, we will not disturb the trial court's order insofar as it denied defendants' request to stay the counts against Lancaster (counts IV and V). We express no view as to whether Lancaster will ultimately be able to show that it is entitled to dismissal in subsequent proceedings.

¶ 79 On this point, defendants' petition for rehearing asserts that we are unduly "critical" of them for not raising any argument challenging the portion of the trial court's order denying their request to stay the two counts against Lancaster. Defendants assert that they did not need to address this issue on appeal, insofar as the trial court denied the request to stay these counts

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as "moot." Defendants suggest that, given the trial court's mootness determination, "there was nothing to appeal," and they "cannot waive something that was never appealable." The petition recites the principle that courts generally do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected. *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009). Indeed, defendants suggest that our court lacked jurisdiction to consider the denial of this request because the trial court deemed it "moot."

¶ 80 The petition's logic is flawed, insofar as it suggests that this court was powerless to review the trial court's denial of the request to stay the counts against Lancaster, simply because the trial court deemed it "moot." Certainly, had defendants properly raised the issue on appeal, this court could have reviewed the correctness of the trial court's determination that the issue was moot. See *id.* at 350 ("the question faced by this court is the correctness of the appellate court's determination that respondent's appeal should be dismissed as moot. This is entirely a question of law. Therefore, our review of this question is *de novo*."). We note that defendants' request to stay the two counts against Lancaster was not premised on the arbitration agreement, but instead was based on their claim that Lancaster had no factual involvement in the underlying allegations. Defendants could have raised a similar argument in this court, but they elected not to do so. Our opinion merely recognizes that, since defendants did not raise any explicit challenge to this specific aspect of the trial court's order, we have no reason not to affirm it. In any event, we reiterate that we make no determination as to whether, in future proceedings, Lancaster may be able to show that it is entitled to dismissal.

¶ 81 III. CONCLUSION

¶ 82 In summary, we affirm all aspects of the trial court's order. Specifically, we affirm denial of defendants' motion to dismiss and compel arbitration with respect to the Nursing Home

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Care Act claim against Oakbrook (count I), the Survival Act negligence counts against Oakbrook (counts II and VIII), and the Survival Act negligence claim against Andora (count VI). We also affirm the denial of defendants' request to stay the Wrongful Death Act counts against Oakbrook (count III) and Andora (count VII). Finally, we affirm the denial of defendants' motion to stay the counts against Lancaster under the Survival Act and Wrongful Death Act (counts IV and V). We remand for further proceedings in accordance with this decision.

¶ 83 Affirmed and remanded.

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No. 1-21-0984

Clanton v. Oakbrook Healthcare Centre, Ltd.,2022 IL App (1st) 210984

Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 2020-L-006460; the Hon. Patricia O. Sheahan, Judge, presiding.
Attorneys for Appellant:	Carter A. Korey, Dana N. Raymond, and Chaniece M. Hill, of Korey Richardson LLP, of Chicago, for appellants.
Attorneys for Appellee:	Michael W. Rathsack, Steven M. Levin, Michael F. Bonamarte IV, and Daisy Ayllon, all of Chicago, for appellee.

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

NANCY CLANTON, as independent administrator of the Estate of Laurel J. Jansen, deceased, *Plaintiff-Respondent,* v. OAKBROOK HEALTHCARE CENTRE, LTD., et al., *Defendants-Petitioners.*	)	No. 129067

The undersigned, being first duly sworn, deposes and states that on April 5, 2023, there was electronically filed and served upon the Clerk of the above court the Brief and Supplemental Appendix of Appellee. On April 5, 2023, service of the Brief will be accomplished through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Michael W. Rathsack
Michael W. Rathsack

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.

/s/ Michael W. Rathsack
Michael W. Rathsack

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