No. 19-

IN THE

Supreme Court of the United States

ROBINSON NURSING AND REHABILITATION CENTER, LLC, D/B/A ROBINSON NURSING AND REHABILITATION CENTER; CENTRAL ARKANSAS NURSING CENTERS, INC.; NURSING CONSULTANTS, INC.; AND MICHAEL MORTON,

Petitioners,

v.

ANDREW PHILLIPS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DOROTHY PHILLIPS, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF DOROTHY PHILLIPS, AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Arbitration Act (FAA) provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That provision requires states to "place[] arbitration contracts 'on equal footing with all other contracts.'" *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

The Supreme Court of Arkansas here refused to enforce hundreds of arbitration agreements. It improperly found that "the arbitration agreement was a separate contract from the admission agreement, regardless of whether it was incorporated into or operated as an addendum to the admissions agreement.'" App., *infra*, 20a. Once separated, it misapplied well-established rules of contract interpretation to hold that the arbitration agreements did not apply to the residents, while still allowing the residents to pursue contract claims based on the validity of the underlying contract.

The questions presented are:

1. Whether the FAA preempts a state-law contract rule that singles out arbitration agreements for invalidation because they were signed by family members or other persons for the benefit of the third-party residents now bringing the claims.

2. Whether the FAA preempts a state-law contract rule singling out arbitration agreements by imposing a "mutuality of

obligation" requirement to them that is not a requirement for other contracts.

3. Whether the FAA preempts a state-law contract rule that singles out arbitration agreements due to lack of "mutuality of assent" because they were not signed by the party seeking to enforce it, when Arkansas law allows other contracts to be valid and enforceable without a signature based on other factors including actual performance.

PARTIES TO THE PROCEEDING

The parties to the proceeding below are listed on the caption.

RULE 29.6 STATEMENT

The owner of Robinson Nursing and Rehabilitation Center, LLC; Central Arkansas Nursing Center, Inc.; and Nursing Consultants, Inc. is Michael Morton. No publicly traded company owns 10% or more of the stock of Robinson Nursing and Rehabilitation Center, LLC; Central Arkansas Nursing Center, Inc.; and Nursing Consultants, Inc.

RELATED PROCEEDING

- *Robinson Nursing and Rehabilitation Center, LLC v. Phillips*, No. CV-16-584, Supreme Court of Arkansas, Judgment entered May 4, 2017.

- *Phillips v. Robinson Nursing and Rehabilitation Center, LLC*, No. 60CV-14-4568, Circuit Court of Pulaski County, Arkansas Sixth Division, currently pending, interlocutory order appealed from entered October 19, 2017.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Robinson Nursing and Rehabilitation Center, LLC; Central Arkansas Nursing Center, Inc.; Nursing Consultants, Inc.; and Michael Morton (collectively "Robinson") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas (App., *infra*, 1a) is reported at 586 S.W.3d 624. The order of the Supreme Court of Arkansas denying rehearing (App., *infra*, 38a) is unreported.

The October 19, 2017 order of the Circuit Court of Pulaski County, Arkansas denying the Motions to Compel Arbitration (App., *infra*, 31a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on October 31, 2019. App., *infra*, 1a. That court denied rehearing on December 19, 2019. App., *infra*, 38a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

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

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

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

STATEMENT OF THE CASE

The Supreme Court of Arkansas refused to enforce hundreds of arbitration agreements. It improperly found that each "arbitration agreement was a separate contract from the admission agreement, regardless of whether it was incorporated into or operated as an addendum to the admissions agreement.'" App., *infra*, 20a. Once segregated, it misapplied well-established rules of Arkansas contract law to hold that the arbitration agreements did not apply to the residents, while still allowing the residents to pursue contract claims based on the validity of the underlying admissions contracts.

The state court, therefore, refused this Court's clear instructions to "place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740, 1745 (2011) (citations omitted). *See also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *KPMG LLP v. Cocchi,* 132 S. Ct. 23 (2011); *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52 (1995).

Specifically, the court deployed three devices for applying contract principles differently in the context of arbitration agreements than in other contracts. These devices are the subject of multiple state and federal court rulings around the country as lower courts seek to invalidate arbitration agreements.

First, the court singles out 271 arbitration agreements for invalidation because they were signed by family members or other persons for the benefit of the third-party residents. This part of the

ruling applies the third-party beneficiary doctrine differently by declaring that the residents are not third-party beneficiaries of the arbitration agreement, while allowing residents to gain the benefits of and pursue claims as third parties to the admission agreement. As detailed below, a split has emerged in state and federal courts as some courts have similarly sought to undermine arbitration agreements signed for third-party beneficiaries.

Second, the court invalidated 216 total (109 additional) arbitration agreements by imposing a "mutuality of obligation" requirement not applied to other contracts. These agreements place an equal obligation on the parties to arbitrate disputes exceeding thirty thousand dollars ($30,000). The court found this provision did not create a mutual obligation because it erroneously believed that it bound only claims the residents would bring, not claims Petitioner would bring. Of greater concern, it is not the law in Arkansas or elsewhere that all contracts must be mutual or that all provisions or types of claims arising under a contract must be resolved in the same way. The U.S. Court of Appeals for the Eighth Circuit last year held that applying this doctrine to arbitration agreements is invalid because it places them on unequal footing. *See Plummer v. McSweeney*, 941 F.3d 341, 346 (8th Cir. 2019). As detailed below, there is also a Circuit split on this issue, with the Fourth Circuit calling for this Court's review. *See Noohi v. Toll Bros., Inc.*, 708 F.3d 599 (4th Cir. 2013).

Third, the court invalided 28 total (13 additional) arbitration agreements claiming there was a lack of "mutuality of assent" because these arbitration

agreements were signed only by the resident or Responsible Party, and not Petitioner who was seeking to enforce them. Again, the court is singling out arbitration agreements for separate treatment, finding that mutual assent mandates a signature as the only means of demonstrating assent to an arbitration agreement despite the fact that Arkansas law has long held that assent to contracts can be demonstrated by other methods, including actual performance. *See Parker v. Carter*, 120 S.W. 836, 838 (Ark. 1909). Petitioner only entered into the admission agreements and admitted the residents into its facility because the arbitration agreements were signed.

Each of these devices for invalidating arbitration agreements demonstrates a stark refusal to adhere to the Federal Arbitration Act ("FAA"), which governs these claims, and this Court's precedent that state contract law must be applied equally to arbitration clauses as to other contracts. The FAA clearly provides that a written agreement to arbitrate in a contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of a contract." 9 U.S.C. § 2. And, this Court had repeatedly stated that the FAA "preclude[s] States from singling out arbitration provisions for suspect status," as the Supreme Court of Arkansas has done in this case. *Doctor's Assocs., Inc. v. Casarotto*, 116 S. Ct. 1652, 1653 (1996).

This Court's review is necessary to prevent state and federal courts from continuing to create new devices to prohibit the enforcement of valid arbitration agreements. The devices here are

becoming common in lower courts and the Circuits are asking for guidance. Given the Supreme Court of Arkansas' blatant disregard of this Court's directive that arbitration agreements be placed on equal footing with other contracts, this Court may wish to consider summary reversal or vacatur for reconsideration.

A. Factual Background

Petitioner Robinson Nursing and Rehabilitation Center, LLC is a long-term care facility in North Little Rock, Arkansas. Petitioners Central Arkansas Nursing Center, Inc. and Nursing Consultants, Inc. provide support services to the facility. Petitioner Michael Morton has an ownership interest in Robinson Nursing and Rehabilitation Center, LLC; Central Arkansas Nursing Center, Inc.; and Nursing Consultants, Inc.

Respondent, Andrew Phillips, represents the estate of Dorothy Phillips and is the class representative for residents of Petitioner in a class action pending in Pulaski County, Arkansas Circuit Court.

Before residents could be admitted to the facility, each class member or a "Responsible Party" for a class member executed an arbitration agreement and admission agreement. The arbitration agreement was generally presented on separate paper so that the signee understood that he or she was waiving the right to trial by judge or jury and that arbitration would be used to resolve disputes arising between Petitioner, the resident and, when applicable, the Responsible Party. All of the arbitration agreements in this litigation, *inter alia*, state that "any and all

claims, disputes, and controversies arising out of, or in connection with, or relating in any way to the admission agreement, or any service or health care . . . shall be resolved exclusively by binding arbitration and not by a lawsuit or resort to court process."

The arbitration agreements further state that they include all claims related to "violations of any right granted to the Resident by law or by the admission agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice or claims based on any departure from accepted medical or health care or safety standards, as well as any and all claims for equitable relief or claims based on contract, tort, statute, fact, or inducement."

Finally, the arbitration agreements state the services provided involve interstate commerce and that arbitration "shall be governed by the Federal Arbitration Act." Thus, if the arbitration agreements are determined to be valid, they would govern the claims in this case.

B. Procedural History

On September 4, 2015, Respondent filed his First Amended Class Action Complaint against Petitioners alleging claims for violation of the Arkansas Deceptive Trade Practices Act, breach of the admission agreement, breach of the Provider Agreement, Negligence, Civil Conspiracy and Unjust Enrichment and seeking damages for physical and economic injuries, as well as punitive damages. App., *infra*, 2a. An Order Granting Respondent's Motion for Class Certification was entered on March

4, 2016 and was upheld by the Supreme Court of Arkansas as to all claims except for negligence. App., *infra*, 3a.

Following the Supreme Court of Arkansas' class certification decision, Petitioners filed four separate Motions seeking to compel into arbitration the claims of 544 Residents with valid and enforceable arbitration agreements: a Motion with respect to Residents who signed arbitration agreements; a Motion with respect to Residents whose guardians signed arbitration agreements; a Motion with respect to Residents whose Attorneys-In-Fact signed arbitration agreements; and a Motion with respect to Residents whose Responsible Parties signed arbitration agreement. App., *infra*, 3a.

A hearing was held on September 22, 2017, at which the Circuit Court ruled that all four of Petitioners' Motions to Enforce Arbitration Agreements and to Compel Class Members with Arbitration Agreements to Submit Their Claims to Binding Arbitration were denied. App., *infra*, 37a. The Court also denied Robinson's request for findings of fact and conclusions of law. App., *infra*, 4a. A written Order was entered of Record on October 19, 2017 from which Petitioners appealed to the Supreme Court of Arkansas. App., *infra*, 31a.

On October 31, 2019, in a majority opinion, the Supreme Court of Arkansas affirmed in part and reversed and remanded in part the Circuit Court's Order. The court held that 271 of the 544 arbitration agreements at issue were invalid because they had been signed by a "Responsible Party" who was not the resident, a legal guardian of the resident, or a

person with power of attorney over the resident. It held that 216 of the arbitration agreements were invalid due to lack of mutuality because those agreements only required arbitration of disputes exceeding $30,000. Because of the overlap in these groupings, this ruling invalidated 109 additional arbitration agreements. The court held that 28 of the agreements were invalid for lack of mutual assent because they were not signed by Robinson. Due to overlap, this holding invalidated 13 additional agreements. Finally the court held that as many as 30 agreements were invalid because they were incomplete, and that three residents' agreements were invalid for individual reasons. The remaining arbitration agreements were enforceable.

The Supreme Court of Arkansas' holding employs multiple devices for invalidating arbitration agreements in contradiction to how these state law devices apply to other types of contracts.

REASONS FOR GRANTING THE PETITION

The Supreme Court of Arkansas' ruling directly conflicts with this Court's clear instructions that if a court enforces a contract, it must also enforce the arbitration agreements that are part of or attendant to those contracts. Here, the court refused to enforce hundreds of arbitration agreements entered into by nursing home residents or "Responsible Parties," who signed the agreements when admitting family members or others into the nursing home. Yet, in each situation, the court held the underlying admission agreement was fully enforceable, giving rise to contract, tort and statutory claims for the residents.

In treating the arbitration agreement differently from the underlying admission agreement, the court asserted that "the arbitration agreement was a separate contract from the admission agreement, regardless of whether it was incorporated into or operated as an addendum to the admissions agreement." This Court, though, has repeatedly stated that arbitration agreements are on equal footing with all other contracts and the FAA preempts any such state-law rule discriminating against arbitration agreements. *See*, *e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Concepcion*, 563 U.S. at 333. As the Court has observed, "we must be alert to new devices and formulas" that state Courts use for "declaring arbitration against public policy." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018).

This Petition involves three such "devices" the Court has not reviewed and that are the subject of arbitration cases in multiple jurisdictions and, in some instances, creating splits among the lower courts. First, the court refused to recognize that a resident could be the third-party beneficiary of the Responsible Party who contracts with the nursing center for the resident's care. Second, it applied the mutuality of obligations doctrine to block arbitration agreements when that doctrine has not been applied in the same way to other contracts. Third, it failed to enforce several arbitration agreements that the resident or Responsible Party signed as a prerequisite for both parties signing the admission agreement because the nursing center signed only the admission agreement. As the dissenting justice points out, the first two, and Petitioner believes all

three, violate "basic Arkansas contract principles" and "well-established rules of contract interpretation."

When state courts distort its traditional contracts law and treat arbitration agreements differently from other contracts, the Court has not hesitated to remind them that they are bound by the FAA and this Court's precedents for upholding arbitration agreements. *See*, *e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." (citing U.S. Const., Art IV, cl. 2.)). Because state supreme court decisions often represent the final say on the enforcement of arbitration agreements, intervention is "a matter of great importance" so that "state supreme courts adhere to a correct interpretation of the [FAA]." *Nitro-Lift Techs., LLC v. Sutter*, 568 U.S. 17, 17-18 (2012).

As this case demonstrates, combating devices states and some federal courts create to defeat arbitration agreements has sometimes resembled a game of Whack-a-Mole. The Court should grant the Petition to "whack" these three new devices for striking down arbitration agreements, as they are appearing in similar cases around the country, and issue strong language that courts should adhere to the Court's consistent jurisprudence that arbitration agreements are not different from underlying contracts. It is not proper for people seeking to enforce contracts to be summarily excused from abiding by the arbitration provisions in them.

A. The Court Should Grant The Petition To Provide Needed Clarity That Arbitration Agreements, As With Other Contracts, Bind Third-Party Beneficiaries.

The third-party beneficiary doctrine at issue in this Petition addresses an issue left uncovered by *Kindred Nursing*, potentially opening a giant loophole on the enforceability of arbitration agreements in nursing homes and other health care facilities where a family member or other person signs the contracts upon which the resident or patient is admitted. In *Kindred Nursing*, the Court required the enforcement of an arbitration agreement in a nursing home when a family member or other person signs with the power-of-attorney for the resident. *See* 137 S. Ct. at 1425 ("Because that rule singles out arbitration agreements for disfavored treatment, we hold that it violates the FAA."). In that situation, the person with the power of attorney is signing on the resident's behalf.

There are many situations where a family member contracts with the health care facility to provide services to a resident, but the family member does not have power of attorney. In some of those situations, as here, the family member signs the contract, not as an agent for the resident, but in his or her own capacity. The sole purpose of the contract is to provide services to the third-party resident, as the contract outlines the rights and obligations of the nursing home, family member signing the contract, and resident. Indeed, the residents have gained the benefits of these contracts by receiving care and are bringing claims based on these contracts.

As the Court has explained, the question of whether arbitration agreements included in (or signed as a prerequisite to) these contracts can be "enforced by or against nonparties"—here the residents—is governed by "'traditional principles' of state law," including "third-party beneficiary theories." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009). In Arkansas, a contract is enforceable against a non-signatory third-party beneficiary if two elements are established: (1) an underlying valid agreement between the parties, and (2) a clear intention that the contract benefits a third party. *See Broadway Health & Rehab., LLC v. Roberts*, 524 S.W.3d 407, 412 (Ark. Ct. App. 2017). Because the third-party beneficiary receives the contract's benefits, he or she is also bound by its terms, and that includes any arbitration agreement. *American Ins. Co. v. Cazort*, 871 S.W.2d 575, 579-80 (Ark. 1994) (explaining that a non-signatory cannot claim benefits of a contract but avoid being bound by an arbitration provision contained therein).

Although there are slight variations in some of the contracts, each family member in this subset of claims signed the arbitration and admission agreements in his or her name as the "Responsible Party," not as a power of attorney or serving in any other representative capacity. App. *infra*, 7a. The Agreements define "Responsible Party" as the person "who agrees to assist the [nursing home] in providing for [the resident's] health, care and maintenance." App., *infra*, 10a. They also state that the Responsible Party intends to be bound by the agreement for the purpose of assisting the nursing home in caring for the third-party resident. App., *infra*, 26a.

As discussed above, to excuse third-party beneficiaries from the arbitration provisions, the court's ruling directly violated *Kindred Nursing* by segregating the arbitration agreement from the admission agreement, despite the fact that the admission agreement incorporates by reference the arbitration agreement. The arbitration agreement is on separate paper and requires a separate signature to assure it is properly highlighted and considered by the signee—not to be given different treatment from the admission agreement. Once separated, the court found the arbitration agreements "do not place any specific obligations or personal liability upon the 'Responsible Party'" so there is no valid agreement. App., *infra*, 13a-14a. It also sought to minimize differences between contracts signed by Responsible Parties and those by resident or legal representatives: "Other than the change in nomenclature, there is no real distinction." App., *infra*, 13a.

As the dissent explains, "[t]he conclusion that the residents were third-party beneficiaries is easily reached" under traditional Arkansas contract law and the majority's ruling to deny third-party beneficiary status to the residents contravenes with "well-established rules of contract interpretation." App., *infra*, 27a-28a. "[B]y voluntarily signing as a 'responsible party,' the individual intends to be bound by the agreement for the purpose of assisting the nursing home in caring for the resident. To hold otherwise would render the language defining a 'responsible party' meaningless, which is contrary to Arkansas contract law." App., *infra*, 26a. Also, equating "responsible party" with a legal guardian or

someone with power of attorney contradicts the written contract. App., *infra*, 28a.

Importantly for the Court's consideration of the Petition, a split has emerged among Federal Circuits as to whether the third-party beneficiary doctrine binds residents in these situations. *Compare JP Morgan Chase & Co. v. Conegie*, 492 F.3d 596 (5th Cir. 2007) (relative signed arbitration and admission agreement admitting patient to nursing home and patient was deemed a third-party beneficiary for purposes of enforcing the arbitration agreement) *with Northport Health Servs. of Ark., LLC v. Posey*, 930 F.3d 1027 (8th Cir. 2019) (relative signed arbitration and admission agreement admitting patient to nursing home and patient was not deemed a third-party beneficiary for purposes of enforcing the arbitration agreement).

Before the recent Eighth Circuit ruling, federal District Courts had applied Arkansas contract law to uphold similar provisions in other third-party beneficiary agreements. *See*, *e.g.*, *Northport Health Servs. of Ark., LLC v. Cmty. First Tr. Co.*, No. 2:12-CV-02284, 2014 WL 217893 (W.D. Ark. Jan. 21, 2014); *Northport Health Servs. of Ark., LLC v. Rutherford,* No. 07-5184, 2009 WL 10673107 (W.D. Ark. March 17, 2009). The Arkansas Supreme Court did not explain why these cases wrongly applied the FAA to the state claims; it summarily dismissed them in a footnote. It also did not mention *Kindred Nursing* or any other of the Court's rulings enforcing arbitration agreements in explaining how its ruling fit within the Court's jurisprudence—all reasons why this case is screaming for this Court's attention.

B. The Court Should Grant This Petition To Address The Growing Circuit Split With Respect To Whether The FAA Preempts State Law Imposing Mutuality Of Obligation Only On Arbitration Agreements.

There is also a split among the Federal Circuits on the second device the Supreme Court of Arkansas used to determine that more than two hundred of the arbitration agreements in question were invalid: the lack of "mutuality of obligation." This doctrine suggests that the contract must impose the requirements of arbitration on both parties. *See* App., *infra*, 16a. As discussed below, many courts have analyzed this theory, including the Eighth Circuit applying Arkansas law, and have held that it cannot be invoked to invalidate arbitration agreements.

Here, the court's ruling significantly stretches this mutuality of obligation doctrine to the extent it can even be applied to bar arbitration agreements. The terms of the arbitration agreement at issue in this subset of claims apply equally to all parties: any claim in excess of $30,000 must be arbitrated in an effort to avoid the high costs of large litigation. Smaller claims can be litigated if the party seeking to enforce the contract so chooses. The court theorized, without foundation, that this limitation would push the type of claims residents might bring against Petitioner into arbitration, while allowing Petitioner to use the court system to pursue smaller claims, like fee disputes, against residents. App., *infra*, 19a. As the dissent explains, this was mere "speculation about what types of hypothetical claims each party

may potentially have against each other and the respective value of those claims." App., *infra*, 30a.

One week before the court's decision here, the Eighth Circuit detailed the reasons Arkansas' entire mutuality of obligation doctrine for arbitration agreements violates the FAA. *See Plummer,* 941 F.3d at 346. In that case, the Eastern District of Arkansas expressed reservations that the arbitration clause "in effect allowed only [the defendant] to obtain redress of claims" in the courts, while plaintiffs had to arbitrate their claims. *Id.* The Eighth Circuit explained that this entire theory relies on "a resistant strain of Arkansas case law that holds that a party's promise to arbitrate disputes is not enforceable unless the other party promises to arbitrate as well." *Id.*

The Eighth Circuit explained that this doctrine "contravene[s] the FAA's directive that courts place arbitration contracts on an equal footing with other contracts." *Id.* (citing *Kindred Nursing*, 137 S. Ct. at 1424). "Arkansas law, for good reason, does not require on 'mutuality of obligation' grounds or any other, that a party's promise, say, to build a house is not enforceable unless the other party also promises to do so." *Id.* at 347 n.1. It noted that it had "intimated" that this "mutuality of obligation" requirement violates the FAA on several other occasions. *Id.* (citing *Dickson v. Gospel for ASIA, Inc.*, 902 F.3d 831, 835 (8th Cir. 2018); *Se. Stud & Components, Inc. v. Am. Eagle Design Build Studios*, LLC, 588 F.3d 963, 966–68 (8th Cir. 2009); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 792 (8th Cir. 1998). Additionally, it noted more than a decade ago that an Eastern District of Arkansas Court had held that

Arkansas' mutuality of obligation requirement for arbitration agreements violates the FAA—"we think correctly." *Id*. (citing *Enderlin v. XM Satellite Radio Holdings, Inc.*, No. 4:06-CV-0032 GTE, 2008 WL 830262, at *10 (E.D. Ark. Mar. 25, 2008)).

Yet, the Supreme Court of Arkansas ignored those rulings. Thus, this conflict between the Eighth Circuit and the Supreme Court of Arkansas means that the enforceability of Arkansas arbitration agreements will vary based on whether a claim is filed in state or federal court.

The Eighth Circuit also does not stand alone. The First Circuit has held that the FAA precludes states from imposing "mutuality of obligation" requirements on arbitration agreements. *See Soto v. State Indus. Prods., Inc.*, 642 F.3d 67, 76 (1st Cir. 2011) ("[T]he FAA preempts Puerto Rico from imposing [a mutuality of obligation] requirement applicable only to arbitration provisions."). The Second Circuit also has explained that "mutuality of obligation" requirements do not invalidate arbitration agreements when there is consideration for the underlying contract, and cautioned that a contrary holding "that required separate consideration for arbitration clauses might risk running afoul of" the strong federal policy favoring arbitration. *See Doctor's Assocs., Inc., v. Distajo*, 66 F.3d 438, 453 (2d Cir. 1995).

Various District Courts are in agreement and have held that state law "mutuality of obligation" requirements for arbitration agreements are preempted by the FAA. *See, e.g., Kelly v. UHC Mgmt. Co., Inc.*, 967 F. Supp. 1240, 1260 (N.D. Ala. 1997)

("The Alabama Supreme Court has added a requirement of 'mutuality of obligation' to arbitration agreements that does not exist for all other contracts formed under Alabama law. This requirement, therefore, does not comport with the commands of § 2 and is not to be considered in determining the validity of the present agreements to arbitrate."); *Higgins v. Ally Fin. Inc.*, No. 4:18-CV-0417-SRB, 2018 WL. 5726213, at *3 (W.D. Mo. Nov. 1, 2018) ("Any Kansas mutuality-of-obligation requirement applying specifically to arbitration provisions would be preempted by the FAA."); *see also Diversicare Leasing Corp., v. Nowlin*, No. 11-CV-1037, 2011 WL 5827208, at *4 (W.D. Ark. Nov. 18, 2011) (applying Arkansas law and holding that mutuality of obligation did not invalidate an arbitration agreement with a fifteen thousand dollar ($15,000) threshold).

These decisions reflect that "'mutuality of obligation' has been largely rejected as a general principle in contract law" and, accordingly, requiring that arbitration agreements satisfy "mutuality of obligation" would violate the FAA. *See, e.g. Distajo*, 66 F.3d at 451 (citing RESTATEMENT (SECOND) OF CONTRACTS § 79 (1979) (If the requirement of consideration is met, there is no additional requirement of . . . 'mutuality of obligation.'")).

Further, there is now a clear Circuit split, as two Circuit Courts have reached the opposite conclusion; they have held state law "mutuality of obligation" requirements for arbitration agreements are not preempted by the FAA. In *Noohi v. Toll Bros., Inc.*, the Fourth Circuit declined to hold that a Maryland law requiring that "an arbitration provision must

contain a mutually coextensive exchange of promises to arbitrate, regardless whether the contract as a whole is supported by adequate consideration" was preempted by the FAA. 708 F.3d at 613. In *Hull v. Norcom, Inc.*, the Eleventh Circuit found that a state law requirement that "the consideration exchanged for one party's promise to arbitrate must be the other party's promise to arbitrate at least some specified class of claims" did not contravene the FAA or its underlying policy. 750 F.2d 1547, 1550-51 (11th Cir. 1985).

Importantly, the Fourth Circuit called on this Court to provide needed guidance on this issue. It stated that it understood "the gravity of the issue presented" but declined to "overturn a decision of the high court of one of the 50 states" in the absence of a decision from the Court. *Noohi*, 708 F.3d at 613 ("The Supreme Court may eventually hold that the FAA preempts such a rule, but doing so now would require an extension of existing precedent—and abrogation of our own.").

This case presents a perfect opportunity for this Court to answer the Fourth Circuit's call and address this growing split with respect to whether the FAA permits states to impose mutuality of obligation requirements on arbitration agreements when they are not required for other types of contracts. Under the Supreme Court of Arkansas' approach, arbitration agreements will be invalidated based on nothing more than the whims of a hostile court and its ability to imagine hypothetical situations where an agreement might not be mutual. Only this Court can eradicate this "resistant strain" and restore

arbitration agreements to equal footing with other contracts.

C. The Supreme Court of Arkansas' Holding On Mutuality of Assent Underscores its Improper Hostile Treatment of Arbitration Agreements.

Finally, the Supreme Court of Arkansas' hostility to arbitration agreements also manifested itself in its conclusion that 28 of the arbitration agreements were invalid due to a lack of mutuality of assent solely because Petitioner had not signed them. The court asserted that "[i]t is a matter of basic contract law that, without its signature, Robinson is unable to demonstrate such mutual assent." This conclusion ignores the numerous ways Arkansas allows mutual assent to be proven for other contracts. So, yet again, the court is applying different law to the arbitration agreement than to other contracts.

To be sure, Arkansas law has never been that the only way for a contract to be valid and enforceable is for it to be signed. *See Childs v. Adams*, 909 S.W.2d 641, 645 (Ark. 1995) ("[M]anifestation of assent to a contract may be made wholly by spoken words or by conduct."). In fact, the Supreme Court of Arkansas has explained that "a written contract . . . is valid if one of the parties signs it and the other acquiesces therein." *Pine Hills Health & Rehab., LLC v. Matthews*, 431 S.W.3d 910, 915 (Ark. 2014) (citing *Parker,* 120 S.W. at 838). This standard is clearly met here. Robinson manifested its assent to the arbitration agreements, which were explicitly and unequivocally incorporated by reference into the admission agreements.

Moreover, contrary to the court's holding, the admission agreement and arbitration agreement are incorporated documents that must be read together. *See Pope v. John Hancock Mut. Ins. Co.*, 426 S.W.3d 557, 560 (Ark. Ct. App. 2013) ("In order to incorporate a separate document by reference into a contract, the reference must be clear and unequivocal, and the terms of the incorporated document must be known or easily available to the contracting parties."). It is undisputed that the residents in question were admitted to Robinson and received the services contemplated by the admission agreements. The arbitration agreements were prepared by Petitioner, presented to the resident or his or her representative and maintained in Petitioner's files with the contemporaneously executed admission agreements. These circumstances clearly demonstrate Petitioner's assent to the arbitration agreements that they seek to enforce. The Supreme Court of Arkansas' refusal to recognize manifestations of assent, besides a signature, where it hasn't done so elsewhere contradicts the FAA and this Court's precedents.

The Supreme Court of Arkansas' hostility to arbitration agreements is apparent and in blatant disregard of this Court's precedent and the FAA's mandate. Although presented as the application of contract principles, the court is applying these principles in unique ways to deny the validity and enforcement of arbitration agreements that the parties entered into willingly and gained their benefits. The Supreme Court has recognized that there are "real benefits to the enforcement of arbitration provisions," including "allow[ing] parties

to avoid the costs of litigation." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

This Petition invokes precisely the types of surreptitious "device[s]" this Court cautioned against in *Epic Sys. Corp.,* 138 S. Ct. at 1623. The Court's intervention is warranted because these issues arise with great frequency, there is a conflict among Circuits on these issues—and a conflict between state and federal courts in Arkansas on the mutuality issue, which could lead to forum shopping—and this Court can make clear that lower courts may not look for excuses to invalidate as many arbitration agreements as possible.

CONCLUSION

Petitioners respectfully request that this Petition for a Writ of Certiorari should be granted. This Court may wish to consider summary reversal or vacatur for reconsideration.

Respectfully submitted,

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March 18, 2020

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF ARKANSAS, DATED OCTOBER 31, 2019

SUPREME COURT OF ARKANSAS

No. CV-18-45

ROBINSON NURSING AND REHABILITATION CENTER, LLC, D/B/A ROBINSON NURSING AND REHABILITATION CENTER; CENTRAL ARKANSAS NURSING CENTERS, INC.; NURSING CONSULTANTS, INC.; AND MICHAEL MORTON,

Appellants,

v.

ANDREW PHILLIPS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DOROTHY PHILLIPS, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF DOROTHY PHILLIPS; AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Appellees.

October 31, 2019, Opinion Delivered

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT.
NO. 60CV-14-4568

Appendix A

HONORABLE TIMOTHY DAVIS FOX, JUDGE.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

COURTNEY RAE HUDSON, Associate Justice

In this interlocutory appeal, appellants Robinson Nursing and Rehabilitation Center, LLC, d/b/a Robinson Nursing and Rehabilitation Center; Central Arkansas Nursing Centers, Inc.; Nursing Consultants, Inc.; and Michael Morton (collectively "Robinson") appeal from the Pulaski County Circuit Court's order denying motions to compel arbitration of a class-action complaint filed by appellees Andrew Phillips, as personal representative of the estate of Dorothy Phillips, and others (collectively "Phillips"). For reversal, Robinson argues that the circuit court erred in refusing to enforce valid arbitration agreements. We affirm in part and reverse and remand in part.

On September 4, 2015, Phillips filed a first amended class-action complaint against Robinson alleging claims that Robinson had breached its admissions and provider agreements, violated the Arkansas Deceptive Trade Practices Act ("ADTPA"), committed negligence and civil conspiracy, and been unjustly enriched. He sought compensatory, economic, and punitive damages, as well as attorney's fees, interest, and costs. Phillips filed an amended motion for class certification on September 10, 2015, requesting that a class be certified of all residents and estates of residents who resided at Robinson from June 11, 2010, to the present.

Appendix A

On September 24, 2015, Robinson filed an answer to the complaint in which it denied the allegations and asserted, among other defenses, that the claims of putative class members were barred from being litigated in a court of law by virtue of arbitration agreements. Robinson also filed a response to the motion for class certification.

The circuit court entered an order granting class certification on March 4, 2016, and Robinson appealed to this court. We affirmed the grant of class certification with respect to Phillips's breach-of-contract, ADTPA, and unjust-enrichment claims, but reversed with respect to the negligence claim. *Robinson Nursing & Rehab. Ctr., LLC v. Phillips*, 2017 Ark. 162, 519 S.W.3d 291.

On September 1, 2017, Robinson filed a motion to compel arbitration with regard to nine class members/residents with arbitration agreements that had been signed by the residents' legal guardians. This motion was later supplemented to add one additional class member. Robinson also filed separate motions to compel arbitration as to 105 residents who had signed the agreements on their own behalf and as to 158 residents whose agreements had been signed by a person with power of attorney over that resident. On September 5, 2017, Robinson filed a fourth motion to compel arbitration as to 271 residents who had "responsible parties" execute arbitration agreements on their behalf. The individual arbitration agreements, admission agreements, and any other accompanying documents were attached to the motions to compel.[1]

1. Because there are several different versions of the admissions and arbitration agreements signed by the residents,

On September 7, 2017, Phillips filed an unopposed motion for extension of time to respond to Robinson's motions to compel arbitration. The motion was granted, and the circuit court extended the time for response until October 17, 2017. However, before Phillips filed a response, the circuit court summarily ruled at a September 22, 2017 hearing that all four of Robinson's motions to compel arbitration were denied. Neither party presented argument in support of, or in opposition to, the motions or objected to the timing of the circuit court's ruling at the hearing. The court also denied Robinson's request for findings of fact and conclusions of law. A written order generally denying the motions to compel was entered on October 19, 2017, and Robinson filed a timely notice of appeal from the order.

On appeal, Robinson argues that the circuit court erred in denying its motions to compel arbitration. Robinson contends that the 544 arbitration agreements at issue were valid and enforceable, that the claims asserted by Phillips were within the scope of the agreements, and that the circuit court's ruling was contrary to this court's strong policy in favor of arbitration.

An order denying a motion to compel arbitration is immediately appealable pursuant to Arkansas Rule of Appellate Procedure—Civil 2(a)(12) (2018). We review a circuit court's denial of a motion to compel arbitration de

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we do not preliminarily set forth all of the relevant language, and we instead refer to the applicable provisions during our discussion of the issues presented on appeal.

novo on the record. *Courtyard Gardens Health & Rehab., LLC v. Arnold*, 2016 Ark. 62, 485 S.W.3d 669. When a circuit court denies a motion to compel arbitration without expressly stating the basis for its ruling, as it did here, that ruling encompasses the issues presented to the circuit court by the briefs and arguments of the parties. *Reg'l Care of Jacksonville, LLC v. Henry*, 2014 Ark. 361, 444 S.W.3d 356; *Asset Acceptance, LLC v. Newby*, 2014 Ark. 280, 437 S.W.3d 119.

The parties do not dispute that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, governs the agreements at issue. The FAA establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution. *Henry, supra*. Likewise, in Arkansas, arbitration is strongly favored as a matter of public policy and is looked upon with approval as a less expensive and more expeditious means of settling litigation and relieving docket congestion. *Arnold, supra; Henry, supra*.

Despite an arbitration provision being subject to the FAA, we look to state contract law to decide whether the parties' agreement to arbitrate is valid. *Henry, supra*. The same rules of construction and interpretation apply to arbitration agreements as apply to agreements in general. *Newby, supra*. In deciding whether to grant a motion to compel arbitration, two threshold questions must be answered: (1) Is there a valid agreement to arbitrate between the parties? and (2) If such an agreement exists, does the dispute fall within its scope? *Id.*

Phillips preliminarily argues in his response brief that the motions to compel arbitration were barred by the law-of-the-case doctrine and that Robinson also waived its right to arbitrate. Phillips claims that Robinson's failure to attempt to exclude residents who were subject to arbitration agreements from the proposed class in its prior appeal from class certification now bars it from seeking to compel those class members to participate in arbitration. He further contends that Robinson waived its right to arbitrate by waiting for more than two years to request it. As Robinson asserts, however, these arguments are not properly preserved for our review. Phillips did not file a response to the motions to compel, nor did he raise these issues to the circuit court at the hearing. Further, because the circuit court's general denial constituted a ruling only on the arguments that were raised by the parties, Phillips has failed to secure a ruling on either the law-of-the-case doctrine or waiver.[2] *Newby, supra*. We therefore decline to address them and instead discuss only the issues raised by Robinson in its motions to compel—namely, whether there was a valid agreement to arbitrate between the parties and whether the claims fell within the scope of the agreements.

2. While Phillips contends that the circuit court "touched on" these issues at the hearing, it is apparent from the circuit court's comments that it was only noting its concern about successive appeals in a case such as this one that involves both class-action certification and the potential arbitration of certain class members' claims.

Appendix A

I. Whether There Is a Valid Agreement to Arbitrate Between the Parties

We must first determine the threshold inquiry of "whether a valid agreement to arbitrate exists; that is, whether there has been mutual agreement, with notice as to the terms and subsequent assent." *Henry*, 2014 Ark. 361, at 6, 444 S.W.3d at 360. We have held that, as with other types of contracts, the essential elements for an enforceable arbitration agreement are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations. *Id.* at 6-7, 444 S.W.3d at 360. As the proponent of the arbitration agreements, Robinson has the burden of proving these essential elements. *DaimlerChrysler Corp. v. Smelser*, 375 Ark. 216, 289 S.W.3d 466 (2008).

A. Validity of the 271 Arbitration Agreements Executed by "Responsible Parties"

Phillips first challenges the validity of Robinson's motion to compel with respect to the 271 arbitration agreements that were not signed by the resident, a legal guardian of the resident, or a person with a power of attorney over the resident. These agreements were instead signed by the resident's "responsible party" or "legal representative." Phillips contends that these agreements are invalid because the signors did not have legal authority to act on the residents' behalf or to bind the residents to arbitration.

Appendix A

When a third party signs an arbitration agreement on behalf of another, we must determine whether the third party was clothed with the authority to bind the other person to arbitration. *Courtyard Gardens Health & Rehab., LLC v. Sheffield*, 2016 Ark. 235, 495 S.W.3d 69. The burden of proving an agency relationship lies with the party asserting its existence. *Id.* Not only must the agent agree to act on the principal's behalf and subject to his control, but the principal must also indicate that the agent is to act for him. *Courtyard Gardens Health & Rehab., LLC v. Quarles*, 2013 Ark. 228, 428 S.W.3d 437.

Robinson admits that the "responsible parties" at issue here did not have legal authority to act as agents on the residents' behalf, as there were no documents presented by these persons demonstrating such authority. Instead, Robinson argues that the residents were bound by the arbitration agreements by virtue of being third-party beneficiaries. Two elements are necessary in order for the third-party-beneficiary doctrine to apply under Arkansas law: (1) there must be an underlying valid agreement between two parties, and (2) there must be evidence of a clear intention to benefit a third party. *Perry v. Baptist Health*, 358 Ark. 238, 189 S.W.3d 54 (2004); *Hickory Heights Health & Rehab, LLC v. Cook*, 2018 Ark. App. 409, 557 S.W.3d 286; *Broadway Health & Rehab, LLC v. Roberts*, 2017 Ark. App. 284, 524 S.W.3d 407.

The critical question in determining whether the third-party-beneficiary doctrine applies to the 271 arbitration agreements at issue is whether the "responsible parties" were signing in their individual capacity or in a

representative capacity. *Cook, supra*. Robinson asserts that these persons were acting in their individual capacity such that it created a valid and enforceable contract between those persons and Robinson, with a clear intention to benefit the nursing-home residents. Phillips, however, argues that these persons signed the agreements only on behalf of, and as representatives of, the residents.

There are three different versions of the arbitration agreements presented by Robinson, with each version using slightly different terms to identify the parties to the agreement. Two of the versions indicate that the arbitration agreement is entered into between "the Facility" and the "Resident and/or Legal Representative," with the resident and legal representative collectively referred to as the "Resident." The signature lines similarly provide for a signature by the "Resident and/or Legal Representative" and the facility's representative. These arbitration agreements also contain a box that may be checked if a copy of guardianship papers, a durable power of attorney, or other documentation has been provided to the facility, although as noted earlier, no such documentation was provided for these 271 residents. The associated admissions agreements refer either to the "resident or resident responsible party" or to the "resident or resident representative/agent," with "agent" defined as "a person who manages, uses, controls, or otherwise has legal access to Resident's income or resources that legally may be used to pay Resident's share of cost or other charges not paid by the Arkansas Medicaid Program." The signature lines have a space for the resident and for either the "Resident Responsible Party" or the "Resident

Representative/Agent" to sign, depending on the version of the admissions agreement, along with the facility representative.

The third version of the arbitration agreement states that it is between "the Facility," "the Resident," and "the Resident's Responsible Party." "Responsible Party" is defined as "your legal guardian, if one has been appointed, your attorney-in-fact, if you have executed a power of attorney, or some other individual or family member who agrees to assist the Facility in providing for your health, care and maintenance." The agreement has signature lines for the facility representative, the "Resident," and the "Responsible Party," and it also has a line to indicate the "Responsible Party's Relationship to Resident." These agreements also have the box to be checked if documentation has been provided to Robinson demonstrating a guardianship or power of attorney over the resident. The admissions agreement associated with this version of the arbitration agreement indicates that the "Resident," the "Facility," and the resident's "Responsible Party" agree to the terms and conditions contained therein. The definition of "Responsible Party" is consistent with that in the arbitration agreement, with additional language stating this "includes a person who manages, uses, controls, or otherwise has legal access to Resident's income or resources that legally may be used to pay Resident's share of cost or other charges not paid by the Arkansas Medicaid Program or any other source." The signature lines of these admissions agreements include spaces for the "Resident," the "Resident's Responsible Party," and the facility representative.

Although this court has not previously addressed this issue in the context of nursing-home residents, our court of appeals has discussed the third-party-beneficiary doctrine in cases involving arbitration agreements that are virtually identical to those at issue here. While we are not bound by opinions by the court of appeals, we may treat such decisions as persuasive authority. *Independence Cnty. v. City of Clarksville*, 2012 Ark. 17, 386 S.W.3d 395.

In *Progressive Eldercare Services - Chicot v. Long*, 2014 Ark. App. 661, 4, 449 S.W.3d 324, 327, the court held that the doctrine did not apply to bind the resident to arbitration agreements that were signed by the resident's "Legal Representative," who was his wife. The court of appeals stated that the wife did not have actual or apparent authority over the resident and that the documents had clearly been designed to be signed by either the resident or his representative; thus, there was no valid underlying agreement between the facility and the resident's wife. *Id.* Similarly, in *Broadway Health & Rehab, LLC v. Roberts, supra*, the arbitration agreement provided for signatures by either the "Resident" or the "Resident Representative." *Id.* at 2, 524 S.W.3d at 409. The resident's daughter signed the agreement, noting "Daughter" in the space provided to indicate her basis for acting as the "Resident Representative." *Id.* at 3, 524 S.W.3d at 409. The court of appeals held, as it did in *Long*, that a valid agreement did not exist because the daughter had not signed in her individual capacity. *Id.* at 7, 524 S.W.3d at 412.

The court of appeals subsequently addressed the situation of a daughter who had signed an arbitration

agreement as the "Responsible Party" for her mother in *Pine Hills Health & Rehab. LLC v. Talley*, 2018 Ark. App. 131, 546 S.W.3d 492. The court again held that the daughter did not intend to sign the agreement in an individual capacity and that the third-party-beneficiary doctrine did not apply to bind her mother to arbitration. *Id.*

Finally, the court of appeals recently decided *Hickory Heights Health & Rehab, LLC v. Cook*, *supra*, a case that involved the same pertinent language as in the third version of Robinson's arbitration agreements discussed above. In *Cook*, the parties to the arbitration agreement were also listed as the facility and "The Resident and/or Responsible Party"; the terms "Resident and/or Responsible Party" were used throughout both the arbitration and admission agreements to define the rights and responsibilities of the parties; the definition of "Responsible Party" was identical to that used in the arbitration and admission agreements here; and the same signatures lines and box to be checked if providing supporting documentation of authority were also present. *Id.* at 2-3, 557 S.W.3d at 288-89. The daughter, who did not have legal authority to do so, signed the agreements on behalf of her resident mother and noted her relationship as "daughter" on the space provided on the arbitration agreement. *Id.* The court of appeals affirmed the circuit court's refusal to compel arbitration, holding that there was no clear indication in the arbitration agreement to demonstrate that the daughter was signing in her individual capacity rather than in her representative capacity. *Id.* at 10-11, 557 S.W.3d at 292.

In its briefs, which were filed prior to the opinion in *Cook*, Robinson attempts to distinguish the situation in both *Long* and *Roberts* by noting that the term "Resident and/or Responsible Party" was used to describe the parties to the agreements in the present case rather than "Resident Representative" or "Legal Representative." Robinson further points to the definition of "Responsible Party" used in the admission and arbitration agreements here. Robinson argues that the contractual language in this case clearly contemplates an individual other than a resident entering into the agreements in his or her individual capacity, as opposed to the language used in cases such as *Roberts*.

By its argument, Robinson essentially concedes that the third-party-beneficiary doctrine does not apply to two of the three versions of its arbitration agreements, both of which utilize the terms "Resident Representative" or "Legal Representative." Furthermore, we agree with the court of appeals' analysis in *Cook*, which held that the doctrine did not apply to an arbitration agreement with language identical to that contained in the third version of Robinson's agreements. Other than the change in nomenclature, there is no real distinction between the different versions of the agreements with regard to the rights or responsibilities of the "Resident Representative," "Legal Representative," or "Responsible Party." Although Robinson points to the provision in the agreements stating that the "Responsible Party" agrees to assist the facility in providing for the resident's health, care, and maintenance, the agreements do not place any specific obligations or personal liability upon the "Responsible

Party." For instance, the "Responsible Party" is obligated to reimburse the facility for the resident's costs only if he or she otherwise has "legal access" to the resident's income or resources. We therefore conclude that Robinson failed to demonstrate that the individuals signing these arbitrations agreements were acting in an individual rather than a representative capacity.[3] Because there was no valid arbitration agreement between Robinson and these individuals, the circuit court correctly denied Robinson's motion to compel arbitration with respect to these 271 class members.

B. Validity of the Arbitration Agreements Applicable Only to Disputes Involving an Amount Greater than $30,000

Phillips next contends that Robinson has failed to demonstrate the essential contractual element of mutuality of obligation with respect to the arbitration agreements that limit arbitration to controversies and disputes involving an amount greater than $30,000. The parties agree that 216 of the 544 arbitration agreements

3. Robinson cites two federal district court cases that reach a different conclusion based on similar contractual language. *See Northport Health Servs. of Ark., LLC v. Cmty. First Tr. Co.*, No. 2:12-CV-02284, 2014 U.S. Dist. LEXIS 7207, 2014 WL 217893 (W.D. Ark. Jan. 21, 2014); *Northport Health Servs. of Ark., LLC v. Rutherford*, No. 07-5184, 2009 U.S. Dist. LEXIS 133073, 2009 WL 10673107 (W.D. Ark. March 17, 2009). However, these decisions are not binding on this court, *Dickinson v. SunTrust Nat'l Mortg. Inc.*, 2014 Ark. 513, 451 S.W.3d 576, and as discussed herein, we find our court of appeals' opinions on this issue to be more persuasive.

contain this limitation; however, we note that some of these 216 agreements are already included within the 271 arbitration agreements that were held to be invalid in our discussion above. The language in the challenged agreements provides as follows:

> It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Nursing Facility to the Patient and involving an amount of or greater than thirty-thousand dollars and no cents ($30,000.00) shall be resolved exclusively by binding arbitration and not by a lawsuit or resort to court process. This agreement to arbitrate includes, but is not limited to, any claim for payment, nonpayment, or refund for services rendered to the Resident by the Nursing Facility, violations of any right granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice or claims based on any departure from accepted medical or health care or safety standards, as well as any and all claims for equitable relief or claims based on contract, tort, statute, fact, or inducement, when the amount in controversy equals or exceeds thirty-thousand dollars and no cents ($30,000.00).

The element of mutuality of contract means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound. *Henry, supra; The Money Place, LLC v. Barnes*, 349 Ark. 411, 78 S.W.3d 714 (2002). We have held that there is no mutuality of obligation when one party uses an arbitration agreement to shield itself from litigation, while reserving to itself the ability to pursue relief through the court system. *Henry, supra; E-Z Cash Advance, Inc. v. Harris*, 347 Ark. 132, 60 S.W.3d 436 (2001). "Thus, under Arkansas law, mutuality requires that the terms of the agreement impose real liability upon both parties." *Henry*, 2014 Ark. 361, at 7, 444 S.W.3d at 360.

Phillips primarily relies on our decisions in both *Harris* and *Henry* as support for his argument that the arbitration agreements containing the $30,000 limitation fail due to a lack of mutuality. In *Harris*, the arbitration clause was held to be unenforceable because the clause allowed the check casher the right to pursue all civil remedies including a returned-check fee, court costs, and attorney's fees when a borrower's check was returned by his or her financial institution, while the customer was limited to arbitration. Although the clause in *Harris* allowed both parties access to small-claims court, we rejected as "disingenuous" E-Z Cash's argument that this provision supplied the necessary element of mutuality. *Id.* at 141, 60 S.W.3d at 442. We stated that "[t]aking into account their line of business, it is difficult to imagine what other causes of action against a borrower remain that E-Z Cash would be required to submit to arbitration." *Id.*

Likewise, in *Henry*, we concluded that the arbitration clause lacked mutuality because it reserved to the nursing home the right to litigate any billing or collection disputes while requiring arbitration for all other claims. We stated that the nursing home had "excluded from arbitration the only likely claim that it might have against a resident" and that its argument that a private-pay resident might have a billing claim against it "rings hollow[.]" *Henry*, 2014 Ark. 361, at 8, 444 S.W.3d at 361. Because the arbitration clause imposed no real liability on the nursing home to arbitrate its own claims, we held that no valid arbitration agreement existed due to a lack of mutuality. *Id.* at 8-9, 444 S.W.3d at 361.

Phillips argues that the $30,000 limitation in many of the arbitration agreements in this case reserves Robinson the right to litigate the only likely claim that it will ever have against a resident, which is a billing or collection dispute, while requiring residents to submit to binding arbitration of their claims, which are likely to be in tort. Phillips points to certain provisions in the admissions agreements to show that the maximum debt that a resident could accumulate before being discharged is between $6,800 and $7,600, which is well below the $30,000 arbitration threshold. In response, Robinson asserts that the cases discussed above are distinguishable because they specifically exclude a particular category or type of claim from arbitration instead of imposing a monetary threshold. Robinson also argues that there are other possible charges besides the daily room rate that a resident could incur, such as private nursing or special equipment, and that it is "certainly conceivable"

that it could have a claim against a resident greater than $30,000. Further, Robinson contends that the resident could potentially have a claim against it for property loss that would not be subject to arbitration.

We do not discern a meaningful distinction between the arbitration agreements at issue here and the ones in *Harris* and *Henry* with regard to the required element of mutuality. As in *Henry*, Robinson's attempt to demonstrate mutuality in this case by pointing to certain hypothetical situations "rings hollow." *Id.* at 8, 444 S.W.3d at 361. We also note that the court of appeals recently decided a case involving the same $30,000 limitation in a nursing-home arbitration agreement and held that the agreement was invalid for lack of mutuality. *Hickory Heights Health & Rehab, LLC v. Adams*, 2018 Ark. App. 560, 566 S.W.3d 134. In reaching its decision, the court rejected arguments by the facility that were virtually identical to those in this case.[4] *Id.* The court of appeals stated that "the arbitration provision was obviously drafted to shield Hickory Heights from defending itself in the court system against the majority of residents' potential claims while maintaining its rights to utilize the court system for its likely claims against residents." *Id.* at 7, 566 S.W.3d at 138.

4. For example, with regard to the facility's argument about a potential claim by the resident for loss of property, the court of appeals noted that the admissions agreement specifically disclaimed all liability against the facility for loss of personal property not delivered to an employee for safekeeping and that the facility further reserved the right to refuse the safekeeping of personal property over fifty dollars. These same provisions are contained in Robinson's admissions agreement.

We agree with the reasoning in *Adams* and conclude that the arbitration agreements containing the $30,000 limitation in this case lack mutuality. As in *Adams*, we believe that the arbitration agreements here serve to shield Robinson from defending itself in the court system against the majority of potential claims by residents, while reserving its right to utilize the court system for its likely claims. Accordingly, these arbitration agreements are not valid or enforceable, and the circuit court correctly denied the motions to compel as to these agreements.[5]

C. Invalidity of Additional Arbitration Agreements Based on Lack of Mutual Agreement or Assent

Phillips also challenges the validity of certain arbitration agreements based on lack of mutual agreement or assent. Specifically, he contends that Robinson failed to authenticate the signatures of the parties to the arbitration agreements; that Robinson failed to show that its representatives were authorized to bind the nursing home to the terms of the agreement; that Robinson failed to sign some of the arbitration agreements; and that Robinson has failed to produce a complete copy of each arbitration agreement.

With regard to the authentication of the signatures and the authorization of its agents to sign on its behalf, Robinson correctly asserts that Phillips failed to put forth

5. Our review of the record reveals approximately 109 arbitration agreements that fail on this basis, in addition to the 271 agreements invalidated earlier in this opinion.

any evidence, either before the circuit court or this court, that any of the signatures on the arbitration agreements were not genuine or that Robinson's representatives were not authorized to sign on its behalf. As Robinson contends, Arkansas Code Annotated section 16-46-102 (Repl. 1999) provides that when a writing purporting to have been executed by one of the parties is referred to in and filed with a pleading, it may be read as genuine against that party unless he denies its genuineness by affidavit before the trial is begun. No such affidavit was filed in this case. While Phillips cites Arkansas Rule of Evidence 901(a) as support for his argument, this rule relates only to authentication as a condition for admissibility in evidence, and it is not relevant to our consideration in this appeal.

We agree that Robinson's failure to sign certain arbitration agreements is fatal to the validity of these agreements, however. We have held that both parties must manifest assent to the particular terms of a contract. *Pine Hills Health & Rehab., LLC v. Matthews*, 2014 Ark. 109, 431 S.W.3d 910. We employ an objective test for determining mutual assent—meaning objective indicators of agreement and not subjective opinions. *Id.* It is a matter of basic contract law that, without its signature, Robinson is unable to demonstrate such mutual assent. *See id.* (holding that arbitration agreement was invalid due to lack of mutual assent where facility's signatures were missing). While Robinson argues that it demonstrated its assent by admitting residents to its facility and providing services, the arbitration agreement was a separate contract from the admissions agreement, regardless of whether it was incorporated into or operated as an addendum to the

admissions agreement. As in *Matthews*, there are no other objective indicators of mutual assent here. Thus, we affirm the circuit court's denial of the motions to compel with respect to the arbitration agreements that were not signed by Robinson.[6]

Similarly, Phillips's argument that any incomplete arbitration agreements are invalid also has merit. Robinson cannot meet its burden to demonstrate mutual agreement or assent to the terms of the arbitration agreement if the complete agreement is not provided. Although Robinson argues that the incomplete agreements are sufficient because they are identical to other agreements that are contained in the record, there are at least three different versions of the arbitration agreements, as we discussed earlier. Accordingly, even though the signature pages of the agreements may have been provided, Robinson cannot show which version of the agreement the parties signed. The circuit court therefore correctly denied arbitration as to any incomplete arbitration agreements.[7]

In our de novo review, we noted additional deficiencies that were apparent from either the face of the arbitration

6. Phillips asserts that there are twenty-eight arbitration agreements that were not signed by Robinson. However, excluding those already held to be invalid for other reasons discussed herein, our review reveals approximately thirteen additional arbitration agreements that contain no signature by Robinson and that are therefore invalid for lack of mutual assent.

7. Phillips claims that 30 of the 544 arbitration agreements are incomplete. However, some of these incomplete agreements may be invalid on other bases already discussed herein.

agreements or the associated documents related to the essential element of mutual agreement. First, as to resident Joyce Moring, neither the arbitration agreement nor the admissions agreement is dated. Because Moring's arbitration agreement was signed by a legal guardian who presented documentation of temporary guardianship over Moring, there is no proof that her guardian was legally authorized to sign on her behalf at the time the arbitration agreement was executed. Thus, this arbitration agreement is not valid or enforceable.

In addition, resident Ruby McGrew's arbitration agreement is not dated. Because her agreement was signed by an individual with power of attorney ("POA") over her, it cannot be determined from the documents before us whether that individual had the legal authority to sign the agreement on McGrew's behalf at that time. Accordingly, Robinson failed to prove McGrew's agreement to arbitrate, and the motion to compel arbitration was correctly denied as to her.

Finally, the documents that were provided to Robinson demonstrating the signor's POA over resident Eldin Hodges are also ineffective to show Hodges's agreement to arbitrate. These POA documents clearly exclude the authority to assent to arbitration. Thus, Hodges's arbitration agreement was invalid, and Robinson's motion to compel was correctly denied as to him as well.

D. Invalidity of Arbitration Agreements Based on Incapacity of Residents

Phillips also challenges the validity of the 105 arbitration agreements signed by the residents on another basis. He contends that Robinson has exclusive access to the information needed to determine the residents' competency at the time they signed the arbitration agreements, but that Robinson has refused to provide this information. Thus, Phillips argues that Robinson has failed to demonstrate the essential element of competency.

As Phillips concedes, the law presumes the capacity to contract, and the burden of establishing incapacity is on the party challenging the contract. *Harris v. Harris*, 236 Ark. 676, 370 S.W.2d 121 (1963). Phillips did not file a response to the motions to compel challenging the residents' competency to sign the arbitration agreements; nor did he object to the circuit court issuing its ruling before his response time had expired or before discovery had been completed. Because he failed to raise the issue of competency below or obtain a ruling, we are unable to address this issue on appeal. *E-Z Cash Advance, supra*.

In sum, after reviewing the record before us, Robinson has failed to meet its burden of proving a valid and enforceable arbitration agreement with respect to each of the agreements that contain the deficiencies previously discussed. Accordingly, the circuit court's order denying the motions to compel arbitration are affirmed as to those agreements.

II. Whether the Claims Asserted Are Within the Scope of the Arbitration Agreements

Robinson has met its burden to prove the validity of the remainder of the arbitration agreements not already discussed. Thus, the next threshold issue that must be addressed is whether the claims asserted by Phillips fall within the scope of those remaining arbitration agreements. Depending on the version of the arbitration agreement, the language states that it applies broadly to "any and all claims, disputes, and controversies arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided" or to "all disputes arising from this or any future stays in this Facility." Phillips does not contend that the claims brought in this class action do not fall within the scope of these arbitration agreements, and we conclude that this requirement is satisfied here. We therefore reverse and remand with respect to those arbitration agreements not otherwise held to be invalid by this opinion.

Affirmed in part; reversed and remanded in part.

Special Justice GREG VARDAMAN joins in this opinion.

WOMACK, J., concurs in part and dissents in part.

WOOD, J., not participating.

Appendix A

APPEAL FROM THE PULASKI COUNTY
CIRCUIT COURT, SIXTH DIVISION
[NO. 60CV-14-4568]

HONORABLE TIMOTHY DAVIS FOX, JUDGE

CONCURRING IN PART; DISSENTING IN PART.

Shawn A. Womack, Justice, Associate Justice.

I agree with the majority that Phillips did not preserve issues regarding the law of the case doctrine and waiver arguments. I further agree that Phillips failed to present evidence regarding the genuineness of signatures of Robinson's representatives. Finally, I agree with the majority that the agreements not signed by Robinson should be excluded. However, a principal question on this appeal is whether the nursing home plaintiffs are required to arbitrate their claims against Robinson Nursing and Rehabilitation Center under the third-party beneficiary doctrine. I conclude that the arbitration agreements signed by "responsible parties" are subject to arbitration, and I would therefore reverse the circuit court's decision in relevant part. I must also dissent from the majority's analysis regarding the mutuality of obligations. Because I believe the $30,000 arbitration threshold does not foreclose mutuality, I would reverse the circuit court's decision on that issue as well.

I.

Robinson contends that because the "responsible parties" who signed the arbitration agreements were

contracting in their individual capacities, the plaintiffs are bound by the agreement as third-party beneficiaries to the contracts. Applying the basic Arkansas contract principles relied upon in a similar case, *Northport Health Servs. of Ark., LLC v. Rutherford*, No. 07-5184, 2009 U.S. Dist. LEXIS 133073, 2009 WL 10673107 (W.D. Ark. Mar. 17, 2009), I would direct the circuit court to compel arbitration as to those plaintiffs.[1]

In *Rutherford*, an Arkansas federal district court examined whether an arbitration agreement signed by a "responsible party" for a nursing home resident bound the resident to the agreement as a third-party beneficiary. 2009 U.S. Dist. LEXIS 133073, [WL] at *5. Just as the agreements here, the *Rutherford* contract defined a "responsible party" as, in part, a person "who agrees to assist the [nursing home] in providing for [the resident's] health, care and maintenance." *Id.* This language indicates that by voluntarily signing as a "responsible party," the individual intends to be bound by the agreement for the purpose of assisting the nursing home in caring for the resident. *Id.* To hold otherwise would render the language defining a "responsible party" meaningless, which is contrary to Arkansas contract law. *Id.* (citing *North v. Phillliber*, 269 Ark. 403, 602 S.W.2d 643 (1980)).

1. While a federal court decision construing Arkansas law is not binding on this court, we have long held that "the opinion of such eminent authority is persuasive." *Baldwin Co. v. Maner*, 224 Ark. 348, 349, 273 S.W.2d 28, 30 (1954); *see also Roeder v. United States*, 2014 Ark. 156, at 12 n.8, 432 S.W.3d 627, 635 n.8.

Applying Arkansas contract law, *Rutherford* determined there was "substantial evidence of a clear intention to benefit [the] third party" resident. *Id.* (quoting *Perry v. Baptist Health*, 358 Ark. 238, 245, 189 S.W.3d 54, 58 (2004)). This conclusion was further supported by language in the arbitration agreement that stated, in part, that execution of the agreement affects the individual rights of the responsible party. *Id.* Accordingly, the court found that the responsible party is bound individually by the agreement and the resident is a third-party beneficiary with respect to the contractual obligations. *Id.* This reasoning, founded on Arkansas contract law, has been subsequently applied to uphold similar provisions in other third-party beneficiary agreements. *See, e.g., Northport Health Servs. of Ark., LLC v. Cmty. First Tr. Co.*, No. 2:12-CV-02284, 2014 U.S. Dist. LEXIS 7207, 2014 WL 217893 (W.D. Ark. Jan. 21, 2014); *Northport Health Servs. of Ark., LLC v. Medlock*, No. 2:13-CV-02083 (W.D. Ark. May 30, 2014).

Because the language analyzed by the Arkansas federal district court is identical to the language here, application of those principles leads to the same result: persons who signed as "responsible parties" individually contracted with Robinson for the benefit of the residents and the residents are contractually bound as third-party beneficiaries. Moreover, there can be no question that Robinson and the "responsible parties" contracted to benefit the residents. Indeed, the residents' care was the animating purpose behind each agreement. The conclusion that the residents were third-party beneficiaries is easily reached.

In a footnote, the majority casually dismisses the federal court's interpretation *sans* analysis in favor of the court of appeals' approach. *See Hickory Heights Health and Rehab, LLC v. Cook*, 2018 Ark. App. 409, 557 S.W.3d 286. But that approach disregards our obligation to consider the sense and meaning of the words within the contract as they are taken and understood in their plain and ordinary meaning. *See First Nat'l Bank of Crossett v. Griffin*, 310 Ark. 164, 169-70, 832 S.W.2d 816, 819 (1992). It likewise disregards our responsibility to view the agreement as a whole and recognize that every word must be taken to have been used for a purpose. *Id.* (internal quotation omitted). In the event of ambiguity, we must reject any construction which neutralizes any provision if the contract can be construed to give effect to all provisions. *Id.*

The majority's adoption of the court of appeals' third-party beneficiary analysis conflicts with these well-established rules of contract interpretation. The majority contends that "[o]ther than the change in nomenclature, there is no real distinction" between agreements signed by "responsible parties," and those signed by "resident representatives" and "legal representatives." By minimizing the distinction between these terms, the majority ignores the terms' plain meaning. Moreover, the definition of "responsible party" includes a legal guardian, someone with power of attorney, "*or* some other individual or family member who agrees to assist [Robinson] in providing for [the resident's] health, care and maintenance." (emphasis added). To proclaim otherwise renders meaningless the language defining "responsible party."

The *Rutherford* court's interpretation of the third-party beneficiary doctrine in this context is the most faithful application of Arkansas contract law. Accordingly, I would direct the circuit court to compel arbitration of the residents' claims whose arbitration agreements were signed by "responsible parties."

II.

Turning to the issue of mutuality, Robinson contends there is a mutuality of obligations between the parties because the agreement does not specifically exclude any specific category of claims from arbitration. Rather, it imposes a monetary threshold requiring arbitration of all claims exceeding $30,000. Except for the monetary threshold, no other limitations exist as to the types of claims covered by the arbitration agreement. Accordingly, I believe the arbitration agreements satisfy the mutuality requirement.

We have held that a contract must impose mutual obligations on both parties to be enforceable. *See Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 119-20, 27 S.W.3d 361, 366 (2000). If a promise made by either party does not by its terms fix a real liability upon one party, then such promise does not form consideration for the promise of the other party. *Id.* Accordingly, a contract which leaves it entirely optional with one party as to whether they will perform their promise is not enforceable. *Id.* In the context of arbitration, we have recognized that there is no mutuality of obligation where one party uses an arbitration agreement to shield itself from litigation, while reserving to itself the ability to

pursue relief through the court system. *Id.; see also E-Z Cash Advance, Inc. v. Harris*, 347 Ark. 132, 60 S.W.3d 436 (2001).

The majority contends that the $30,000 threshold in the arbitration agreements precludes mutuality because the limitation shields Robinson from defending itself in court against most potential claims by residents, while reserving its right to utilize the courts for its claims against residents. But this conclusion turns on speculation about what types of hypothetical claims each party may potentially have against each other and the respective value of those claims. Except for a sole court of appeals' opinion—which is not controlling on this court—the majority cites only to cases where the arbitration agreement expressly excludes specific categories from arbitration. *See, e.g., Harris*, 347 Ark. 132, 60 S.W.3d 436; *The Money Place, LLC v. Barnes*, 349 Ark. 411, 78 S.W.3d 714 (2002). That is not the case here, where the *only* limitation is a monetary threshold.

I am not convinced that there is a lack of mutuality in the arbitration agreements. It is certainly plausible that the residents could have a claim against Robinson that would compel arbitration. Indeed, the agreement is very broad in its coverage of claims. Apart from the $30,000 threshold, no limitations exist as to the types of claims that are covered. I therefore conclude that the arbitration agreements satisfy the mutuality requirement and would hold that the agreements are enforceable in relevant part.

Accordingly, I respectfully concur in part and dissent in part.

APPENDIX B — ORDER OF THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS SIXTH DIVISION, DATED OCTOBER 19, 2017

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS SIXTH DIVISION

CASE NO. 60CV-14-4568

ANDREW PHILLIPS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DOROTHY PHILLIPS, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF DOROTHY PHILLIPS; AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

VS.

ROBINSON NURSING AND REHABILITATION CENTER, LLC D/B/A ROBINSON NURSING AND REHABILITATION CENTER; CENTRAL ARKANSAS NURSING CENTERS, INC.; NURSING CONSULTANTS, INC.; AND MICHAEL MORTON,

Defendants.

ORDER DENYING DEFENDANTS' MOTIONS TO ENFORCE ARBITRATION AGREEMENTS AND TO COMPEL CLASS MEMBERS WITH ARBITRATION AGREEMENTS TO SUBMIT THEIR CLAIMS TO BINDING ARBITRATION

Appendix B

On this 22nd day of September 2017, Defendants' Motion to Enforce Arbitration Agreements Signed by Residents and to Compel Class Members with Arbitration Agreements to Submit their Claims to Binding Arbitration filed September 1, 2017; Defendants' Motion to Enforce Arbitration Agreements Signed by Guardians and to Compel Class Members with Arbitration Agreements to Submit their Claims to Binding Arbitration filed September 1, 2017; Defendants' Motion to Enforce Arbitration Agreements Signed by Powers of Attorney and to Compel Class Members with Arbitration Agreements to Submit their Claims to Binding Arbitration filed September 1, 2017; and Defendants' Motion to Enforce Arbitration Agreements Signed by Responsible Parties and to Compel Class Members with Arbitration Agreements to Submit their Claims to Binding Arbitration filed September 5,2017, came on for consideration.

The Court finds that Defendants' Motions should be and hereby are denied.

IT IS SO ORDERED.

/s/_____
The Honorable Timothy Fox
Circuit Judge

10/19/17_____
Date

APPENDIX C — EXCERPT OF TRANSCRIPT OF THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS SIXTH DIVISION, DATED SEPTEMBER 22, 2017

[1]IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS SIXTH DIVISION

No. 60CV-14-4568

ANDREW PHILLIPS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DOROTHY PHILLIPS, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF DOROTHY PHILLIPS; AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

ROBINSON NURSING AND REHABILITATION CENTER, LLC D/B/A ROBINSON NURSING AND REHABILITATION CENTER; CENTRAL ARKANSAS NURSING CENTERS, INC.; NURSING CONSULTANTS, INC.; AND MICHAEL MORTON,

Defendants.

CAPTION

BE IT KNOWN that on the 22nd day of September, 2017, this cause came on for hearing before the Honorable

Appendix C

Timothy Davis Fox, Circuit Judge of the Sixth Division Circuit Court, Sixth Judicial District, Pulaski County, Arkansas.

***

[7]THE COURT: All right. I realize that they are not technically ripe, but it may be a while before you all get back in here, and I have completely reviewed everything that has been submitted so far.

There were four motions that were filed to stay -- to enforce the arbitration agreements and to either stay or dismiss -- or I guess it was to kick these folks out of class membership, is that correct, Mr. Hatfield?

MR. HATFIELD: Well, I think it's our position that they -- if you have an enforceable arbitration agreement, you can only proceed if you –

THE COURT: Right. So, that you cannot be -- that you'd be excluded from the class then?

[8]MR. HATFIELD: Yes. And it's our position that they shouldn't even get notice.

THE COURT: And it really raises an interesting issue, I think, in that -- I did go back through the entire file I believe, or at least most of it.

And although the arbitration agreements were mentioned from day one, and they have been pled by the

defendants from their original response -- you know, up until a few years ago, the case law was perfectly clear on class certifications, that the trial courts were not to do anything, I mean, anything that even remotely seemed to address the merits of a cause of action.

You know, if you could -- if it met the Rule 23 requirements, and you could get the notice out, then that was the obligation of the trial court.

And I forget which case it was -- you guys probably know off the top of your heads. A few years ago, our Supreme Court kind of said -- they backed up just a little on that one and said, "You know, if it's pretty clear at the outset on a 12(b)(6) that there's not even a cause of action, then perhaps we don't -- perhaps we don't see that as addressing the merits; we see that as you can have a -- you can have a class action because there's not a cause of action."

[9]I guess a good example would be if somebody just invented a cause of action that didn't exist, right? But that's as far as it ever went. And I don't think we have any case law out of our state.

It seems to me that arbitration agreements -- well, at least in situations where folks acknowledge that arbitration agreements were signed, not the legal effect of them, but that they exist, it would seem to me that those fall within the threshold.

And I would have thought that that was something -- this whole excluding these folks when some side gets to take an interlocutory appeal on the class certification or the denial of a class certification, if these folks at the threshold can't be a member of the class because of that, it would seem to me that that is a legitimate inquiry that I would encourage the Court, if it sees this thing on appeal, this record on appeal, to think about why address that two different times if it really is as threshold an inquiry as a 12(b)(6).

And so, then the class definition -- so, for instance, they reviewed the certification that the court made, and they affirmed it all except they kicked out the negligence. Okay? If these folks are truly not members of the class, if they're not any [10]different than say folks who are outside of any possible statute of limitations, why couldn't that be done then as well with that? Because it still doesn't get to the merits of the cause of action.

But it assists the parties and the purposes of judicial efficiency to go ahead and get that done one time with an average appeal taking a year and a quarter, year and a half probably, between getting the transcript prepared. Okay. Well, off of my suggestion box and back to where we are.

I am going to rule -- and just -- I'm going to make it -- they were all filed on September 1st, there's four of them; but, Mr. Hatfield, you all may want to prepare a separate order on this.

Appendix C

The Motion to Enforce Arbitration Agreements signed by folks having durable power of attorneys involving 158 residents, dated September 1st, 2017, is denied.

The Motion to Enforce Arbitration Agreements signed by guardians involving nine residents, filed on September 1st, 2017, is denied.

The Motion to Enforce Arbitration Agreement signed by 105 of the residents themselves, and that motion was filed on September 1st of 2017, is denied.

And the kind of catchall Motion to Enforce [11] Arbitration Agreement that was signed by persons other than those that were in the other three motions, and it involves 271 residents, that was also filed on September 1st, is denied.

****

APPENDIX D — DENIAL OF REHEARING OF THE ARKANSAS SUPREME COURT, DATED DECEMBER 19, 2019

OFFICE OF THE CLERK
ARKANSAS SUPREME COURT
625 MARSHALL STREET
LITTLE ROCK, AR 72201
DECEMBER 19, 2019

RE: SUPREME COURT CASE NO. CV-18-45

ROBINSON NURSING AND REHABILITATION CENTER, LLC, D/B/A ROBINSON NURSING AND REHABILITATION CENTER; CENTRAL ARKANSAS NURSING CENTERS, INC.; NURSING CONSULTANTS, INC.; AND MICHAEL MORTON,

V.

ANDREW PHILLIPS, AS PERSONAL REPRESENTATIVE OF THE, ESTATE OF DOROTHY PHILLIPS, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF DOROTHY PHILLIPS AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

THE ARKANSAS SUPREME COURT ISSUED THE FOLLOWING ORDER TODAY IN THE ABOVE STYLED CASE:

Appendix D

"APPELLANTS' PETITION FOR REHEARING IS DENIED. SPECIAL JUSTICE GREG VARDAMAN AGREES. WOMACK, J., WOULD GRANT. WOOD, J., NOT PARTICIPATING."

SINCERELY,

/s/_____
STACEY PECTOL CLERK