

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAIDE, L.L.C. D/B/A GENTLE SPRING  
CARE HOME; SOKHENA K. HUCH;  
MIKI N. TON,

Appellants,

v.

CORINNE R. DILEO AS SPECIAL  
ADMINISTRATOR FOR THE ESTATE  
OF THOMAS DILEO; THOMAS DILEO,  
JR., AS STATUTORY HEIR TO  
THOMAS DILEO; AND CINDY DILEO,  
AS STATUTORY HEIR TO THOMAS  
DILEO,

Appellees,

Supreme Court No.: 81804

Electronically Filed  
Apr 07 2021 03:08 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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APPELLANTS' RESPONSE TO THE NEVADA JUSTICE ASSOCIATION'S  
MOTION FOR EXTENSION OF TIME TO FILE MOTION FOR LEAVE TO  
FILE AMICUS BRIEF

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Appellants, MAIDE, L.L.C. D/B/A GENTLE SPRING CARE HOME;  
SOKHENA K. HUCH; and MIKI N. TON by and through their attorneys of  
record, LEWIS BRISBOIS BISGAARD & SMITH LLP, file their Opposition to  
THE NEVADA JUSTICE ASSOCIATION'S MOTION FOR EXTENSION OF  
TIME TO FILE MOTION FOR LEAVE TO FILE AMICUS BRIEF. This  
Response is made and based upon the papers and pleadings on file herein, the  
following Memorandum of Points and Authorities, and any oral argument allowed  
by the Court during a hearing of this matter.

## **POINTS AND AUTHORITIES**

### **I. INTRODUCTION/STATEMENT OF FACTS**

This Response arises from an appeal filed due to the District Court's denial of Appellants' Application for Judicial Relief-Motion to Compel Arbitration.

Decedent Thomas Dileo was a resident at Gentle Spring Care Home ("Gentle Spring"). Gentle Spring is a licensed "residential home for groups" under NRS 449 et seq. At the outset of Mr. Dileo's residency at Gentle Spring, Corinne Dileo, as Mr. Dileo's power of attorney, executed an arbitration agreement (the "Agreement") on his behalf. Bella Estate Care Home Resident Agreement Addendum, attached hereto as Exhibit "A." Appellees Thomas Dileo, Jr. and Cindy Dileo (the "Heirs") did not sign the Agreement. On or around June 24, 2017, Mr. Dileo developed a wound on his leg that became gangrenous and his leg was later amputated. He died on August 13, 2017, while admitted at Spring Valley Hospital. Plaintiffs sued Gentle Spring, alleging various causes of action.

Appellants filed an Application for Judicial Relief-Motion to Compel Arbitration on September 13, 2019. Defendants' Motion to Compel Arbitration, attached hereto as Exhibit "B." In their Opposition, Appellees argued that the Agreement did not comply with NRS 597.995(1), which requires arbitration agreements to contain a specific authorization. Plaintiff's Opposition to Defendants' Motion to Compel Arbitration, attached hereto as Exhibit "C." The

Court granted Appellants' Motion with regard to the Estate and denied it with regard to the Heirs. Notice of Entry of Order, filed April 22, 2020, attached hereto as Exhibit "D."

Appellees filed a Motion for Rehearing of Defendants' Motion to Compel Arbitration. Plaintiff's Motion for Rehearing, attached hereto as Exhibit "E." They argued in this motion that the District Court incorrectly ruled that the Agreement complied with NRS 597.995(1). The Court reversed its prior order and ruled that the Agreement did not comply with NRS 597.995(1) and was, therefore, unenforceable. Notice of Entry of Order, filed August 14, 2020, attached hereto as Exhibit "F."

Pertinent here, Appellants appealed the District Court's denial of their Motion to Compel Arbitration. They filed their Opening Brief on February 10, 2021, raising two issues: (1) whether the District Court erred as a matter of law denying Appellant's Motion to Compel Arbitration; and (2) whether the doctrine of substantial compliance applies to NRS 597.995(1). Appellants' Opening Brief, attached hereto as Exhibit "G," at p. 1. Those issues have been briefed by both parties; only Appellants' Reply Brief remains to be filed. Notably, although argued below, Appellants did not appeal the issue of whether heirs in wrongful death, medical malpractice nursing home cases are bound by the signature of the decedent to arbitrate. Exhibit "C," at p. 33; Reply in Support of Defendants' Motion to

Compel Arbitration, attached hereto as Exhibit “H,” at p. 77.

Proposed Amicus Curiae, Nevada Justice Association (NJA), now seeks to insert itself in this matter. Here, NJA moves this Court for an extension of time to file a motion for leave to file an amicus brief. (“Motion”) NJA claims that “good cause” exists to allow a 30-day extension of time to file that motion because its participation had to be approved by a committee before appearing and because its counsel need time to “familiarize themselves with the record, the legal arguments, and the briefing” in this matter. Motion at p. 3. Further, NJA “believes it can assist this Court in issues relating to whether heirs in wrongful death, medical malpractice nursing home cases are bound by the signature of the decedent to arbitrate and the interpretation of NRS 597.995.” *Id.*

NJA’s Motion fails for several reasons. First, Respondents’ Answering Brief was untimely filed. Respondents filed their Answering Brief On March 26, 2021, two weeks past the due date to file that Brief as set forth in NRAP 31(a)(1)(B). Nor is there any evidence that they requested a telephonic extension to file. Nevada Supreme Court Docket Sheet, Case No 81804, attached hereto as Exhibit “I.” Under NRAP 31(d)(2), a respondent who fails to file an answering brief will not be heard at oral argument except by the court’s permission. Because of Respondent’s untimely filing, any Amicus Brief would support a brief that does not warrant oral argument. Thus, NJA should likewise not be allowed to argue.

Second, NJA proposes to argue issues either not before the court or already sufficiently briefed by Respondents. Thus its purported “assistance” amounts to nothing but a burden on the Court and on Appellants. Therefore, Appellants respectfully request this Court to deny NJA’s Motion for Extension of Time to File Motion for Leave to File Amicus Brief and thereby halt NJA’s procedurally improper and wasteful efforts before they impose further on this matter.

## **II. LEGAL ARGUMENT**

### **A. NJA’s Proposed Amicus Brief is Inappropriate Because it Purports to Support Respondents’ Untimely Filed Answering Brief**

The Nevada Rules of Appellate procedure govern the timing of briefing before the Nevada Appellate Courts, and they set forth penalties for failing to adhere to those mandates. NRAP 31(a)(1)(B) requires that the respondent serve and file its answering brief within 30 days after the appellant’s brief is served. Further, “[i]f a respondent fails to file an answering brief, respondent will not be heard at oral argument except by permission of the court. The failure of respondent to file a brief may be treated by the court as a confession of error and appropriate disposition of the appeal thereafter made.” NRAP 31(d)(2).

In *Polk v. State*, 233 P.3d 357 (Nev. 2010), this Court explained its jurisprudence interpreting and applying NRAP 31(d). The *Polk* Court started by putting all on notice that it “expect[s] all appeals to be pursued with high standards

of diligence, professionalism, and competence,” and “intend[s] to impress upon the members of the bar [its] resolve to end . . . lackadaisical [appellate] practices.” *Id.* at 359 (internal citations and quotation marks omitted). The Court further explained that “NRAP 31(d) is a discretionary rule” and that in breaking that rule, a respondent risks the Court “preclud[ing] that respondent from participating at oral argument and consider[ing] the failure to respond as a confession of error.” *Id.* at 359-60. The Court went on to state that, although it “routinely invoked [its] discretion and enforced NRAP 31(d) when no answering brief has been filed[,]” it invoked NRAP 31(d) even when a brief was filed but failed to pass muster for other reasons. *Id.* at 360. For example, this Court has ruled that a party confessed error “when that party's answering brief effectively failed to address a significant issue raised in the appeal[,]” (internal citations omitted) or when “a respondent has inexcusably disregarded applicable appellate procedures or court orders.” *Id.*

Finally, the *Polk* Court noted that it has exercised its discretion and not applied NRAP 31(d) on certain occasions, such as “when a respondent has filed a response but inadvertently failed to respond to an inconsequential issue or had a recognizable excuse.” *Id.* An example included when the State failed to address all of an appellant's issues, but those issues were meritless and were being raised for the first time on appeal. *Hewitt v. State*, 113 Nev. 387, 392, 936 P.2d 330, 333 (1997), overruled on other grounds by *Martinez v. State*, 115 Nev. 9, 11-12, 974

P.2d 133, 134-35 (1999). This Court further refused to adopt a confession of error when the respondent was not represented by counsel. *State ex rel. Welfare Div. v. Hudson*, 97 Nev. 386, 388, 632 P.2d 1148, 1149 (1981), superseded by statute on other grounds as recognized in *Smith v. County of San Diego*, 109 Nev. 302, 303, 849 P.2d 286, 287 (1993).

Here, Respondents failed to timely file their Answering Brief. Appellants filed their Opening Brief on February 10, 2021, after having availed themselves of this Court's procedure for requesting a telephonic extension. Exhibit "I." That created a deadline for Respondent's Answering Brief of March 12, 2021. Respondents filed their Answering Brief on March 26, 2021. NJA in turn filed its Notice of Appearance of Amicus Counsel and Motion for Extension of Time to File Motion for Leave to File Amicus Brief on March 31, 2021. And while NJA's filings are timely made, the Brief NJA seeks to support was not. Instead, Respondents filed their Answering Brief a full two weeks past the deadline. Furthermore, it seems that Respondents failed to obtain an extension to file that Brief, as would have been provided if they had made a simple phone call to the Court as Appellants did. *Id.*

As a result, Respondents have run afoul of NRAP 31(d), and they risk the consequences that arise from their failure. Under the Rule, this Court could treat that failure as a confession of error and dispose of the appeal accordingly.

Respondents have not shown that they had a recognized excuse for untimely filing their Brief, such as would arise if a party proceeded in pro se, as this Court concluded in *Hudson*. Nor did Respondents merely fail to discuss an inconsequential issue as in *Hewitt*. To the contrary, their Brief discusses the crucial matters in dispute here, namely whether the Agreement satisfied NRS 597.995 and whether strict or substantial compliance is the proper standard. Moreover, Respondents inexcusably disregarded applicable appellate procedures. Thus, their failure to file timely their Answering Brief must not be lightly set aside.

Even if the Court opts not to take the serious step of treating Respondents' failure as a confession of error, at least, Respondents should not be able to provide oral argument in this matter. And because NJA seeks to file an amicus brief in support of Respondents' flawed Answering Brief, by extension, NJA should likewise not be allowed to argue in this matter. Accordingly, NJA does not stand on secure footing in requesting this Court grant it an extension to file a Motion for Leave to File an Amicus Brief.

**B. NJA Proposes to Argue Issues Either Not Before the Court or Already Sufficiently Briefed by Respondents**

NRAP 29 governs the filing of amicus briefs. Except in circumstances not at issue here, an amicus curiae must seek leave of court to file its brief. NRAP 29(a). The proposed amicus curiae must file a motion for leave to file an amicus brief that sets forth "the movant's interest . . . and the reasons why an amicus brief is

desirable.” NRAP 29(c). The amicus curiae has seven days to file both its brief and the motion for leave to file that brief from the date the brief of the party being supported is served. NRAP 29(f). Here, NJA filed a Motion for Extension of Time within seven days of Respondents’ having filed their Answering Brief. Motion.

It is axiomatic that this Court cannot consider matters not before it on appeal. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n. 3, 252 P.3d 668, 672 n. 3 (2011) (“Issues not raised in an appellant's opening brief are deemed waived.”). An exception exists for issues of constitutional dimension, which the Court can consider sua sponte. *Palmieri v. Clark Cnty.*, 131 Nev. 1028, 1047 n. 14, 367 P.3d 442, 455 n. 14 (Ct. App. 2015). Here, no weighty issues of constitutional import are implicated. Absent any such issues, no matter *not* before the Court on appeal in this matter should be considered here.

In defiance of that notion, NJA presumes to instruct the Court as to an issue not raised by Appellants in their Opening Brief and, thus, not before the Court for its consideration. Namely, NJA assures the Court that “it can assist this Court in issues relating to whether heirs in wrongful death, medical malpractice nursing home cases are bound by the signature of the decedent to arbitrate . . . .” Motion at p. 3. NJA also proposes to assist the Court as to issues relating to the interpretation of NRS 597.995. However, the parties have already addressed those issues in their opening and answering briefs, as well as below in the District Court.

These same notions apply in the context of Amicus Curiae briefing. “Absent exceptional circumstances, amicus curiae cannot expand the scope of an appeal to implicate issues not presented by the parties or seek relief beyond that sought by the parties.” C.J.S. Amicus Curiae § 17 (2013).

Amicus Curiae must accept the issues made and [the] propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered. [Citations omitted.] Otherwise, amicus curiae, rather than the parties themselves, would control the issues litigated. It would also be inappropriate for amicus curiae unilaterally to augment the scope and thus the cost of litigation to the opposing party.

*Lance Camper Manufacturing Corp. v. Republic Indemnity Co.*, 109 Cal. Rptr. 2d 515, 522 n. 6 (Cal. Ct. App. 2001).

As noted above, Appellants did not raise the issue of whether heirs in wrongful death, medical malpractice nursing home cases are bound by the signature of the decedent to arbitrate in their Opening Brief. Why then should NJA be permitted to hold forth on that subject as they propose in the instant Motion? Such gratuitous opinions are irrelevant to this matter and so would not assist the court. Instead, it would merely give the NJA an opportunity to express unsolicited opinions on matters this court has not been asked to decide. In the meantime, Appellants are forced to respond to the instant motion and potentially to the brief if allowed. If so, Appellants would have to incur the expense and effort of filing a

supplemental answering brief on a matter it did not consider appropriate for appeal.

Moreover, Appellants in their Opening Brief and Respondents in their Answering Brief, have fully addressed the other issue on which NJA seeks to opine—interpretation of NRS 597.995. Additional discussion by NJA would add nothing to this Court’s understanding of the matter. Rather, it would merely add to Appellants’ and this Court’s burden and expense, with no corresponding benefit.

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### III. CONCLUSION

NJA proposes to file a Motion for Leave to File an Amicus Brief and insists it requires an extension of time to do so. NJA has not shown that there is an appropriate basis on which to file any of these motions. To the contrary, the proposed Motion is questionable as a matter of both procedure and substance. Therefore, Appellants respectfully request this Court deny NJA's Motion for Extension of Time.

Dated this 7<sup>th</sup> day of April, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

Bv: /s/ John M. Orr

S. Brent Vogel  
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John M. Orr  
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*Attorneys for Appellants*

## CERTIFICATE OF SERVICE

I hereby certify that on this 7<sup>th</sup> day of April, 2021, the foregoing APPELLANTS' OPPOSITION TO THE NEVADA JUSTICE ASSOCIATION'S MOTION FOR EXTENSION OF TIME TO FILE MOTION FOR LEAVE TO FILE AMICUS BRIEF was filed electronically with the Nevada Supreme Court. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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/s/ Roya Rokni

An employee of LEWIS BRISBOIS  
BISGAARD & SMITH, LLP

## BELLA ESTATE CARE HOME

### Resident Agreement Addendum

#### Grievance and Arbitration

1. **Grievances:** Resident may voice reasonable grievances about services rendered by staff or other personnel and the Home shall record such grievances upon request to do so. In the event of a written grievances, the Home shall investigate it and make written reply to residents of the Home's findings with a reasonable period thereafter.

2 **Arbitration:** Any controversy, dispute or disagreement, whether sounding in tort or contract to law, arising out of or relating to this Agreement, the breach thereof, or the subject matter thereof, shall be settled exclusively by binding arbitration, which shall be conducted in (City, State) in accordance with American health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration, and which to the extent of the subject matter of the Arbitration, shall be binding of all parties to the agreement and judgment on the award rendered by the arbitrator maybe entered in any court having jurisdiction thereof. The parties shall agree upon a sole arbitrator of their choice and if they cannot agree on a single arbitrator there shall be three arbitrators with the neutrals arbitrator chosen by the parties' nominated arbitrators.

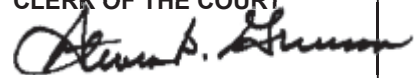
Corinne R. D. Co  
Resident Responsible Party

1/30/2015  
Date

A  
Resident Responsible Party

1/30/15  
Date

# EXHIBIT ‘B’



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*Sokhena K. Huch, and Miki N. Ton*

9  
10 DISTRICT COURT  
11 CLARK COUNTY, NEVADA

12 CORINNE R. DILEO as Special  
13 Administrator for the ESTATE OF THOMAS  
DILEO; THOMAS DILEO, JR., as Statutory  
14 Heir to THOMAS DILEO; and CINDY  
DILEO, as Statutory Heir to THOMAS  
15 DILEO,

16 Plaintiffs,

17 vs.

18 MAIDE, L.L.C, a Nevada limited-liability  
company d/b/a GENTLE SPRING CARE  
19 HOME; SOKHENA K. HUCH, an individual;  
MIKI N. TON, an individual; DOE  
20 INDIVIDUALS 1-10, inclusive; ROE  
ENTITIES 11-20, inclusive,

21 Defendants.  
22

CASE NO. A-19-797533-C  
Dept. No.: 1

**MAIDE, L.L.C, a Nevada limited-liability  
company d/b/a GENTLE SPRING CARE  
HOME; SOKHENA K. HUCH, an  
individual; MIKI N. TON's MOTION TO  
COMPEL ARBITRATION**

**[HEARING REQUESTED]**

23 Defendants MAIDE, L.L.C, a Nevada limited-liability company d/b/a GENTLE SPRING  
24 CARE HOME; SOKHENA K. HUCH, an individual; MIKI N. TON (collectively referred to as  
25 "Defendants"), by and through their attorneys of record, S. Brent Vogel, Esq., Jeffrey H. Ballin,  
26 Esq., and John M. Orr, Esq. of the Law Firm LEWIS BRISBOIS BISGAARD & SMITH, hereby  
27 file this Motion to Compel Arbitration.

28 ///

1 This Motion is based upon the papers and pleadings on file in this case, the attached  
2 exhibits, the Memorandum of Points and Authorities submitted herewith, and any argument made  
3 at the time of hearing in this matter.

4 DATED this 13th day of September, 2019.

6 LEWIS BRISBOIS BISGAARD & SMITH LLP

8 By /s/ John M. Orr

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10 Nevada Bar No. 6858

11 JOHN M. ORR

12 Nevada Bar No. 14251

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15 Tel. 702.893.3383

16 *Attorneys for Defendants, The Heights of Summerlin,*  
17 *LLC*

18 **MEMORANDUM OR POINTS AND AUTHORITIES**

19 **I. INTRODUCTION**

20 This case arises out of the care and treatment that Thomas Dileo received while admitted at  
21 the Gentle Spring Care Home in Las Vegas. Plaintiff Corinne Dileo, as administrator of Mr.  
22 Dileo's Estate, Thomas Dileo, Jr., and Cindy Dileo ("Plaintiffs") filed a Complaint against  
23 Defendants on June 27, 2019, alleging, *inter alia*, that Gentle Spring's employees negligently  
24 failed to supervise and care for Mr. Dileo. The Complaint further alleges that due to the alleged  
25 negligence of Defendants, Mr. Dileo died on November 16, 2017.

26 At the outset of Mr. Dileo's residency at Gentle Spring, Plaintiff Corinne Dileo, as Mr.  
27 Dileo's personal representative, voluntarily executed a Resident Agreement Addendum ("the  
28 Agreement") on January 30, 2015. A complete copy of this Agreement is attached hereto as  
Exhibit. "A." Amongst other important terms, this Agreement provided as follows: "Any  
controversy, dispute, or disagreement, whether sounding in tort or contract law, arising out of or  
relating to this Agreement, the breach thereof, or the subject matter thereof, shall be settled

1 exclusively by binding arbitration....*Id.*

## 2 **II. ARGUMENT**

3 In Nevada, “strong public policy favors arbitration, and arbitration clauses are generally  
4 enforceable.” *Gonski v. Second Judicial Dist. Court of Nev.*, 245 P.3d 1164, 1168 (Nev. 2010).  
5 Both the Nevada Legislature and Nevada Supreme Court support the enforcement of arbitration  
6 provisions for alternative dispute resolution in Nevada. In fact, the Nevada Supreme Court has  
7 noted that arbitration is favored in this state because arbitration “generally avoids the higher costs  
8 and longer time periods associated with traditional litigation.” *D.R. Horton, Inc. v. Green*, 120  
9 Nev. 549, 553, 96 P.3d 1159, 1162 (2004). Accordingly, Nevada courts have uniformly held that  
10 agreements to arbitrate are specifically enforceable and any doubts concerning the arbitrability of  
11 the subject matter of the disputes are to be resolved in favor of arbitration. *See Silverman v.*  
12 *Fireman's Fund Ins. Co.*, 96 Nev. 30 (1980); *see also Exber, Inc. v. Sletten Const. Co.*, 92 Nev.  
13 721 (1976).  
14

15 Additionally, the Nevada Legislature has enacted the Uniform Arbitration Act, which  
16 provides the correct procedure the District Court must apply when considering a Motion to Compel  
17 Arbitration where one party refuses to arbitrate:  
18

19 NRS § 38.221 Motion to compel or stay arbitration.

20 1. On motion of a person showing an agreement to arbitrate and  
21 alleging another person’s refusal to arbitrate pursuant to the  
22 agreement:

23 (a) If the refusing party does not appear or does not oppose the  
24 motion, the court shall order the parties to arbitrate; and

25 (b) If the refusing party opposes the motion, the court shall proceed  
26 summarily to decide the issue and order the parties to arbitrate  
27 unless it finds that there is no enforceable agreement to arbitrate.

28 2. On motion of a person alleging that an arbitral proceeding has  
been initiated or threatened but that there is no agreement to  
arbitrate, the court shall proceed summarily to decide the issue. If  
the court finds that there is an enforceable agreement to arbitrate, it  
shall order the parties to arbitrate.

1 3. If the court finds that there is no enforceable agreement, it may  
2 not, pursuant to subsection 1 or 2, order the parties to arbitrate.

3 4. The court may not refuse to order arbitration because the claim  
4 subject to arbitration lacks merit or grounds for the claim have not  
5 been established.

6 5. If a proceeding involving a claim referable to arbitration under  
7 an alleged agreement to arbitrate is pending in court, a motion  
8 under this section must be made in that court. Otherwise, a motion  
9 under this section may be made in any court as provided in NRS  
10 38.246.

11 6. If a party makes a motion to the court to order arbitration, the  
12 court on just terms shall stay any judicial proceeding that involves a  
13 claim alleged to be subject to the arbitration until the court renders a  
14 final decision under this section.

15 7. If the court orders arbitration, the court on just terms shall stay  
16 any judicial proceeding that involves a claim subject to the  
17 arbitration. If a claim subject to the arbitration is severable, the  
18 court may limit the stay to that claim.

19 Pursuant to this statute, the Court, when receiving a Motion to Compel Arbitration must  
20 “summarily” decide the issue and “shall” order the parties to submit to arbitration unless the Court  
21 finds that no arbitration agreement actually exists. The statute does not permit the Court to  
22 consider other factors such as the merits of the claim when ruling on the Motion.

23 It has long been the policy in Nevada that absent some countervailing reason, contracts will  
24 be construed from the written language and enforced as written. *Ellison v. California State Auto.*  
25 *Ass’n*, 106 Nev. 601 (1990). This Court is bound to enforce the plain terms of contracts. *Lindley*  
26 *& Co. v. Piggly Wiggly Nev. Co.*, 55 Nev. 458, 465 (1935) (“Where language of contract is not  
27 ambiguous, court must enforce contract in accordance with its provisions.”). *Bell v. Leven*, 120  
28 Nev. 388 (2004) (holding that when the terms of a contract are clear, “the courts must enforce the  
contract according to its terms.”).

In this matter, both the plain terms of the Agreement, as well as Nevada law favoring  
arbitration, requires the Complaint to be submitted to binding arbitration. Gentle Spring and Mr.  
Dileo, through his personal representative, Plaintiff Corinne Dileo, entered into an agreement to

1 arbitrate any dispute arising out of the his residency at Gentle Spring. Accordingly, because the  
2 parties in this case have a prior agreement to submit any disputes to arbitration, Defendants  
3 respectfully request that this Court enter an Order compelling Plaintiff to submit to binding  
4 arbitration in this matter.

5 **III. CONCLUSION**

6 Based upon the foregoing, Defendants respectfully request that this Honorable Court grant  
7 Defendants' Motion to Compel Arbitration.  
8

9 DATED this 13th day of September, 2019

10 LEWIS BRISBOIS BISGAARD & SMITH LLP  
11  
12

13 By /s/ John M. Orr

14 S. BRENT VOGEL

Nevada Bar No. 006858

15 JOHN M. ORR

Nevada Bar No. 14251

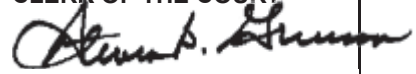
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19 *Summerlin, LLC*  
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# EXHIBIT ‘C’



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*Attorneys for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

CORINNE R. DILEO as Special  
Administrator for the ESTATE OF THOMAS  
DILEO; THOMAS DILEO, JR. as Statutory  
Heir to THOMAS DILEO; and CINDY  
DILEO, as Statutory Heir to THOMAS  
DILEO

Plaintiffs,

vs.

MAIDE, L.L.C, a Nevada limited-liability  
company d/b/a GENTLE SPRING CARE  
HOME; SOKHENA K. HUCH, an individual;  
MIKI N. TON, an individual; DOE  
INDIVIDUALS 1–10, inclusive; ROE  
ENTITIES 11–20, inclusive;

Defendants.

Case No.: A-19-797533-C  
Dept. No.: 1

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS MAIDE, L.L.C. d/b/a  
GENTLE SPRING CARE HOME'S,  
SOKHENA K. HUCH'S, AND MIKI N.  
TON'S MOTION TO COMPEL  
ARBITRATION**

**Hearing Date: October 17, 2019  
Hearing Time: In Chambers**

Plaintiffs Corinne R. DiLeo, as Special Administrator for the Estate of Thomas DiLeo,  
Thomas DiLeo, Jr., as Statutory Heir to Thomas DiLeo, and Cindy DiLeo, as Statutory Heir to  
Thomas DiLeo (collectively, "Plaintiffs"), by and through their counsel of record, Jamie S.  
Cogburn, Esq. and Hunter S. Davidson, Esq. of Cogburn Law, hereby file their Opposition  
("Opposition") to Defendants Maide, L.L.C. d/b/a Gentle Spring Care Home's, Sokhena K. Huch's,  
and Miki N. Ton's (collectively, "Defendants") Motion to Compel Arbitration ("Motion").

1 This Opposition is made and based upon the following Memorandum of Points and  
2 Authorities, the papers and pleadings on file herein, any exhibits attached hereto, and any oral  
3 argument this Court may entertain at the time of hearing on this matter.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 This case arises from the neglect of an “older person,”<sup>1</sup> Thomas DiLeo (“Decedent”), while  
7 he was admitted at Defendant’s skilled-nursing facility. After being admitted for dementia,  
8 Decedent injured his leg on a wheelchair while in the skilled-nursing facility. When treating  
9 Decedent’s leg, Defendants wrapped his leg too tightly with an elastic bandage wrap, causing his  
10 leg to develop gangrene. Within weeks of his leg injury, Decedent was transported to the hospital,  
11 where he had his leg amputated to reduce further harm from the gangrene. Decedent passed away  
12 one week after the amputation.

13 Defendant now seeks to compel this matter into binding arbitration based upon an  
14 Arbitration Agreement that makes absolutely no reference to any of the Defendants or their  
15 representatives. In addition, the Arbitration Agreement lacks the statutorily-mandated  
16 authorization that indicates Decedent affirmatively agreed to the specific provision mandating  
17 “any controversy, dispute or disagreement” be submitted to binding arbitration. As such,  
18 Defendants’ Motion to Compel should be denied.

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25 <sup>1</sup> See NRS 41.1395.

1 **II. BACKGROUND**

2 **A. Statement of Relevant Facts**

3 As alluded to above, Defendants Maide, L.L.C. d/b/a Gentle Spring Care Home (“Maide”),  
4 Sokhena K. Huch (“Huch”), and Miki N. Ton (“Ton”), at all relevant times, owned, operated, and  
5 controlled the Gentle Spring Care Home skilled-nursing facility, located at 6418 Spring Meadow  
6 Drive, Las Vegas, Nevada 89103 (“Nursing Facility”).<sup>2</sup>

7 In or about the year 2014, Decedent was admitted to Defendants’ Nursing Facility because  
8 he suffered from dementia and required 24-hour care and supervision. This constant care and  
9 supervision included Decedent’s most basic needs, such as, providing him with food, shelter,  
10 clothing, and services necessary to maintain his physical and mental health.

11 In or about July 2017, Decedent injured his leg on a wheelchair while at the Nursing  
12 Facility. To treat Decedent’s leg injury, an employee or agent of the Nursing Facility wrapped  
13 Decedent’s leg with an elastic bandage wrap and would not let Decedent remove it, despite him  
14 expressing discomfort. Unfortunately for Decedent, the elastic band wrap was applied too tightly,  
15 causing Decedent to develop gangrene on his leg. After noticing that Decedent’s leg began to  
16 change colors, the Nursing Facility attempted to treat Decedent themselves, rather than  
17 transporting him to a hospital.

18 On or about July 21, 2017, after realizing the Nursing Facility would not transport  
19 Decedent to a hospital, Plaintiff Cindy DiLeo called 911 and had Decedent immediately  
20 transported to Spring Valley Hospital. Upon being admitted to Spring Valley Hospital, hospital  
21 physicians determined they needed to amputate Decedent’s leg that developed gangrene. On or  
22 about August 3, 2017, Decedent’s leg was amputated. On or about August 10, 2017, Decedent  
23 passed away from complications stemming for Defendant’s inadequate care.

24 \_\_\_\_\_  
25 <sup>2</sup> See Pl.’s Comp. at ¶ 11; Def.’s Answer at ¶ 5 (“Answering Paragraphs 7, 8, 9 and 11 of Plaintiffs’ Complaint, Defendant admits to the allegations contained therein.”).

1           **B.       Procedural History**

2           On June 27, 2019, Plaintiffs filed their Complaint, asserting the following causes of action  
3 against each of the Defendants: (1) Abuse/Neglect of an Older Person; (2) Negligence; (3)  
4 Wrongful Death; and (4) Survival Action. On August 14, 2019, Defendants filed their Answer to  
5 Plaintiff's Complaint.

6           On September 13, 2019, Defendants filed the underlying Motion arguing the instant matter  
7 should be removed into binding arbitration pursuant to the Arbitration Agreement purportedly  
8 entered between Decedent and Defendants on January 30, 2015.<sup>3</sup> The Arbitration Agreement  
9 provided by Defendants is merely part of a one-page "Resident Agreement Addendum."  
10 Importantly, the Arbitration Agreement only lists the names of Plaintiff Corinne R. DiLeo, who  
11 had a power of attorney over Decedent, and Bella Estate Home Care, which is an entirely different  
12 nursing facility, located at 3140 Coachlight Circle, Las Vegas, Nevada 89117.<sup>4</sup> That is, the  
13 Arbitration Agreement makes no mention of Defendant Maide, Defendant Huch, Defendant Ton,  
14 or any other individual or entity that has the authority to bind Defendants to an Arbitration  
15 Agreement. Notwithstanding these deficiencies, the Arbitration Agreement, in relevant part, states:

16           **2       Arbitration:** Any controversy, dispute or disagreement, whether sounding  
17 in tort or contract to law, arising out of or relating to this Agreement, the breach  
18 thereof, or the subject matter thereof, shall be settled exclusively by binding  
19 arbitration, which shall be conducted in (City, State) in accordance with American  
20 health [sic] Lawyers Association Alternative Dispute Resolution Service Rules of  
21 Procedure for Arbitration, and which to the extent of the subject matter of the  
Arbitration, shall be binding of all parties to the agreement and judgment on the  
award rendered by the arbitrator maybe [sic] entered in any court having  
jurisdiction thereof. The parties shall agree upon a sole arbitrator of their choice  
and if they cannot agree on a single arbitrator there shall be three arbitrators with  
the neutrals [sic] arbitrator chosen by the parties' nominated arbitrators.

22  
23 <sup>3</sup> See generally Exhibit A of Defendants Maide, L.L.C. d/b/a Gentle Spring Care Home's, Sokhena K. Huch's, and Miki N. Ton's Motion to Compel Arbitration.

24 <sup>4</sup> See Nevada Division of Public and Behavioral Health ("NVDPBH") Licensee Search, attached hereto as **Exhibit 1**;  
25 NVDPBH May 15, 2014 Inspection of Bella Estate Care Home, attached hereto as **Exhibit 2**; NVDPBH April 1, 2015 Inspection of Bella Estate Care Home, attached hereto as **Exhibit 3**; Stipulation for Settlement of Disciplinary Actions, entered August 6, 2015, attached hereto as **Exhibit 4**, at ¶ 3.

1 **III. LEGAL ARGUMENT**

2  
3 **A. Defendant's Motion to Compel Arbitration should be denied because the Arbitration Agreement is void and unenforceable under NRS 597.995.**

4 NRS 597.995(1) (2013)<sup>5</sup> states that any agreement with a provision requiring a person to  
5 submit to arbitration "any dispute arising between the parties" must include specific authorization  
6 indicating the person affirmatively agrees to *that provision*. If the agreement fails to include  
7 specific authorization for the provision requiring submission to arbitration for "any dispute arising  
8 between the parties," then the provision is void and unenforceable. NRS 597.995(2) (2013).

9 Here, the subject Arbitration Agreement is void and unenforceable under NRS 597.995  
10 because it does not include a specific authorization for its provision requiring all disputes be  
11 submitted to arbitration. In relevant part, Provision (2) of the Arbitration Agreement states "[a]ny  
12 controversy, dispute or disagreement, whether sounding in tort or contract to law, arising out of or  
13 relating to this Agreement . . . shall be settled exclusively by binding arbitration." However, absent  
14 from Provision (2) is any signature line, initial line, or otherwise that indicates Plaintiff Corinne  
15 DiLeo, as Decedent's power of attorney, affirmatively agreed to submit to arbitration "any  
16 controversy, dispute or disagreement" relating to the Arbitration Agreement. Rather, the  
17 Arbitration Agreement only includes a sole signature line at the bottom of the page wherein  
18 Plaintiff Corinne R. DiLeo generally acknowledges all of the listed provisions. Thus, the  
19 Arbitration Agreement is void and unenforceable because Plaintiff Corinne DiLeo, as Decedent's  
20 Power of Attorney, did not specifically authorize Provision (2).

21 ///

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24 \_\_\_\_\_  
25 <sup>5</sup> This statute was enacted in 2013 and amended in June 2019. Given the subject events occurred in 2017, the 2013 version of the statute applies.

**B. Defendants' Motion to Compel Arbitration should be denied because Defendants have not met their burden of proving a valid arbitration agreement exists.**

NRS 38.221 provides that if a party requests a court to compel arbitration pursuant to a written agreement to arbitrate, and the opposing party denies the existence of such an agreement, the court shall summarily determine the issue. "If the court finds that there is no enforceable agreement, it may not . . . order the parties to arbitrate." NRS 38.221(3). The moving defendants, therefore, have the burden of showing that a binding arbitration agreement exists. *Obstetrics and Gynecologists v. Pepper*, 101 Nev. 105, 107, 693 P.2d 1259, 1261 (1985). Arbitration is a matter of contract, and "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Truck Ins. Exch. v. Swanson*, 124 Nev. 629, 634, 189 P.3d 656 (2008). The question of whether an agreement to arbitrate exists is one of fact, such that the district court's findings are given significant deference and reviewed under the clearly erroneous standard. *Id.* at 633, 189 P.3d at 659. Here...

**1. Defendants have not met their burden of proving a valid arbitration agreement exists because Defendants failed to sign purported Arbitration Agreement and failed to show they were parties to the Agreement.**

An arbitration agreement is subject to the same rules of construction as any other contract. *Kindred v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 116 Nev. 405, 410, 996 P.2d 903, 907 (2000). For any contract, the parties' consent is a basic element. *See Back Streets, Inc. v. Campbell*, 95 Nev. 651, 652, 601 P.2d 54, 55 (1979) ("A contract is founded upon the meeting of the minds of the parties as to ascertainable terms."). In addition, the parties' consent must be communicated to one another. *Alter v. Resort Properties of Am.*, 2014 WL 2466282, at \*2 (Nev. May 30, 2014) ("Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties."). Thus, consent is essential to the contractual underpinning of an arbitration procedure; the asserted absence of contractual consent renders arbitration, by its very definition, inapplicable to resolve the issue. *See id.*; *Toal v. Tardif*, 178 Cal.

1 App. 4th 1208, 1221, 101 Cal. Rptr. 3d 97, 106–07 (2009); *see also Truck Ins. Exch.*, 124 Nev. at  
2 633–34, 189 P.3d at 659 (holding arbitration agreement was invalid as to law firm because the law  
3 firm was not a signatory to any of the arbitration agreements).

4 Here, the Arbitration Agreement is invalid because Defendants cannot demonstrate that  
5 Decedent (i.e. Corinne DiLeo as power of attorney) and Defendants mutually assented to the  
6 subject Arbitration Agreement. Like *Truck Ins. Exch.*, none of the Defendants or their  
7 representatives are signatories to the Arbitration Agreement. In fact, there is absolutely no mention  
8 of any of the Defendants or their representatives in the Arbitration Agreement. Accordingly, the  
9 Arbitration Agreement is invalid and unenforceable because Defendants cannot satisfy their  
10 burden of proving they are parties and signatories to the Arbitration Agreement.

11 **2. Defendants have not met their burden of proving a valid arbitration**  
12 **agreement exists because Defendants cannot bind Plaintiffs to the terms**  
13 **of the Arbitration Agreement.**

14 “Generally, arbitration is a matter of contract and a party cannot be required to submit to  
15 arbitration any dispute which he has not agreed so to submit.” *Truck Ins. Exch.*, 124 Nev. at 634,  
16 189 P.3d at 660; *see also Goliger v. AMS Properties, Inc.*, 123 Cal. App. 4th 374, 378, 19 Cal.  
17 Rptr. 3d 819, 821 (2004) (holding daughter who signed arbitration agreement was not bound to  
18 arbitration of her own claim for wrongful death of her mother against the defendant because she  
19 did not sign the arbitration agreement “in her personal capacity.”). Only under the following  
20 limited theories may a nonsignatory be bound to an arbitration agreement: (1) incorporation by  
21 reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; or (5) estoppel. *Truck Ins. Exch.*,  
124 Nev. at 634–35, 189 P.3d at 660.

22 Here, Plaintiffs cannot be bound to the Arbitration Agreement because they did not sign  
23 the Arbitration Agreement, nor are they incorporated by reference. Like *Goliger*, here, none of the  
24 Plaintiffs signed the Arbitration Agreement in their personal capacity; recall, Plaintiff Corinne  
25 DiLeo only signed the Arbitration Agreement as Decedent’s power of attorney. Moreover, none

1 of the theories for binding a nonsignatory, which are outlined in *Truck Ins. Exch.*, are applicable  
2 to the instant matter. If Defendants wanted to bind individuals such as Plaintiffs, then they should  
3 have included a provision in their Arbitration Agreement stating the Agreement would apply to  
4 Decedent's successors, spouses, children, assigns, agents, heirs, estate executors, etc.

5 **II. CONCLUSION**

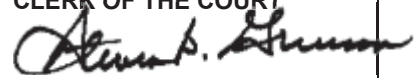
6 For the foregoing reasons, Plaintiff respectfully request the Court deny Defendants' Motion  
7 to Compel Arbitration.

8 Dated this 24<sup>th</sup> day of September, 2019.

9 COGBURN LAW

10  
11 By: /s/Hunter S. Davidson  
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18 *Attorneys for Plaintiff*  
19  
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25

# EXHIBIT ‘D’



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7 *Attorneys for Defendants*

8 *Maide, LLC d/b/a Gentle Spring Care Home,*  
9 *Sokhena K. Huch, and Miki N. Ton*

10 DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 CORINNE R. DILEO as Special  
13 Administrator for the ESTATE OF THOMAS  
DILEO; THOMAS DILEO, JR., as Statutory  
14 Heir to THOMAS DILEO; and CINDY  
DILEO, as Statutory Heir to THOMAS  
15 DILEO,

16 Plaintiffs,

17 vs.

18 MAIDE, L.L.C, a Nevada limited-liability  
company d/b/a GENTLE SPRING CARE  
19 HOME; SOKHENA K. HUCH, an individual;  
MIKI N. TON, an individual; DOE  
20 INDIVIDUALS 1-10, inclusive; ROE  
ENTITIES 11-20, inclusive,

21 Defendants.  
22

CASE NO. A-19-797533-C

DEPT. NO. 14

**NOTICE OF ENTRY OF ORDER**

23 ...

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1 PLEASE TAKE NOTICE that an ORDER was entered with the Court in the above-  
2 captioned matter on the 7<sup>th</sup> day of April, 2020, a copy of which is  
3 attached hereto.  
4

5 DATED this 22<sup>nd</sup> day of April, 2020

6 LEWIS BRISBOIS BISGAARD & SMITH LLP  
7  
8

9 By /s/ John M. Orr

10 S. BRENT VOGEL

11 Nevada Bar No. 6858

12 JOHN M. ORR

13 Nevada Bar No. 14251

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15 Las Vegas, Nevada 89118

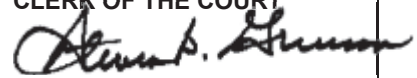
16 Tel. 702.893.3383  
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Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22<sup>nd</sup> day of April, 2020, a true and correct copy of **NOTICE OF ENTRY OF ORDER** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, who have agreed to receive Electronic Service in this action.

By /s/ Roya Rokni  
An Employee of  
LEWIS BRISBOIS BISGAARD & SMITH LLP



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8 *Maide, LLC d/b/a Gentle Spring Care Home,*  
9 *Sokhena K. Huch, and Miki N. Ton*

10 DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 CORINNE R. DILEO as Special  
13 Administrator for the ESTATE OF THOMAS  
DILEO; THOMAS DILEO, JR., as Statutory  
14 Heir to THOMAS DILEO; and CINDY  
DILEO, as Statutory Heir to THOMAS  
15 DILEO,

16 Plaintiffs,

17 vs.

18 MAIDE, L.L.C, a Nevada limited-liability  
company d/b/a GENTLE SPRING CARE  
19 HOME; SOKHENA K. HUCH, an individual;  
MIKI N. TON, an individual; DOE  
20 INDIVIDUALS 1-10, inclusive; ROE  
ENTITIES 11-20, inclusive,

21 Defendants.  
22

CASE NO. A-19-797533-C

DEPT. NO. 14

**ORDER ON DEFENDANTS' MOTION TO  
COMPEL ARBITRATION**

23 ...

24 ...

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27 ...

1 The above-entitled matter having come on for hearing upon Defendants Maide,  
2 LLC, Sokhena Huch, and Miki Ton's (collectively referred to as "Defendants") Motion to  
3 Compel Arbitration on January 28, 2020. Defendants, appearing by and through John M.  
4 Orr, Esq. and Plaintiffs Cindy Dileo, as the Administrator of the Estate of Thomas Dileo  
5 (the "Estate"), Thomas Dileo, Jr., an heir of Thomas Dileo, and Cindy Dileo, an heir of  
6 Thomas Dileo (Thomas Dileo, Jr. and Cindy Dileo collectively referred to as the "Heirs"),  
7 appeared by and through Hunter Davidson, Esq. The Court having reviewed the  
8 pleadings and papers on file, being fully advised in the premises, having heard the oral  
9 argument of counsel and good cause appearing therefore, the Court finds as follows:

10 The Court finds Corinne Dileo executed a valid arbitration agreement (the  
11 "Agreement") on behalf of Thomas Dileo on January 30, 2015, when Mr. Dileo became a  
12 resident at Gentle Spring Care Home. On June 27, 2019, Plaintiffs Corinne Dileo, Thomas  
13 Dileo, Jr., and Cindy Dileo, filed a Complaint against Defendants, asserting claims under  
14 NRS § 41.1395 ("Elder Abuse"), NRS 48.105 ("Wrongful Death"), and for Negligence  
15 under NRS § 41.100. Cindy and Thomas Dileo, Jr. were not signatories to the  
16 Agreement.

17 The Supreme Court of Nevada has held "[g]enerally, arbitration is a matter of  
18 contract and a party cannot be required to submit to arbitration any dispute which he has  
19 not agreed so to submit" *Truck Ins. Exchange v. Swanson*, 124 Nev. 629, 634, 189 P.3d  
20 656, 550 (2008). A nonsignatory "may be bound to an arbitration agreement if so dictated  
21 by the 'ordinary principles of contract and agency...[:]' (1) incorporation by reference; (2)  
22 assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." *Id.*

23 NRS 38.221 further provides a specific framework with which this Court must  
24 analyze whether a dispute is subject to arbitration:

25 NRS § 38.221 Motion to compel or stay arbitration.

26 1. On motion of a person showing an agreement to arbitrate  
27 and alleging another person's refusal to arbitrate pursuant to  
28 the agreement:

1 (a) If the refusing party does not appear or does not oppose  
the motion, the court shall order the parties to arbitrate; and

2 (b) If the refusing party opposes the motion, the court shall  
3 proceed summarily to decide the issue and order the parties  
4 to arbitrate unless it finds that there is no enforceable  
agreement to arbitrate.

5 2. On motion of a person alleging that an arbitral proceeding  
has been initiated or threatened but that there is no  
6 agreement to arbitrate, the court shall proceed summarily to  
decide the issue. If the court finds that there is an enforceable  
7 agreement to arbitrate, it shall order the parties to arbitrate.

8 3. If the court finds that there is no enforceable agreement, it  
may not, pursuant to subsection 1 or 2, order the parties to  
9 arbitrate.

10 . . .

11 . . .

12 6. If a party makes a motion to the court to order arbitration,  
the court on just terms shall stay any judicial proceeding that  
13 involves a claim alleged to be subject to the arbitration until  
the court renders a final decision under this section.

14 7. If the court orders arbitration, the court on just terms shall  
stay any judicial proceeding that involves a claim subject to  
15 the arbitration. If a claim subject to the arbitration is  
severable, the court may limit the stay to that claim.

16 NRS 38,221(1)-(3), (6)-(7).  
17

18 The Estate's claims for Wrongful Death, Elder Abuse, and Negligence are subject  
19 to Arbitration because Corrinne Dileo, as the special administrator of the Estate,  
20 "succeeds to the rights and obligations of the Estate's decedent, effectively stepping into  
21 the shoes of the decedent." *Colo. Nat'l Bank of Denver v. Friedman*, 846 P.2d 159, 163  
22 (Colo. 1993). The Heirs "not have standing to assert an elder abuse or negligence claim."  
23 *Echevarria v. Echevarria*, No. 66618, 2015 WL 7431757 (Nov. 19, 2015) ("nothing in NRS  
24 41.085 authorizes an heir to maintain an action for elder abuse or neglect on behalf of a  
25 decedent."); NRS 41.100(1) ("[e]xcept as otherwise provided in this section, no cause of  
26 action is lost by reason of the death of any person, but may be maintained by or against  
27 the person's executor or administrator.").

1           The Court finds that there is no evidence the Heirs are bound to the Agreement  
2 by virtue of other principles of contract law, i.e., estoppel, assumption, agency. Under  
3 NRS 38.221(1), there is not a valid agreement to arbitrate between the Heirs and  
4 Defendants.

5           The Court does find as a matter of law that there is a valid agreement to arbitrate  
6 between the Estate and Defendants.

7           The Court, having considered the arguments of counsel, and good cause  
8 appearing, hereby finds and orders as follows:

9           IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff Corinne R.  
10 Dileo's, as Special Administrator for the Estate of Thomas Dileo, claims against  
11 Defendants for Elder Abuse, Negligence, and Survival Action be referred to binding  
12 Arbitration pursuant to the Resident Agreement Addendum attached to Defendants'  
13 Motion.

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1 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs Thomas  
2 Dileo, Jr. and Cindy Dileo's, as statutory heirs to Thomas Dileo, individual claims against  
3 Defendants for Wrongful Death are stayed during the pendency of the binding arbitration.

4 IT IS SO ORDERED

5 DATED this <sup>AE</sup> ~~3rd~~ day of <sup>April</sup> ~~March~~, 2020.

6   
7 \_\_\_\_\_  
8 DISTRICT COURT JUDGE

9 Submitted By:

10 LEWIS BRISBOIS BISGAARD & SMITH LLP

11 By: /s/ John M. Orr

12 S. Brent Vogel, Esq.

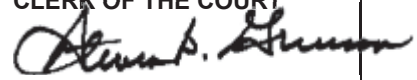
13 John M. Orr, Esq.

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15 Las Vegas, Nevada 89118

16 *Attorneys for Defendant*

# EXHIBIT ‘E’



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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

CORINNE R. DILEO as Special  
Administrator for the ESTATE OF THOMAS  
DILEO; THOMAS DILEO, JR. as Statutory  
Heir to THOMAS DILEO; and CINDY  
DILEO, as Statutory Heir to THOMAS  
DILEO

Plaintiffs,

vs.

MAIDE, L.L.C, a Nevada limited-liability  
company d/b/a GENTLE SPRING CARE  
HOME; SOKHENA K. HUCH, an individual;  
MIKI N. TON, an individual; DOE  
INDIVIDUALS 1–10, inclusive; ROE  
ENTITIES 11–20, inclusive;

Defendants.

Case No.: A-19-797533-C  
Dept. No.: 1

**PLAINTIFFS' MOTION FOR  
REHEARING ON DEFENDANTS'  
MOTION TO COMPEL ARBITRATION**

**(Hearing Requested)**

Plaintiffs Corinne R. DiLeo, as Special Administrator for the Estate of Thomas DiLeo,  
Thomas DiLeo, Jr., as Statutory Heir to Thomas DiLeo, and Cindy DiLeo, as Statutory Heir to  
Thomas DiLeo (collectively, "Plaintiffs"), by and through their counsel of record, Jamie S.  
Cogburn, Esq. and Hunter S. Davidson, Esq. of Cogburn Law, hereby file their Motion for  
Rehearing on Defendants' Motion to Compel Arbitration ("Motion for Rehearing").

1 This Motion for Rehearing is made and based upon the following Memorandum of Points  
2 and Authorities, the papers and pleadings on file herein, any exhibits attached hereto, and any oral  
3 argument this Court may entertain at the time of hearing on this matter.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 This case arises from the neglect of an “older person,”<sup>1</sup> Thomas DiLeo (“Decedent”), while  
7 he was admitted at Defendant’s skilled-nursing facility. After being admitted for dementia,  
8 Decedent injured his leg on a wheelchair while in the skilled-nursing facility. When treating  
9 Decedent’s leg, Defendants wrapped his leg too tightly with an elastic bandage wrap, causing his  
10 leg to develop gangrene. Within weeks of his leg injury, Decedent was transported to the hospital,  
11 where he had his leg amputated to reduce further harm from the gangrene. Decedent passed away  
12 one week after the amputation.

13 This Motion respectfully submits that this Court’s Order compelling Plaintiff Corinne R.  
14 DiLeo’s Special Administrator claims into binding arbitration is clearly erroneous and, therefore,  
15 should be reheard. The plain language of NRS 597.995(1) could not be clearer:

16 [A]n agreement which includes a provision which requires a person to submit to  
17 arbitration any dispute arising between the parties to the agreement **must include**  
18 **specific authorization for the provision** which indicates that the person has  
affirmatively agreed to **the provision**.

19 Here, the subject Arbitration Provision lacks NRS 597.995(1)’s mandatory specific  
20 authorization. Therefore, compelling Plaintiff Corinne R. DiLeo’s Special Administrator claims  
21 into binding arbitration was clearly erroneous.

22 ///

23 ///

24

25 <sup>1</sup> See NRS 41.1395.

1 **II. BACKGROUND**

2 **A. Statement of Relevant Facts**

3 As alluded to above, Defendants Maide, L.L.C. d/b/a Gentle Spring Care Home (“Maide”),  
4 Sokhena K. Huch (“Huch”), and Miki N. Ton (“Ton”), at all relevant times, owned, operated, and  
5 controlled the Gentle Spring Care Home skilled-nursing facility, located at 6418 Spring Meadow  
6 Drive, Las Vegas, Nevada 89103 (“Nursing Facility”).<sup>2</sup>

7 In or about the year 2014, Decedent was admitted to Defendants’ Nursing Facility because  
8 he suffered from dementia and required 24-hour care and supervision. This constant care and  
9 supervision included Decedent’s most basic needs, such as, providing him with food, shelter,  
10 clothing, and services necessary to maintain his physical and mental health.

11 In or about July 2017, Decedent injured his leg on a wheelchair while at the Nursing  
12 Facility. To treat Decedent’s leg injury, an employee or agent of the Nursing Facility wrapped  
13 Decedent’s leg with an elastic bandage wrap and would not let Decedent remove it, despite him  
14 expressing discomfort. Unfortunately for Decedent, the elastic band wrap was applied too tightly,  
15 causing Decedent to develop gangrene on his leg. After noticing that Decedent’s leg began to  
16 change colors, the Nursing Facility attempted to treat Decedent themselves, rather than  
17 transporting him to a hospital.

18 On or about July 21, 2017, after realizing the Nursing Facility would not transport  
19 Decedent to a hospital, Plaintiff Cindy DiLeo called 911 and had Decedent immediately  
20 transported to Spring Valley Hospital. Upon being admitted to Spring Valley Hospital, hospital  
21 physicians determined they needed to amputate Decedent’s leg that developed gangrene. On or  
22 about August 3, 2017, Decedent’s leg was amputated. On or about August 10, 2017, Decedent  
23 passed away from complications stemming for Defendant’s inadequate care.

24 \_\_\_\_\_  
25 <sup>2</sup> See Pl.’s Comp. at ¶ 11; Def.’s Answer at ¶ 5 (“Answering Paragraphs 7, 8, 9 and 11 of Plaintiffs’ Complaint, Defendant admits to the allegations contained therein.”).

1           **B.       Procedural History**

2           On June 27, 2019, Plaintiffs filed their Complaint, asserting the following causes of action  
3 against each of the Defendants: (1) Abuse/Neglect of an Older Person; (2) Negligence; (3)  
4 Wrongful Death; and (4) Survival Action. On August 14, 2019, Defendants filed their Answer to  
5 Plaintiff's Complaint.

6           On September 13, 2019, Defendants filed a Motion to Compel Arbitration arguing the  
7 instant matter should be removed into binding arbitration pursuant to the Arbitration Agreement  
8 purportedly entered between Decedent and Defendants on January 30, 2015.<sup>3</sup> The Arbitration  
9 Agreement provided by Defendants is merely part of a one-page "Resident Agreement  
10 Addendum." Importantly, the Arbitration Agreement only lists the names of Plaintiff Corinne R.  
11 DiLeo, who had a power of attorney over Decedent, and Bella Estate Home Care, which is an  
12 entirely different nursing facility, located at 3140 Coachlight Circle, Las Vegas, Nevada 89117.<sup>4</sup>  
13 That is, the Arbitration Agreement makes no mention of Defendant Maide, Defendant Huch,  
14 Defendant Ton, or any other individual or entity that has the authority to bind Defendants to an  
15 Arbitration Agreement. Notwithstanding these deficiencies, the Arbitration Agreement, in relevant  
16 part, states:

17           **2       Arbitration:** Any controversy, dispute or disagreement, whether sounding  
18 in tort or contract to law, arising out of or relating to this Agreement, the breach  
19 thereof, or the subject matter thereof, shall be settled exclusively by binding  
20 arbitration, which shall be conducted in (City, State) in accordance with American  
21 health [sic] Lawyers Association Alternative Dispute Resolution Service Rules of  
22 Procedure for Arbitration, and which to the extent of the subject matter of the  
23 Arbitration, shall be binding of all parties to the agreement and judgment on the  
24 award rendered by the arbitrator maybe [sic] entered in any court having  
25 jurisdiction thereof. The parties shall agree upon a sole arbitrator of their choice

3   See generally Exhibit A of Defendants Maide, L.L.C. d/b/a Gentle Spring Care Home's, Sokhena K. Huch's, and Miki N. Ton's Motion to Compel Arbitration.

4   See Nevada Division of Public and Behavioral Health ("NVDPBH") Licensee Search, attached hereto as **Exhibit 1**; NVDPBH May 15, 2014 Inspection of Bella Estate Care Home, attached hereto as **Exhibit 2**; NVDPBH April 1, 2015 Inspection of Bella Estate Care Home, attached hereto as **Exhibit 3**; Stipulation for Settlement of Disciplinary Actions, entered August 6, 2015, attached hereto as **Exhibit 4**, at ¶ 3.

1 and if they cannot agree on a single arbitrator there shall be three arbitrators with  
2 the neutrals [sic] arbitrator chosen by the parties' nominated arbitrators.

3 On January 28, 2020, Defendants' Motion to Compel Arbitration came before Senior Judge  
4 Charles Thompson, who held that the Arbitration Agreement was binding on the Special  
5 Administrator for the Estate of Thomas Dileo, but not binding on the heirs to Thomas DiLeo.<sup>5</sup> As  
6 such, Plaintiff Corinne R. DiLeo's Special Administrator claims against Defendants for Elder  
7 Abuse, Wrongful Death, and Survival Action would be subject to binding arbitration, while  
8 Plaintiff Thomas DiLeo, Jr. and Cindy DiLeo's statutory heir claims against Defendants for  
9 Wrongful Death would be stayed in district court during the pendency of the binding arbitration.<sup>6</sup>

10 On April 3, 2020, your Honor signed Defendants' proposed Order regarding their Motion  
11 to Compel Arbitration. Defendants have yet to file a Notice of Entry of the Order.<sup>7</sup>

### 12 **III. LEGAL STANDARD**

13 A district court may reconsider a previously-decided issue if the prior decision was clearly  
14 erroneous. *See* EDCR 2.24; *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga, &*  
15 *Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). A finding is "clearly erroneous" when,  
16 although there is evidence to support it, the reviewing court on the entire evidence is left with the  
17 definite and firm conviction that a mistake has been committed. *Unionamerica Mortg. & Equity*  
18 *Tr. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981). Here, Plaintiff respectfully  
19 submits that the Court's Order compelling Plaintiff Corinne R. DiLeo's Special Administrator  
20 claims into binding arbitration is clearly erroneous and, therefore, should be reheard.

21 ///

22 ///

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23 <sup>5</sup> See Minute Order from Hearing on Defendants' Motion to Compel Arbitration, attached hereto as **Exhibit 5**.

24 <sup>6</sup> See *id.*

25 <sup>7</sup> As such, Plaintiff's Motion for Rehearing is timely pursuant to EDCR 2.24(b).

1 **IV. LEGAL ARGUMENT**

2 NRS 597.995(1) (2013)<sup>8</sup> states that any agreement with a provision requiring a person to  
3 submit to arbitration “any dispute arising between the parties” must include specific authorization  
4 indicating the person affirmatively agrees to *that provision*. If the agreement fails to include  
5 specific authorization for the provision requiring submission to arbitration for “any dispute arising  
6 between the parties,” then the provision is void and unenforceable. NRS 597.995(2) (2013). Here,  
7 Plaintiff respectfully submits that the Court’s Order is clearly erroneous because the Arbitration  
8 Provision in the “Bella Estate Care Home Resident Agreement Addendum” lacks the specific  
9 authorization required under NRS 597.995.

10 **A. The Court’s Order is clearly erroneous because the “Bella Estate Care Home**  
11 **Resident Agreement Addendum” is a separate agreement that lacks the**  
12 **specific authorization required under NRS 597.995.**

13 When evaluating any contract or agreement, courts should limit their inquiry to the four  
14 corners of the contract. *See State Dep’t of Transportation v. Eighth Judicial Dist. Court in & for*  
15 *Cty. of Clark*, 133 Nev. 549, 554, 402 P.3d 677, 682–83 (2017). If a contract or agreement is  
16 ambiguous—i.e. subject to more than one reasonable interpretation—then the ambiguity should  
17 be construed against the drafter. *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215–16, 163  
18 P.3d 405, 407 (2007).

19 Here, Plaintiff respectfully maintains that the Court’s Order is clearly erroneous because  
20 the “Bella Estate Care Home Resident Agreement Addendum” is a separate agreement that lacks  
21 NRS 597.995’s specific authorization. In addition to listing an entirely different nursing home  
22 from the Gentle Spring Care “Admission Agreement,” the “Bella Estate Care Home Resident  
23 Agreement Addendum” also references itself as an entirely separate agreement. Specifically, the  
24 second provision the “Bella Estate Care Home Resident Agreement Addendum” states:

25 <sup>8</sup> This statute was enacted in 2013 and amended in June 2019. Given the subject events occurred in 2017, the 2013  
version of the statute applies.

1 Any controversy, dispute or disagreement, whether sounding in tort or contract to  
2 law, arising out of or relating to **this Agreement**, the breach thereof, or the subject  
matter thereof, shall be settled exclusively by binding arbitration . . . .

3 Thus, a closer evaluation of the “Bella Estate Care Home Resident Agreement Addendum”  
4 reveals that it is a separate contract pertaining to the rights and responsibilities associated with  
5 Resident “Grievances” (as outlined in the first provision). Given the “Bella Estate Care Home  
6 Resident Agreement Addendum” is a separate contract, the second provision concerning  
7 Arbitration must have specific authorization next to *that provision*. Here, the “Bella Estate Care  
8 Home Resident Agreement Addendum” is merely signed in its entirety and, therefore, lacks the  
9 specific authorization required under NRS 597.995.

10 **B. Even if the “Bella Estate Care Home Resident Agreement Addendum” is a**  
11 **continuation of the Gentle Spring Care Home “Admission Agreement,” the**  
12 **Court’s Order is clearly erroneous because the “Bella Estate Care Home**  
**Resident Agreement Addendum” lacks the specific authorization required**  
**under NRS 597.995.**

13 As alluded to above, the plain language of NRS 597.995(1) states that any contract  
14 provision requiring an individual to submit to arbitration “any dispute arising between the parties”  
15 must include specific authorization that indicates the individual affirmatively agrees to *that*  
16 *provision*.

17 Here, even if the Court finds that the “Bella Estate Care Home Resident Agreement  
18 Addendum” is a continuation of the Gentle Spring Care Home “Admission Agreement,” the  
19 subject arbitration provision is still void and unenforceable because it lacks NRS 597.995’s  
20 specific authorization. The executed “Bella Estate Care Home Resident Agreement” clearly  
21 demonstrates that it is simply signed in its entirety by Plaintiff Corrine R. DiLeo; that is, it lacks  
22 specific authorization as to the second provision regarding binding arbitration. As such, the  
23 Arbitration Provision is void and unenforceable under NRS 597.995.

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25 ///

1 **II. CONCLUSION**

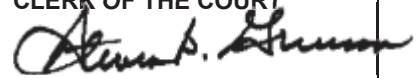
2 For the foregoing reasons, Plaintiff respectfully request the Court rehear Defendants'  
3 Motion to Compel Arbitration.

4 Dated this 21<sup>st</sup> day of April, 2020.

5 COGBURN LAW

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# EXHIBIT ‘F’



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7 *Attorneys for Defendants*

8 *Maide, LLC d/b/a Gentle Spring Care Home,*  
9 *Sokhena K. Huch, and Miki N. Ton*

10 DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 CORINNE R. DILEO as Special  
13 Administrator for the ESTATE OF THOMAS  
DILEO; THOMAS DILEO, JR., as Statutory  
14 Heir to THOMAS DILEO; and CINDY  
DILEO, as Statutory Heir to THOMAS  
15 DILEO,

16 Plaintiffs,

17 vs.

18 MAIDE, L.L.C, a Nevada limited-liability  
company d/b/a GENTLE SPRING CARE  
19 HOME; SOKHENA K. HUCH, an individual;  
MIKI N. TON, an individual; DOE  
20 INDIVIDUALS 1-10, inclusive; ROE  
ENTITIES 11-20, inclusive,

21 Defendants.  
22

CASE NO. A-19-797533-C

DEPT. NO. 14

**NOTICE OF ENTRY OF ORDER**

23 ...

24 ...

25 ...

26 ...

27 ...

1 PLEASE TAKE NOTICE that an ORDER REGARDING PLAINTIFFS' MOTION FOR  
2 REHEARING ON DEFENDANTS' MOTION TO COMPEL ARBITRATION was entered with  
3 the Court in the above-captioned matter on the 12<sup>th</sup> day of August, 2020, a copy of which is  
4 attached hereto.

5  
6 DATED this 14<sup>th</sup> day of August, 2020

7 LEWIS BRISBOIS BISGAARD & SMITH LLP  
8  
9

10 By /s/ John M. Orr

11 S. BRENT VOGEL

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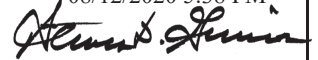
17 Tel. 702.893.3383

18 Attorneys for Defendants  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of August, 2020, a true and correct copy of **NOTICE OF ENTRY OF ORDER** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, who have agreed to receive Electronic Service in this action.

By /s/ Roya Rokni  
An Employee of  
LEWIS BRISBOIS BISGAARD & SMITH LLP

  
CLERK OF THE COURT

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

CORINNE R. DILEO as Special  
Administrator for the ESTATE OF THOMAS  
DILEO; THOMAS DILEO, JR. as Statutory  
Heir to THOMAS DILEO; and CINDY  
DILEO, as Statutory Heir to THOMAS  
DILEO

Plaintiffs,

vs.

MAIDE, L.L.C, a Nevada limited-liability  
company d/b/a GENTLE SPRING CARE  
HOME; SOKHENA K. HUCH, an individual;  
MIKI N. TON, an individual; DOE  
INDIVIDUALS 1–10, inclusive; ROE  
ENTITIES 11–20, inclusive;

Defendants.

Case No.: A-19-797533-C  
Dept. No.: 14

**ORDER REGARDING PLAINTIFFS'  
MOTION FOR REHEARING ON  
DEFENDANTS' MOTION TO  
COMPEL ARBITRATION**

*Order re: Motion for Rehearing  
DiLeo, et al. v. Maide, L.L.C  
Case No. A-19-797533-C*

Plaintiffs’ Motion for Rehearing on Defendants’ Motion to Compel Arbitration (“Motion to Reconsider”) was heard by the Honorable Adriana Escobar on May 26, 2020 at 9:00 a.m. Hunter S. Davidson, Esq., of Cogburn Law, appeared on behalf of Plaintiffs Corinne R. DiLeo, as Special Administrator for the Estate of Thomas DiLeo (“the Estate”); Thomas DiLeo, Jr., as Statutory Heir to Thomas DiLeo (“Plaintiff Thomas”); and Cindy DiLeo, as Statutory Heir to Thomas DiLeo (“Plaintiff Cindy” and, collectively with the Estate and Plaintiff Thomas, “Plaintiffs”). John M. Orr, Esq., of Lewis Brisbois Bisgaard & Smith, appeared on behalf of Defendants Maide, L.L.C d/b/a Gentle Spring Care Home (“Maide”), Sokhena K. Huch (“Defendant Huch”), and Miki N. Ton (“Defendant Ton” and, collectively with Maide and Defendant Huch, “Defendants”).

After review and consideration of the points and authorities on file herein, and having heard oral arguments of counsel on this matter, the Court hereby finds and concludes as follows:

**I. BACKGROUND**

This case arises from the alleged neglect of Decedent Thomas DiLeo (“Decedent”) while he was a resident of Defendants’ residential facility for groups, Gentle Spring Care Home, located at 6418 Spring Meadow Drive, Las Vegas, Nevada (“Care Home”). On August 10, 2017, Decedent passed away, allegedly from Defendants’ neglect and inadequate care.

On June 27, 2019, Plaintiffs filed their Complaint, asserting the following causes of action against each of the Defendants: (1) Abuse/Neglect of an Older Person; (2) Negligence; (3) Wrongful Death; and (4) Survival Action. On August 14, 2019, Defendants filed their Answer to Plaintiffs’ Complaint.

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*Order re: Motion for Rehearing  
DiLeo, et al. v. Maide, L.L.C  
Case No. A-19-797533-C*

On September 13, 2019, Defendants filed a Motion to Compel Arbitration (“Motion to Compel Arbitration”), arguing the instant matter should be removed into binding arbitration pursuant to NRS 38.221 and an arbitration agreement purportedly entered between Decedent and Defendants on January 30, 2015 (“Arbitration Agreement”).

On September 24, 2019, Plaintiffs filed their Opposition to Defendants’ Motion to Compel Arbitration wherein they argued, among other things: (1) that the Arbitration Agreement was void and unenforceable because it lacked NRS 597.995’s specific authorization requirement; and (2) that Plaintiffs could not be bound to the Arbitration Agreement because they were not signatories to the Arbitration Agreement.

On January 28, 2020, Defendants’ Motion to Compel Arbitration came before Senior Judge Charles Thompson, who held the Arbitration Agreement was binding and enforceable between the Estate and Defendants but not between Plaintiffs Thomas and Cindy and Defendants. As such, the Estate’s claims against Defendants for Elder Abuse, Wrongful Death, and Survival Action were subject to binding arbitration, while Plaintiff Thomas’s and Plaintiff Cindy’s claims against Defendants for Wrongful Death remained stayed in District Court during the pendency of the binding arbitration.

On April 7, 2020, Judge Thompson’s Order was entered. Defendants filed their Notice of Entry of Order on April 22, 2020.

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***Order re: Motion for Rehearing  
DiLeo, et al. v. Maide, L.L.C  
Case No. A-19-797533-C***

On April 21, 2020, Plaintiffs filed the underlying Motion to Reconsider. In their Motion to Reconsider and Reply in Support of Motion to Reconsider, Plaintiffs argued that Judge Thompson's decision was clearly erroneous because the Arbitration Agreement lacked the specific authorization required under NRS 597.995. In support of their position, Plaintiffs pointed to the various arbitration agreements reviewed in *Fat Hat, LLC v. DiTerlizzi*, 385 P.3d 580 (Nev. 2016), wherein the Nevada Supreme Court interpreted NRS 597.995's specific authorization requirement.

On May 5, 2020, Defendants filed their Opposition to Plaintiffs' Motion to Reconsider wherein they argued, *inter alia*, that the Arbitration Agreement complied with NRS 597.995's specific authorization requirement as interpreted in *Fat Hat, LLC v. DiTerlizzi*, 385 P.3d 580 (Nev. 2016).

On May 26, 2020, Plaintiffs' Motion to Reconsider came on for hearing before Department 14 of the Eighth Judicial District Court, with the Honorable Adriana Escobar presiding.

**II. FINDINGS**

After review and consideration of the points and authorities on file herein, and having heard oral arguments of counsel on this matter, the Court hereby finds as follows:

1. Leave for reconsideration of motions is within the Court's discretion. EDCR 2.24. The Court may reconsider its order when one of the following apply: (1) the prior ruling was clearly erroneous; (2) there is an intervening change in controlling law; (3) substantially different evidence is subsequently introduced; (4) there are other changed circumstances; or (5) manifest injustice would result were the prior ruling permitted to stand. *See Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga, & Wirth, Ltd.*, 113 Nev. 737, 941 P.2d 489 (1997); NRCP 60.

///

///

2. NRS 597.995(1) provides the clear and unambiguous requirement for an agreement that includes an arbitration clause:

[A]n agreement which includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement must include specific authorization for the provision which indicates that the person has affirmatively agreed to the provision.

3. Here, Judge Thompson's decision to grant, in part, Defendants' Motion to Compel Arbitration was clearly erroneous because the binding arbitration provision within the Arbitration Agreement lacks NRS 597.995(1)'s specific authorization requirement. Specifically, the subject provision within the Arbitration Agreement did not have a separate signature block or initial section for Plaintiffs to affirmatively agree to said provision. As such, the Arbitration Agreement is void and unenforceable pursuant to NRS 597.995(2)

### III. CONCLUSION

Based upon the foregoing, it is hereby ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiffs' Motion to Reconsider is GRANTED.

2. The Court's prior Order regarding Defendants' Motion to Compel Arbitration, entered on April 7, 2020, is VACATED.

3. Defendants' Motion to Compel Arbitration is DENIED IN ITS ENTIRETY.

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**COGBURN LAW**  
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Telephone: (702) 748-7777 | Facsimile: (702) 966-3880

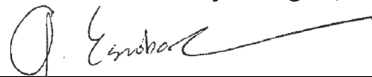
***Order re: Motion for Rehearing  
DiLeo, et al. v. Maide, L.L.C  
Case No. A-19-797533-C***

4. Each of Plaintiffs' causes of action, Abuse/Neglect of an Older Person, Negligence, Wrongful Death, and Survival Action, may proceed before the Eighth Judicial District Court.

**IT IS SO ORDERED.**

DATED: August 12, 2020.

Dated this 12th day of August, 2020



DISTRICT COURT JUDGE

**718 AE3 448B 394F  
Adriana Escobar  
District Court Judge**

*Respectfully Submitted by:*

**COGBURN LAW**

By: /s/ Hunter S. Davidson

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*Attorneys for Plaintiffs*

# EXHIBIT ‘G’

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MAIDE, L.L.C. D/B/A GENTLE SPRING  
CARE HOME; SOKHENA K. HUCH;  
MIKI N. TON,

Appellants,

v.

CORINNE R. DILEO AS SPECIAL  
ADMINISTRATOR FOR THE ESTATE  
OF THOMAS DILEO; THOMAS DILEO,  
JR., AS STATUTORY HEIR TO  
THOMAS DILEO; AND CINDY DILEO,  
AS STATUTORY HEIR TO THOMAS  
DILEO,

Appellees,

Supreme Court No.: 81804

District Court No.: A-19-797533-C

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**APPELLANTS' OPENING BRIEF**

---

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Nevada Bar No. 006858

JOHN M. ORR

Nevada Bar No. 014251

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Las Vegas, Nevada 89118

Telephone: 702-893-3383

*Attorneys for Petitioners*

## **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. Appellant, MAIDE, LLC, is a domestic limited liability corporation. Appellant SOKHENA “KENNY” HUCH is the sole managing member of MAIDE, LLC. No publicly held company or corporation owns 10% of MAIDE, LLC OR has any ownership interest in it.

2. The undersigned counsel of record for appellants are the only attorneys who have appeared on their behalf in this matter, both before this court and in the district court. Attorney John M. Orr, Esq., appeared for APPELLANTS SOKHENA HUCH, MIKI TON, AND MAIDE, LLC in the proceedings before the district court.

These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Dated this 10th day of February, 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: /s/ John M. Orr

S. BRENT VOGEL, ESQ.

Nevada Bar No. 004665

JOHN M. ORR, ESQ.

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Attorneys for Appellants

## TABLE OF CONTENTS

<b>TABLE OF AUTHORITIES .....</b>	<b>iii</b>
<b>JURISDICTION.....</b>	<b>1</b>
<b>ROUTING STATEMENT .....</b>	<b>1</b>
<b>STATEMENT OF THE ISSUES PRESENTED FOR REVIEW .....</b>	<b>1, 2</b>
<b>STATEMENT OF THE CASE.....</b>	<b>2, 3</b>
<b>STATEMENT OF RELEVANT FACTS .....</b>	<b>6, 7, 8, 9, 10</b>
<b>SUMMARY OF APPELLANT'S ARGUMENT .....</b>	<b>8, 9</b>
<b>LEGAL ARGUMENT .....</b>	<b>9, 10, 11, 12, 13</b>
<b>A.    The Agreement Complies with NRS 597.995(1).....</b>	<b>9-13</b>
<b>B.    The Agreement Substantially Complies with NRS             597.995(1) .....</b>	<b>14-18</b>
<b>CONCLUSION.....</b>	<b>19</b>

## TABLE OF AUTHORITIES

### Cases

<i>Clark Co. Public Employees v. Pearson</i> , 106 Nev. 587, 798 P.2d 136, 137 (1990).....	9
<i>Fat Hat, LLC v. DiTerlizzi</i> , No. 68479, 2016 Nev. Unpub. LEXIS 762, (Nev. Sept. 21, 2016).....	10, 11, 12, 13
<i>Hardy Cos., Inc. v. SNMARK, LLC</i> , 126 Nev. 528, 245 P.3d 1149, 1155 (2010)...	15
<i>Leven v. Frey</i> , 123 Nev. 399, 168 P.3d 712, 717 (2007).....	8, 14, 15
<i>Levy v. Nat'l Default Servicing Corp.</i> , 127 Nev. 470, 255 P.3d 1275, 1278 (2011).....	14
<i>Markowitz v. Saxon Special Servicing</i> , 129 Nev. 660, 310 P.3d 569, 571 (2013)..	14
<i>Redl v. Heller</i> , 120 Nev. 75, 85 P.3d 797, 800-01 (2004).....	14
<i>Schleining v. Cap. One, Inc.</i> , 130 Nev. 323, 326 P.3d 4, 13 .....	16

### Statutes

NRS 597.995 .....	10, 15
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## **JURISDICTION**

This is an appeal from the District Court's denial of Appellants' Application for Judicial Relief-Motion to Compel Arbitration, which is a final order in a special proceeding under NRAP 3(a). Such orders are appealable under NRS 38.247(1)(a), which provides that "[a]n appeal may be taken from an order denying a motion to compel arbitration." NRS 38.241(1)(a).

The Notice of Entry of Order denying Appellant's Motion to Compel Arbitration was filed and served on August 14, 2020. Appellant's filed their Notice of Appeal on September 12, 2020. This Court has jurisdiction over the instant appeal.

## **ROUTING STATEMENT**

Under NRAP 17(b)(6),(12), this case would be presumptively assigned to the Court of Appeals as it concerns "a contract dispute where the amount in controversy is less than \$75,000" and a case "challenging the grant of denial of injunctive relief." NRAP 17(b)(6),(12).

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether the District Court erred as a matter of law denying Appellant's Motion to Compel Arbitration.
2. Whether the doctrine of substantial compliance applies to NRS 597.995(1),

3. If the doctrine of substantial compliance applies to NRS 597.995(1), whether the District Court abused its discretion in not finding that the subject arbitration agreement substantially complies with NRS 597.995(1).

### **STATEMENT OF THE CASE**

This appeal stems from Thomas Dileo's residency at Gentle Spring Care Home ("Gentle Spring"). Gentle Spring is a licensed "residential home for groups" under NRS 449 *et seq.* At the outset of Mr. Dileo's residency at Gentle Spring, Corinne Dileo, as Mr. Dileo's power of attorney, executed an arbitration agreement (the "Agreement") on his behalf. Appellants' App. Vol I at 00093. Appellees Thomas Dileo, Jr. and Cindy Dileo (the "Heirs") did not sign the Agreement. On or around June 24, 2017, Mr. Dileo developed a wound on his leg that became gangrenous and his leg was later amputated. He died on August 13, 2017, while admitted at Spring Valley Hospital. Corrine Dileo, as Special Administrator of the Estate of Thomas Dileo (the "Estate"), Cindy Dileo, and Thomas Dileo, Jr. allege that Gentle Spring negligently cared for and supervised Mr. Dileo, which purportedly caused him to develop gangrene and his subsequent need for a leg amputation. They further allege this amputation caused or contributed to Mr. Dileo's death. *See id.* at 00001–00010.

Appellants filed an Application for Judicial Relief-Motion to Compel Arbitration (the "Motion") on September 13, 2019. *Id.* at 00011. The District Court

heard this Motion on January 28, 2020. In their Opposition, Appellees argued that the Agreement did not comply with NRS 597.995(1), which requires arbitration agreements to contain a specific authorization. The Court found the Agreement complied with NRS 597.995. The Court, however, found that because the Heirs were not signatories to the Agreement, they could not be compelled to arbitrate their claims against Appellants. The Court, therefore, granted Appellants' Motion with regard to the Estate and denied it with regard to the Heirs. The order granting in part and denying in part Appellant's Motion was entered on April 22, 2020. *Id.* at 00156.

Appellees filed a Motion for Rehearing of Defendants' Motion to Compel Arbitration on April 21, 2020. *Id.* at 00110. They argued in this motion that the District Court incorrectly rules that the Agreement complied with NRS 597.995(1). Appellees' Motion for Rehearing was heard on May 26, 2020. The Court reversed its prior order and ruled that the Agreement did not comply with NRS 597.995(1) and was, therefore, unenforceable.<sup>1</sup> The Court's Order granting Appellees' Motion for Rehearing and Denying Appellants' Motion to Compel Arbitration was entered on August 14, 2020. Appellants' App. Vol II at 00274.

Appellants now seek review of the District Court's Order granting Appellees' Motion for Rehearing and denying Appellants' Motion to Compel

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<sup>1</sup> Appellants' Motion to Compel Arbitration was initially heard by Hon. Senior Judge Charles

Arbitration.

### **STATEMENT OF RELEVANT FACTS**

Mrs. Dileo, Thomas Dileo's duly appointed Power of Attorney, executed the Agreement on January 30, 2015. Appellant's App. Vol I at 00093. The Agreement is on a single 8.5x11 inch paper. It contains two bolded headings that read "Resident Agreement Addendum" and "Grievance and Arbitration." *Id.* The Agreement contains two paragraphs. *Id.* The first paragraph is labeled, "Grievances," and provides:

**1. Grievances:** Resident may voice reasonable grievances about services rendered by staff of other personnel and the Home shall Record such grievances upon request to do so. In the event of a written grievances, the Home shall investigate it and make a written reply to residents of the Home's findings with a reasonable period thereafter.

*Id.* The second paragraph is bolded and labeled "Arbitration" and provides:

**2 Arbitration:** Any controversy, dispute or disagreement, whether sounding in tort or contract to law, arising out of or relating to this Agreement, the breach thereof, or the subject matter thereof, shall be settled exclusively by binding arbitration, which shall be conducted in (City, State) in accordance with American health [sic] Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration, and which to the extent of the subject matter of the Arbitration, shall be binding of all parties to the agreement and judgment on the award rendered by the arbitrator maybe [sic] entered in any court having

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Thompson. Appellees' Motion for Rehearing was heard by Hon. Adriana Escobar.

jurisdiction thereof. The parties shall agree upon a sole arbitrator of their choice and if they cannot agree on a single arbitrator there shall be three arbitrators with the neutrals [sic] arbitrator chosen by the parties' nominated arbitrators.

*Id.* The arbitration clause is 136-words and is in plain, 12-point font. There is no fine print or “legalese.” Approximately one-half inch below the arbitration clause is a signature line where Mrs. Dileo signed and dated the Agreement. CITE. The Agreement was set aside from the rest of the intake paperwork that Mrs. Dileo signed. Mrs. Dileo signed a five-page packet of documents that comprised Gentle Spring’s general resident agreement (the “Resident Agreement”). Appellant’s App. Vol I at 82–86. This Resident Agreement contains a single signature block on the last page that applies to the whole agreement. *Id.* at 00086. The arbitration clause is on a separate addendum that contains its own signature line where Mrs. Dileo affixed her signature and the date. *Id.* at 93.

Appellees Corrine Dileo, as the special administrator of the Estate of Thomas Dileo, and Thomas Dileo, Jr. and Cindy Dileo, as heirs to Thomas Dileo, filed a Complaint against Maide, LLC dba Gentle Spring Care Home, Miki Ton, and Sokhena Huch on June 27, 2019. *Id.* at 1–10. Appellants filed a Motion to Compel Arbitration on September 13, 2019. *Id.* at 19. Appellees filed their Opposition to Appellants’ Motion to Compel Arbitration on September 24, 2019. *Id.* at 27. Appellees argued the Agreement did not comply with NRS 597.995

because they claimed it did not contain a specific authorization for arbitration. *Id.* at 31. Appellees further argued that the Heirs could not be bound to the Agreement because they did not sign it. *Id.* at 33.

Appellants filed their reply in support of their Motion to Compel Arbitration on October 10, 2019. *Id.* at 71. They argued that the Agreement complied with NRS 597.995 because it was set apart from the general Resident Agreement and contained its own signature block where Mrs. Dileo signed and filled in the date. *Id.* at 74–75. Appellants further argued that the Estate could be compelled to arbitrate because Appellees’ claims for negligence and elder abuse belonged solely to the Estate, which is bound to Mr. Dileo’s contractual rights and obligations that existed prior to his death. *Id.* at 77–78. The Heirs do not have standing to pursue claims for negligence and elder abuse.

Appellants’ Motion to Compel Arbitration was heard on January 28, 2020. The Court found that the Agreement complied with NRS 597.995. *Id.* at 97. Appellees argued that the Agreement did not contain a specific authorization for arbitration because the Agreement contained a clause titled “grievances” and a second clause titled “arbitration”:

We have the Residential Agreement and then we have this Addendum. Both are separately signed; both are separately dated. With that being said, we have a separate contract here with the Addendum and within it, there are two provisions there, one for grievances and one for arbitration. And, under NRS 5997, you need to

have a specific authorization next to that arbitration provision. It can be an initial, it can be a signature, anything of the like...

*Id.* at 104:2–10. The Court noted: “The signatures are right below. It’s pretty clear.” *Id.* at 104:11–12. The Court ruled that the Agreement complied with NRS 597.995 and compelled the Estate’s claims to arbitration. It stayed the Heirs’ claims during the pendency of the arbitration pursuant to NRS 38.221(7). The Notice of Entry of Order Granting in part and Denying in Part Defendants’ Motion to Compel Arbitration was filed and served on April 22, 2020. *Id.* at 159.

On April 21, 2021, the Estate filed a Motion for Rehearing on April 21, 2020. *Id.* 110–158. The Estate reiterated its argument that the Agreement did not comply with NRS 597.995(1) because it contained two clauses related to grievances and arbitration respectively. Appellants reasserted that the Agreement complied with NRS 597.995(1) because it contained its own signature block and was set apart from the remainder of the Resident Agreement. Appellants further argued that the Agreement substantially complied with NRS 597.995(1).

On July 28, 2020, the Court issued a minute order granting Appellees’ Motion for Rehearing and Denying Appellants’ Motion to Compel Arbitration. Appellants’ App. Vol. II at 305. The Court found its prior order was clearly erroneous because the binding arbitration provision within the Agreement lacked a specific authorization requirement. *Id.* at 280 The Court further found “the subject

provision within the Arbitration Agreement did not have a separate signature block or initial section for Plaintiffs to affirmatively agree to said provision.” *Id.* Appellants now seek review of the Court’s Order denying their Motion to Compel Arbitration. Appellants seek reversal of the Court’s Order and an order compelling the Estate’s claims to binding arbitration.

### **SUMMARY OF APPELLANTS’ ARGUMENTS**

The District Court erred in denying Appellants’ Motion to Compel Arbitration for two key reasons. First, the Court incorrectly found that the Agreement does not comply with NRS 597.995(1). The Agreement was set aside from the rest of the Admission Agreement and contains its own signature block where Mrs. Dileo signed and dated. This constitutes a “specific authorization” as required by NRS 597.995(1). Second, even if the form of the Agreement does not strictly comply with NRS 597.995(1), the District Court abused its discretion by refusing to find that the Agreement substantially complies with NRS 597.995(1). When a statute proscribes form and content requirements, substantial compliance applies. *Leven v. Frey*, 123 Nev. 399, 407, 168 P.3d 712, 717 (2007). Substantial compliance may also be applied to avoid harsh or absurd results. *Id.* In this case, the Agreement is a simple, one-page document that is clearly labeled “Grievances and Arbitration.” It is two paragraphs in length that do not contain any legalese or fine print. The signature line for the Agreement is immediately below the

paragraph labeled “Arbitration.” Appellants’ App. Vol. I at 93. The Agreement is not buried in the annals of a dense packet of documents or otherwise difficult to read. Appellees did not argue or present any evidence that Mrs. Dileo did not understand or was unaware of the Agreement at the time she signed it. For these reasons, the Agreement itself and the circumstances surrounding Mrs. Dileo’s execution of it militate in favor applying the doctrine of substantial compliance. The Court, therefore, abused its discretion in not finding that the Agreement substantially complies with NRS 597.995(1).

## **LEGAL ARGUMENT**

### **A. The Agreement Complies with NRS 597.995(1)**

The Supreme Court of Nevada reviews the denial of a motion to compel arbitration de novo. *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990). Any “doubts regarding the propriety of arbitration are resolved in favor of requiring arbitration. *Id.* at 591, 798 P.2d at 138. NRS § 597.995(1) provides:

1. Except as otherwise provided in subsection 3, an agreement which includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement must include specific authorization for the provision which indicates that the person has affirmatively agreed to the provision.
2. If an agreement includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement and the agreement

fails to include the specific authorization required pursuant to subsection 1, the provision is void and unenforceable.

NRS § 597.995(1)–(2). This Court considered what constitutes a “specific authorization” under NRS § 597.995(1) in *Fat Hat, LLC v. DiTerlizzi*, No. 68479, 2016 Nev. Unpub. LEXIS 762, (Nev. Sept. 21, 2016) (unpublished disposition). In *Fat Hat*, Fat Hat, LLC (“Fat Hat”) was sued by several of its employees after they discovered Fat Hat had been secretly filming them in their dressing areas as they changed attire. Fat Hat moved to compel arbitration based on the arbitration clauses in the plaintiffs’ respective independent contractor or employment contracts. The district court denied this motion, so Fat Hat appealed.

On appeal, each of the six employee plaintiffs argued that their arbitration agreements did not comply with NRS § 597.995(1) because the agreements did not contain a “specific authorization” for arbitration. The court accepted this argument for four of the six employees. It reasoned:

[t]hough the arbitration provision immediately preceded the signature line on the last page for all the contracts, that was a general signature line indicating consent to all the terms of the contract. Thus, those signatures do not qualify as specific authorizations for the arbitration provision. Although Kirtz initialed at the bottom of the page with the arbitration provision, she initialed at the bottom of every page; thus, her initials fail to demonstrate that she affirmatively agreed to the arbitration provision.

*Fat Hat*, 2016 Nev. Unpub. LEXIS 762, at \*4. The invalid agreements were three-pages in length and contained twenty-one separate paragraphs. Each paragraph was in fine print. Appellants’ App. Vol. II 239–247. The signature block at the conclusion of the agreement applied to the whole agreement. *Id.* The *Fat Hat* Court held the two remaining arbitration agreements complied with NRS 597.995(1) because “[i]n addition to a signature line at the end of the contracts, both Hebert and Mihaylova were required to fill in their names and addresses in the blank spaces of the provision, explicitly stating that the agreement to arbitrate was effective.” *Id.* at \*4–\*5.

In this case, Mrs. Dileo initially signed a Resident Agreement that contained five-pages with a single signature block on page “five” that applied to the whole agreement. Appellants’ App. Vol. I 82–86. She then signed a separate “Resident Agreement Addendum” (the “Addendum”) that contained the subject arbitration clause. *Id.* at 93. This Addendum contained its own signature line, and, just like the two valid arbitration clauses in *Fat Hat*, Mrs. Dileo was required to fill in her name, date, and her signature. The Addendum contained a bolded heading that reads “Grievance and Arbitration.” *Id.* While the invalid agreements in *Fat Hat* were several pages in length in all fine print, the Addendum here is on a single page, lacks any fine print, and contains its own signature block. No reasonable

person could review the Addendum and conclude that the arbitration provision is buried in the annals of fine print or difficult to read and understand.

Appellees' arguments against enforcing the Agreement evince an attempt to turn NRS 597.995(1) into a cheap technicality and a semantic nightmare. Appellees argued that because the Addendum contains two paragraphs, labeled "Grievances" and "Arbitration" respectively, that the signature block at the bottom of the Agreement was a general authorization akin to the invalid agreement in *Fat Hat*. Appellees ignore that the signature line for the invalid *Fat Hat* agreements were a sweeping authorization for over 20 paragraphs on a variety of topics spread across three-pages all comprised of fine print. Appellants' App. Vol. II 239–247. The Addendum here was one single page in standard font and contained two short paragraphs. The signature blocked applied to two paragraphs on a single page, not over 20 paragraphs of fine print spread across several pages.

Appellees argued that Mrs. Dileo did not specifically authorize the Agreement because the Addendum contained a 54-word sentence about her right to submit grievances to the group home staff but would ultimately be required to arbitrate any grievances. This argument assumes that the "Grievances" clause is a separate "provision" for purposes of NRS 597.995(1). It is not. It is an introductory clause to the Addendum. It provides that residents may voice grievances to the group home staff. Appellants' App. Vol. I at 93. The second clause states that

those grievances or disputes are ultimately subject to arbitration. These two clauses comprise a single arbitration agreement. More importantly, as highlighted above, the signature line for the Addendum is an inch below the arbitration clause. This is unlike the *Fat Hat* agreement that contained over 20 paragraphs of provisions related to arbitration, the nature and duration of work, payment, and a litany of other unrelated provisions. Appellants' App. Vol. II 239–247. Appellees' argument depends on how broadly or narrowly the Court defines' "provision for arbitration," which reinforces that Appellees' arguments relate to technicalities and minutiae, rather than ensuring a person knowingly authorizes arbitration.

Appellees lack any tenable basis to say that Mrs. Dileo was not aware of the arbitration agreement and did not specifically authorize it. She did not offer any testimony that she was unaware of the arbitration clause or that she was confused because the Addendum contained two clauses. If the Court had any doubts regarding whether the Agreement complies with NRS 597.995(1), those doubts should have been resolved in favor of arbitration. *Pearson*, 106 Nev. at 590, 798 P.2d at 137 ("doubts regarding the propriety of arbitration are resolved in favor of requiring arbitration."). For these reasons, the Court erred as a matter of law in determining that the Addendum was not compliant with NRS 597.995(1).

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## **B. The Agreement Substantially Complies with NRS 597.995(1)**

This Court reviews substantial-compliance determinations for an abuse of discretion. *Redl v. Heller*, 120 Nev. 75, 81, 85 P.3d 797, 800–01 (2004). The District Court abused its discretion in not finding that the Addendum substantially complies with NRS 597.995(1). Statutes “may contain both mandatory and directory provisions.” *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 664, 310 P.3d 569, 571 (2013). Statutory provisions that provide for “a specific time and manner for performance” are subject to strict compliance. *Id.* at 664, 310 P.3d at 572 (internal quotation omitted). “Time and manner refers to when performance must take place and the way in which the deadline must be met.” *Id.* Directory provisions, on the other hand, “are those governing form and content, which dictate who must take action and what information that party is required to provide and do not implicate notice.” *Id.* at 664–65, 310 P.3d at 572 (internal quotations omitted).

To assess whether substantial compliance applies, Nevada courts “examine whether the purpose of the statute or rule can be adequately served in a manner other than by technical compliance with the statutory or rule language.” *Levy v. Nat’l Default Servicing Corp.*, 127 Nev.470, 476, 255 P.3d 1275, 1278 (2011). Substantial compliance may be sufficient “to avoid harsh, unfair or absurd consequences.” *Leven v. Frey*, 123 Nev. 399, 407, 168 P.3d 712, 717 (2007). This Court has also held that when the purpose of a statute is to give notice to a party,

the doctrine of substantial compliance applies if the party receives actual notice and is not prejudiced. *See id* (“The purpose of NRS 108.227(1) is to notify the property owner of the lien; therefore, substantial compliance with the requirements of the statute will suffice if the owner receives actual notice and is not prejudiced.”); *see also, Hardy Cos., Inc. v. SNMARK, LLC*, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010).

NRS 597.995’s plain objective is to ensure that a signatory is aware of an arbitration agreement and does not sign one sweeping authorization that applies to a multipage document. Its requirement that arbitration agreements have a specific authorization is a clear “form and content” provision that dictates where an authorization must appear on an agreement containing an arbitration provision. Nothing in NRS 597.995(1) prescribes the timing or manner in which performance must be rendered. *See Leven*, 23 Nev. at 407, 168 P.3d at 717. For these reasons, substantial compliance is sufficient to satisfy NRS 597.995.

On a broader level, substantial compliance must apply to all arbitration agreements and their compliance with NRS 597.995(1). This is because such agreements come in varied forms and use different language and structures. Some arbitration agreements comprise several pages. Some, as is this case here, are only one-page in length. It would be impractical to require all persons and entities in Nevada to utilize a uniform arbitration agreement. Such a rigid requirement would

unduly infringe on a person's freedom to contract. This practical reality reinforces the need to review an arbitration agreement's conformity with NRS 597.995(1) for substantial compliance.

Although NRS 597.995(1) arguably implicates notice of an arbitration provision, substantial compliance applies to NRS 597.995(1) as it relates to the facts of this case. Appellees presented no evidence or any arguments that Mrs. Dileo was unaware of the Agreement or did not have an opportunity to review it before signing it. *See Schleining v. Cap. One, Inc.*, 130 Nev. 323, 330, 326 P.3d 4, 13 (“Although Schleining claimed that his failure to act to save the property at issue was because he did not receive the appropriate notice, there was no evidence presented that Schleining attempted to refinance the property but failed due to time constraints.”). Given the brevity and simplicity of the Agreement, as described above, it would strain credulity to suggest that the Agreement was buried in the annals of a voluminous packet of documents or somehow indiscernible. Mrs. Dileo did not testify or argue that she was unaware of the Agreement at the time she signed it.

The Estate suffers no prejudice by the enforcement of the Agreement. Arbitration is not prejudicial per se. The Estate will have a full and fair opportunity to conduct discovery, present evidence, examine witnesses, be heard by a neutral arbitrator, and obtain any appropriate relief during arbitration. If anything, Gentle

Spring is prejudiced by the Estate's avoidance of the Agreement to the extent it is being robbed of the benefit of its bargain. While Gentle Spring honored its obligations under the contract to provide group home services to Mr. Dileo, the Estate has stripped Gentle Spring of its contractual right to the more efficient, inexpensive arbitration process.

The District Court also abused its discretion by not finding that the Agreement substantially complies with NRS 597.995 because not doing so produces an absurd and unfair result in this case. There is no dispute that Mrs. Dileo knowingly executed the Agreement. While NRS 597.995(1) is meant to be a protection for unwitting signatories, Appellees' arguments transform NRS 597.995(1) into a cheap technicality. It would be absurd for a person to knowingly and voluntarily authorize an arbitration agreement and then seek to avoid its enforcement by arguing that he did not specifically authorize it. Again, the Agreement was on a single-page containing standard font. It was boldly labeled "Grievances and Arbitration." Mrs. Dileo's signature is immediately below the Arbitration provision. Appellees' argument suggests that had Gentle Spring simply combined these two paragraphs, there would be no issue here with specific authorization. This underscores the tedium of Appellees' argument and their attempt to use NRS 597.995(1) as a technical trapdoor, rather than an important protection. Again, any doubts regarding whether the Agreement complies with

NRS 597.995(1) should have been resolved in favor of arbitration. *Pearson*, 106 Nev. at 590, 798 P.2d at 137 (“doubts regarding the propriety of arbitration are resolved in favor of requiring arbitration.”). To preserve the equity of this situation, substantial compliance satisfies NRS 597.995(1) as it applies to this case. The District Court, therefore, abused its discretion by refusing to apply substantial compliance to NRS 597.995(1) and allowing the Estate to invalidate an Agreement that Mrs. Dileo properly and willingly executed.

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## **CONCLUSION**

The District Court erred as a matter of law in finding that the subject arbitration agreement does not comply with NRS 597.995(1). It further abused its discretion by not finding that the arbitration agreement substantially complies with this same statute. Appellants, therefore, respectfully request this Court to reverse the District Court's order denying Appellants' motion to compel arbitration and to compel the Estate's claims to binding arbitration and to stay the Heir's claims pursuant to NRS 38.241(7)

Dated this 10th day of February, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

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# EXHIBIT ‘H’



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DISTRICT COURT

CLARK COUNTY, NEVADA

12 CORINNE R. DILEO as Special  
13 Administrator for the ESTATE OF THOMAS  
14 DILEO; THOMAS DILEO, JR., as Statutory  
15 Heir to THOMAS DILEO; and CINDY  
DILEO, as Statutory Heir to THOMAS

16 Plaintiffs,

17 vs.

18 MAIDE, L.L.C, a Nevada limited-liability  
19 company d/b/a GENTLE SPRING CARE  
HOME; SOKHENA K. HUCH, an individual;  
20 MIKI N. TON, an individual; DOE  
ENTITIES 11-10, inclusive; ROE  
21 ENTITIES 11-20, inclusive,

Defendants.

CASE NO. A-19-797533-C  
Dept. No.: 1

**MAIDE, L.L.C, a Nevada limited-liability  
company d/b/a GENTLE SPRING CARE  
HOME; SOKHENA K. HUCH, an  
individual; MIKI N. TON's REPLY IN  
SUPPORT OF DEFENDANTS' MOTION  
TO COMPEL ARBITRATION**

**HEARING DATE: 10/17/2019  
IN CHAMBERS**

22  
23 Defendants MAIDE, L.L.C, a Nevada limited-liability company d/b/a GENTLE SPRING  
24 CARE HOME; SOKHENA K. HUCH, an individual; MIKI N. TON (collectively referred to as  
25 "Defendants"), by and through their attorneys of record, S. Brent Vogel, Esq., Jeffrey H. Ballin,  
26 Esq., and John M. Orr, Esq. of the Law Firm LEWIS BRISBOIS BISGAARD & SMITH, hereby  
27 file this Reply in Support of Defendants' Motion to Compel Arbitration.  
28

1 This Motion is based upon the papers and pleadings on file in this case, the attached  
2 exhibits, the Memorandum of Points and Authorities submitted herewith, and any argument made  
3 at the time of hearing in this matter.

4 DATED this 10th day of October, 2019.

6 LEWIS BRISBOIS BISGAARD & SMITH LLP

8 By /s/ John M. Orr

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14  
15 **MEMORANDUM OR POINTS AND AUTHORITIES**

16 **I. INTRODUCTION**

17 Plaintiffs' claims against Defendants are subject to binding arbitration in accordance with  
18 the arbitration agreement (the "Agreement") that Corrine Dileo signed as the personal  
19 representative of Thomas Dileo. Plaintiffs make three principle arguments against the  
20 enforceability of the Agreement. First, Plaintiff argues that the Agreement is unenforceable  
21 because it does not contain a specific authorization as required by NRS § 597.995(1). The  
22 argument misstates facts. The Agreement is clearly labelled "Grievances and Arbitration" and is  
23 set aside from the rest of the resident agreement on its own page. It also contains its own signature  
24 line, which the Supreme Court of Nevada has held constitutes a "specific authorization" for  
25 purposes of NRS § 597.995(1). *See Fa Hat, LLC v. DiTerlizzi*, No. 68479, 2016 Nev. Unpub.  
26 LEXIS 762, at \*4-\*5 (Nev. Sept. 21, 2016). Ms. Dileo signed this Agreement on a separate  
27 signature line, demonstrating her assent to the Agreement.

1 Second, Plaintiffs argue the Agreement is unenforceable because it incorrectly contains the  
2 name of another residential group home owned by Maide, LLC, Bella Estate Care Home. Mr.  
3 Dileo was a resident at Gentle Springs Care Home (“Gentle Spring”), not Bella Estate Care Home  
4 (“Bella Estate”). Plaintiffs conveniently ignore, however, that Ms. Dileo was fully aware that her  
5 agreement was with Gentle Spring based on the circumstances of the transaction and the obvious  
6 fact that Mr. Dileo was a resident of Gentle Spring, not Bella Estate. Moreover, the Agreement did  
7 not need to be signed by Defendants to be enforceable. In accordance with the plain language of  
8 NRS § 597.995 and well-settled principles of contract law only, the Agreement only needed to  
9 contain the signature of the person being compelled to arbitrate, i.e. Ms. Dileo.

10 Plaintiffs lastly argue that they cannot be compelled to arbitrate their claims because Ms.  
11 Dileo only signed the Agreement in her representative capacity as Mr. Dileo’s power of attorney.  
12 This argument disregards the nature of Plaintiffs’ claims. Plaintiffs have asserted claims for  
13 negligence, elder abuse under NRS § 41.1395, and wrongful death under NRS § 48.105. As the  
14 personal representative of Mr. Dileo’s Estate, Ms. Dileo “succeeds to the rights and obligations of  
15 the Estate’s decedent, effectively stepping into the shoes of the decedent.” *Colo. Nat’l Bank of*  
16 *Denver v. Friedman*, 846 P.2d 159, 163 (Colo. 1993). The heirs do not have standing to assert an  
17 elder abuse or negligence claim. *Echevarria v. Echevarria*, No. 66618, 2015 WL 7431757 (Nov.  
18 19, 2015) (“nothing in NRS 41.085 authorizes an heir to maintain an action for elder abuse or  
19 neglect on behalf of a decedent.”). NRS 41.100(1) (“[e]xcept as otherwise provided in this section,  
20 no cause of action is lost by reason of the death of any person, **but may be maintained by or**  
21 **against the person’s executor or administrator.**” (emphasis added). These claims belong to Ms.  
22 Dileo as the personal representative of Mr. Dileo’s estate. The Estate’s claims are unequivocally  
23 subject to arbitration because Ms. Dileo is subject to Mr. Dileo’s contractual right and obligation.

24 With regard to the heirs’ wrongful death claim, this claim is subject to arbitration because  
25 it is not severable from the Estate’s claims. It would be a waste of time, resources, and an affront  
26 to judicial economy to try these claims in separate forums. NRS § 38.221(7). To any extent the  
27 Court determines the heirs’ claims are severable, NRS § 38.221(7) requires the Court to stay  
28 these claims during the pendency of the arbitration, given these claims all stem from a common

1 nucleus of operative facts. NRS § 38.221(7) (“If the court orders arbitration, the court on just  
2 terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim  
3 subject to the arbitration is severable, the court may limit the stay to that claim.”). For these  
4 reasons, Defendants move this Court to dismiss Plaintiffs’ Complaint and refer this case to binding  
5 arbitration.

## 6 **II. LEGAL ARGUMENT**

### 7 **A. The Agreement Complies with NRS § 597.995(1).**

8 NRS § 597.995(1) provides as follows:

9 1. Except as otherwise provided in subsection 3, an agreement  
10 which includes a provision which requires a person to submit to  
11 arbitration any dispute arising between the parties to the agreement  
must include specific authorization for the provision which indicates  
that the person has affirmatively agreed to the provision.

12 2. If an agreement includes a provision which requires a person to  
13 submit to arbitration any dispute arising between the parties to the  
14 agreement and the agreement fails to include the specific  
15 authorization required pursuant to subsection 1, the provision is void  
and unenforceable.

16 NRS § 597.995(1)–(2). In *Fat Hat*, the Supreme Court of Nevada considered what constitutes a  
17 “specific authorization” under NRS § 597.995(1). *Fat Hat*, LLC (“Fat Hat”) was sued by several of  
18 its employees after the employees discovered Fat Hat had been secretly filming them in their  
19 dressing areas as they changed attire. Fat Hat moved to compel arbitration based on the arbitration  
20 clauses in the plaintiffs’ independent contractor or employment contracts. The district court denied  
21 this request, so Fat Hat appealed.

22 On appeal, each of the six employee plaintiffs argued that their arbitration agreements did  
23 not comply with NRS § 597.995(1) because they did not contain a “specific authorization” for  
24 arbitration. The court accepted this argument for four of the six employees. It reasoned

25  
26 Though the arbitration provision immediately preceded the signature  
27 line on the last page for all the contracts, that was a general  
signature line indicating consent to all the terms of the contract.  
28 Thus, those signatures do not qualify as specific authorizations for

1 the arbitration provision. Although Kirtz initialed at the bottom of  
2 the page with the arbitration provision, she initialed at the bottom of  
3 every page; thus, her initials fail to demonstrate that she  
affirmatively agreed to the arbitration provision.

4 *Fat Hat*, 2016 Nev. Unpub. LEXIS 762, at \*4. With regard to the other two employee plaintiffs,  
5 the Court held they did specifically authorize arbitration because “[i]n addition to a signature line  
6 at the end of the contracts, both Hebert and Mihaylova were required to fill in their names and  
7 addresses in the blank spaces of the provision, explicitly stating that the agreement to arbitrate was  
8 effective.” *Id.* at \*4–\*5. Based on this, the Court held these two contracts complied with NRS §  
9 597.995(1).  
10

11 In this case, Ms. Dileo initially signed a Resident Agreement that contained five pages  
12 with a single signature block on page 5 that applied to the whole agreement. Resident Agreement,  
13 attached hereto as **Exhibit “A.”** She then signed a separate “Resident Agreement Addendum” that  
14 contained the subject arbitration clause. Resident Addendum, attached hereto as **Exhibit “B.”** This  
15 Agreement contained its own signature line, and, just like the two employee contracts in *Fat Hat*,  
16 Ms. Dileo was required to fill in her name, date, and her signature. Under *Fat Hat*, this constitutes  
17 a specific authorization under NRS 597.995(1). Plaintiff incorrectly argues that the arbitration  
18 agreement only includes “a sole signature line at the bottom of the page wherein Plaintiff Corinne  
19 R. Dileo generally acknowledges all of the listed provisions.” Pltfs.’ *Oppo.* at 5. Plaintiffs’  
20 ironically ignore that the arbitration and grievance clause is the only provision on the page and  
21 contains a signature block separate and apart from the rest of the Resident Agreement. The Court’s  
22 reasoning in *Fat Hat* suggests that NRS 597.995(1) is designed to ensure that signatories  
23 specifically acknowledge an arbitration clause rather than agreeing to a myriad of contractual  
24 provisions buried in the annals of an agreement with one sweeping authorization. This is not a  
25 concern in this case. Ms. Dileo separately signed the Agreement separate and apart from the total  
26 Resident Agreement. Her signature on the addendum reflects her specific acknowledgement and  
27  
28

1 assent to the arbitration clause.

2 **B. The Agreement Is Valid and Enforceable**

3 Plaintiffs further suggest that the Agreement is not a valid contract because the letterhead  
4 on the Agreement reads “Bella Estate Care Home,” rather than Gentle Spring Care Home.  
5 Plaintiffs suggest that this does not sufficiently identify the parties to the Agreement and somehow  
6 makes the Agreement invalid. This argument lacks any legal foundation. Indeed, Plaintiffs cite no  
7 legal authority to support this flimsy argument. Both Bella Estate and Gentle Spring are residential  
8 group homes owned and operated by Maide, LLC. Ton, M. Decl., attached hereto as **Exhibit “C.”**  
9 “Although the party seeking to enforce an arbitration clause bears the burden of proving the  
10 clause's valid existence, any party opposing arbitration must establish a defense to enforcement.”  
11 *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004). Defendants have met  
12 their burden of showing the arbitration clause is enforceable by producing a signed copy of the  
13 original arbitration agreement. Plaintiffs do not dispute that Ms. Dileo signed this Agreement. The  
14 Agreement otherwise satisfies Nevada’s statute of frauds because it contains the signature of the  
15 party to be charged. Nevada courts follow the Restatement, which requires the contract to be  
16 "signed by the party to be charged" and state "with reasonable certainty . . . each party to the  
17 contract either by his own name, or by such a description as will serve to identify him." *Stanley v.*  
18 *A. Levy & J. Zentner Co.*, 60 Nev. 432, 112 P.2d 1047, 1053 (Nev. 1941) (quoting Restatement  
19 (First) of Contracts § 207 (1932)); (“In the following cases every agreement is void, unless the  
20 agreement, or some note or memorandum thereof expressing the consideration, is in writing, and  
21 subscribed by the person charged therewith...”); *Wiley v. Cook*, 94 Nev. 558, 563, 583 P.2d 1076,  
22 1079 (1978) ) (“A memorandum, in order to make enforceable within the Statute, any document or  
23 writing, formal or informal, [s]igned by the party to be charged or by his agent actually or  
24 apparently authorized thereunto.”).

25 To any extent the Agreement is ambiguous because it contains the name of Bella Estate,  
26 rather than Gentle Spring, Nevada law permits parol evidence to clear up supplemental details of  
27 an agreement. *See Butler v. Lovoll*, 96 Nev. 931, 620 P.2d 1251, 1253 (Nev. 1980). It is  
28 disingenuous for Plaintiffs to suggest that they were not aware that the correct entity was Gentle

1 Spring. The circumstances of this transaction clearly demonstrate that both parties understood that  
2 Mr. Dileo and Gentle Spring were parties to the Agreement. The fact Mr. Dileo was admitted into  
3 Gentle Spring reflects this intent. Ms. Dileo has not asserted that she thought the Agreement was  
4 with a different entity or that there was not otherwise mutual assent to the substance of the  
5 Agreement. Plaintiffs' argument reflects a desperate attempt to capitalize on a cheap technicality,  
6 rather than the true intent of the parties. *See Hilton Hotels Corp. v. Butch Lewis Productions*, 107  
7 Nev. 226, 231–32, 808 P.2d 919, 922 (“the better approach is for the courts to examine the  
8 circumstances surrounding the parties' agreement in order to determine the true mutual intentions  
9 of the parties. Courts today tend to be willing to look beyond the written document to find the  
10 “true understanding of the parties.”). Both Gentle Spring and Bella Estate are owned and operated  
11 by Maide, LLC, Ex. C., so on a practical level, the Agreement identifies the correct party.

12 **C. Plaintiffs Are Bound to the Arbitration Agreement**

13 Plaintiffs' argument that Ms. Dileo is not bound to the Agreement misapprehends her role  
14 as Mr. Dileo's personal representative and the nature of her claims. As Plaintiffs point out, they  
15 have asserted claims for negligence, elder abuse under NRS § 41.1395, and for wrongful death  
16 under NRS § 41.085.<sup>1</sup> The Nevada Supreme Court has specifically held that an heir does not have  
17 standing to assert an elder abuse claim under NRS 41.085. *Echevarria v. Echevarria*, No. 66618,  
18 2015 WL 7431757 (Nov. 19, 2015) (“nothing in NRS 41.085 authorizes an heir to maintain an  
19 action for elder abuse or neglect on behalf of a decedent.”). NRS 41.100(1) provides: “[e]xcept as  
20 otherwise provided in this section, no cause of action is lost by reason of the death of any person,  
21 *but may be maintained by or against the person's executor or administrator.*” NRS 41.100(1)  
22 (emphasis added). NRS § 41.085 allows the personal representative to maintain an action for  
23 wrongful death and recover damages on behalf of the decedent. NRS § 41.085(5). The personal  
24 representative of an Estate steps into the decedent's shoes and inherits the decedent's contractual  
25

26  
27 <sup>1</sup> Plaintiffs claim they also asserted a survivor action under NRS 41.100. There is no distinct cause of action entitled a  
28 survivor action. NRS 41.100 simply confers standing on a personal representative to assert claims on behalf of a  
decedent.

1 rights, obligations, and causes of action. *Colo. Nat'l Bank of Denver v. Friedman*, 846 P.2d 159,  
2 163 (Colo. 1993); *Farm Bureau Mut. Ins. Co. of Idaho v. Eisenman*, 286 P.3d 185, 189 (Id. 2012)  
3 (“the personal representative “steps into the shoes” of the decedent to administer the estate, and  
4 may sue on causes of action the decedent may have pursued, the personal representative may not  
5 bring an action that abated upon the death of the decedent.’). Mr. Dileo’s heirs do not have  
6 standing to assert a negligence or elder abuse claim against Defendants. Those claims belong to  
7 Ms. Dileo as the Estate’s personal representative under NRS § 41.100. Given Ms. Dileo inherits  
8 Mr. Dileo’s contractual rights and obligations, the Estate’s claims for elder abuse, negligence, and  
9 wrongful death are subject to arbitration.

10       The heirs should also be compelled to arbitrate their wrongful death claim because it is not  
11 severable from the Estate’s claims. NRS 38.221(7) provides: “If the court orders arbitration, the  
12 court on just terms shall stay any judicial proceeding that involves a claim subject to the  
13 arbitration. *If a claim subject to the arbitration is severable, the court may limit the stay to that*  
14 *claim.*” NRS 38.221(7) (emphasis added). The heirs’ claims are not severable. Claims are  
15 severable when they rest on different facts and legal theories. *Coutin v. Young & Rubicam Puerto*  
16 *Rico, Inc.*, 124 F.3d 331, 339 (5th Cir. 1997) (“When different claims for relief are not  
17 interconnected—that is, when the claims rest on different facts and legal theories—they are by  
18 definition severable and unrelated.”); *Figueroa-Torres v. Toledo-Davila*, 232 F.3d 270, 278 (1st  
19 Cir. 2000) (“We recently held that when different claims for relief are not interconnected that is,  
20 when the claims rest on different facts and legal theories they are by definition severable and  
21 unrelated.”) (internal alterations omitted). The heirs’ claims are based on Mr. Dileo’s residency at  
22 Gentle Spring. It would waste the parties’ and this Court’s time and resources to essentially  
23 litigate the same set of facts twice, and it hazards leading to inconsistent results. All claims will  
24 require Plaintiffs to prove that Defendants breached the applicable standard of care and that those  
25 breaches caused Mr. Dileo’s death or other injuries. These claims are so intertwined that it would  
26  
27  
28

1 be a waste of judicial resources and the parties' resources to litigate identical claims in two  
2 forums. Moreover, the Supreme Court of Nevada has held that all doubts regarding the scope of an  
3 arbitration agreement are resolved in favor of arbitration *Kindred v. 2nd Jud. Dist. Court*, 116  
4 Nev. 405, 411, 996 P.2d at 907 ("in judging the scope of the arbitration agreements, we resolve  
5 all doubts concerning the arbitrability of the subject matter of a dispute in favor of arbitration").  
6

7 In the event the Court determines that the heirs' wrongful death claim is not subject to  
8 arbitration, NRS 38.221(7) requires these claims to be stayed during the pendency of the  
9 arbitration of the Estates' claims. NRS § 38.221(7) ("If the court orders arbitration, the court on  
10 just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a  
11 claim subject to the arbitration is severable, the court may limit the stay to that claim.").

### 12 III. CONCLUSION

13 Based upon the foregoing, Defendants respectfully request that this Honorable Court grant  
14 Defendants' Motion to Compel Arbitration.

15 DATED this 10th day of October, 2019

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17  
18  
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# EXHIBIT ‘I’

## Cases

Case Search

Participant Search

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### Case Information: 81804

<b>Short Caption:</b>	MAIDE, LLC VS. DILEO	<b>Court:</b>	Supreme Court
<b>Lower Court Case(s):</b>	Clark Co. - Eighth Judicial District - A797533	<b>Classification:</b>	Civil Appeal - General - Other
<b>Disqualifications:</b>		<b>Case Status:</b>	Briefing Reinstated
<b>Replacement:</b>		<b>Panel Assigned:</b>	Panel
<b>To SP/Judge:</b>	09/28/2020 / Chapin, Patrick	<b>SP Status:</b>	Completed
<b>Oral Argument:</b>		<b>Oral Argument Location:</b>	
<b>Submission Date:</b>		<b>How Submitted:</b>	

### + Party Information

### + Due Items

### Docket Entries

Date	Type	Description	Pending?	Document
09/17/2020	Filing Fee	Filing Fee due for Appeal. (SC)		
09/17/2020	Notice of Appeal Documents	Filed Notice of Appeal. Appeal docketed in the Supreme Court this day. (SC)		20-34300
09/17/2020	Notice/Outgoing	Issued Notice to Pay Supreme Court Filing Fee. No action will be taken on this matter until filing fee is paid. Due Date: 10 days. (SC)		20-34303
09/24/2020	Filing Fee	Filing Fee Paid. \$250.00 from Lewis Brisbois Bisgaard & Smith. Check no. 14764. (SC)		
09/25/2020	Notice/Outgoing	Issued Notice of Referral to Settlement Program. This appeal may be assigned to the settlement program. Timelines for requesting transcripts and filing briefs are stayed. Docketing Statement mailed to counsel for appellant - due: 21 days. (SC).		20-35347
09/28/2020	Settlement Notice	Issued Notice: Assignment to Settlement Program. Issued Assignment Notice to NRAP 16 Settlement Program. Settlement Judge: Patrick N. Chapin. (SC).		20-35512
10/28/2020	Notice/Outgoing	Issued Notice to File Docketing Statement. Due date: 10 days. (SC).		20-39466
10/29/2020	Settlement Program Report	Filed ECAR/Not Appropriate for Settlement Program. This case is not appropriate for mediation. (SC).		20-39615
10/29/2020	Settlement Order/Procedural	Filed Order Removing From Settlement Program and Reinstating Briefing. This appeal is removed from the settlement program. Appellant(s): 14 days transcript request; 90 days opening brief. (SC)		20-39703
11/02/2020	Docketing Statement	Filed Appellant's Civil Docketing Statement. (SC)		20-39912

11/10/2020	Transcript Request	Filed Request for Transcript of Proceedings. Transcripts requested: 1/28/20 and 5/26/20. To Court Reporter: Kristen Lunkwitz. (SC)		20-41192
12/07/2020	Transcript	Filed Notice from Court Reporter. Rebeca Gomez stating that the requested transcripts were delivered. Dates of transcripts: 1/28/20 and 5/26/20. (SC)		20-44309
12/11/2020	Transcript	Filed Notice from Court Reporter. Kristine Santi stating that the requested transcripts were delivered. Dates of transcripts: 1/28/20 and 5/26/20. (SC)		20-45032
01/08/2021	Order/Clerk's	Filed Order Granting Telephonic Extension. Appellants' Opening Brief and Appendix due: February 10, 2021. (SC)		21-00540
02/10/2021	Brief	Filed Appellants' Opening Brief. (SC)		21-04058
02/10/2021	Appendix	Filed Appellants' Appendix Vol. I. (SC)		21-04063
02/10/2021	Appendix	Filed Appellants' Appendix Vol. II. (SC)		21-04069
02/10/2021	Appendix	Filed Appellants' Appendix Vol. III. (SC)		21-04068
03/26/2021	Brief	Filed Respondents' Answering Brief. (SC)		21-08742
03/31/2021	Notice/Incoming	Filed Notice of Appearance of Amicus Counsel. (In Support of Respondents) (SC)	Y	21-09345
03/31/2021	Motion	Filed Motion for Extension of Time to File Motion for Leave to File Amicus Brief of The Nevada Justice Association. (SC)	Y	21-09346

[Combined Case View](#)