

CONNOR & CONNOR, LLC

TRIAL LAWYERS

www.TheConnorFirm.com

RECEIVED

Sep 26 2022

SC Court of Appeals

September 26, 2022

Via Electronic Filing

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Viola M. Hackworth v. Bayview Manor, LLC et al.
Appellate Case No. 2019-001536

Dear Ms. Kitchings:

The undersigned counsel for Respondent Viola M. Hackworth submits this letter brief addressing the impact of *Arredondo v. SNH SE Ashley River Tenant, LLC et al.*, 433 S.C. 69, 856 S.E.2d 550 (Dec. 6, 2021) as requested by the Court. For the reasons discussed below, the General Durable Power of Attorney did not grant Ms. Hackworth authority to execute the arbitration agreement, and the trial court's denial of Appellants' Motion to Compel Arbitration should be upheld.

On November 2, 2015, Mr. Boles was admitted to Bayview Manor after suffering a stroke. (R. 214) Mr. Boles was assessed to be alert but exhibited memory problems and cognitive deficits. (R. 16) Mr. Boles' admission paperwork was originally signed by Clifford Byars, Mr. Boles' brother. (R. 74) When Mr. Boles was admitted to Bayview Manor, Ms. Hackworth held a General Durable Power of Attorney. (R. 77) She was not present at the time of admission, and did not arrive in South Carolina until after Mr. Boles was in the facility. (R. 214)

Defendants seek to compel arbitration under an Admission Agreement (R. 64), and a separate Binding Arbitration Agreement. (R. 75) The Admission Agreement contains an "Optional Arbitration Clause" that states any action, dispute, claim or controversy of any kind in anyway arising from or relating to this Agreement governing the Resident's stay at the Facility shall be resolved by binding arbitration.¹ (R. 74). The Admission Agreement also includes a "Waiver of

¹ Respondent notes that the Optional Arbitration Clause contained within the Admission Agreement is not valid under 42 C.F.R. § 483.70(n), which requires the facility to explicitly state that binding arbitration is not a condition of admission to, or as a requirement to continue to receive care at, the facility; the agreement to explicitly grant the resident the right to rescind within 30 days; and the agreement to provide for selection of a neutral arbitrator and selection of a venue convenient to both parties. The Optional Arbitration Clause in the Admission Agreement does not include any of these requirements.

Jury Trial” provision that states the resident waives the right to trial by jury with respect to any litigation arising from or relating to the Agreement or any other document connected with the Agreement, or arising out of or relating to any of the said documents or any relationship between the Facility and Resident.² (R. 72) The Binding Arbitration Agreement contains a mutual waiver of the right to a trial and requires arbitration of any dispute, controversy, demand or claim that arises out of or relates to the Admission Agreement, or any service or health care provided by the Facility to the resident. (R. 75)

According to the South Carolina Supreme Court, to determine whether the General Durable Power of Attorney authorized Ms. Hackworth to execute the pre-dispute Binding Arbitration Agreement, a court must look to the specific language of the power of attorney. *Arredondo*, at 75, 554.³

A. Generally

Article I of the Power of Attorney provides Ms. Hackworth:

absolute discretion from time to time and at any time with **respect to my property, real or personal**, at any time owned or held by me and without authorization of any court and in addition to any other rights, powers or authority **granted by any other provisions of this Power of Attorney** or by statute or general rules of law, with full power of substitution as follows... (R. 190)

The most general statement of Ms. Hackworth’s authority under the document is discretion with respect to property. Under the holding in *Arredondo*, this discretion did not apply to a property right that did not exist at the time Ms. Hackworth allegedly signed the arbitration agreement. *Arredondo*, at 78, 555. The pre-dispute arbitration contract does not relate to any property rights of Mr. Boles, but rather to his constitutional rights. *Id.* citing *Kindred Nursing Centers Ltd. Partnership v. Wellner*, 533 S.W.3d 189 (Ky. 2017). Therefore, the general powers given to Ms. Hackworth would not include authorization to sign the arbitration agreement, because the arbitration agreement did not concern a property right Mr. Boles possessed at the time Ms. Hackworth allegedly signed it. *Id.* at 79, 556.

² Respondent notes that the Waiver of Jury Trial provision is not valid for the same reasons outlined in Footnote 1. In addition, the Waiver is unconscionable. Appellants’ Admission Agreement presents the Waiver of Jury Trial as a “take it or leave it” proposition. There is no option for the resident and/or their representative to opt out of this waiver, violating the prohibition of nursing homes to require this waiver as a precondition for admission. See 42 U.S.C. §1396r(c)(5)(A)(iii).

³ Respondent maintains the General Durable Power of Attorney similarly did not grant her authority to agree to the Optional Arbitration Clause and/or the Waiver in the Admission Agreement. For the sake of brevity, and because Respondent maintains those provisions are invalid, Respondent will focus on whether Ms. Hackworth had the authority to enter into the Binding Arbitration Agreement.

When the specific powers described and enumerated in the power of attorney are examined, none of the provisions grant Ms. Hackworth the authority to enter into an arbitration agreement as detailed below.

B. Powers Relating to Management and Disposition of Assets

Paragraph 1 under Section B authorizes Ms. Hackworth to convey or transfer property. (R. 190) The Supreme Court of South Carolina held that by signing the arbitration agreement the attorney-in-fact was not transferring anything to anyone. *Id.* at 79, 556. Thus, the provision of the General Durable Power of Attorney authorizing Ms. Hackworth to convey or transfer property did not grant her authority to sign an arbitration agreement.

Paragraph 3 under Section B authorizes Ms. Hackworth to make, sign, execute, acknowledge agreements, waivers and releases **as may be necessary, convenient, or proper in the premises.** (R. 191). Even if such powers related to real and personal property could be interpreted to apply to constitutional rights, the arbitration agreement is not necessary, convenient, or proper. The arbitration agreement itself states, “the execution of this Arbitration Agreement is not a precondition to the furnishing of services to the Resident by the Facility.” (R. 142) As the Supreme Court defined, “necessary” means absolutely needed or required. *Arredondo*, at 81, 557. The signature of Ms. Hackworth was not necessary, or even convenient, to ensure Mr. Boles’ admission to the facility. Mr. Boles had been at the facility for four (4) days already receiving care and treatment when Ms. Hackworth arrived in South Carolina.

The powers outlined under Section B cannot be read under any interpretation to grant Ms. Hackworth authority to sign the arbitration agreement.

C. Powers Relating to Management of Assets

Paragraph 6 under Section C authorizes Ms. Hackworth to institute, prosecute, defend, arbitrate, and dispose of legal suits, or otherwise engage in litigation involving Mr. Boles, his property, or any interests of his. Because Ms. Hackworth allegedly signed arbitration agreement before any potential legal claim accrued, this provision does not grant her authority to sign such agreements. *Id.* at 84-85, 558-559.

The Supreme Court in *Arredondo* held the power to “institute or defend” suits concerning property rights did not grant the agent authority to execute a pre-dispute arbitration agreement. *Id.* at 85, 559 *citing Wellner*, 533 S.W.3d (“the act of executing a pre-dispute arbitration agreement upon admission to a nursing home has nothing at all to do with...instituting legal proceedings”). Here, Ms. Hackworth did not allegedly execute the arbitration agreement in connection with an existing claim Mr. Boles had against the facility, and her actions do not constitute any of the powers delineated in Paragraph 6.

Paragraph 18 under Section C authorizes Ms. Hackworth to renounce and disclaim any property or interest in property or powers to which for any reason and by any means Mr. Boles may become entitled; or to release or abandon any property or interest in property or powers which Mr. Boles now or hereafter owns. For the reasons already stated above, this provision cannot be interpreted to grant Ms. Hackworth authority to sign the arbitration agreement because the pre-dispute arbitration contract does not relate to any property rights of Mr. Boles.

No provisions of Section C granted Ms. Hackworth the authority to enter into an arbitration agreement on Mr. Boles' behalf.

D. Powers Relating to Custody of Person

Paragraph 1 under Section D authorizes Ms. Hackworth to make all necessary arrangements for Mr. Boles at any nursing home. Again, the agreement to arbitrate was not "necessary" for Mr. Boles' admission to the facility. The arbitration contract specifically states this, and 42 CFR § 483.70(n) requires that the facility not require any resident or his or her representative to sign an arbitration agreement as a condition of admission to, or as a requirement to continue to receive care at the facility. Mr. Boles had already been admitted into the facility and provided with a room before Ms. Hackworth was asked to sign the admissions agreement or the arbitration agreement. The facility did not present the documents until after Mr. Boles received the services requested. Because her signature was not required for Mr. Boles to be admitted and receive services at the facility, Paragraph 1 did not give Ms. Hackworth authority to execute an arbitration agreement.

E. Conclusion

While the General Durable Power of Attorney gave Ms. Hackworth significant authority to make property decisions for Mr. Boles, the mere title of the document did not increase Ms. Hackworth's authority beyond the plain meaning of the provisions contained in the document. *Arredondo* at 80, 556. The General Durable Power of Attorney in this case was narrowly focused to provide the attorney-in-fact with discretion with respect to Mr. Boles' property and granted by the specific provisions of the Power of Attorney.

Contrary to Appellants' arguments, Mr. Byars did not have authority to enter into the Admission Agreement and Arbitration Agreement because he was not Mr. Boles' attorney-in-fact. *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346 (stating the sister was authorized to make health care decisions for the decedent only because decedent had no guardian or attorney-in-fact).

After hearing arguments, reviewing briefing, reviewing various documents including Affidavits, the Arbitration Agreement, the Admission Agreement, and the General Durable Power of Attorney, the Circuit Court denied Appellants' Motion to Stay the Action; denied Appellants' Motion to Compel Arbitration, In the Alternative Motion for Nonjury Trial; and Denied Appellants' Motion for Protective Order. A circuit court's factual findings, in determining

arbitrability, will not be reversed on appeal if **any evidence reasonably supports the findings**. *Arredondo* at 74-75, 553. Under the Supreme Court of South Carolina's ruling in *Arredondo*, the General Durable Power of Attorney did not give Ms. Hackworth the authority to waive Mr. Boles constitutional rights or execute the arbitration agreement. Therefore, there is ample evidence to reasonably support the lower court's findings and the denial of Appellants' motions should be upheld.

With kind regards,

CONNOR & CONNOR, LLC

A handwritten signature in black ink, appearing to read 'AKM', with a long, sweeping horizontal stroke extending to the right.

Anne K. Moore

Attorney for Respondent

RECEIVED

Sep 26 2022

SC Court of Appeals

CERTIFICATE OF SERVICE

I certify that this the 26th day of September, 2022, I have caused to be served a copy of this Letter Brief was served on Appellants electronically as follows, with a copy of the same to be deposited in the United States mail.

A. Todd Darwin
HOLCOMBE BOMAR, P.A.
101 W. St. John Street, Suite 200
PO Box 1897
Spartanburg, SC 29306
tdarwin@holcombebomar.com

Walker Barnes
Boulier Thompson & Barnes, LLC
101 W. St. John St., Suite 300
Spartanburg, SC 29306
(864) 606-9994 – *direct*
(864) 606-9610 - *receptionist*
(864) 316-3178 – *mobile*
wbarnes@btblawfirm.com



Anne K. Moore, SC Bar No. 101018
C. Caleb Connor, SC Bar No. 100517
Kenneth L. Connor, SC Bar No. 100298
CONNOR & CONNOR, LLC
302 Park Avenue SE
Aiken, South Carolina 29801
P: (803) 226-0543
F: (800) 480-9715
anne@theconnorfir.com

Attorneys for Respondent