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September 25, 2022

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Sep 26 2022
SC Court of Appeals

VIA ELECTRONIC FILING
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Viola M. Hackworth, as Personal Representative of the Estate of Eugene Boles, a/k/a Eugene N. Boles, deceased, v. Bayview Manor, LLC d/b/a Bayview Manor, et al
Case No. 2017-CP-07-00433
Appellate Case No. 2019-001536
HB File No. 15378

Dear Mrs. Kitchings:

The Appellants respectfully submit this letter brief in response to the Court's September 16, 2022 letter, which requested arguments regarding the effect of *Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69, 856 S.E.2d 550 (Dec. 6, 2021) on this appeal.

As set forth by the South Carolina Supreme Court in *Arredondo*, a court must look to the specific language of the General Durable Power of Attorney to determine whether it authorized Respondent to execute the agreements. *Arredondo*, at 75, 554. The General Durable Power of Attorney (R. 77) executed by Eugene Boles unequivocally granted Viola Boles Hackworth ("Respondent") the authority to execute the Admission Agreement (R. 64) and the Resident and Facility Binding Arbitration Agreement (R. 75).

Article I A. of the General Durable Power of Attorney entitled POWERS IN GENERAL gives Respondent the power to:

> To do and perform all and every act, deed, matter, and thing whatsoever in and about my estate, property and affairs as fully and effectually to all intents and purposes as I might or could do in my own proper person, if personally present, the specifically enumerated powers described below being an aid and exemplification of the full, complete, and general power herein granted and not in limitation or definition thereof. (R. 77)

Article I D. of the General Durable Power of Attorney entitled POWERS RELATED TO CUSTODY OF PERSON gives the Respondent the power to "establish where I shall reside... and, if necessary, to make all arrangements for me at any...nursing home or similar establishment, to have and exercise all rights on my behalf which I may have and possess at such residence or institution..." (R. 82)

Article III of the General Power of Attorney entitled INCIDENTAL POWERS AND BINDING EFFECT states:

> In connection with the exercise of the powers herein described, Attorney is fully authorized and empowered to perform any other acts or things necessary, appropriate, or incidental thereto, with the same validity and effect as if I were personally present, competent, and personally exercised the powers myself. All acts lawfully done by Attorney hereunder during any period of disability or mental incompetence shall have the same effect and inure to the benefit of and bind me and my heirs, devisees, legatees and personal representatives as if I were mentally competent and not disabled. The powers herein conferred may be exercised by Attorney alone and the signature or act of Attorney on my behalf may be accepted by third persons as if I were present in person, acting on my own behalf and competent. No person who may act in reliance upon the representations of Attorney for the scope of authority granted to Attorney shall incur any liability to me or to my estate as a result of permitting Attorney to exercise any power, nor shall any person dealing with attorney be responsible to determine or insure the proper application of funds or property. (R. 85)

This is precisely the type of language our Supreme Court was looking for when analyzing the language contained in Arredondo's power of attorney.[1] The Court emphasized that its analysis did not turn upon the presence or absence of an explicit reference to arbitration or arbitration agreements in the power of attorney because such an analysis was improper giving the decision of the United States Supreme Court (USSC) in *Kindred Nursing Centers Ltd. Partnership v. Clark. Arredondo,* at 75, 554.

In *Kindred,* the USSC reviewed cases from the Supreme Court of Kentucky dealing with a power of attorney signed by am individual named Wellner, and another signed by an individual named Clark. In both cases the agents holding the powers or attorney signed arbitration agreements when their principals were admitted into a nursing facility. *Arredondo*, at 75-76, 554. In rejecting the Supreme Court of Kentucky's ruling that an agent was only authorized to sign an arbitration agreement depriving the principal of a jury trial only if the express terms of the power of attorney so provided, the USSC held that such a ruling violated the Federal Arbitration Act by failing to put arbitration agreements on an equal plane with other contracts. *Arredondo*, at 76, 554

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[1]Although *Arredondo* discussed both a General Durable Power of Attorney and a Health Care Power of Attorney, since there is no Health Care Power of Attorney at issue in this appeal, Appellants will only be referring to the General Durable Power of Attorney when discussing the South Carolina Supreme Court's ruling in that case.

As noted by the South Carolina Supreme Court in *Arredondo*, "[t]he USSC then held the Clark Power of Attorney undoubtedly authorized the agent to sign an arbitration agreement because it granted the agent the all-encompassing authority 'to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way' and '[g]enerally to do and perform for me and in my name all that I might do if Present.' As such, no remand for further proceedings related to the Clark power of attorney was necessary." *Arredondo*, at 76, 554. However, when analyzing the Wellner power of attorney, the USSC noted that the Supreme Court of Kentucky had also invalidated the Wellner arbitration agreement on an alternative ground by finding that the Wellner power of attorney was not broad enough to allow Wellner's agent to sign a pre-dispute arbitration agreement. *Id.*

Appellants assert that the General Durable Power of Attorney at issue in the case at bar is analogous to the Clark power of attorney discussed in *Arredondo*. It specifically gives Respondent the right "**[t]o do and perform all and every act, deed, matter, and thing whatsoever in and about my estate, property and affairs as fully and effectually to all intents and purposes as I might or could do in my own proper person, if personally present, the specifically enumerated powers described below being an aid and exemplification of the full, complete, and general power herein granted and not in limitation or definition thereof.**" (R. 77) This express language undoubtedly authorized Respondent to sign the Admission Agreement (R. 64) and the Resident and Facility Binding Arbitration Agreement (R. 75).

In holding that the particular power of attorney did not authorize Ms. Arredondo to sign the arbitration agreement, the South Carolina Supreme Court stated that the power of attorney "could have been drafted to give Arredondo the broad power to sign all documents Whaley could sign himself or otherwise do anything Whaley could do himself, but it was not so drafted." *Arredondo*, at 80, 556. The General Durable Power of Attorney executed by Eugene Boles did indeed give the Respondent the broad powers to do anything he "might or could do" in his "own proper person, if personally present." That is where the analysis should stop, just as the USSC's analysis stopped with regard to the Clark power of attorney in *Kindred*, with no need to get bogged down in any discussion or analysis of property rights or choses in action.

In conclusion, Appellants believe that the South Carolina Supreme Court's ruling in *Arredondo* supports their position that the Respondent had the authority to execute the Admission Agreement (R. 64) and the Resident and Facility Binding Arbitration Agreement (R. 75). As pointed out in that opinion, when reviewing actions to set aside or interpret a power of attorney, South Carolina courts have looked to contract law, the cardinal rule of which is to ascertain and give effect to the intention of the parties. *Arredondo*, at 75, 553. The General Durable Power of Attorney at issue in this appeal is not in name only. When looking at the actual language of the General Durable Power of Attorney, it is abundantly clear that it granted the Respondent the broad powers to sign all documents Eugene Boles could have signed himself or otherwise do anything Eugene Boles could have done himself. For those reasons there is no evidence that reasonably supports the lower court's denial of Appellants' Motion to Stay Action and Compel Arbitration; in the Alternative Motion for Nonjury Trial; and Motion for Protective Order ("Motion to Stay") (R. 127), and this Court should

reverse the order denying their Motion to Stay (R. 1) and the order (R. 4) denying their Motion to Alter or Amend (R. 304)

Thank you for your kind consideration.

Sincerely yours,

A. Todd Darwin

ATD/sam

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CERTIFICATE OF SERVICE

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

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