THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2019-001536

Lower Court Case No. 2019-CP-07-00433

Viola M. Hackworth, as Personal Representative of the Estate of Eugene Boles a/k/a Eugene N. Boles, deceased, ...Respondent,

v.

Bayview Manor, LLC d/b/a Bayview Manor, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations,..................................Appellants.

RESPONDENT'S PETITION FOR REHEARING

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@theconnorfirm.com

Attorneys for Respondent

ARGUMENT FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Respondent Viola M. Hackworth, as Personal Representative of the Estate of Eugene Boles, petitions this Court for rehearing of the Court's decision in *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, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations*, 2023-UP-096 (S.C. Ct. App. filed March 15, 2023). Respondent submits that the Court misapprehended the law or overlooked the evidence when it reversed the trial court's order denying Appellants' motion to compel arbitration. Respondent respectfully requests the Court reconsider its decision for the reasons stated in its briefs and oral argument, as well as the following reasons:

I. The Court Erred in Finding that the Admission Agreement was a Valid Agreement Containing an Enforceable Arbitration Provision.

The Court made two general holdings regarding the arbitration provision in the admission agreement – (1) Ms. Hackworth and Bayview Manor formed a valid contract, i.e. the Admission Agreement and (2) the arbitration provision from the Admission Agreement is an enforceable agreement to arbitrate. Both holdings are factually and legally incorrect.

Respondent has maintained that no credible evidence exists in the record to confirm the existence of a valid agreement. The Court's opinion suggests there is no dispute that Ms. Hackworth signed the Admission Agreement asserted by Appellants. However, Respondent has repeatedly asserted that the evidence in the record from Appellants falsely states that Ms. Hackworth entered into an Admission Agreement on the day of Mr. Boles' admission of November 2, 2015. (R. pp. 214-215, 329: lines 16-18). The Affidavits from Appellants employees and the purported Admission Agreement itself state that Ms. Hackworth signed such agreement on a date when she was not present at Bayview Manor, or even present in the state of South Carolina. (R.

pp. 130-142, 143-201). Appellants refused Respondent's requests to discovery on this matter, and failed to create any record to establish a valid contract was entered into. (R. p. 205-260).

Further, there is evidence in the record that the Admission Agreement was to be "disregarded". (R. pp. 309, 330: line 10, 331: line 7). The circuit court found no valid contract because there was no credible evidence for which the court could rely to find the existence of a valid contract; thus, the court was precluded from compelling arbitration. This Court's opinion misstates the uncontroverted facts in the Record on Appeal and disregards the "any evidence" standard of review that applies to the circuit court's factual findings in this case. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 3 (2016).

Further, the Court does not address Respondent's argument that the arbitration provision from the Admission Agreement is unlawful. The Court held "as long as the arbitration provision is valid, it must be enforced." However, the arbitration provision violates the law. 42 C.F.R. § 483.70(n) establishes that if a facility chooses to ask a resident or his or her representative to enter into an agreement for binding arbitration, the facility must comply with six requirements.

> (1) The facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility and must explicitly inform the resident or his or her representative of his or her right not to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility.
>
> (2) The facility must ensure that:
> (i) The agreement is explained to the resident and his or her representative in a form and manner that he or she understands, including in a language the resident and his or her representative understands;
> (ii) The resident or his or her representative acknowledges that he or she understands the agreement;
> (iii) The agreement provides for the selection of a neutral arbitrator agreed upon by both parties; and
> (iv) The agreement provides for the selection of a venue that is convenient to both parties.

(3) The agreement must explicitly grant the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it.

(4) The agreement must explicitly state that neither the resident nor his or her representative is required to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility.

(5) The agreement may not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials, including but not limited to, federal and state surveyors, other federal or state health department employees, and representatives of the Office of the State Long-Term Care Ombudsman, in accordance with § 483.10(k).

(6) When the facility and a resident resolve a dispute through arbitration, a copy of the signed agreement for binding arbitration and the arbitrator's final decision must be retained by the facility for 5 years after the resolution of that dispute on and be available for inspection upon request by CMS or its designee.

42 C.F.R. § 483.70(n).

Clearly, a number of these requirements are not satisfied by the arbitration provision in the Admissions Agreement. The facility must explicitly inform residents or their representatives of the right to not sign the agreement as a condition of admission, or as a requirement to continue to receive care at the facility, and the arbitration agreement itself must expressly state the same. 42 C.F.R. § 483.70(n)(1). The Court held that the consideration Respondent received was the Appellants' agreement to the arbitration provision. However, this finding is directly controverted by Appellants in the record. When asked by the circuit court judge what the consideration was, Appellants' counsel stated, "The consideration is the services provided by the facility. We're going to give you room and board." (R. pp. 323, lines 19-24). Appellants cannot on one hand argue that the care and services at the facility were not contingent on the arbitration provision but on the other hand argue that admission and continued care and services was a valuable consideration for the agreement.

The facility must also ensure that the resident or his or her representative acknowledges that he or she understands the arbitration agreement, and the agreement must explicitly grant the resident or his representative the right to rescind the agreement within 30 days. 42 C.F.R. § 483.70(n)(2)(ii) and (3). These requirements are clearly not found in the arbitration provision in the Admission Agreement, making the arbitration provision unlawful. Respondent preserved this challenge based on statutory grounds in her brief, and argued the unlawfulness of the provision when asked about the Admission Agreement in oral argument. Respondent acknowledges that she may not have argued this point as loudly as others, but she has maintained throughout briefing and arguments at the circuit court, and before this Court, that the arbitration provision of the Admission Agreement is invalid and unenforceable. (R. pp. 207, footnote 2, 328: line 1-2, 330: lines 19-25, 331: lines 1-7). The general rule, well established in South Carolina, is that courts will not enforce an illegal contract, or a contract that violates public policy as expressed in constitutional provisions, statutes, or judicial decisions. *Berkebile v. Outen*, 311 S.C. 50, 53-54, 426 S.E.2d 760, 762 (1993); *Batchelor v. American Health Ins. Co.*, 234 S.C. 103, 107 S.E.2d 36 (1959). Respondent did not focus her brief on this issue, because it is absolutely clear the arbitration provision in the Admission Contract is violative of the Federal regulations governing nursing homes who participate in Medicare.

For these reasons, and those stated in Respondent's brief and at oral argument, Respondent requests the Court grant the petition for rehearing and hold that there was no valid and/or enforceable agreement to arbitrate.

II. The Court Erred in Finding Respondent Viola M. Hackworth had authority to execute a pre-dispute arbitration agreement.

This Court's finding of authority is based on a misinterpretation of the language and context of the power of attorney at issue.

A review of the full language and context of the power of attorney shows that it did not confer authority to agree to arbitration. To avoid repetition, Respondent refers the Court to its Letter Brief addressing the impact of *Arrendondo v. SNH SE Ashley River Tenant, LLC et al.*, 433 S. C. 69, 856 S.E.2d 550 (Dec. 6, 2021). At the most general level, Article I provides Ms. Hackworth discretion with respect to Mr. Boles' property, real or personal. Under the holding in *Arredondo*, this discretion does not apply to a property right that did not exist at the time Ms. Hackworth allegedly signed the Admission Agreement. *Arredondo, at 78, 555.* The powers conferred in Section A as to Mr. Boles' "estate, property, and affairs" must be considered in light of the broad statement regarding Ms. Hackworth's powers under Article I. The power described is not indicative of the intention to grant authority to enter into an arbitration agreement waiving Mr. Boles' constitutional rights.

For these reasons, and those stated in Respondent's Letter Brief and at oral argument, Respondent request the Court grant the petition for rehearing and hold that the power of attorney did not confer authority for Ms. Hackworth to execute the arbitration provision in the Admission Agreement or the Arbitration Agreement.

CONCLUSION

For the reasons set forth herein, in Respondent's Brief, Respondent's Letter Brief, and at oral argument, the Court should grant the petition for rehearing and reconsider its decision. Respondent requests the Court affirm the circuit court's order denying Appellant's motion to compel arbitration and remand the case to proceed in circuit court. Alternatively, Respondent requests the Court to remand the case to circuit court to proceed with discovery on the arbitration issue, as originally requested by Respondent and refused by Appellant.

This the 28th day of March, 2023.

Respectfully submitted,

s/ Anne K. Moore
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@theconnorfirm.com

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that this the 28th day of March, 2023, I have caused to be served a copy of this Petition for Rehearing 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

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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

s/ Anne K. Moore
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@theconnorfirm.com

Attorneys for Respondent

CONNOR & CONNOR, LLC

TRIAL LAWYERS

www.TheConnorFirm.com

March 28, 2023

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Via FEDEX

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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

Dear Ms. Kitchings:

The undersigned counsel for Respondent emailed her Petition for Rehearing for filing to ctappfilings@sccourts.org today. Respondent encloses a copy of that filing as well as the $50 filing fee.

By copy of this letter, I am serving all counsel of record with a copy of the same. If you have any questions, please do not hesitate to contact me. Thank you.

With kind regards,

CONNOR & CONNOR, LLC

Anne K. Moore

Enclosures

cc: A. Walker Barnes
A. Todd Darwin

302 PARK AVE SE • AIKEN, SOUTH CAROLINA 29801 • 803.226.0543
1.800.480.9715 (f)

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Express

FROM:
C. Caleb Connor
Christopher Connor
302 PARK AVE SE
AIKEN SC 29801
US

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ACTWGT: 1.00 LB

BILL SENDER

TO The Honorable Jenny A. Kitchings
Clerk of Court / Court of Appeals
1220 Senate Street

COLUMBIA SC 29201
(803) 226-0543

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