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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
Supreme Court

APPEAL FROM BEAUFORT COUNTY
Edgar W. Dickson, Circuit Court Judge

Opinion No. 2023-UP-096
Heard October 3, 2022 – Filed March 15, 2023

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

v.

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

APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Appellate Case No. 2019-001536

Appeal From Beaufort County
Edgar W. Dickson, Circuit Court Judge

Unpublished Opinion No. 2023-UP-096
Heard October 3, 2022 – Filed March 15, 2023

REVERSED AND REMANDED

A. Todd Darwin, of Holcombe Bomar, P.A., and A. Walker Barnes, of Boulier Thompson & Barnes, LLC, both of Spartanburg, for Appellants.

Kenneth Luke Connor, Christopher Caleb Connor, and Anne Katharine Moore, all of Connor & Connor LLC, and Allen Keith McAlister, Jr., of Hawk Law Group, all of Aiken, for Respondent.

PER CURIAM: In this wrongful death action, Viola Hackworth, as personal representative of the estate of Eugene Boles (the Estate), sued Bayview Manor, LLC, a nursing home, and several of its affiliates: Epic MGT, LLC; Epic Group, LP; Teddie Simmons, the nursing home administrator; John Does; and Richard Roe Corporations (collectively, Bayview Manor) for damages. Bayview Manor moved to compel arbitration, and the motion was denied. Bayview Manor now appeals the order denying its motion to compel arbitration, or in the alternative, for a non-jury trial. We reverse and remand for arbitration.

I.

In October 2012, Boles executed and recorded an agreement giving his sister, Hackworth, a general durable power of attorney over his affairs. In 2015, Boles suffered a stroke and, as a result, required full-time nursing care. On November 2, 2015, Boles was transferred to Bayview Manor for continued care and treatment. A little over a year later, on December 14, 2016, Boles was found unresponsive by staff at Bayview Manor and was transported by EMS to Beaufort Memorial Hospital. He passed away later that day. It is alleged that, while at Bayview Manor, Boles suffered neglect, malnutrition, and severely infected pressure sores, which ultimately led to his death.

Hackworth, in her capacity as personal representative to the Estate, filed this wrongful death action against Bayview Manor. Bayview Manor filed both an answer and a motion to compel arbitration, or, in the alternative, for a non-jury trial. The motion to compel arbitration alleged that, at the time of Boles' admission to Bayview Manor, Hackworth signed and executed an Admission Agreement, containing an arbitration provision, as well as a separate Arbitration Agreement. In support of the motion, Bayview Manor attached both agreements, as well as affidavits from Christy Drinkard, the administrator at Bayview Manor in charge of business records, and Lucy Caruso, the admissions director at the time of Boles' admission. Caruso's affidavit stated she met with Hackworth on both November 2 and 3, 2015, she explained both agreements to Hackworth, and Hackworth signed them. Drinkard's affidavit stated Hackworth signed the Admission Agreement on the day Boles was admitted.

The Admission Agreement was a ten-page contract that contained the terms of Bayview Manor's administration of care to Boles; arrangement for payment for Boles' care; a waiver of jury trial provision; and an "Optional Arbitration Clause,"

which stated in its entirety:

> **Optional Arbitration Clause:** Any action, dispute, claim or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims of violations of Resident's Rights) now existing or hereafter arising between the parties, in anyway [sic] arising from or relating to this Agreement governing the Resident's stay at the Facility, shall be resolved by binding arbitration. Such binding arbitration shall be governed by the provisions of the South Carolina Arbitration Code. As appropriate and in the event that the South Carolina Arbitration Code is deemed to not apply, binding arbitration shall be governed by the Federal Arbitration Act. **OPTIONAL: If the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only. I have X this clause ___ initial.**

(Emphasis in original). The opt-out blank was not marked. The Admission Agreement was signed by Caruso, Hackworth, and Clifford Byars (Boles' brother). Each signature was dated November 2, 2015. The separate Arbitration Agreement was signed by Hackworth and Caruso. In the first paragraph of the Arbitration Agreement, the two spaces for the names of the parties to be written by hand remained blank—without either Bayview Manor or Boles inserted as named parties. Hackworth and Caruso's signatures were dated November 3, 2015.

In its memorandum opposing Bayview Manor's motion to compel arbitration, the Estate alleged Caruso's and Drinkard's affidavits contained false representations. Specifically, the Estate asserted Hackworth was not present at Bayview Manor on November 2 or 3, 2015, but was in Florida where she resided. The Estate claimed Hackworth did not arrive at Bayview Manor until November 6, 2015—and, in support, the Estate attached Hackworth's affidavit describing her travel itinerary, as well as a copy of her bank statement showing her travel expenditures. The Estate argued because the motion to compel arbitration was supported by fraudulent affidavits, it should be denied and Bayview Manor should be sanctioned under Rule 11, SCRCP.

Bayview Manor asserted the Estate did not dispute or deny that: 1) Hackworth was Boles' attorney-in-fact; 2) she was involved in the process to admit Boles to Bayview Manor; or 3) she signed both the Admission Agreement and the Arbitration

Agreement. Bayview Manor claimed, therefore, that both the arbitration provision from the Admission Agreement and the Arbitration Agreement were valid contracts, and each bound the Estate to arbitrate just the type of lawsuit at issue here.

At the motion to compel hearing, Bayview Manor acknowledged the dates on the two agreements were allegedly incorrect but argued the dates were not material to whether a contract was formed because there was no dispute Hackworth did, in fact, sign the two agreements. The circuit court took the matter under advisement and, later, issued a Form 4 order denying the motion to compel arbitration.

Bayview Manor's reconsideration motion, seeking rulings on each of its arguments from the memorandum in support of the motion to compel, was denied in another Form 4 order. This appeal follows.

II.

We hold there is no dispute that Hackworth, with Boles' power of attorney, and Bayview Manor entered into the Admission Agreement, which contained an enforceable arbitration provision. Accordingly, we reverse the circuit court's order and remand for arbitration.

1. We hold the October 2012 general durable power of attorney agreement gave Hackworth the authority to enter into an arbitration agreement on Boles' behalf. *See Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69, 75, 856 S.E.2d 550, 553–54 (2021) (stating regular contract principles are used when reviewing power-of-attorney agreements and when the language of an agreement granting a power of attorney is unambiguous, it alone determines the force and effect of the agreement). The October 2012 power-of-attorney agreement gave Hackworth the power "[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." This broad language is unambiguous, and it allowed Hackworth to bind Boles to arbitration. *See Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246, 249, 256 (2017) (finding the broad language of a power-of-attorney agreement, which stated the attorney-in-fact had "'full power . . . to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way,' including the power to 'draw, make, and sign in my name any and all . . . contracts, deeds, or agreements,'" gave the attorney-in-fact authority to enter into an arbitration agreement); *Arredondo*, 433 S.C. at 75–76, 856 S.E.2d at 554 (explaining that, under the "Equal Footing Provision" of the FAA, the language in a power of attorney agreement need not

explicitly reference arbitration in order to be found broad enough to allow an attorney-in-fact to enter into a binding arbitration agreement).

2. We hold Hackworth and Bayview Manor formed an arbitration agreement when they signed the Admission Agreement. Both the South Carolina Arbitration Act and the Federal Arbitration Act (FAA) mandate that when there is an arbitration agreement between two parties, but one party disregards the agreement, the other may move for the court to compel arbitration in the manner provided for in the agreement. 9 U.S.C.A. § 4 (2018); S.C. Code Ann. § 15-48-20(a) (2005). A hearing is then held on the motion, and if the court is satisfied that the "making" of a valid arbitration agreement is "not in issue," it will direct the parties to arbitration. 9 U.S.C.A. § 4; S.C. Code Ann. § 15-48-20(a). If a party denies the existence of an arbitration agreement, and the circuit court finds there is a bona fide dispute regarding whether an arbitration agreement was formed, then "the court shall proceed summarily to the trial" to determine if a valid arbitration agreement was formed. 9 U.S.C.A. § 4; S.C. Code Ann. § 15-48-20(b) (2005). This provision is known as the "Trial Provision." *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234 (4th Cir. 2019). When a court is deciding whether there is a bona fide dispute regarding the "making" of the arbitration agreement, the court "is obliged to employ a standard such as the summary judgment test." *Id.*; *see also* 9 U.S.C.A. § 4; S.C. Code Ann. § 15-48-20(b). "The party resisting arbitration bears the burden of showing an entitlement to a jury trial under the FAA and must produce some evidence to substantiate the allegations that the prevailing law would release him from a contractual obligation to arbitrate." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 38 n.3, 524 S.E.2d 839, 844 n.3 (Ct. App. 1999). When a party signs a contract, he or she owes a duty to the other party to read the document and learn its contents. *Id.* at 39, 524 S.E.2d at 845. Accordingly, under this duty, when there is no dispute a party has signed an agreement, there can generally be no bona fide dispute he or she is aware of all terms in the agreement. *See id* at 39–40, 524 S.E.2d at 845.

Hackworth did not deny she signed the Admission Agreement, and she did not check the opt-out box of the arbitration provision from the Admission Agreement. Therefore, in this case, the accuracy of the date next to the signatures on the Admission Agreement is immaterial to whether Hackworth formed an agreement with Bayview Manor. Hackworth's signature demonstrates she understood the contents of the Admission Agreement, and the absence of a mark in the arbitration provision's opt-out box demonstrates she assented to be bound by it. *See Simmons v. Benson Hyundai, LLC*, 438 S.C. 1, 7, 881 S.E.2d 646, 649 (Ct. App. 2022) (stating that, under South Carolina law, a contract is formed when there is a meeting of the

minds between the parties as to all essential and material terms, as well as a manifestation of a mutual intent to be bound to those terms).

Further, we find nothing in the language of the arbitration provision demonstrates lack of mutuality. Each party agreed in the arbitration provision to arbitrate claims, which is adequate consideration. *See O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) ("A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement."). Because there is no bona fide dispute of fact regarding whether Hackworth manifested an intent to be bound by the arbitration provision of the Admission Agreement, we hold Hackworth did not meet her burden of proving "the making" of the arbitration agreement within the Admission Agreement is "in issue." *See Towles*, 338 S.C. at 39–40, 524 S.E.2d at 845 (finding employee's signature on the acknowledgement form of an arbitration agreement gave rise to only one inference: that the employee understood the terms of the agreement; therefore, the the Trial Provisions from the FAA and the South Carolina Arbitration Act were not triggered). Accordingly, as long as the arbitration provision is valid, it must be enforced.

3. We find the arbitration provision from the Admission Agreement is valid. Under the "separability" doctrine of *Prima Paint*, we must consider validity challenges specific to the arbitration provision, and in doing so, must separate the arbitration provision from the remainder of the Admission Agreement. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967). We find nothing in the language of the arbitration provision demonstrates unconscionability. The arbitration provision was optional and contained a bolded opt-out box; accordingly, Hackworth, acting as Boles' attorney-in-fact, had a meaningful choice in deciding to enter into the arbitration provision. *Cf. Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 611–17, 879 S.E.2d 746, 755–58 (2022) (explaining an arbitration provision is unconscionable when a party has no meaningful choice when entering into it or it is so one-sided as to be oppressive). Further, there is nothing in the language of the arbitration provision from the Admission Agreement that demonstrates one-sided or oppressive terms. *Cf. id*. Finally, to the extent there are any other challenges to the enforceability of the arbitration provision of the Admission Agreement, we find they have been abandoned on appeal. *See* Rule 208(b)(1)(D), SCACR (stating an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) (providing where an issue is not argued within the body of the brief but is only

a short, conclusory statement, it is abandoned on appeal).[1] We therefore hold the arbitration provision from the Admission Agreement is enforceable.

4. To the extent the circuit court denied Bayview Manor's motion to compel as a sanction under Rule 11, SCRCP, this was error. Rule 11, SCRCP, is a rule designed to foster attorney responsibility and to deter litigation abuse. *See Kovach v. Whitley*, 437 S.C. 261, 263–65, 878 S.E.2d 863, 864–65 (2022) (emphasizing purpose of Rule 11, SCRCP). Next, an attorney being accused of a Rule 11, SCRCP, violation must be given notice and an opportunity to be heard on the accusation before a sanction may be imposed. *Burns v. Universal Health Servs. Inc.*, 340 S.C. 509, 514, 532 S.E.2d 6, 9 (Ct. App. 2000). If a court then, in its discretion, determines a sanction should be imposed, the court "should, in its order, describe the conduct determined to constitute a violation of the Rule and explain the basis for the sanction imposed." *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). In the Form 4 order denying the motion to compel arbitration in this case, the circuit court did not recite any reason Bayview Manor or its attorney should be sanctioned. Accordingly, we find Rule 11, SCRCP, was not the basis of the motion's denial, nor would a denial of the motion have been an appropriate sanction if it was found Bayview Manor or its attorney had violated Rule 11, SCRCP. *See id.* (stating sanctions under Rule 11, SCRCP, may include "an order to pay the reasonable costs and attorney's fees incurred by the party or parties defending against the frivolous action or action brought in bad faith, a reasonable fine to be paid to the court, [a] directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future frivolous action or action in bad faith[, or] if appropriate under the facts of the case, the court may order a party and/or the party's attorney to pay a reasonable monetary penalty to the party or parties defending against the frivolous action or action brought in bad faith").

5. Because we remand this case for arbitration under the arbitration provision from the Admission Agreement, we need not consider the remainder of Bayview Manor's issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598,

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[1] We note there has been no citation to law at any point in the procedural history of this case regarding the lack of statutory authority to bind a wrongful death beneficiary to an arbitration agreement, and accordingly, we decline to address the issue on the merits. Rule 208(b)(1)(D), SCACR (stating an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal). However, we also note that "courts may not refuse to compel arbitration simply because a wrongful death claim is involved." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 378 n.3, 759 S.E.2d 727, 731 n.3 (2014).

613, 518 S.E.2d 591, 598 (1999) (stating a court need not address remaining issues when another issue is dispositive).

REVERSED AND REMANDED.

GEATHERS and MCDONALD, JJ., and HILL, A.J., concur.

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THE STATE OF SOUTH CAROLINA
In the 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

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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

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Mar 28 2023
SC Court of Appeals

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.

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The South Carolina Court of Appeals

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.

Appellate Case No. 2019-001536

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ A.J.

Columbia, South Carolina

cc:

FILED
Jun 05 2023

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The Honorable Edgar W. Dickson

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Case No. 2019-CP-07-00433
Appellate Case No. 2019-001536

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.

APPELLANTS' FINAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

I. Whether the Trial Court erred in failing to order arbitration because Mrs. Hackworth was Mr. Boles' attorney-in-fact and had authority under basic contract principles to enter into the Admission Agreement containing the arbitration provision.

II. Whether the Trial Court erred in failing to order arbitration because Mrs. Hackworth and Mr. Byars each independently had authority to bind Respondent to the arbitration provision pursuant to the Adult Health Care Consent Act because the arbitration provision was contained within the Admission Agreement.

III. Whether the Trial Court erred in failing to order arbitration because Respondent is equitably estopped from asserting claims founded in duties arising out of the Admission Agreement while simultaneously attempting to disclaim the arbitration provision contained within the Agreement.

IV. Whether the Trial Court erred in failing to order arbitration because Mr. Boles was the intended and direct beneficiary of the Admission Agreement containing the arbitration provision.

V. Whether the Trial Court erred in failing to order arbitration pursuant to the Federal Arbitration Act because Mrs. Hackworth had authority to enter the Admission Agreement and Respondent's claims fall within the scope of the arbitration provision.

VI. Whether the Trial Court erred in failing to order arbitration because the Admission Agreement and the Facility Binding Arbitration Agreement merged.

STATEMENT OF THE CASE

On March 1, 2019, Viola M. Hackworth ("Mrs. Hackworth") as Personal Representative of the Estate of Eugene Boles a/k/a Eugene N. Boles ("Respondent") filed a Summons and Complaint against Bayview Manor, LLC d/b/a Bayview Manor ("Bayview Manor"), Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations (collectively, "Appellants"). (R. pp. 7 – 59) Respondent alleged in her Complaint that Appellants provided care in 2015-2016 to Eugene Boles a/k/a Eugene N. Boles ("Mr. Boles") which fell below the standard of care. Appellants timely answered on April 8, 2019, denying liability. (R. pp. 119 – 126)

On April 8, 2019, Appellants filed a Notice of Motion and Motion to Stay Action and

Compel Arbitration; in the Alternative Motion for Nonjury Trial; and Motion for Protective Order ("Motion") (R. pp. 127 – 201) The Motion was based on the terms and provisions found in the Admission Agreement ("Admission Agreement") and the Resident and Facility Binding Arbitration Agreement ("Arbitration Agreement"). (R. pp. 278 – 292)

On June 7, 2019, Appellants filed a memorandum of law in support of their Motion. (R. pp. 261 – 303) On June 11, 2019, The Honorable Edgar W. Dickson (the "Trial Court") heard the Motion. (R. pp. 316 – 340) By Form 4 Order dated and filed July 26, 2019, the Trial Court denied the Motion. (R. pp. 1 – 3) On August 5, 2019, Appellants filed a Notice of Motion and Motion to Alter or Amend. (R. pp. 304 – 306) By Form 4 Order dated and filed August 20, 2019, the Trial Court denied the Motion to Alter or Amend. (R. pp. 4 – 6) On September 9, 2019, Appellants filed their Notice of Appeal. (R. pp. 314 – 315)

STATEMENT OF THE FACTS

On October 3, 2012, Mr. Boles executed a General Durable Power of Attorney ("Power of Attorney") appointing his sister Mrs. Hackworth as his attorney-in-fact. (R. pp. 77 – 88) Mr. Boles' Power of Attorney was recorded in the Beaufort County Probate Court on October 10, 2012 and specifically gave Mrs. Hackworth the power to "establish where [Mr. Boles] shall reside, including the exact physical location, and the city, county, and state of residence and, if necessary, to make all necessary arrangements for [Mr. Boles] at any hospital, convalescent institution nursing home or similar establishment… ." (R. p. 166, Section D.1)

On November 2, 2015, after suffering a stroke in October 2015, Mr. Boles was admitted to Bayview Manor, a skilled nursing home facility. As a part of the admissions process, Mrs. Hackworth and Mr. Boles' brother Clifford Byars ("Mr. Byars") each initialed and signed the Admission Agreement. (R. pp. 278 – 289) Mrs. Hackworth initialed and signed the Arbitration

Agreement.

The Admission Agreement contained an arbitration clause which required the arbitration of any action, dispute, claim or controversy of any kind. (R. pp. 278 – 289) The arbitration clause provided:

> **Optional Arbitration Clause:** Any action, dispute, claim or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims or violations of Resident's Rights) now existing or hereafter arising between the parties, in anyway arising from or relating to this Agreement governing the Resident's stay at the Facility, shall be resolved by binding arbitration. Such binding arbitration shall be governed by the provisions of the South Carolina Arbitration Code. As appropriate and in the event that the South Carolina Arbitration Code is deemed to not apply, binding arbitration shall be governed by the Federal Arbitration Act. **OPTIONAL: If the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only. I have X this clause ___ initial.** (emphasis in original).

(R. p. 289) No X was marked to void the Arbitration Clause.

The Arbitration Agreement states that "any legal dispute, controversy, demand or claim . . . shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the Federal Arbitration Act." (R. p. 291, paragraph 1)

Lucy Caruso, Admissions Director of Bayview Manor at the time, executed the Admission Agreement and Arbitration Agreement on behalf of Bayview Manor. (R. pp. 278 – 292, 299 – 303)

STANDARD OF REVIEW

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (internal citations omitted). "Determinations of arbitrability are subject to de novo

review, but if any evidence reasonably supports the circuit court's factual findings, [the appellate] court will not overrule those findings." Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012). Because federal and state policy favor arbitrating disputes, all doubts regarding the scope of an arbitration clause must be resolved in favor of arbitration. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004).

ARGUMENT

I. The Trial Court improperly denied Appellants' Motion because Mrs. Hackworth was Mr. Boles' attorney-in-fact and had authority under basic contract principles to enter into the Admission Agreement containing the arbitration provision.

The Trial Court erred in finding that Mr. Boles' attorney-in-fact lacked authority to bind Mr. Boles' estate to the arbitration provisions contained in the Admission Agreement pursuant to basic contract principles. A 2017 United States Supreme Court opinion, Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1424–29, 197 L. Ed. 2d 806 (2017), supports Appellants' position that the Trial Court's ruling must be reversed. In the context of alleged nursing home negligence, the Kindred lower courts – like the Trial Court in this case – declined to uphold arbitration clauses that were executed by attorneys-in-fact on behalf of their nursing home resident relatives. The U.S. Supreme Court overturned the lower state court rulings, in large part, on the basis that a nursing home resident's power of attorney generally is permitted to enter into an arbitration agreement on behalf of their relative/principal.

As was the case in Kindred, Mr. Boles' power of attorney:

- designated an attorney-in-fact (Mrs. Hackworth);
- afforded the attorney-in-fact broad authority to manage the affairs of the principal; and
- gave the attorney-in-fact authority to institute legal proceedings and enter into contracts.

(R. pp. 77, 78, 80 – 83)

Like this case, the Kindred arbitration clauses provided that "[a]ny and all claims or controversies arising out of or in any way relating to ... the Resident's stay at the Facility" would be resolved through "binding arbitration" rather than a lawsuit. Id., 137 S. Ct. at 1425. A court may invalidate an arbitration agreement based on "generally applicable contract defenses" like fraud or unconscionability, but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).

Like the Kindred lower court, the Trial Court must be overturned because of the existence of Mr. Boles' valid power of attorney and the attorney-in-fact's decision to enter into a valid contract on behalf of Mr. Boles.

II. The Trial Court improperly denied Appellants' Motion because Mrs. Hackworth and Mr. Byars each independently had authority to bind Respondent[1] to the arbitration provision pursuant to the AHCCA because the arbitration provision was contained within the Admission Agreement.

The Trial Court also erred in finding that Mrs. Hackworth (as Mr. Boles' attorney-in-fact and sister) and/or Mr. Byars (as Mr. Boles' brother) lacked authority to bind Mr. Boles' estate to the arbitration provisions contained in the Admission Agreement pursuant to the South Carolina's Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10, et seq. ("AHCCA").

[1] Throughout this brief, when Appellants state that the Admission Agreement and/or Arbitration Agreement bind(s) Respondent, Appellants refer to Respondent's claims on behalf of Mr. Boles' Estate because the Estate stands in the shoes of Mr. Boles, and on behalf of his wrongful death beneficiaries because the beneficiaries claims are derivative claims. See, e.g., Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 347, 699 S.E.2d 143, 145 (2010) ("[O]ur law has remained steadfast to the principle of limiting the right of recovery under the wrongful death statute to those cases in which the party injured would have been entitled to recover if death had not ensued.").

The AHCCA defines "health care" as including intermediate or skilled nursing care. S.C. Code Ann. § 44-66-20(1). It also specifically includes "the placement in or removal from a facility that provides these forms of care." Id. A party may consent to health care on behalf of a patient if the patient is deemed unable to consent to treatment after two licensed physicians have examined the patient and certify an inability to consent. S.C. Code Ann. § 44-66-20(8). An attorney-in-fact / adult sister and an adult brother each are independently authorized to consent to health care on behalf of a patient pursuant to the AHCCA. S.C. Code Ann. § 44-66-30(A)(2) and (A)(6).

Pursuant to Section 44-66-20(8), Bayview Manor appropriately determined Mr. Boles was unable to make health care decisions on his own behalf. At the time of his admission to Bayview Manor, Bayview Manor was aware that Mr. Boles had, *inter alia*, a history of stroke, left side hemiparesis, dementia, cognitive/memory deficits, impaired speech, and severe confusion. (R. pp. 294 – 297 (paragraph 15), 300 – 301 (paragraph 6)) Respondent has not disputed in any filing or at oral argument before the Trial Court that Mr. Boles was unable to make health care decisions on his own behalf at the time of his admission to Bayview Manor.

Pursuant to Section 44-66-30 of the South Carolina Code, Mrs. Hackworth (as Mr. Boles' attorney-in-fact and sister) and Mr. Byars (as Mr. Boles' brother) each had statutory authority to act as an agent on Mr. Boles' behalf in making "health care" decisions, which included placing him at Bayview Manor and executing all paperwork on Mr. Boles' behalf associated with his placement in Bayview Manor. Accordingly, the Admission Agreement, including the arbitration provision, is binding on Respondent.

The South Carolina Supreme Court's reasoning in Coleman v. Mariner Health Care, et al., 407 S.C. 346, 755 S.E.2d 450 (2014) supports Appellants' position in this case. The Coleman Court considered whether a sister of a nursing home resident could bind the resident to an

arbitration agreement at the time of admission. The sister signed several documents relating to the admission of her sister, Mary Brinson, to a nursing home in Florence, South Carolina. Ms. Brinson was unable to consent within the meaning of the AHCCA. Included within these documents signed by the sister was an arbitration agreement that was separate from the Admission Agreement.

Examining the impact of the AHCCA, the Court noted that the sister was authorized to make decisions concerning Ms. Brinson's "heath care," which, under Section 44-66-20(1) of the South Carolina Code, includes "a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin...also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled, or sick persons; and the placement in or removal from a facility that provides these forms of care." Id. at 351-52, 755 S.E.2d at 453. Based upon this statutory grant of authority, the Court reasoned that the AHCCA gave the sister two types of authority: (1) she could consent on Ms. Brinson's behalf to the provision or withholding of medical care including placement in a facility which provided such care, and (2) she could make certain financial decisions on behalf of her sister. Id.

The Court found that the sister's authority to consent to decisions concerning the resident's health care extended to all terms contained within the admission and financial agreement which was the basis upon which the nursing home agreed to provide health care, and under which the sister agreed to pay the nursing home. Id. at 353-54, 755 S.E.2d at 454. Because the arbitration agreement *was a separate document from the admission and financial agreement*, did not contain any provisions regarding medical, nursing, or health care services, and did not require any financial commitment to pay for such services, the Court reasoned that the sister did not have authority pursuant to the AHCCA to bind the resident to the arbitration agreement.

Unlike Coleman, the arbitration provision which Appellants seek to enforce is contained

within the Admission Agreement and is not a separate agreement. The Admission Agreement, pursuant to which Mr. Boles was admitted to Bayview Manor, contained the terms under which Bayview Manor would provide long term care health services to Mr. Boles and how those services would be paid for. For instance, it was agreed that Bayview Manor would provide care and treatment according to practice, policy and physician orders (R. p. 64); a physician would be chosen to provide care to Mr. Boles in the facility (R. p. 64); and Mr. Boles would be responsible to ensure payment was made to the facility for his care under such clauses as Basic Charges, Supplemental Charges, Medical Supplies, and Pharmacy Services (R. pp. 67 – 68)

Thus, unlike the situation in the Coleman case in which there were separate contracts involving (1) the health care services to be provided to the resident and how those services were to be paid for, and (2) the agreement to arbitrate any disputes, all those provisions are contained within the Admission Agreement signed by Mrs. Hackworth and Mr. Byars in the case at bar. Therefore, applying the reasoning set forth in Coleman, the AHCCA empowered both Mrs. Hackworth and Mr. Byars to sign the Admission Agreement on behalf of Mr. Boles and to bind Respondent to all provisions of that contract, including the arbitration provision.

III. The Trial Court improperly denied Appellants' Motion because Respondent is equitably estopped from asserting claims founded in duties arising out of the Admission Agreement while simultaneously attempting to disclaim the arbitration provision contained within the Agreement.

The Admission Agreement serves as the foundation upon which Bayview Manor agreed to provide the care and treatment to Mr. Boles which now is at issue in this lawsuit. Respondent is equitably estopped from suing Appellants for breaches of duties arising out of the Admission Agreement while trying to repudiate the arbitration provision contained in the very same contract.

The doctrine of equitable estoppel "exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the

contract, namely the contractual arbitration provision." Southern Ill. Beverage, Inc. v. Hansen Beverage Co., 2007 WL 3046273 at *11 (S.D. Ill. 2007). The Fourth Circuit has held that "no party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein." U.S. v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001); see also Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act." (internal citation omitted)). It would be manifestly inequitable to permit a party to claim the other has failed to perform on its contractual obligations, while at the same time allowing that party to avoid the arbitration provisions of the contract upon which the party bases its claims, when such claims are in the scope of the arbitration provisions. Hughes Masonry Co. v. Greater Clark County School Bldg. Corp., 659 F.2d 836, 838-39 (7th Cir. 1981). In other words, a plaintiff cannot "have it both ways" by relying upon certain terms of the Admission Agreement when it works to her advantage and repudiating others when it works to her disadvantage. Id.

In THI of South Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. 2011), the United States District Court of South Carolina addressed this issue directly. In that case, a daughter executed an admissions contract containing an arbitration clause for the admission of her father into a nursing home. After a dispute arose, the nursing home moved to compel arbitration. The daughter countered by arguing the admissions contract was unenforceable because there was nothing in the record to indicate she had authority to act as agent for her father, to legally bind her father, or to waive her father's right to a jury trial. One of the nursing home's arguments in response was that the daughter, as personal representative of her father's estate, was estopped from

denying the contract formation. Id. at *5.

The court noted that it was undisputed that the contract was signed by one of the father's immediate family members for the purpose of obtaining residential care for him at the facility. After the contract was executed, the father became a resident and received the benefits provided for under the admissions contract. The court further held that because the nursing home performed in reliance on the terms of the admissions contract and the father received benefits under the admissions contract, it would be inequitable for the father's estate to void the arbitration provision within the admissions contract. The court ruled that the father's estate was equitably estopped from disclaiming the enforceability of the admissions contract and the arbitration provision contained therein. Id. at *6.

The above authorities are directly on point. The Admission Agreement served as the foundation for Mr. Boles' admission to Bayview Manor and the duties and obligations which Mr. Boles and Bayview Manor had to one another. Bayview Manor agreed to provide Mr. Boles with care and treatment, and Mr. Boles agreed to pay for the care and treatment. Without the Admission Agreement, there would have been no relationship between the parties.

All of Respondent's claims in the instant case are dependent on the duties which arise from the terms of the Admission Agreement. Respondent cannot disclaim the arbitration provision which is a part of the Admission Agreement, while at the same time assert claims arising under other terms of the Admission Agreement, and Respondent should be equitably estopped from doing so.

IV. The Trial Court erred in denying Appellants' Motion because Mr. Boles was the intended and direct beneficiary of the Admission Agreement containing the arbitration provision.

Even if Mrs. Hackworth and/or Mr. Byars theoretically lacked statutory and/or regulatory

authority to enter into the Admission Agreement and Respondent were not equitably estopped from contesting the validity of the arbitration provision within the Admission Agreement, Respondent still would be bound to the arbitration provision because Mr. Boles was a third-party beneficiary of the Admission Agreement.

Mr. Boles, while not a signatory to the Admission Agreement, is a third-party beneficiary of the Admission Agreement. It is clear from the plain language of the Admission Agreement that Mr. Boles was an intended beneficiary and the purpose of the Admission Agreement was to ensure Bayview Manor would provide the services laid out therein. Mr. Boles did, in fact, receive those services. Mr. Boles' estate, therefore, is obligated to arbitrate any claims within its scope.

Appellants' position is also supported by the Wiggins decision. As set forth above, the daughter in Wiggins executed an admissions contract containing an arbitration clause for the admission of her father into the nursing home. The Wiggins Court noted that the third-party beneficiary doctrine is well-accepted in South Carolina and that pursuant to that doctrine, a third party may be bound to a contract when it is shown that she was the intended and direct beneficiary of the contract. Id. at *6, quoting Helms Realty, Inc. v. Gibson-Wall, Co., 363 S.C. 334, 611 S.E.2d 485 (2005), Touchberry v. Florence, 295 S.C. 47, 367 S.E.2d 149 (1988). Applying the third-party beneficiary doctrine, the Wiggins Court reasoned that because the resident's care was the essential purpose of the admissions contract, the arbitration provision within the contract remained binding on Hall's Estate. Id.[2]

[2] See also Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1171 (N.D. Miss. 2011) (resident's Estate and beneficiaries bound by terms of arbitration clause contained in admission agreement which daughter signed because resident's care was the essential purpose of the admission agreement); Trinity Mission Health & Rehabilitation of Clinton v. Estate of Scott, 19 So.3d 735 (Miss. Ct. App. 2008) (resident was third party beneficiary of admission agreement containing arbitration provision because she received care pursuant to the admission agreement and, therefore, her Estate was abound to arbitrate it claims against provider).

It is clear the Admission Agreement was for Mr. Boles' benefit and that he directly benefited from its execution. It follows that Respondent is bound to arbitrate all claims against Bayview Manor as a result of Mr. Boles' status as a third-party beneficiary under the Admission Agreement.

V. The Trial Court improperly denied Appellants' Motion because the Federal Arbitration Act mandates arbitration since Mrs. Hackworth had authority to enter the Admission Agreement and Respondent's claims fall within the scope of the arbitration provision.

The Federal Arbitration Act ("FAA") requires courts to place arbitration agreements "on equal footing with all other contracts." Kindred, 137 S. Ct. at 1426 (internal citations omitted). The FAA requires that:

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

9 U.S.C. § 2.

The arbitration provision in the Admission Agreement provides that arbitration shall be governed by the provisions of the South Carolina Arbitration Code, and in the event that it is deemed not to apply, the arbitration shall be governed by the FAA. (R. p. 74) Section 15-48-10(b)(4) of the South Carolina Code provides that the South Carolina Arbitration Code shall not apply to any claim arising out of personal injury based on contract or tort. Thus, the South Carolina Arbitration Code does not apply. Instead, the FAA is controlling in the instant case.

The FAA expresses a strong national policy in favor of arbitration and "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25

(1983). The FAA enforces arbitration agreements as written to prevent a party from avoiding their contractual obligations to arbitrate. See Stokes v. Metropolitan Life Ins. Co., 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985). Additionally, the FAA's purpose is to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and place them on the same footing as other contracts." Volt Info. Serv., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 474 (1989) (internal citation omitted).

Under the FAA, arbitration is required when there is a valid arbitration agreement and a dispute exists which is within the scope of the agreement. Under the arbitration provision of the Admission Agreement, both prongs are satisfied. First, there is a valid Admission Agreement in place for the reasons presented above and incorporated herein. Second, as will be discussed immediately below, Respondent's claims are within the scope of the arbitration provision.

a. Respondent's claims are within the scope of the arbitration provision.

Respondent's claims are clearly within the scope of the arbitration provision of the Admission Agreement. The arbitration provision provides in part:

> Any action, dispute, claim or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims or violations of Resident's Rights) now existing or hereafter arising between the parties, in anyway arising from or relating to this [Admission] Agreement governing the Resident's stay at the Facility, shall be resolved by binding arbitration.

(R. p. 74)

Respondent's claims include professional negligence, ordinary negligence, negligent misrepresentation, wrongful death and survivorship, all which allegedly stem from the care and treatment received by Mr. Boles under the Admission Agreement. (R. pp. 7 – 59) All of these causes of action are included within the scope of the arbitration provision quoted above. Thus,

there can be no dispute from the plain language of the arbitration provision that all the allegations contained in Respondent's Complaint fall under the types of disputes to be arbitrated under the arbitration provision.

b. Interstate Commerce is Satisfied.

The FAA applies to written arbitration agreements which evidence a transaction involving interstate commerce. 9 U.S.C. § 2. This requirement is broadly construed so as to be coextensive with congressional power to regulate under the Commerce Clause. Comanche Indian Tribe of Okla. v. 49, LLC, 391 F.3d 1129, 1132 (10th Cir. 2004). The interstate commerce requirement under the FAA includes contracts relating to interstate commerce. Id. The interstate commerce requirement is met if "in the aggregate the economic activity in question would represent 'a general practice...subject to federal control.'" Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003) (internal citation omitted).

The interstate commerce requirement under the FAA is met in the present case on multiple grounds. As noted in Bayview Manor Administrator Christy Drinkard's Affidavit, at the time of Mr. Boles' residency, (1) Bayview Manor received payments from Medicare, Medicaid, and private insurers from other states; (2) the majority of food served at Bayview Manor came from Charlotte, North Carolina; and (3) Bayview Manor obtained lab and radiology services, oxygen rental and supplies, medical forms, specialty beds and mattresses, laundry supplies and other items from out-of-state. (R. pp. 89 – 93)

In Dean v. Heritage Healthcare of Ridgeway, LLC, et al., 408 S.C. 371, 759 S.E.2d 727 (2014), the South Carolina Supreme Court found that a nursing home residency agreement implicated interstate commerce by requiring the facility to provide the resident with food and medical supplies which were instruments of interstate commerce. Id. at 381-82, 759 S.E.2d at

732-733. The Admission Agreement at issue required Bayview Manor to provide Mr. Boles room and board, medical supplies, and many other goods and services, all of which were instruments of interstate commerce. (R. pp. 64 – 74)

For all of the above reasons, the FAA's interstate commerce requirement is satisfied.

VI. The Trial Court erred in denying Appellants' Motion because the Admission Agreement and the Arbitration Agreement merged.

Appellants' primary position is that the Trial Court erred in ruling that the arbitration provision contained within the Admission Agreement was not binding for the reasons presented in Arguments I – V above. Out of an abundance of caution, Appellants also argue that Respondent is compelled to arbitrate her action against Appellants based upon Mrs. Hackworth's execution of the Arbitration Agreement at or near the same time as the Admission Agreement. (R. pp. 75 – 76) Unlike Coleman, the Admission Agreement and Arbitration Agreement at issue in this matter merged. "The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together. The theory is that the instruments are effectively one instrument or contract." Klutts Resort Realty, Inc. v. Down'round Development Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). Given merger of the Admission Agreement and the Arbitration Agreement, the Arbitration Agreement is enforceable and mandates arbitration based on the grounds set forth in Arguments I – V above.

CONCLUSION

Respondent is bound to arbitrate her claims against Appellants. The Admission Agreement executed by an attorney-in-fact/sister and brother are valid and are enforceable under basic contract principles and the Adult Health Care Consent Act; Respondent is equitably estopped from disclaiming the arbitration provision; Mr. Boles was the intended and direct beneficiary of the

Admission Agreement containing the arbitration provision; the claims asserted by Respondent are within the scope of the arbitration clauses, and the Federal Arbitration Act mandates that the claims be arbitrated; and the Admission Agreement and the Arbitration Agreement merged.

For these reasons, this Court should reverse the Trial Court's order denying Appellants' Motion, and the matter should be stayed or dismissed pending the arbitration of the dispute.

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January 19, 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Case No. 2019-CP-07-00433
Appellate Case No. 2019-001536

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.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

The undersigned hereby certifies that on the 19th day of January 2022, he has served all counsel of record with a copy of **APPELLANTS' FINAL BRIEF WITH UPDATED COVER AND SIGNATURES** in this matter by e-mail, to the following addresses:

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STATEMENT OF ISSUE ON APPEAL

I. WHETHER THE CIRCUIT COURT CORRECTLY HELD THAT APPELLANTS FAILED TO SET FORTH CREDIBLE EVIDENCE TO ESTABLISH THE EXISTENCE OF A VALID AND ENFORCEABLE ARBITRATION AGREEMENT?

STATEMENT OF THE CASE

This is an appeal from an order denying a motion to dismiss and compel arbitration filed by Appellants Bayview Manor, LLC d/b/a Bayview Manor, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons; John Does, and Richard Roe Corporations (collectively "Appellants"). The case involves an admission agreement ("Admission Agreement") and arbitration agreement ("Arbitration Agreement") purportedly signed by Clifford Byars and Viola M. Hackworth, after their brother, Eugene Boles ("Mr. Boles"), entered Bayview Manor, a skilled nursing facility, located at 11 Todd Drive in Beaufort, South Carolina (the "Facility"). During his year-long residency at the Facility, Mr. Boles suffered multiple injuries, including but not limited to: numerous falls; contractures of his lower extremities; multiple pressure ulcers including Stage IV wounds on his left and right buttocks and ulcerations of his toe and heels; painful irrigation and debridement of his left buttock wound; sepsis; disfigurement; malnutrition; dehydration; and other injuries that ultimately resulted in his wrongful death.

On March 1, 2019, Viola M. Hackworth, as Personal Representative of the Estate of Mr. Boles ("Respondent"), commenced her wrongful death and survival action asserting claims of professional and ordinary negligence, negligence *per se*, and negligence misrepresentation. (R. pp. 7-59). On April 8, 2019, Appellants filed their Notice of Motion and Motion to Stay Action and Compel Arbitration; in the Alternative Motion for Nonjury Trial; and Motion for Protective Order ("Motion"). (R. pp. 127-129). As exhibits in support of their Motion, Appellants submitted for the Circuit Court's review the Facility's Admission Agreement and Arbitration Agreement. (R. pp. 130-142). Appellants also included affidavits of Facility representatives, Christy Drinkard ("Ms.

Drinkard"), current Administrator, and Lucy Caruso ("Ms. Caruso"), former Admission and Marketing Director. (R. pp. 143-201). As exhibits of these affidavits, Appellants also submitted Respondent's General Durable Power of Attorney. *Id.*

On March 11, 2019, Respondent emailed Appellants to request discovery regarding concerns of enforceability of the arbitration provisions in the Admission and Arbitration Agreements. (R. p. 205, n 1). Appellants declined. On April 30, 2019, Respondent filed her motion to conduct limited discovery. (R. pp. 202-204). On June 6, 2019, Respondent filed her Response in Opposition to Appellants' Motion. (R. pp. 205-260).

On June 11, 2019, the Honorable Edgar W. Dickson held a hearing on the Motion. On July 26, 2019, the Circuit Court issued a Form 4 Order Denying Appellants' Motion. (R. pp. 1-3). On August 5, 2019, Appellants filed a motion to alter or amend. (R. pp. 304-306). On August 7, 2019, Respondent filed her Response in Opposition to Appellants' Motion to Alter or Amend. (R. pp. 307-313). On August 20, 2019, Judge Dickson issued a Form 4 Order denying Appellants' motion to alter. (R. pp. 4-6). On September 9, 2019, Appellants filed their Notice of Appeal. (R. pp. 314-315).

FACTS

Respondent is the surviving sister of the decedent, Mr. Boles. (R. p. 206). Mr. Boles was admitted to the Facility on November 2, 2015, for skilled nursing and rehabilitative care after suffering a stroke. (R. pp. 10, 16, 42). In addition to his stroke, Mr. Boles also suffered cognitive deficits due to dementia, including short and long-term memory deficits, confusion, disorientation, and impaired decision-making, and he had trouble making his needs known as his speech was mumbled and slurred and often non-verbal. *Id.*

According to Appellants, the Facility's Admissions and Marketing Director, Ms. Caruso, "**met**" with Respondent and her brother, Clifford Byars ("Mr. Byars"), and "**personally presented**" admissions paperwork on **November 2 and 3, 2015**. (R. pp. 173-176, ¶¶ 7-8, 12) (emphasis added). Ms. Caruso also swore that Respondent and Mr. Byars were provided an admissions packet, including an "Admissions Agreement" and a "separate Arbitration Agreement," and she described and explained the arbitration and jury waiver provisions. (R. p. 174, ¶¶ 8-9; R. p. 330, lines 10-24). Although Ms. Caruso "knew that Mrs. Hackworth was the designated power of attorney for Mr. Boles," she apparently had Mr. Byars sign and initial the documents, despite his known lack of authority. (R. pp. 174-175, ¶¶ 8, 10). Ms. Caruso further swore that Respondent "signed the Admissions Agreement" but "advised she wanted more time to think about the Arbitration Agreement" and returned "the following day, on November 3, 2015," to sign "the Arbitration Agreement." (R. p. 175, ¶ 12).

In light of Appellants' detailed sworn testimony, including vivid descriptions of supposed interactions with Respondent on November 2 and 3, 2015, Respondent filed a counter-affidavit with corroborating documentation, which illustrates "[n]one of [those details] can be true." (R. pp. 214-215, ¶¶ 4, 8; R. p. 329, lines 16-19). Contrary to Appellants' assertions, Respondent testified she "**was not present during [her] brother Eugene Boles' admission on November 2, 2015, nor did [she] return to the facility to sign an arbitration agreement on November 3, 2015**." (R. p. 214, ¶ 5) (emphasis added). Rather, due to childcare concerns and work obligations, Respondent did not travel from her home in Florida to South Carolina **until November 6, 2015**. *Id.* at ¶ 6. To reinforce her sworn testimony, Respondent offered her work schedule as well as bank statements from that time period. (R. pp. 216-217). Moreover, her brother, Mr. Byars, was not with her at this time, despite contrary claims by Ms. Caruso. (R. p. 215, ¶ 7).

Appellants moved to compel arbitration based upon two (2) separate agreements, the Admission Agreement and Arbitration Agreement, which contain conflicting arbitration provisions. (R. p. 127). The Admission Agreement is an eleven (11) page document found in the admissions packet and its pages are numbered fifteen (15) to twenty-five (25). (R. pp. 130-140). The parties to the agreement are "Eugene Boles ('Resident')" and "Bayview Manor ('Facility')." (R. p. 130). Ms. Caruso apparently signed[1] on behalf of the Facility on November 2, 2015. (R. p. 140). While no "Responsible Party" is identified or defined, the Admission Agreement was purportedly signed by Respondent and Mr. Byars on November 2, 2015. *Id.* No other persons witnessed the agreement's execution, despite available signature lines. *Id.*

The Admission Agreement attempts to preclude the Facility's liability for "injuries of any kind unless caused by the willful act or negligence of the Facility or the Facility's employees." (R. p. 137). It requires any "notice, request, consent, waiver, or other communication" be provided to Mr. Boles at the Facility, despite his incapacity. *Id.* The agreement further provides a three (3) business day withdrawal period. (R. p. 138).

Pursuant to the Admission Agreement, "the Facility shall be entitled to receive reasonable attorney's fees and costs" incurred in "any legal action or other proceeding by the Facility to enforce or interpret any provision of this Agreement or to enforce any remedy for [its] breach," including "any appellate proceeding." *Id.* It also allows the Facility to recover attorney's fees and costs "for any legal action or proceeding brought by the Resident and/or responsible party upon a finding" that the Facility "committed no wrongdoing," including fees incurred at the appellate level. *Id.*

---

[1] A closer review and comparison of Ms. Caruso's signature on multiple documents within the admissions packet indicates it was either pre-printed or otherwise stamped on the documents. It also appears a different pen was used for purposes of entry of the date.

The Admission Agreement also includes separate jury waiver and arbitration clauses. (R. pp. 138, 140). The Waiver of Jury Trial provision states in part:

> Resident hereby knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any litigation . . . arising out of or relating to any of the said documents or any relationship between the Facility and Resident, including the Resident's admission itself, or any other course of conduct . . . or actions of the Facility or Resident.

(R. p. 138). This provision further provides "the waiver . . . has been freely given and voluntarily made after reviewing the same, or having had an opportunity to review the same, with counsel of Resident's choice." *Id.* The Admission Agreement then provides an "Optional Arbitration Clause" which states:

> Any action, dispute, claim or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims of violations of Resident's Rights) now existing or hereafter arising between the parties, in any way arising from or relating to this Agreement governing the Resident's stay at the Facility, shall be resolved by binding arbitration. Such binding arbitration shall be governed by the provisions of the South Carolina Arbitration Code.
>
> * * *
>
> **OPTIONAL: If the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only. I have X this clause ____ initial.**

(R. p. 140) (emphasis in original).

Further, the Admission Agreement's "Entire Agreement" clause states that "it sets forth the entire understanding of the parties . . . and supersedes all prior Agreements, understanding, and discussions relative to such subject matter." (R. p. 139). It further provides that "**[n]othing in this Agreement shall be construed to give any person or entity other than the parties hereto any rights to remedies**." *Id.* (emphasis added). The agreement also authorizes the Facility to "modify, change or amend this Agreement" at any time in its sole discretion. (R. p. 140). Finally, the

Admission Agreement includes another pre-printed provision that claims the Resident and/or Responsible Party "has read or has been read and understands and agrees to all terms and conditions." *Id.*

The separate Arbitration Agreement is a two (2) page document found in admissions packet but is not numbered. (R. pp. 141-142). It fails to identify the parties to the agreement and leaves placeholders for the "Facility" and the "Resident" or "Resident's Authorized Representative" incomplete. (R. p. 141). The Arbitration Agreement provides that "any legal dispute, controversy, demand or claim . . . that arises out of or relates to that certain Resident Admission Agreement . . . executed by the Resident and the Facility, or any service or healthcare provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration . . . in accordance with the Federal Arbitration Act. . . ." *Id.* It further provides the scope of the agreement shall include "any claim for payment, nonpayment or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Resident Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care. . . ." *Id.*

The Arbitration Agreement also states that it "shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident." *Id.* The Arbitration Agreement claims the Resident "understands" she has the right to seek legal counsel, "the execution of this Arbitration Agreement is not a precondition to furnishing the services to the Resident by the Facility," and the agreement "may be rescinded by written notice given . . . within thirty (30) days of signature." (R. p. 142). Furthermore, the Arbitration

Agreement provides the "PARTIES UNDERSTAND AND AGREE . . . THEY ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY." *Id.* According to Appellants, Respondent purportedly signed the Arbitration Agreement as Resident/Representative on November 3, 2015. *Id.* Again, Ms. Caruso appears to have signed for the Facility; however, again, it is unclear whether her signature was pre-printed or stamped upon the document. *Id.* A different pen was clearly used to enter the dates. *Id.* There are no other signatories to the Arbitration Agreement. *Id.*

While a resident under the care of the Appellants between November, 2015, and December, 2016, Mr. Boles was transferred to Beaufort Memorial Hospital on multiple occasions due to his development of significant pressure ulcerations and infections. (R. pp. 42-47). He also experienced numerous falls, substantial weight loss, altered mental status, and other issues. *Id.* On October 6, 2016, in emergency preparation for Hurricane Matthew, Mr. Boles was temporarily transferred and hospitalized at McLeod Regional Medical Center ("McLeod") in Florence, South Carolina, where medical staff identified a large, open, infected, Stage IV left sacral/buttock pressure ulceration with yellow, purulent drainage. (R. p. 47). McLeod medical staff also found a plugged feeding tube, and his white blood cell count and other laboratory values were elevated. *Id.* Following the storm, Mr. Boles was returned to Bayview Manor where his condition continued to deteriorate. *Id.*

During his thirteen (13) month residency, Mr. Boles suffered numerous injuries, including, but not limited to: (a) numerous falls; (b) contractures of his lower extremities; (c) multiple pressure ulcers including Stage IV wounds on his left and right buttocks and ulcerations of his toe and heels; (d) painful irrigation and debridement of his left buttock wound; (e) sepsis;

(f) disfigurement; (g) malnutrition; (h) dehydration; and (i) urinary tract infections, amongst others. (R. p. 17, ¶ 27; R. pp. 47-59). On December 14, 2016, Mr. Boles was found unresponsive by Bayview Manor staff. (R. p. 22, ¶ 56; R. p. 47). Resuscitation efforts were attempted until emergency medical services (EMS) arrived and transported Mr. Boles to Beaufort Memorial Hospital. *Id.* He passed away a short time later due to vascular collapse, sepsis and osteomyelitis. *Id.* Litigation then ensued and this appeal followed.

STANDARD FOR REVIEW

"Arbitrability determinations are subject to de novo review." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* at 48.

ARGUMENT

This case arises out of Appellants' negligent care of Mr. Boles that resulted in his death. His sister and personal representative, Respondent, initiated this action in Circuit Court seeking survival and wrongful death damages for Mr. Boles' injuries and death. Appellants seek to enforce arbitration of those claims based on an Admission Agreement and/or Arbitration Agreement purportedly executed by Respondent after Mr. Boles' admission to the Facility. As briefed to the Circuit Court with counter-affidavit, argued at the hearing with additional, supporting documentation, and as explained below, the arbitration provisions of the Admission Agreement and Arbitration Agreement are invalid and unenforceable because no credible evidence was made part of the record to confirm the existence of a valid arbitration agreement.[2]

---

[2] Respondent also preserved the right to argue enforceability of the Admission Agreement and Arbitration Agreement due to applicable contract law defects or defenses, including unconscionability, no meeting of the minds, lack of consideration and mutuality, and lack of merger. (*See* R. pp. 326-336; *See generally* R. p. 207, n. 2; R. pp. 310-311). In addition,

While there is a presumption in favor of arbitration agreements, including those contracts governed by the Federal Arbitration Act (FAA), this presumption only applies where a valid arbitration agreement exists. *EEOC v. Waffle House*, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014). If the existence of a valid agreement or clause is disputed, the "presumption disappears." *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir. 2002); *Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.,* 157 F.3d 775, 779 (10th Cir.1998) ("[W]hen the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away."). Appellants then bear the burden of establishing the existence of a valid contract, *Hinson-Barr, Inc. v. Pinckard*, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1987), and to prove that waiver of Respondent's fundamental right to a jury trial was knowing, voluntary, and intentional. *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Colo. 1982).

"Congress did not intend for the FAA to force parties who [have] not agreed to arbitrate into a non-judicial forum." *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001); 9 U.S.C. § 4. "The FAA thereby places arbitration agreements on an equal footing with other contracts," which "may be invalidated by generally applicable contract defenses." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67-68, 130 S. Ct. 2772, 2776 (2010). Under the FAA, contract formation remains "a matter of judicial determination," and the trial court must "consider general [state-law] contract defenses to ensure a meeting of the minds to arbitrate existed, and that such an agreement was not the result of fraud, duress, [or] unconscionability." *York v. Dodgeland*, 406 S.C. 67, 78, 749 S.E.2d 1139, 145 (2013); *citing Zabinski v. Bright Acres Assocs.*, 346 S.C.

Respondent preserved the right to argue other statutory limitations, including an inability to bind wrongful death beneficiaries and lack of authority. *Id.*

580, 593, 553 S.E.2d 110, 116 (2001); *See also Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 388, 759 S.E.2d 727, 736 n. 13 (2014) (The court "must engage in a full inquiry . . . prior to any attempt to enforce the [a]greement," including "whether there was a meeting of the minds between the parties."). When faced with a motion to compel arbitration that is opposed based on enforceability of the contract, the opposing party is given "the benefit of all reasonable doubts and inferences that may arise." *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980).

Further, "[a]n unappealed ruling is the law of the case and requires affirmance." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).[3] This Court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. Appellants also "cannot raise issues on appeal that were not raised at the Circuit Court as such arguments are deemed abandoned and waived." *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (internal citations omitted); *See also United States v. McCall*, 235 F.3d 1211, 1216 (10th Cir. 2000). Similarly, "[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court." *Id.*; *citing Fields v. Melrose Ltd. P'ship,* 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct.App.1993).

I. THE CIRCUIT COURT CORRECTLY DENIED APPELLANTS' MOTION BECAUSE NO CREDIBLE EVIDENCE WAS OFFERED TO SUPPORT THE EXISTENCE OF A VALID AND ENFORCEABLE ARBITRATION AGREEMENT.

Appellants bear the burden of establishing the existence of a valid arbitration agreement through submission of credible evidence. *Hinson-Barr*, 292 S.C. at 268. Credible evidence is

[3] While Appellants' Motion requested an alternative remedy of a non-jury trial, Appellants fail to argue the applicability of any jury waiver provision in their brief. They also abandoned this issue at the hearing. As such, Appellants have waived appeal on this issue.

"[e]vidence that is **worthy of belief**," and it may come in the form of affidavit, testimony, documents, or other tangible objects. *Black's Law Dictionary* (11th ed. 2019) (emphasis added).

Appellants' Motion, brief in support, and oral argument lacked credible, foundational evidence necessary to establish the existence of a valid contract. Therefore, the Circuit Court correctly denied Appellants' Motion.

A. Appellants concede sworn affidavits regarding the entry of the purported Admission Agreement and Arbitration Agreement were not credible.

An affidavit is a "voluntary declaration of facts written down and **sworn to by a declarant** before an officer authorized to administer oaths." *Collins v. Doe*, 343 S.C. 119, 124, 539 S.E.2d 62, 64 (Ct. App. 2000), *rev'd on other grounds*, 352 S.C. 462, 574 S.E.2d 739 (2002) (emphasis added); *quoting Black's Law Dictionary* (11th ed. 2019). To be legally sufficient, an affidavit must unequivocally and affirmatively show "the affiant's competence to testify to the facts stated and that such facts are personally known to the affiant." *State ex rel. Simmons v. Moore*, 774 S.W.2d 711, 715 (Tex. App. 1989).[4] Ultimately, determination of the affidavit's credibility is "left to the discretion of the court." *Caggiano v. Ross*, 130 A.D.2d 538, 539, 515 N.Y.S.2d 274 (1987).

In South Carolina, a motion may be supported by affidavit so long as the affidavit accompanies the motion at the time of filing. Rule 6(d), SCRCP. Affidavits "**shall be made on personal knowledge**, shall set forth such facts as would be admissible in evidence, and **shall show affirmatively that the affiant is competent to testify** to the matters stated therein." Rule 56(e), SCRCP (emphasis added).[5] Affidavits are sworn under penalty of perjury. S.C. Code Ann. § 16-

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[4] In fact, courts have warned against affidavits generated from interviews conducted by an attorney with an interest in the litigation because "interviews at which the affidavits [are] taken [are] not conducive to frank disclosures." *N. L. R. B. v. Lifetime Door Co.*, 390 F.2d 272, 275 (4th Cir. 1968).

[5] Although not a motion for summary judgment, Respondent contends the same general affidavit requirements apply.

9-10(A)(1). Where a pleading or affidavit is submitted to the court that is "false," sanctions may be imposed, including the striking of the pleading, denial of the requested relief, or dismissal. *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 19, 633 S.E.2d 722, 729 (2006); *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996); Rule 11, SCRCP.

To compel this matter to arbitration, Appellants relied upon and presented to the Circuit Court sworn testimony of their former Admission's Director, Ms. Caruso, which was categorically false. (R. pp. 173-176). In her affidavit, Ms. Caruso swore in very specific detail about her interaction and events with Respondent on **November 2 and 3, 2015**:

- "**On November 2, 2015, I met with Mr. Boles' sister** and Power of Attorney, Viola Boles Hackworth . . . and Mr. Boles' brother, Clifford Byars. . . .";
- "**I personally presented** . . . the admissions documents[,]" "**I described** . . . **the terms** of the agreement[,]" and "**I explained the waiver of jury trial and arbitration provisions**. . . .";
- "Mrs. Hackworth was given as much time as she desired to read the Admission Agreement and Arbitration Agreement. . . .";
- ". . . she wanted more time to think about the Arbitration Agreement. **I recall** that **Mrs. Hackworth came to my office in the later part of the day on November 2, 2015** and, **the following day, on November 3, 2015**, Mrs. Hackworth returned to Bayview . . . and **signed the Arbitration Agreement.**"; and
- ". . . Mrs. Hackworth listened carefully to what I told her, and there was nothing about her demeanor, questions, or behavior that suggested in any way that she did not understand what she was signing."

(R. pp. 174-175, ¶¶ 7-8, 10-13) (emphasis added).[6] After reviewing Appellants' Motion and their false affidavits, Respondent submitted a counter-affidavit with corroborating documentation,

[6] Though Christy Drinkard was not serving as Bayview Manor's Administrator during the time period in question, Appellants relied upon her affidavit in support of their Motion as well. Ms. Drinkard's affidavit also falsely states that Respondent entered an arbitration clause on the day of Mr. Boles' admission of November 2, 2015. (R. p. 145, ¶ 10).

which illustrated Ms. Caruso's statements were "false" and "[could not] be relied upon." (R. p. 215, ¶ 8; R. p. 327, line 20-p. 331, line 7).

Respondent was not present at Bayview Manor during the admission of Mr. Boles on November 2, 2015 nor was she present the following day on November 3, 2015. (R. p. 214, ¶ 5). Rather, she arrived in Beaufort on the evening of November 6, 2015, after leaving Florida and traveling through Georgia and South Carolina with her sister. (R. pp. 214-215, ¶¶ 6-7). Respondent's testimony was also corroborated by documentation, including her work schedule and bank statements. (R. p. 214-217, ¶ 6).

At the hearing for Appellants' Motion, counsel for Appellants acknowledged inaccuracies in the sworn testimony of Ms. Caruso:

> [F]or purposes of today, Your Honor, we would contend that **it does not matter. We will accept plaintiff's contention that it was not, in fact, signed on those dates** and Plaintiffs have asserted she would have been at the facility on November 6.

(R. p. 319, line 22- p. 320, line 2) (emphasis added). After oral argument of Respondent's counsel, Appellants' counsel reiterated their concession to Respondent's affidavit:

> As far as the "falsified dates", as I said in the beginning of my argument, **we are for purposes of today accepting the Plaintiff's argument**. . . .

(R. p. 338, lines 1-3) (emphasis added). Although no supplemental affidavit was submitted, Appellants further conceded: "**Why the dates say November 2nd and 3rd on the two Agreements, I can't explain**. . . ." (R. p. 338, line 25-p. 339, line 2) (emphasis added).

South Carolina's Constitution guarantees that the right to a trial by jury "**shall be preserved inviolate.**" S.C. Const. art. I, § 14 (emphasis added).[7] For the Circuit Court to compel

[7] In fact, Appellants acknowledged South Carolina afforded this right during the hearing. (R. p. 323, lines 8-12).

arbitration and waive such a fundamental right, Appellants bear the burden of establishing the existence of a valid contract. *Hinson-Barr*, 292 S.C. at 268. To do so, Appellants must submit credible evidence for the Circuit Court's consideration. Here, Appellants admittedly submitted false affidavits of Facility personnel that were "directly contradicted" by Respondent's testimony and corroborating evidence. *Russell*, 370 S.C. at 19. Moreover, as explained in more detail below, Appellants submitted purported contractual documents that were either back-dated or falsified. (R. p. 330, lines 10-24; R. p. 335, line 23-p. 336, line 2). However, rather than withdraw their Motion because it lacked good faith support, Appellants stated the fabrication of testimonial and documentary evidence "does not matter," and insisted that the Circuit Court should compel arbitration anyway. (R. p. 319, line 22-p. 320, line 2). Appellants offered no credible evidence for which the Circuit Court could rely to find the existence of a valid contract; thus, the Circuit Court was precluded from compelling arbitration and waiving Mr. Boles and Respondent's right to a jury trial.

B. In willfully producing perjured testimony and concealing relevant information, Appellants committed a fraud on the court.

By swearing false affidavits to procure a jury waiver, Appellants have willfully produced perjured testimony in an attempt to subvert justice. Appellants also concealed relevant documentation in an unconscionable plan to improperly influence the Circuit Court's decision regarding arbitration.

The instant action closely parallels the facts and analysis in *Eppes v. Snowden*, 656 F.Supp. 1267 (E.D. Ky. 1986). In that case, a Federal court learned that a defendant "manufactured and produced" perjured testimony as well as documents that had been "backdated" in an effort to sway the court's decision-making. *Eppes*, 656 F.Supp. at 1269, 1279. Relying on the United States

Supreme Court decision in *Hazel-Atlas Glass Co.* and its progeny, the *Eppes* court found the defendant committed "fraud on the court":

> [T]ampering with the administration of justice . . . is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

Eppes, 656 F.Supp. at 1277; *citing Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46 (1944). In its analysis, the court explained that misconduct such as "presentation of false testimony, fabrication and nondisclosure of relevant information" tampers "with the judicial machinery and subverts the integrity of the court itself." *Id.* Utilizing its inherent power to protect the integrity of the proceedings as a result of defendant's misconduct, the *Eppes* court struck and dismissed the defendant's pleadings and granted the plaintiff sanctions, including an award of costs, expenses and attorney's fees incurred in defending the entire action. *Id.* at 1279, 1281.

Here, Appellants concede they manufactured affidavits, not based upon the affiant's "personal knowledge" but, rather, speculatively based upon "dates that [she]" saw in the agreements. (R. p. 338, line 11-p. 339, line 2). Appellants also cannot explain the dates "on the two Agreements," which were presumably back-dated. *Id.* Further, Appellants' own admission records illustrate that they concealed relevant information from the Circuit Court as Respondent presented Appellants' notation that instructed the parties to "**disregard the [Admission] contract**" – which forms the primary basis of their Motion. (R. pp. 309, 330, line 10-p. 331, line 7). Though this notation was conspicuously attached to the Admission Agreement, Appellants failed to disclose this "relevant information" as part of their exhibit; thus, further attempting to mislead the Circuit Court. (R. pp. 130-140, 330, lines 16-22).

Accordingly, Appellants' misconduct – in introducing perjured testimony, back-dating or falsifying contracts, and withholding relevant information – constituted a "fraud on the court."

Appellants interfere with the "administration of justice" and attack the very "institutions set up to protect and safeguard" individuals such as Mr. Boles and Respondent, who are in desperate need of necessary healthcare. Moreover, if left unchecked, Appellants' misconduct would eviscerate South Carolina's Constitution, including one of our most sacred individual guarantees – the right of trial by jury. In accordance with this Court's "any evidence" standard, Appellants' Motion was correctly denied by the Circuit Court pursuant to Rule 11, SCRCP, and its inherent power.[8]

CONCLUSION

The Circuit Court correctly denied Appellants' Motion because Appellants failed to establish the existence of a valid arbitration agreement. Appellants' Motion was not supported by credible evidence. For the reasons set forth herein, and any others appearing in the Record on Appeal, Respondent requests this Court affirm the decision of the Circuit Court and remit the case to the Circuit Court.

This the 14th day of April, 2020.

Respectfully submitted,

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[8] On other sustaining grounds, the arbitration provisions of the Admission Agreement and Arbitration Agreement are unenforceable due to applicable contract law defects or defenses, including unconscionability, no meeting of the minds, lack of consideration and mutuality, and lack of merger. (R. p. 207, n 2; R. pp. 310-311, 326-336). In addition, the arbitration provisions cannot be enforced due to other statutory limitations, including an inability to bind wrongful death beneficiaries and lack of authority.

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THE STATE OF SOUTH CAROLINA
In the 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.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that Final Brief of Respondent complies with Rule 211(b), SCACR.

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April 14, 2020

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REPLY ARGUMENT

I. Appellants' supporting affidavits are credible, and Respondent's allegations of perjury, back-dating, falsification, and a fraud on the court are without merit.

Respondent makes the following incorrect and unsubstantiated allegations in her Initial Brief ("Brief"), which Appellants address below each allegation:

1. "Appellants concede sworn affidavits . . . were not credible." (Respondent's Brief, p. 11).

   (a) Appellants have made no such concession.

2. " . . . Appellants relied upon and presented to the Circuit Court sworn testimony of their former Admissions Director, Ms. Caruso, which was categorically false." Id., at p. 12.

   (a) Appellants do not agree that Ms. Caruso's affidavit is false. As repeatedly stated at the Trial Court hearing, Appellants' position is that even if Respondent is correct that Respondent did not sign the Admission Agreement and Arbitration Agreement on November 2 and 3, but rather on November 6 and 7, a valid contract was still formed between Mr. Boles (through Respondent and Mr. Byars) and Appellants, which mandates arbitration or, alternatively, a non-jury trial. Respondent has presented no legal argument as to why any alleged inaccuracy in the dates appearing on the Admission Agreement and Arbitration Agreement would change the binding nature of the agreements, especially given the fact that neither Respondent nor Mr. Byars has ever denied signing the agreements.

3. Appellants submitted "false affidavits," Id., at p. 13.

   (a) See 2(a) above.

4. "At the hearing for Appellants' Motion, counsel for Appellants acknowledged inaccuracies in the sworn testimony of Ms. Caruso." Id.

   (a) Appellants made no such concession.

5. "After oral argument of Respondent's counsel, Appellants' counsel reiterated their concession to Respondent's affidavit." Id.

   (a) Appellants made no such concession.

6. "Appellants submitted purported contractual documents that were either back-dated or falsified." Id., at p. 14.

   (a) Even if Respondent is correct that she did not sign the Admission Agreement and Arbitration Agreement on November 2 and 3, but rather on November 6 and 7, that

does not mean there was any back-dating or falsification of records. It could be that Respondent or Ms. Caruso inadvertently wrote the wrong dates. It could be that Respondent is incorrect about her travel itinerary. Regardless, a binding contract was still formed between Mr. Boles (by Respondent and Mr. Byars) and Appellants, which requires arbitration or, alternatively, a non-jury trial. Respondent has presented no legal argument as to why any alleged inaccuracy in the dates appearing on the Admission Agreement and Arbitration Agreement would change the binding nature of the agreements, especially given the fact that neither Respondent nor Mr. Byars has denied signing the agreements.

7. "In willfully producing perjured testimony and concealing relevant information, Appellants committed a fraud on the court." Id.

   (a) See 6(a) above as to the perjury allegation. Appellants do not understand Respondent's allegation of concealment and are thus unable to respond to the same.

8. "By swearing false affidavits to procure a jury waiver, Appellants have willfully produced perjured testimony in an attempt to subvert justice." Id.

   (a) See 6(a) above.

9. "Appellants also concealed relevant documentation in an unconscionable plan to improperly influence the Circuit Court's decision regarding arbitration." Id., at p. 15.

   (a) Appellants do not understand Respondent's allegation of concealment and are thus unable to respond to the same. Appellants produced to Respondent and the Circuit Court all applicable agreements.

10. ". . . Appellants concede they manufactured affidavits . . ." Id.

    (a) Appellants made no such concession.

11. The dates on the two agreements "were presumably back-dated." Id.

    (a) See 6(a) above.

12. Appellants "concealed relevant information from the Circuit Court as Respondent presented Appellants' notation that instructed the parties to 'disregard the [Admission] contract'… ; thus further attempting to mislead the Circuit Court." Id., at p. 15-16.

    (a) Appellants do not understand Respondent's allegation of concealment and are thus unable to respond to the same. Appellants produced to Respondent and the Circuit Court all applicable agreements.

13. "…Appellants' misconduct – in introducing perjured testimony, back-dating or falsifying contracts, and withholding relevant information – constituted a 'fraud on the court . . .

interfere with the 'administration of justice' and attack the very 'institutions set up to protect and safeguard' individuals such as Mr. Boles and Respondent, . . ." Id., at p. 16.

(a) See 6(a) above.

A. <u>Respondent has never disputed that she or her brother Clifford Byars signed the Admission Agreement and Arbitration Agreement or met with Lucy Caruso to discuss and complete the two agreements</u>.

Respondent states in her Brief that:

- the Admission Agreement and Arbitration Agreement were "purportedly signed" by Respondent and Clifford Byars ("Mr. Byars") (Respondent's Brief, p. 1); and

- there were "supposed interactions"[1] between (a) Respondent and Lucy Caruso ("Ms. Caruso") and (b) Mr. Byars and Ms. Caruso to discuss and complete the Admission Agreement and Arbitration Agreement (Respondent's Brief, p. 3).

However, despite producing an Affidavit to the Trial Court which failed to dispute that she and her brother Mr. Byars (1) actually signed the Admission Agreement and/or Arbitration Agreement; or (2) actually met with Ms. Caruso to discuss and complete the two agreements, Respondent once again does not dispute in her Brief that she and Mr. Byars signed the two agreements or met with Ms. Caruso to discuss and complete the two agreements.

Despite taking great efforts throughout her Brief and trial-level Affidavit to incorrectly assert that Appellants' representatives, Christy Drinkard ("Ms. Drinkard") and Ms. Caruso, committed perjury, back-dating, falsification, and a fraud on the court, nowhere in her Brief does Respondent deny that she and Mr. Byars actually signed the agreements or actually met with Ms. Caruso to discuss and complete the agreements, merely that (a) Respondent (but not Mr. Byars) did not allegedly sign these two agreements on the dates which appear on the face of the agreements and (b) Respondent and Mr. Byars were not together at the same time to sign, discuss, and complete the two agreements.

[1] Respondent also puts the words "met" and "personally presented" in quotation marks in her Brief. (Respondent's Brief, p. 3.)

Given the conclusory nature of Respondent's insinuation that she and Mr. Caruso may not have signed the agreements or that they may not have met with Ms. Caruso to discuss and complete the agreements, it should be deemed abandoned on appeal and not considered. See, e.g., Judy v. Judy, 384 S.C. 634, 682 S.E.2d 836 (Ct. App. 2009) (an issue presented through conclusory argument without citation to legal authority is deemed abandoned on appeal). Nonetheless, Respondent's insinuations are wrong on the merits because arbitration is a matter of contract, and any evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). No requirement exists under contract law – nor has Respondent even attempted to argue – that Respondent and Mr. Byars had to sign the agreements on the same date or in presence of one another.

B. Ms. Caruso's signatures on the Admission Agreement and Arbitration Agreement are presumptively valid, and Respondent has offered no evidence to rebut the presumption.

Respondent states in her Brief that Ms. Caruso "apparently signed" the Admission Agreement and Arbitration Agreement and in Footnote No. 1 goes on to state that "[a] closer review and comparison of Ms. Caruso's signature on multiple documents within the admissions packet indicates it was either pre-printed or otherwise stamped on the documents" and "[i]t also appears a different pen was used for purposes of entry of the date." (Respondent's Brief, p. 4). Respondent later states in her Brief: "it is unclear whether [Ms. Caruso's] signature was pre-printed or stamped upon the document . . . A different pen was clearly used to enter the dates." (Respondent's Brief, p. 7). However, nowhere in her Brief or in her arguments to the Trial Court

does Respondent offer any evidence or legal support for the suggestion that Ms. Caruso's signatures are somehow inauthentic or not genuine.

Given the conclusory nature of Respondent's commentary about Ms. Caruso's signatures, it should be deemed abandoned on appeal and not considered. See, e.g., Judy v. Judy, 384 S.C. 634, 682 S.E.2d 836 (Ct. App. 2009) (an issue presented through conclusory argument without citation to legal authority is deemed abandoned on appeal). Nonetheless, Respondent's insinuations are wrong on the merits because a stamped signature is a valid form of signing a document and Respondent has offered no basis for doubting the genuineness or authenticity of Ms. Caruso's signature. See, e.g., Smith v. Greenville Cty., 188 S.C. 349, 199 S.E. 416, 418–20 (1938) ("the general rule as to the mode that one may adopt in affixing his signature is . . . as follows: . . . 'The signature may be written by hand, or printed, or stamped, or typewritten, or engraved, or photographed, or cut from one instrument and attached to another.' "); Pee Dee Prod. Credit Ass'n v. Joye, 284 S.C. 371, 375, 326 S.E.2d 650, 653 (1984) ("It is undisputed that a presumption does exist regarding the authenticity of an uncontroverted signature. . . No requirement exists that a signature be witnessed in order to authenticate a document. . . The genuineness of a signature may be established by testimony of one who witnessed the signature where the signature is to be used as a basis of comparison.").

II. Appellants have appropriately preserved their argument that all claims raised by Respondent are subject to arbitration, or, in the alternative, to a non-jury trial.

Respondent incorrectly states in her Brief that Appellants abandoned their alternative remedy of a non-jury trial. (Respondent's Brief, p. 10, n. 3.) Each of the following documents refute Respondent's argument:

(a) the arguments contained in Appellants' Motion and Memorandum in Support of same;

(b) the arguments contained in Appellants' Motion to Alter or Amend;

(c) the Affidavits produced by Appellants;

(d) the plain language of the Admission Agreement made an exhibit to every filing at the trial court level as well as this appeal; and

(e) the hearing transcript before the Trial Court.

Appellants' Motion filed on April 8, 2019 is entitled "NOTICE OF MOTION AND MOTION TO STAY ACTION AND COMPEL ARBITRATION; **IN THE ALTERNATIVE MOTION FOR NONJURY TRIAL**; AND MOTION FOR PROTECTIVE ORDER." (R. p. 127) (emphasis added). Appellants specifically state in their Motion that "**[Appellants] are entitled to a non-jury trial** as a result of the Waiver of Jury Trial provision in the Admission Agreement." (R. p. 128) (emphasis added).

Appellants' Memorandum filed on June 7, 2019 is entitled "MEMORANDUM IN SUPPORT OF 'MOTION TO STAY ACTION AND COMPEL ARBITRATION; **IN THE ALTERNATIVE MOTION FOR NONJURY TRIAL**; AND MOTION FOR PROTECTIVE ORDER' " (R. p. 261) (emphasis added). Appellants specifically state in their Memorandum that "The ADMISSION AGREEMENT contained a **Waiver of Jury Trial** . . ." (R. p. 262) (emphasis added).

Appellants produced an Affidavit from Ms. Caruso which states that:

- "In connection with [Mr. Boles'] admission, I personally presented [Respondent] and Mr. Byars with the admissions documents. . . I described to [Respondent] and Mr. Byars the terms of the agreement and both [Respondent] and Mr. Byars initialed each page confirming all the terms were reviewed and agreed upon. **I explained the waiver of jury trial** . . . provisions to them, and among other things told them that if [Respondent] agreed to these terms, **[Respondent] would be waiving Mr. Boles' right to have a jury hear any dispute**." (R. p. 61, ¶ 8) (emphasis added).

- "I discussed with [Respondent] a separate Arbitration Agreement . . . Here again, **I explained that by signing this agreement, [Respondent] would be waiving Mr. Boles' right to have a jury hear any dispute**. (R. p. 61, ¶ 9) (emphasis added).

The Admission Agreement states:

> **Waiver of Jury Trial: (Please read carefully)**
> Resident hereby **knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any litigation** . . . Resident represents and warrants that the waiver contained in this Paragraph has been freely and voluntarily made after reviewing the same, or having had an opportunity to review the same, with counsel of Resident's choice.

(R. p. 72) (emphasis added).

Appellants' Motion to Alter or Amend filed on August 5, 2019 specifically states: "[t]he Admission Agreement executed on behalf of Mr. Boles by [Respondent] and [Respondent's] brother (Clifford Byars) is valid on its face and contained a **Waiver of Jury Trial**. . ." (R. p. 305) (emphasis added).

Finally, the June 11, 2019 Transcript of the Hearing on Appellants' Motion further refutes Respondent's argument that Appellants waived their alternative remedy of a non-jury trial:

> The Court: Okay. So, it looks like Mr. Barnes, you filed the Motion to Compel arbitration?
> Mr. Barnes: Yes, Your Honor. Walker Barnes on behalf of all Defendants. This is a Motion to Compel Arbitration **in the alternative for a non jury trial** and a Motion for Protective Order.

(R. p. 318, lines 12 – 17) (emphasis added).

> Mr. Barnes: Your Honor, we've submitted, if you look at Exhibit D, the last exhibit that I handed up it is a **affidavit from Lucy Caruso**, who was the admissions director in 2015, at the time of Mr. Boles admission, and **she has sworn to this Court that she would have** explained the concept of arbitration to Ms. Hackworth, the Plaintiff, and would have **literally, specifically explained her waiving a right to a jury trial on behalf of your brother**.

(R. p. 322, lines 17 – 25) (emphasis added).

> The Court: So, which brings me to, so **you asked me for a alternative and one of the alternatives was that it be put on the non-jury docket**, is that ...
> Mr. Barnes: If the decision is to deny the Motion to Compel arbitration **that would absolutely be our second alternative request** but we would prefer to arbitrate the case and we think we have a contractual right to.

(R. p. 325, lines 17 – 24) (emphasis added).

> The Court: Mr. McAllister, **what about the option of putting this on a non-jury docket?**
> Mr. McAllister: Your Honor, we would prefer, obviously, to have a jury of our peers in Beaufort County . . . .

(R. p. 336, lines 2 – 7) (emphasis added).

The Trial Court issued Form 4 denials of Appellants' Motion and Motion to Reconsider. As shown above, both Appellants' Motion and Motion to Reconsider included the alternative remedy of a non-jury trial. The Trial Court gave no indication that its rulings were applicable only to Appellants' request to arbitrate and not to the alternative remedy of a non-jury trial. By obtaining rulings on whether Respondent was bound to arbitrate or, in the alternative, to proceed to a non-jury trial, Appellants preserved their argument that Respondent is bound to arbitrate all claims she raises, or, in the alternative, to proceed to a non-jury trial. Appellants, therefore, are entitled to appellate review of whether Respondent is required to arbitrate all claims raised within her Complaint, or, in the alternative, to a non-jury trial.

III. Respondent has abandoned the issues of unconscionability, lack of meeting of the minds, lack of consideration and mutuality, lack of merger, and inability to bind wrongful death beneficiaries.

In Footnotes 2 and 8 of her Brief, Respondent makes the conclusory statements that she has preserved the right to argue additional defenses against the enforceability of the Admission Agreement and Arbitration Agreement "due to applicable contract law defenses or defects such as unconscionability, no meeting of the minds, lack of consideration and mutuality, … lack of merger . . . [and] other statutory limitations, including an inability to bind wrongful death beneficiaries..." [Respondent's Brief, p. 9, 16]. Respondent also claims that she preserved these arguments at oral argument before the Trial Court and in her two briefs filed with the Trial Court. Id. However, nowhere in her Brief, at oral argument, or in her two briefs before the Trial Court did Respondent offer any evidence, caselaw, or other legal support for the issues of unconscionability, lack of

meeting of the minds, lack of consideration and mutuality, lack of merger, or other statutory limitations, including inability to bind wrongful death beneficiaries.

Given the conclusory nature of Respondent's argument, Respondent's argument as to unconscionability, lack of meeting of the minds, lack of consideration and mutuality, lack of merger, or other statutory limitations, including inability to bind wrongful death beneficiaries should be deemed abandoned on appeal and not considered. See, e.g., Judy v. Judy, 384 S.C. 634, 682 S.E.2d 836 (Ct. App. 2009) (an issue presented through conclusory argument without citation to legal authority is deemed abandoned on appeal).

IV. Mr. Byars independently had authority to bind Respondent to the arbitration provision pursuant to the AHCCA because the arbitration provision was contained within the Admission Agreement.

Respondent argues in her Brief that Mr. Byars lacked authority to bind Respondent to the arbitration provision contained within the Admission Agreement and that only Respondent, as attorney-in-fact, could have such authority. (Respondent's Brief, p. 3). Respondent is incorrect in this argument because Mr. Byars (in addition to Respondent) independently had authority to bind Respondent to the arbitration provisions contained in the Admission Agreement pursuant to the South Carolina's Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10, et seq. ("AHCCA").

For the reasons already articulated in Appellants' Brief[2], the South Carolina Supreme Court's reasoning in Coleman v. Mariner Health Care, et al., 407 S.C. 346, 755 S.E.2d 450 (2014) supports Appellants' position on this matter, and Appellants will not repeat those arguments here, other than to point out that, pursuant to the Coleman holding, the AHCCA empowered Mr. Byars (in addition to Respondent) to sign the Admission Agreement on behalf of Mr. Boles and to bind

[2] See Appellants' Brief, p. 5-8.

Respondent to all provisions of that contract, including the arbitration provision.

CONCLUSION

Respondent is bound to arbitrate her claims, or, in the alternative, to proceed to a non-jury trial, and the arguments presented in her Brief do not change that outcome. Appellants, therefore, reiterate that this Court should reverse the Trial Court's order denying Appellants' Motion and Appellants' Motion to Alter or Amend, and the matter should proceed to arbitration, or, in the alternative, be remanded to the Trial Court for a non-jury trial.

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Attorneys for Appellants

January 19, 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Case No. 2019-CP-07-00433
Appellate Case No. 2019-001536

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.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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Case No. 2019-CP-07-00433
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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.

PROOF OF SERVICE

The undersigned hereby certifies that on the 19th day of January 2022, he has served all counsel of record with a copy of **APPELLANTS' FINAL REPLY BRIEF WITH UPDATED COVER AND SIGNATURES** in this matter by e-mail, to the following addresses:

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The South Carolina Court of Appeals

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September 16, 2022

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

Dear Counsel:

Your case is set for oral argument during the October 2022 term of court. In preparation for argument of this case, we request that you serve and file a letter brief, no longer than five pages, addressing the impact of Arredondo v. SNH SE Ashley River Tenant, LLC, 433 S.C. 69, 856 S.E.2d 550 (Dec. 6, 2021), on this case. Your letter brief must be served and filed on or before September 26, 2022.

Very truly yours,

CLERK

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September 25, 2022

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

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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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.

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[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

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.

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Attorneys for Respondent

ELECTRONICALLY FILED - 2019 Jul 26 11:25 AM - BEAUFORT - COMMON PLEAS - CASE#2019CP0700433

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0700433

Viola M Hackworth et al
PLAINTIFF(S)

Bayview Manor Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

that the Defendant's Motion to Stay Action is DENIED; the Defendant's Motion to Compel Arbitration is DENIED; and the Defendant's motion for a protective order is DENIED.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/26/2019 .

Eugene N Boles Estate
Eugene Boles

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2019 Jul 26 11:25 AM - BEAUFORT - COMMON PLEAS - CASE#2019CP0700433

ELECTRONICALLY FILED - 2019 Jul 26 11:25 AM - BEAUFORT - COMMON PLEAS - CASE#2019CP0700433

Beaufort Common Pleas

Case Caption: Viola M Hackworth , plaintiff, et al VS Bayview Manor Llc , defendant, et al

Case Number: 2019CP0700433

Type: Order/Electronic Form 4

So Ordered

s/ Edgar W. Dickson #2153

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0700433

Viola M Hackworth et al
PLAINTIFF(S)

Bayview Manor Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

After careful consideration, the Court respectfully denies the Defendant's Motion to alter or amend the denial of its previous Motion to Stay Action and Compel Arbitration; its motion for a nonjury trial; and motion for protective order.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/20/2019 .

Eugene N Boles Estate
Eugene Boles

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

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Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Beaufort Common Pleas

Case Caption:	Viola M Hackworth , plaintiff, et al VS Bayview Manor Llc , defendant, et al
Case Number:	2019CP0700433
Type:	Order/Electronic Form 4

So Ordered

s/ Edgar W. Dickson #2153

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
VIOLA M. HACKWORTH, as Personal Representative of the Estate of EUGENE BOLES a/k/a EUGENE N. BOLES, deceased,	)	C/A No. 2019-CP-14-____
Plaintiff,	)	
vs.	)	
BAYVIEW MANOR, LLC d/b/a BAYVIEW MANOR; EPIC MGT, LLC; EPIC GROUP, Limited Partnership; TEDDIE SIMMONS; JOHN DOES; and RICHARD ROE CORPORATIONS,	)	
Defendants.	)	

SUMMONS

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at their offices, 302 Park Avenue SE, Aiken, SC 29801, within thirty (30) days after the service hereof, exclusive of the date of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

This the 1st day of March, 2019.

s/ C. Caleb Connor
C. Caleb Connor, SC Bar No. 100517
Kenneth L. Connor, SC Bar No. 100298
A. Keith McAlister, Jr., SC Bar No. 78213
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
VIOLA M. HACKWORTH, as Personal Representative of the Estate of EUGENE BOLES a/k/a EUGENE N. BOLES, deceased,	)	**COMPLAINT FOR DAMAGES (Wrongful Death/Survival Action)**
Plaintiff,	)	C/A No. 2019-CP-14-_____
vs.	)	Jury Trial Demanded
BAYVIEW MANOR, LLC d/b/a BAYVIEW MANOR, EPIC MGT, LLC, EPIC GROUP, LIMITED PARTNERSHIP, TEDDIE SIMMONS, JOHN DOES, and RICHARD ROE CORPORATIONS,	)	
Defendants.	)	

COMES NOW Plaintiff Viola M. Hackworth, as Personal Representative of the Estate of Eugene Boles a/k/a Eugene N. Boles, deceased, and files this Complaint for Damages against Defendants Bayview Manor, LLC d/b/a Bayview Manor; Epic MGT, LLC; Epic Group, Limited Partnership, LP; Teddie Simmons; John Does; and Richard Roe Corporations and alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Viola M. Hackworth ("Plaintiff"), was duly appointed as the Personal Representative of the Estate of Eugene Boles ("Mr. Boles"), deceased, on August 1, 2018 in the Beaufort County Probate Court in South Carolina. A Certificate of Appointment is attached hereto as Exhibit A. Plaintiff is therefore authorized to bring this action in tort in order to recover for Mr. Boles' wrongful death for damages to the statutory heirs of Mr. Boles, and for claims belonging to Mr. Boles in life and belonging to his estate including, but not limited to, pre-death pain and

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suffering, mental distress, medical bills, loss of quality of life to decedent, and funeral expenses. S.C. Code Ann. §§ 15-5-90, 15-5-100, and 15-51-10.

2. On November 2, 2015, Mr. Boles, after suffering a stroke at the age of sixty-eight (68), was admitted to Bayview Manor (the "Facility"), a skilled nursing and rehabilitation facility located at 11 Todd Drive, Beaufort, South Carolina 29902.

3. Upon information and belief, Defendant Bayview Manor, LLC d/b/a Bayview Manor was at all material times a South Carolina limited liability company doing business in South Carolina. Defendant Bayview was licensed by the State of South Carolina (License No. NCF-0898) to maintain and operate the Facility. Bayview Manor, LLC conducted and engaged in business activities within the State of South Carolina, engaged in substantial and not isolated activities within the State of South Carolina, and purposefully availed itself of the privileges of the South Carolina Constitution. Bayview Manor, LLC committed tortious acts against Mr. Boles in the State of South Carolina, which are specifically alleged in the subsequent counts. Bayview Manor, LLC may be served through its attorney, A. Walker Barnes, Holcombe Bomar, PA, 101 W. St. John St., Suite 200, Spartanburg, SC 29304.

4. Upon information and belief, Defendant Epic MGT, LLC ("Epic MGT") was at all material times a South Carolina limited liability company doing business in South Carolina. At all times relevant herein, through its individual actions and acts of its agents, and in concert with other Defendants, Epic MGT engaged in oversight, management, direction, and operation of the Facility. Epic MGT conducted and engaged in business activities within the State of South Carolina, engaged in substantial and not isolated activities within the State of South Carolina, and purposefully availed itself of the privileges of the South Carolina Constitution. Epic MGT committed tortious acts against Mr. Boles in the State of South Carolina, which are specifically

alleged in the subsequent counts. Epic MGT may be served through its attorney, A. Walker Barnes, Holcombe Bomar, PA, 101 W. St. John St., Suite 200, Spartanburg, SC 29304.

5. Upon information and belief, Defendant Epic Group, Limited Partnership ("Epic LP") was at all material times a North Carolina limited partnership doing business in South Carolina. Epic LP has its principal place of business at 820 67th Avenue North 71030, Myrtle Beach, SC 29572. At all times relevant herein, through its individual actions and acts of its agents, and in concert with other Defendants, Epic LP engaged in oversight, management, direction, and operation of the nursing home facility. Epic LP conducted and engaged in business activities within the State of South Carolina, engaged in substantial and not isolated activities within the State of South Carolina, and purposefully availed itself of the privileges of the South Carolina Constitution. Epic LP committed tortious acts against Mr. Boles in the State of South Carolina, which are specifically alleged in the subsequent counts. Epic LP may be served through its attorney, A. Walker Barnes, Holcombe Bomar, PA, 101 W. St. John St., Suite 200, Spartanburg, SC 29304.

6. Upon information and belief, Teddie Simmons ("Ms. Simmons") held herself out to be, and was employed as, a licensed Nursing Home Administrator in the State of South Carolina in accordance with S.C. Code Ann. § 40-35-30 during Mr. Boles' residency at the Facility. Ms. Simmons engaged in business activities within the State of South Carolina, engaged in substantial and not isolated activities within the State, and purposefully availed herself of the privileges of the State of South Carolina. As a licensed Administrator in the State of South Carolina, Ms. Simmons was responsible for the administration, management, supervision, and general administrative charge of nursing homes. Furthermore, Ms. Simmons was under a continuing duty to conform his conduct to the standards and rules governing his profession and the standards of reasonably

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prudent licensed nursing home administrators. Ms. Simmons is sued in her individual capacity for her own acts and omissions. Ms. Simmons may be served through her attorney, A. Walker Barnes, Holcombe Bomar, PA, 101 W. St. John St., Suite 200, Spartanburg, SC 29304.

7. Plaintiff intends to name as defendants any other entity that, either directly or by joining or in concert with others was negligent and breached the applicable standard of care in assessing, diagnosing, caring for, and treating Mr. Boles while he was a resident at the Facility and was responsible for the actions or inactions that caused Mr. Boles' injuries and premature death. Defendants John Does are unknown or unidentified persons or entities within the network of individuals and businesses which participated in these acts and omissions.

8. Plaintiff intends to name as defendants any other entity who are, or were, an alter ego of the Defendants named in this action, or who were agents of or joint-venturers with the named Defendants. Defendants Richard Roe Corporations are unknown or unidentified entities that are, or were, alter egos of Defendants or agents of or joint-venturers with the named Defendants in the establishment, ownership, operation, management, or control of the Facility. Plaintiff cannot determine the exact number or identities of such individuals or entities at this time.

9. Whenever the term "Defendants" is utilized in this Complaint, such term collectively refers to and includes all named Defendants in this lawsuit, unless specifically restricted within a cause of action or as further defined below.

10. At all material times, Defendants remained actively engaged in and transacted business in Beaufort County, South Carolina by establishing, owning, maintaining, managing and/or operating the Facility.

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11. At all material times, the Defendants were responsible for ensuring that the operations of the Facility complied with all applicable state and federal statutes, laws, and regulations.

12. Additionally, at all material times, the Facility was a participant in the Medicare and Medicaid programs and was, therefore, required to comply with the provisions of 42 CFR § 483.1 *et seq*.

13. Whenever in this Complaint it is alleged that the Defendants did any act or failed to do any act, it is meant that the officers, agents, or employees of the Defendants respectively performed, participated in, or failed to perform such acts while in the course and scope of their employment or agency relationship with said Defendants.

14. The cause of action sued upon arose in Beaufort County, South Carolina. Defendants are subject to the jurisdiction of this Honorable Court.

15. Defendants are joint tort-feasors and were all jointly, directly, and vicariously liable for the care and treatment Mr. Boles received. Venue is, therefore, proper for all Defendants in Beaufort County, South Carolina.

16. Plaintiff and Defendants completed pre-suit mediation pursuant to S.C. Code Ann. § 15-79-125 on February 7, 2019, and the parties were unable to reach a settlement in this matter. Proof of mediation is attached as Exhibit B to this Complaint.

NATURE OF THE DEFENDANTS' LIABILITY:
DIRECT AND VICARIOUS LIABILITY

17. Defendants have a history of executing contracts and creating entities that purport to comprise a complete and operational corporate structure, while simultaneously disregarding corporate form, operating as a single enterprise, and engaging in "top down" control of their subsidiary facilities, including Bayview Manor.

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18. Defendants' corporate structure was utilized by the Defendants to shield their revenue and profits from regulators, watchdogs, and injured nursing home residents. The corporate structure serves as an attempt to avoid accountability and liability both in tort and in administrative proceedings.

19. Despite the creation of an elaborate corporate structure of affiliated entities, Defendants are directly liable by virtue of their own conduct for the wrongful acts detailed herein. Defendants are also vicariously, or indirectly, liable and responsible for the wrongful conduct detailed herein under one or more of the following alternative legal theories:

a. ***Alter Ego***: At all times material to this lawsuit, Defendants were *alter egos* of one another. Defendants conducted the business of these entities, including the Facility, as if they were one by commingling them on an interchangeable basis or confusing separate properties, records, or control. Furthermore, the Facility was a subsidiary, affiliate, and/or alter ego of the Defendants. The management and operations of the Facility were so assimilated within the Defendants that Bayview Manor was simply a name through which the Defendants conducted their business. Defendants dominated and controlled the operations of the Facility, and any assertions by the Defendants that each was a separate corporate enterprise with an independent and separate existence is a sham and part of a scheme to perpetrate fraud, promote injustice, and evade existing legal and fiduciary obligations.

b. ***Agency***: At all times material to this lawsuit, Defendants acted as agents for one another and each ratified or authorized the acts or omissions of the other.

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c. ***Joint Venture/Enterprise***: To the extent that the Defendants are found to be separate corporate entities, Defendants each remain liable for the acts and omissions of the other because they were engaged in a joint venture and enterprise and acted in concert in the establishment, operation, management, and control of the Facility. Defendants acted jointly and in concert for the furtherance of their overriding mission, which was to ensure that their nursing home enterprise, including Bayview Manor, was profitable. Defendants agreed to a common purpose of establishing, operating, managing, and controlling the Facility and had equal rights to control their venture as a whole, as well as to control the operation and management of the Facility. Defendants' joint enterprise was executed and facilitated through the use of overlapping, interlocking management employees and boards of directors through transfers of employees and funds within the joint enterprise without regard to corporate form and through mixed accounting processes, including transfers of assets and liabilities among and between the entitities. To treat each of the Defendants as distinct, real entities, would be to blindly exalt form over substance, and to ignore the single functional identity of the nursing home enterprise.

d. ***Amalgamation of Interests***: Defendants each remain liable for the acts and omissions of the other because the Defendants are and have been operating as an amalgamation of interests creating a blurred corporate identity through an integrated enterprise and/or joint venture in the establishment, operation, management, and control of the Facility. Defendants shared a common purpose in establishing, operating, managing, and controlling the Facility and combined

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their property and labor in the Facility for the purpose of making a profit and to blur the legal distinction between the entities and their activities.

20. At all material times hereto, the Defendants domineered and exercised full control over the nursing home enterprise and every facet of the operations of the facilities, including Bayview Manor.

21. At all times material hereto, all Defendants individually and collectively owed duties, some of which were non-delegable, to the residents of Bayview Manor, including Mr. Boles.

22. Defendants had the right and/or power to direct and control their employees and/or agents in the business of delivering care for a fee through skilled nursing/rehabilitation facilities and they are personally, jointly, and severally liable for the acts and omissions committed.

23. While engaged in the conduct alleged herein, Defendants each acted with the express or implied knowledge, consent, authorization, approval, and/or ratification of the other Defendants.

FACTS COMMON TO ALL CAUSES OF ACTION

24. At the time of his admission to the Facility on November 2, 2015, Mr. Boles' medical history included left side hemiparesis which caused physical limitations, cognitive deficits, Dementia, impaired speech, and diabetes. Mr. Boles was assessed to be alert but exhibited memory problems and cognitive deficits, and he was deemed a high risk of falls and pressure ulcers. He required total care and was incontinent of bowel and bladder.

25. Mr. Boles was dependent on the staff at the Facility for nursing and rehabilitative care, as well as assistance with his daily needs including, but not limited to: transfers; mobility;

pressure relief; adequate nutrition and hydration; toileting; hygiene and grooming; and other activities of daily living.

26. At all material times, Defendants represented that: (a) they were competent to provide Mr. Boles with the necessary care, treatment and services and would provide the same; and (b) that Mr. Boles' condition was capable of being successfully managed by them.

27. Despite these representations, during his admission to the Facility, Mr. Boles suffered multiple injuries at the hands of the Defendants including, but not limited to: (a) numerous falls; (b) contractures of his lower extremeties; (c) multiple pressure ulcers including a Stage IV wounds on his left and right buttocks and ulcerations of his toe and heels; (d) painful irrigation and debridement of his left buttock wound; (e) sepsis; (f) disfigurement; (g) malnutrition; (h) dehydration; (i) urinary tract infections; (j) weight loss; (k) constant discomfort; (l) insults to his human dignity; (m) violation of his rights; (n) loss of enjoyment of life; (o) physical pain and suffering; and (p) mental anguish, all contributing to and hastening Mr. Boles' untimely death.

28. At all material times, Defendants were fully aware that the delivery of care and custodial services to residents in Bayview Manor, including Mr. Boles, required: (a) provision of adequate and appropriate staffing at the Facility; and (b) appropriate and manageable census levels and types within the Facility.

29. Despite this knowledge, Defendants made operational, budgetary, and administrative decisions that were determined more by the financial needs and goals of the Defendants than by the custodial, medical, and nursing needs of residents of the Facility, including Mr. Boles.

30. Defendants entered into a continuing course of negligent conduct creating, implementing, and enforcing dangerous operational budgets, practices, and policies at the Facility

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which deprived residents, including Mr. Boles, of safe, adequate, and essential care and resources to meet their needs including, but not limited to: assessment and continued monitoring of his condition; appropriate plans of care; appropriate documentation for the care of Mr. Boles; assistance with activities consistent with daily living; fall prevention measures and interventions to prevent recurrent falls; pressure relief to prevent skin breakdown; adequate nutrition; fluids to prevent dehydration; and a clean and safe environment to prevent falls, infections and other harm.

31. Notwithstanding the Defendants' decisions, directives, and practices which resulted in inadequate and inappropriate staffing of the Facility, Defendants sought to market, recruit, and admit higher acuity, heavier care, higher pay residents to the Facility, even though the needs of the resident population, including the needs of Mr. Boles, exceeded the capacity of the staff.

32. At all material times, Defendants had a duty to allocate resources and exercise fiscal and operational policies with reasonable care so as to prevent the infliction of harm on residents of the Facility, including Mr. Boles.

33. Defendants breached their duty by failing to allocate sufficient financial and operational resources to the Facility, thereby causing harm to residents, including Mr. Boles. This conduct was specifically directed, controlled, and authorized by Defendants, who knew or should have known that such conduct would likely cause harm to residents at the Facility, including Mr. Boles.

34. At all material times, Defendants knew or should have known that the delivery of essential and necessary care would suffer due to their budgetary and operational decisions, causing resident injury if they did not provide needed resources to adequately and appropriately staff and operate the Facility.

35. As a result of the Defendants' conduct, dependent residents, including Mr. Boles,

suffered repeated and ongoing neglect and were subjected to dangerous conditions, including the routine deprivation of basic custodial care.

36. The neglect and injuries of Mr. Boles were foreseeable to the Defendants.

37. Upon information and belief, Defendants were repeatedly placed on notice that the same kind of dangerous conduct and conditions which caused injury to Mr. Boles were occurring and had occurred within the Facility by virtue of:

a. Complaints and concerns registered to Defendants and/or regulatory agencies by Defendants' staff, residents, and the families of residents about substantially similar conditions and neglect as that experienced by Mr. Boles; and

b. Defendants own records and communications about substantially similar conditions and neglect as that experienced by Mr. Boles.

38. The repeated notice and warning of ongoing violations of the minimum standards of care experienced by other similarly situated residents within the Facility was inextricably intertwined and connected to that neglect experienced by Mr. Boles and relevant to the Defendants' knowledge, indifference, negligence, and willful and wanton conduct.

39. Upon information and belief, not only did the Defendants refuse to heed these warnings, but Defendants also failed as a routine practice to report occurrences at the Facility, which the Defendants knew required reporting to and investigation by authorities.

40. At the time of his admission on November 2, 2015, Mr. Boles weight was recorded at 190 pounds, he was a known risk for falls and pressure ulcers, and the Facility's staff was aware of his need for appropriate interventions.

41. Despite this knowledge, Mr. Boles experienced at least five (5) documented falls during his residency.

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42. By November 25, 2015, Mr. Boles' weight was down to 179.2 pounds. Mr. Boles continued to suffer severe weight loss, and on December 1, 2016, his last documented weight at the Facility was 125.7 pounds.

43. Mr. Boles also suffered skin breakdown, including but not limited to Stage IV wounds on his buttocks/sacral area and pressure ulcerations on his toes and heels.

44. Mr. Boles was sent to the hospital on at least six (6) different occasions throughout his residency at the Facility.

45. On March 11, 2016, Mr. Boles was observed to be unresponsive and was transported by EMS to Beaufort Memorial Hospital where he was treated for a urinary tract infection with possible sepsis. He remained hospitalized until March 15, 2016 when he was discharged back to the Facility.

46. On March 19, 2016, due to his lethargic state, Mr. Boles' family requested he be sent to the hospital for evaluation where his Albumin was noted to be at 2.5, indicating malnutrition. Mr. Boles remained in the hospital until March 23, 2016 when he was transported back to Bayview Manor.

47. On July 2, 2016, Mr. Boles' sister again requested that Mr. Boles be sent to the hospital because of concern about his weight loss and sacral ulcer. Upon admission to Beaufort Memorial Hospital, Mr. Boles was diagnosed with altered mental status, Systemic Inflammatory Response Syndrome, fever, unstageable sacral decubitus ulcer, and infection. Mr. Boles was treated with IV antibiotics and provided wound care. He returned to Bayview Manor on July 8, 2016.

48. On July 29, 2016, Mr. Boles was sent to Beaufort Memorial Hospital for placement of a feeding tube. Despite placement of the tube, Mr. Boles continued to lose weight and suffer from malnutrition.

49. On August 13, 2016, Mr. Boles appeared "deceased" and was unable to be aroused by the staff at Bayview Manor. He was transferred to Beaufort Memorial Hospital once again. The physician noted that Mr. Boles had a Stage IV pressure ulcer to his sacram, his white blood count was elevated, and his Albumin level was very low at 1.9. Mr. Boles' left buttocks pressure ulcer was debrided during the hospital stay.

50. On August 18, 2016, Mr. Boles returned to Bayview Manor with orders for IV antibiotics; however, the nursing home staff were unable to provide these IV medications and Mr. Boles was returned to the hospital a day later for treatment, after which he returned to the Facility.

51. Mr. Boles continued to suffer from pressure ulcers to his sacrum and buttocks area, along with multiple black areas to his feet. The pressure ulceration on his left buttocks continued to deteriorate and had a large amount of drainage and odor.

52. On September 13, 2016, Mr. Boles was sent to Beaufort Wound Care for evaluation and treatment. Orders were given to provide a low air loss mattress, a pressure relieving cushion to the wheelchair, to limit sit time, and to turn and reposition Mr. Boles every two (2) hours.

53. At a follow-up visit to the wound center on September 20, 2016, Mr. Boles developed tachycardia and tachypnea and was transported to Beaufort Memorial Hospital. Evaluation of left buttocks ulceration showed visible bone with tunneling in the wound bed. Additional ulcerations included an unstageable, left lateral buttock ulcer and wound and eschar covered areas to the feet. Mr. Boles was also diagnosed with Clostridium Difficile ("C-Diff") and sepsis.

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54. On October 6, 2016, in preparation for Hurricane Matthew, Mr. Boles was hospitalized at McLeod Regional Medical Center ("McLeod") after a refusal by Dundee Nursing Home because of Mr. Boles' diagnosis of C-Diff. Upon examination at McLeod, medical staff noted a large, open and infected Stage IV sacral/buttock pressure ulceration, a Stage IV pressure ulcer to the right buttocks, several pressure ulcerations on both his feet and heels, contractures of the lower extremities, fever, dehydration, and an "old, plugged" feeding tube.

55. Mr. Boles underwent debridement for his sacral/buttock area and was placed on IV antibiotics. He was discharged from McLeod on October 17, 2016 and returned to Bayview Manor.

56. Mr. Boles continued to deteriorate at the Facility and was found unresponsive by the Bayview Manor staff on December 14, 2016. Mr. Boles was transported by EMS to Beaufort Memorial Hospital where he passed away later that day.

FIRST CAUSE OF ACTION
PROFESSIONAL NEGLIGENCE

57. Plaintiff re-alleges and incorporates by reference Paragraphs 1 through 56 as if fully set forth *verbatim*.

58. Defendants, individually and collectively, and by virtue of their own independent actions and while acting as *alter egos* and agents of one another, and while acting as joint venturers in the establishment, operation, management, and/or control of the Facility, and while acting through the nursing staff employed by them at the Facility, owed a duty to Mr. Boles to comply with the standard of care and skill exercised by nurses generally under similar conditions and like surrounding circumstances as those presented by Mr. Boles during his residency at the Facility.

59. Defendants, individually and collectively, and by virtue of their own independent actions and while acting as *alter egos* and agents of one another, and while acting as joint venturers

in the establishment, operation, management, or control of the Facility, and while acting through the nurses employed by them at the Facility, violated the standard of care and skill exercised by nurses generally under similar conditions and like surrounding circumstances such as those presented by Mr. Boles in their care and treatment of him. Their professional negligence includes, but is not limited to, the following:

General

a. Failure to provide Mr. Boles with necessary care and services to allow him to attain or maintain the highest practicable physical, mental, and psychological well-being;

b. Failure to provide adequate and appropriate services in the facility to accommodate the individual needs of Mr. Boles;

c. Failure to provide Mr. Boles a safe environment;

d. Failure to provide staff with the knowledge, skills, and competencies to care for residents with dementia and who are at risk for falls, including Mr. Boles;

Assessment

e. Failure to accurately and timely assess and monitor Mr. Boles;

f. Failure to obtain and provide timely and appropriate assessments of Mr. Boles' changes of condition;

Care Planning

g. Failure to provide adequate and appropriate care plans specific to Mr. Boles' condition;

h. Failure to develop, implement, and update comprehensive and individualized care plans to account for Mr. Boles' physical and mental limitations and protect against his overall physical decline, including prevention of falls, malnutrition, dehydration, skin breakdown, and infections;

i. Failure to timely update and revise care plans to ensure interventions were implemented, during his admission and readmission, to meet Mr. Boles' specific care needs;

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Falls

j. Failure to provide adequate and appropriate supervision and necessary interventions to protect Mr. Boles from preventable falls and injuries;

k. Failure to consult with an MD to timely obtain orders for safety devices;

Skin Integrity

l. Failure to provide appropriate skin care and personal hygiene to prevent skin breakdown;

m. Failure to to prevent the development and progression of multiple avoidable pressure ulcers;

n. Failure to properly, accurately, and timely monitor and observe Mr. Boles' skin condition and development of multiple avoidable pressure ulcers, including the deterioration and progression of his buttocks/sacral area wounds;

o. Failure to implement appropriate interventions in a patient identified as high risk for pressure ulcer development, including but not limited to pressure reduction to prevent excessive pressure to bony prominences and heel protectors;

p. Failure to provide a wound care referral as ordered;

q. Failure to turn and reposition Mr. Boles at least every two (2) hours as needed to prevent the formation and deterioration of pressure ulcers;

r. Failure to provide the needed care and services to promote the healing of pressure ulcers and to prevent infection;

s. Failure to provide treatments and medication in compliance with physician's orders;

t. Failure to communicate pertinent information, including but not limited to the worsening of Mr. Boles' ulcerations, to the treating provider;

u. Failure to perform weekly wound tracking;

Nutrition

v. Failure to provide adequate assessment and oversight of Mr. Boles' nutrition status;

w. Failure to provide Mr. Boles with sufficient nutrition to prevent malnutrition and weight loss;

x. Failure to obtain a dietary consult, as ordered;

y. Failure to timely consult with a physician and obtain orders to implement adequate nutritional interventions;

z. Failure to provide adequate interventions, including but not limited to meal alternatives, snacks, and assistance with feeding, to prevent weight loss and malnutrition;

aa. Failure to provide nutritional and protein supplements as ordered;

bb. Failure to record meal intake;

cc. Failure to monitor blood sugar levels;

Hydration

dd. Failure to monitor signs and symptoms of dehydration exhibited by Mr. Boles, including his fluid intake;

ee. Failure to ensure Mr. Boles received sufficient amounts of fluid in order to prevent dehydration and to protect against development and progression of wounds and infections;

Infections

ff. Failure to assess Mr. Boles' for signs and symptoms of infection;

gg. Failure to provide care and treatment to prevent the development of infections, including urinary tract infections, C-Diff, and sepsis;

hh. Failure to implement contact precautions in order to prevent exposure to and development of infection;

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Contractures

ii. Failure to implement appropriate interventions to prevent the development, worsening, decline, and progression of avoidable contractures;

jj. Failure to provide restorative care, including passive range of motion exercises, to prevent Mr. Boles' physical decline;

Documentation

kk. Failure to consistently, appropriately and completely document information related to Mr. Boles' health status, care, treatment, and injuries;

ll. Failure to maintain complete and accurate medical records free from missing records, late entries, and discrepancies in documentation;

60. As a direct and proximate result of the violations of the standard of care by the Defendants as described above, Mr. Boles suffered multiple injuries including economic and non-economic damages as more particularly described in Paragraph 27.

61. As a further result, the Defendants' violations of the standard of care described above were the direct and proximate cause of the damage and injuries suffered by Mr. Boles' wrongful death beneficiaries including, but not limited to, pecuniary loss, grief and sorrow, mental shock and suffering, wounded feelings, loss of companionship, and deprivation of the use and comfort of Mr. Boles' society, including the loss of his judgment in managing his affairs.

62. Also, as a direct and proximate result of the violations of the standard of care by the Defendants described above, Mr. Boles died prematurely, and his death resulted in funeral expenses and burial expenses.

63. Defendants are liable to Plaintiff Viola M. Hackworth, in her capacity as Personal Representative, for wrongful death damages sustained by Mr. Boles' statutory beneficiaries.

64. Defendants are liable to Plaintiff Viola M. Hackworth, in her capacity as Personal

Representative for the Estate of Eugene Boles, for physical and mental pain and suffering experienced by Mr. Boles prior to his death, as well as his medical, funeral, and burial expenses.

65. To the extent an affidavit pursuant to S.C. Code § 15-36-100 is required, Plaintiff has attached as Exhibit C to this Complaint the affidavit of Maryann Hewston, MPM, BSN, RN , NHA, who is qualified as an expert on the issues raised in this Complaint. This affidavit specifies at least one negligent act or omission on the part of Defendants and the factual basis for each claim based upon the available evidence at the time of the filing of the affidavit. The attached affidavit is not inclusive of each act, error, or omission that has been committed, or may not have been committed by the Defendants, and Plaintiff reserves the right to contend and prove additional acts, errors, and omissions on the part of the Defendants that reflect a departure from the requisite standard of care required by law.

66. In addition to being negligent and breaching the standard of care, the conduct of Defendants violated provisions of applicable federal and state law, including but not limited to provisions of: the Omnibus Budget Reconciliation Act of 1987 and the regulations adopted pursuant thereto (42 C.F.R. § 483.1, *et seq.*) ("OBRA Regulations"); the South Carolina Omnibus Adult Protection Act (S.C. Code Ann. § 43-35-5, *et seq*.); South Carolina Department of Health and Environmental Control's Regulations for Nursing Homes (S.C. Code Reg. 61-17, *et seq*.); the South Carolina Bill of Rights for Residents of Long-Term Care Facilities (S.C. Code Ann. § 44-81-10, *et seq*.); and the South Carolina Nurse Practice Act (S.C. Code Ann. § 40-33-5, *et seq*.), constituting negligence *per se*.

67. If any of the acts or omissions complained of in Paragraph 59 are deemed by the court to involve ordinary negligence rather than professional negligence, they are alternatively incorporated and averred as part of Paragraph 70 of this Complaint.

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SECOND CAUSE OF ACTION
ORDINARY NEGLIGENCE/SIMPLE NEGLIGENCE

68. Plaintiff re-alleges and incorporates by reference Paragraphs 1 through 56 as if fully set forth *verbatim*.

69. Defendants had a duty to exercise ordinary and reasonable care in providing services to Mr. Boles, including, but not limited to, the following: assisting Mr. Boles with activities necessary for daily living such as protecting him from falls, bathing, feeding, and turning and repositioning; providing Mr. Boles appropriate hydration; and observing, and documenting and reporting abnormal findings to nurses and physicians.

70. Defendants, individually and collectively, and by virtue of their own independent actions and while acting as *alter egos* and agents of one another, and while acting as joint venturers in the establishment, operation, maintenance, supervision, management, or control of the Facility, and while acting through staff employed by them, failed to exercise ordinary and reasonable care in provision of services for Mr. Boles. Defendants' ordinary negligence included, but was not limited to:

a. Failure to provide sufficient numbers of staff to meet Mr. Boles' fundamental needs for care and services;

b. Ongoing failure to accurately and appropriately document care provided to Mr. Boles;

c. Ongoing failure to keep a complete, concise and accurate medical record for Mr. Boles;

d. Failure to hire, adequately screen, and train adequate and appropriate personnel to monitor, supervise, care for, and/or treat Mr. Boles;

e. Retention and assignment of unfit, unqualified and incompetent direct care staff to monitor, supervise, care for, and/or treat Mr. Boles;

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f. Failure to adequately screen, evaluate, and check references, test for competence, and use ordinary care in selecting nursing personnel, resulting in direct care givers who were unfit to provide care to Mr. Boles;

g. Failure to establish and implement appropriate corporate budgeting policies which were consistent with the needs of residents of the Facility, including Mr. Boles;

h. Failure to allocate sufficient financial resources, thereby causing harm to Mr. Boles described above;

i. Creation and enforcement of operational budgets which deprived residents of adequate staffing, supplies, and caused neglect;

j. Failure to establish, implement, and/or enforce appropriate safety, training, staffing, and fundamental policies and procedure to prevent harm to Mr. Boles and avoid the known consequences of inadequate care;

k. Failure to have systems in place to ensure that that the staff functioned within the scope of their professional practice, education and training to meet the needs of residents, including Mr. Boles;

l. Failure to have systems in place to ensure communication between nurses and nursing assistants regarding changes in resident condition for all residents to prevent harm to Mr. Boles;

m. Failure to investigate and correct known systemic breakdowns in the delivery of care at the Facility to avoid the consequences and harm to Mr. Boles; and

n. Failure to provide proper care and services in accordance with Mr. Boles' rights and needs.

71. As a direct and proximate result of the negligence by the Defendants as described above, Mr. Boles suffered multiple injuries and death as more particularly described in Paragraphs 27, 60, 61 and 62.

72. Defendants are liable to Plaintiff Viola M. Hackworth, in her capacity as Personal Representative, for wrongful death damages sustained by Mr. Boles' statutory beneficiaries.

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73. Defendants are liable to Plaintiff Viola M. Hackworth, in her capacity as Personal Representative for the Estate of Eugene Boles, for physical and mental pain and suffering experienced by Mr. Boles prior to his death, as well as his medical, funeral, and burial expenses.

74. In addition to being negligent and breaching the duty of ordinary reasonable care, the conduct of Defendants violated provisions of applicable federal and state law as more particularly described in Paragraph 66, constituting negligence *per se*.

75. If any of the acts or omissions complained of in Paragraph 70 are deemed by the court to involve professional negligence by the Defendants rather than ordinary negligence, they are alternatively incorporated and averred as part of Paragraph 59 of this Complaint.

THIRD CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION

76. Plaintiff re-alleges and incorporates by reference Paragraphs 1 through 56 as if fully set forth *verbatim*.

77. In addition to the negligent conduct already described herein, Defendants by virtue of their own independent actions, and while acting through their agents (actual or apparent), servants and/or employees engaged in a continuing and routine practice of making false representations which proximately caused Mr. Boles' injuries, damages and death.

78. For example, at all material times, Defendants represented and held the Facility out to the public, including Mr. Boles and his representatives, as a highly qualified and competent care facility capable of providing skilled nursing care and custodial services to residents, including Mr. Boles, as prescribed by law and applicable professional standards.

79. The foregoing representations made by the Defendants about the level of care, services, and treatment the Facility could provide were false at the time the representations were made. Defendants knew or should have known said representations were false and made them

with the intention of inducing members of the public, including Mr. Boles and his representatives, to rely upon them.

80. Additionally, Defendants engaged in misrepresentations concealing, suppressing and/or failing to disclose material facts to Mr. Boles and his representatives. These material facts include, but are not limited to:

a. The fact that the staff of the Facility was not sufficient in number, qualifications, competency, or training to meet the care and treatment of residents, including Mr. Boles;

b. The fact that the acuity and care needs of residents, including Mr. Boles, exceeded the care capabilities, qualifications, and competence of staff;

c. The fact that adequate policies and procedures were not in place to ensure staffing numbers and qualifications were sensitive and responsive to specific needs of residents, including Mr. Boles;

d. The fact that Mr. Boles' needs were not being met; and

e. The fact of theDefendants' continuing neglect of its residents, including Mr. Boles.

81. Defendants had a pecuniary interest in making such false representations and knew the public, including Mr. Boles and his representatives, would rely upon such representations.

82. During Mr. Boles' residency, Defendants were aware and knowledgeable of these material facts. Defendants knew that Mr. Boles and his representatives were ignorant of the same, and Defendants knew that Mr. Boles and his representatives did not have an equal opportunity to discover the truth about such facts.

83. As a resident who elected skilled nursing care and custodial care at the Facility, Defendants owed Mr. Boles and his representatives a duty to disclose material facts that it knew, or should have known, would have affected the decision to admit Mr. Boles to the Facility and

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allow him to remain a resident of the Facility. Defendants also owed a duty of care to Mr. Boles and his representatives to see that truthful information was communicated to them.

84. Defendants breached their duty by failing to exercise due care.

85. Mr. Boles and his representatives justifiably relied on Defendants' ongoing representations, and trusting in them, Mr. Boles became a resident of the Facility in lieu of alternative nursing facilities. Defendants' actions and the material consequences which flowed therefrom were a direct and proximate cause of Mr. Boles' injuries, subsequent complications, and death as more particularly described in Paragraphs 27, 60, 61 and 62.

86. As a further result, Mr. Boles and his representatives suffered a pecuniary loss as a direct and proximate result of their reliance on the Defendants' representations.

87. Defendants' actions described herein grew out of financial motives and an attempt to hide Defendants' dangerous and ongoing calculated business practices engaged in to protect Defendants' revenue stream and to improve its profitability.

88. Defendants are liable to Plaintiff Viola M. Hackworth, in her capacity as Personal Representative, for wrongful death damages sustained by Mr. Boles' statutory beneficiaries.

89. Defendants are liable to Plaintiff Viola M. Hackworth, in her capacity as Personal Representative for the Estate of Eugene Boles, for physical and mental pain and suffering experienced by Mr. Boles prior to his death, as well as his medical, funeral, and burial expenses.

FOURTH CAUSE OF ACTION
PUNITIVE DAMAGES

90. Plaintiff re-alleges and incorporates by reference Paragraphs 1 through 89 as if fully set forth *verbatim*.

91. The acts and omissions of the Defendants were reckless, willful, and wanton, and demonstrate a conscious failure to exercise due care and conscious indifference to and/or reckless

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disregard to the rights and safety of residents, including the safety, health and welfare of Mr. Boles. Further, the acts and omissions of the Defendants were extraordinary and outrageous.

92. As a result of the acts and omissions of the Defendants, Mr. Boles suffered the injuries, damages and death alleged above.

93. Defendants are liable for punitive damages to Plaintiff Viola M. Hackworth, as Personal Representative of the Estate of Eugene Boles.

94. Punitive damages should be awarded to Plaintiff Viola M. Hackworth, as Personal Representative of the Estate of Eugene Boles, and against the Defendants to punish them for their reckless, willful and wanton conduct and to deter them from repeated misconduct as set forth in this Complaint.

WHEREFORE, Plaintiff prays for the following relief:

(a) That a process be issued as to Defendants;

(b) That Plaintiff Viola M. Hackworth recover a judgment against the Defendants, jointly and severally, in the form of compensatory damages in an amount in excess of $25,000.00 for all causes of action alleged herein as shown by the evidence at the trial of this case;

(c) That Plaintiff Viola M. Hackworth recover a judgment against the Defendants, jointly and severally, in the form of compensatory damages in an amount in excess of $25,000.00 for the wrongful death beneficiaries including, but not limited to, pecuniary loss, grief and sorrow, mental shock and suffering, wounded feelings, loss of companionship, and deprivation of the use and comfort of Mr. Boles' society, including the loss of his judgment in managing his affairs and as shown by the evidence at the trial of this case;

(d) That Plaintiff Viola M. Hackworth, as Personal Representative of the Estate of Eugene Boles, recover a judgment against the Defendants, jointly and severally, in the form of

compensatory damages in an amount in excess of $25,000.00 for the pain and suffering, medical expenses, and funeral and burial expenses of Mr. Boles and as shown by the evidence at the trial of this case;

(e) That Plaintiff Viola M. Hackworth, as Personal Representative of the Estate of Eugene Boles, recover punitive damages from the Defendants;

(f) That Plaintiff recover the costs of this action;

(g) That Plaintiff be granted a jury to try this case; and

(h) That the Court and jury grant such other and further relief as may be just and proper.

Respectfully submitted, this the 1st day of March, 2019.

s/ C. Caleb Connor
C. Caleb Connor, SC Bar No. 100517
Kenneth L. Connor, SC Bar No. 100298
A. Keith McAlister, Jr., SC Bar No. 78213
Anne K. Moore, SC Bar No. 101018
CONNOR & CONNOR, LLC
302 Park Avenue SE
Aiken, SC 29801
P: 803-226-0543
F: 800-480-9715

Attorneys for Plaintiff

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STATE OF SOUTH CAROLINA)
)
COUNTY OF: BEAUFORT)
)
IN THE MATTER OF:)
EUGENE NELSON BOLES AKA EUGENE N. BOLES)
(Decedent))

IN THE PROBATE COURT

CERTIFICATE OF APPOINTMENT

CASE NUMBER: 2017ES0700278

This is to certify that

VIOLA MARY HACKWORTH,

is/are the duly qualified

- ☒ PERSONAL REPRESENTATIVE
- ☐ SUCCESSOR PERSONAL REPRESENTATIVE
- ☐ SPECIAL ADMINISTRATOR

in the above matter and that this appointment, having been executed on the 1st day of August, 2018, is in full force and effect.

RESTRICTIONS:
NO MONIES, ACCOUNTS, OR OTHER PERSONALTY ASSETS OF THE ESTATE MAY BE DISBURSED, TRANSFERRED, ASSIGNED, DISTRIBUTED, OR DISPOSED OF IN ANY WAY BY THE PERSONAL REPRESENTATIVE, WITHOUT PRIOR WRITTEN AUTHORIZATION OF THIS COURT; PROVIDED, HOWEVER, THAT THE PERSONAL REPRESENTATIVE MAY EXECUTE AND HAVE RECORDED A PROPER DEED OF DISTRIBUTION FOR ANY REAL PROPERTY OF THE ESTATE SITUATED IN THE STATE OF SOUTH CAROLINA, IN COMPLIANCE WITH THE APPLICABLE PROVISIONS OF S.C. CODE SECTION 62-3-907.

Executed this 1st day of August, 2018.

PROBATE COURT SEAL BEAUFORT COUNTY

Kenneth E. Fulp, Jr., Probate Court Judge

Do not accept a copy of this certificate without the raised seal of the Probate Court.

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FORM #141ES (1/2014)
62-1-305, 62-3-103

EXHIBIT A

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ELECTRONICALLY FILED - 2019 Mar 04 10:23 AM - BEAUFORT - COMMON PLEAS - CASE#2018NI0700016

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT VIOLA M. HACKWORTH, as Personal Representative of the Estate of Eugene Boles a/k/a Eugene N. Boles, deceased, Plaintiff, vs. BayviewManor, LLC d/b/a,Bayview Manor; Epic Management, LLC; Epic Group, LP; and Teddie Simmons, Defendant.	)	IN THE COURT OF COMMON PLEAS PROOF OF ADR OR EXEMPTION FILE NO.: 2018-NI-07-00016

(An original and copy of this form is to be completed and filed with the Office of the Clerk of Court and a copy forwarded to the attorneys for the parties within 10 days of the conclusion of ADR, or within 300 days of the filing date of the action, whichever is earlier.)

PURSUANT to the South Carolina Alternative Dispute Resolution Rules (SCADR):

A. _____ I certify that this case is exempt from ADR for the following reason and the parties wish to exercise that exemption:

Plaintiff/Attorney for Plaintiff	Defendant/Attorney for Defendant
Print Name	Print Name
Phone/Fax	Phone/Fax
Date:	

B. X 1. Alternative Dispute Resolution (ADR) was conducted in the form of:

Telephone mediation

(Note: If binding arbitration has been chosen by the parties but not yet completed, an appropriate order of dismissal must be attached hereto.)

2. The neutral(s) was/were: (Name of arbitrator/mediator):

Robert M. Erwin, Jr.

3. The ADR was conducted on February 7 , 20 19

SCADR 104A (11/2012)

4. As a result of ADR, this case should be considered (please check one);

( ) Fully Settled.

( ) by Consent Judgment, to be filed by _____

or ( ) Voluntary Dismissal to be filed by _____

( ) Partially Settled.

(X) At an Impasse.

( ) In need of further ADR I ☐ am ☐ am not willing to continue as a neutral. I recommend that ADR resume as of _____ .

5. Plaintiff ☐ was present ☐ was not present
Defendant ☐ was present ☐ was not present

6. Other participants were:

_____ Lawyer for Defendant W. McElhaney White
_____ Lawyer for Plaintiff Caleb Conner, Kip McAllister
_____ Representative for Insurance Carrier _____
_____ Guardian *ad Litem* _____
_____ Experts
_____ Others _____

7. Choice of the neutral was by:

X Stipulation
_____ Court Order

8. The total number of hours spent in ADR was: 0.5 hours.

9. Further comments of the neutral:

_____

_____

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Neutral's Signature

Date: 11 Mar 2019

SCADR 104B (11/2012)

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LAW OFFICES
ROBERT M. ERWIN, JR.
305 Main Street
Greenwood, South Carolina 29646
Telephone (864) 229-5010
Toll Free Telephone (800) 880-5010
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February 8, 2019

W. McElhaney White
Holcombe Bomar, PA
PO Box 1897
Spartanburg, SC 29304

Kip McAlister
Christopher Caleb Connor
Connor & Connor, LLC Aiken Office
302 Park Ave. SE
Aiken, SC 29801

Re: V. Hackworth, as PR of the Estate of Eugene Boles v. Bayview Manor, et al.
(2018-NI-07-0016)

Dear Counsel:

Please find enclosed invoice for the telephone pre-suit mediation concerning the above referenced matter. Should you have any questions, please let me know.

With kindest regards, I am

Very truly yours,

Robert M. Erwin, Jr.

RME/st

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Commonwealth of Pennsylvania
County of Crawford

AFFIDAVIT OF MARYANN HEWSTON, MPM, BSN, RN, NHA

Mary Ann Hewston, MPM, BSN, RN, NHA, being first duly sworn, states as follows:

1.

My curriculum vitae, attached hereto as Exhibit A, accurately reflects my education, training, and experience in caring for patients and residents in the sub-acute care, hospital, and long-term care setting.

2.

I am a registered nurse and nursing home administrator licensed in Pennsylvania. Currently, I serve as the Chief Nurse Executive at Meadville Medical Center in which I am responsible for all nursing services and patient care at the medical center. Areas of responsibility involving medical services include, but are not limited to: wound care, infection prevention, and long-term care services. With authority and responsibility for the development and implementation of nursing related policies and procedures, nursing care standards related to patient care, standards of nursing practice and standards of care, standards to measure and assess outcomes and development of continuous process improvement related to improving patient outcomes and overall patient experiences.

3.

I earned my Bachelor's Degree in Nursing from Edinboro University in Pennsylvania in 1980. I subsequently obtained my nursing license through the Pennsylvania State Board of Nursing and have maintained that license since 1980. In 1994, I received my license to be a nursing home administrator. In 2000, I obtained my Masters of Public Management with an emphasis in Healthcare Administration from Carnegie Mellon University in Pittsburgh, Pennsylvania.

4.

As a result of having been regularly and continuously engaged in the active practice of nursing from 1980 to the present, I have actual professional knowledge and experience in the areas of practice in which this opinion is given. Further, for greater than three of the last five years immediately preceding this opinion, I was actively and regularly involved in assessing, planning, and caring for patients in the acute and long-term care setting who suffered from the same or similar conditions as Mr. Eugene Boles, while a resident of Bayview Manor from November 2, 2015 – December 14, 2016. I am familiar with the standards of care applicable to RNs, LPNs, CNAs, non-licensed support personnel and the other interdisciplinary staff providing care in skilled nursing facilities similar to Bayview Manor, LLC.

EXHIBIT C

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5.

Pursuant to the provisions of S.C. Code Ann. § 15-36-100, which requires that an affidavit of an expert witness must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit, I make this affidavit in support of an action to be filed on behalf of Mr. Eugene Boles alleging, among other things, negligence with regard to his care and treatment while a resident at Bayview Manor. My opinions contained in this Affidavit are expressed as a nursing expert engaged in providing care to patients in the long-term care environments. To date, I have reviewed the medical records and documents related to Eugene Boles listed below:

- Bayview Manor 11/2/15 – 12/14/16
- Beaufort Memorial Hospital 10/27/15 – 9/27/16
- PharMercia 3/31/16 – 7/31/16
- Beaufort County EMS 10/27/15 – 12/14/16
- McLeod Regional Medical Center 10/6/16 – 10/17/16
- Personal Care Ambulance 11/5/15 – 10/7/16
- Death Certificate 12/14/16

6.

After review of the foregoing records, it is my professional opinion, which I express within a reasonable degree of nursing certainty, that the acts or omissions by Bayview Manor and the nursing staff, and any other entity or person responsible for managing, supervising, or operating the nursing home or its staff, were negligent and below the applicable standard of care/standard of practice for long-term care facilities treating patients with the same or similar conditions as Eugene Boles. These negligent acts or omissions, while under the care of Bayview Manor and its staff, caused Eugene Boles to suffer harm and contributed to his death. Examples of the negligent conduct and the factual bases for my opinions are provided below.

7.

After suffering from a stroke, Mr. Boles was transferred from Beaufort Memorial Hospital to Bayview Manor on November 2, 2015 for continued care and treatment. Upon admission to the nursing home, Mr. Boles' weight was recorded at 190 lbs.

While at Bayview Manor, Mr. Boles had cognitive deficits, due to his recent stroke, Dementia, and Organic Brain Syndrome. His stroke caused him to have both long and short-term memory deficits, as well as confusion, disorientation, and impaired decision-making. His stroke and underlying Dementia caused him to be aphasic and have difficulty making his needs known, as his speech was mumbled and slurred, and often non-verbal.

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Mr. Boles' stroke also caused him to have left sided hemiparesis, which created physical limitations in both his upper and lower extremities. His recent stroke also caused him to have impaired balance and coordination, generalized weakness, and an unsteady gait producing very limited mobility. Mr. Boles was essentially chair-bound, non-ambulatory, and required the use of a Hoyer lift, during his stay at Bayview Manor. Due to his physical limitations, he required total care of 1-2 persons with his ADL needs. He also had to be fed by staff and developed contractures, during his residency, at Bayview Manor. While at Bayview Manor, Mr. Boles was incontinent and reliant on the staff for provision of his toileting, personal hygiene, and bathing needs. He was also a known diabetic.

On November 2, 2015, the same day he was admitted, Mr. Boles had an unwitnessed fall out of the bed and was found lying on the floor on his left side.

On November 9, 2015, Mr. Boles had another fall, which was also unwitnessed as he was discovered on his left side inside the solarium.

On November 25, 2015, Mr. Boles' most recent weight was recorded at 179.2 lbs., which was significantly lower than his admitting weight of 190 lbs. On November 30, 2015, he also had a lowered Albumin of 3.3. No skin breakdown was present at this time.

On December 1, 2015, Heather Smith, RD, noted a 4.2% weight loss, since his admission to the facility.

On January 24, 2016, around 2:00 am, staff heard Mr. Boles "calling out" and entered his room where they found him on the floor. He was assisted by 3 staff members into the "geri-chair & brought to nurses station."

Mr. Boles continued to lose weight, and by January 25, 2016, he was 166 lbs., a loss of 24 lbs. since his admission in November, 2015.

On January 27, 2016, around 2:15 am, the nurse "heard resident yell out – went to resident's room & observed resident lying on his back on floor between bed and wall." His bed alarm on was disconnected. He was assisted up to bed, and his bed alarm was "placed out of resident's reach."

On February 18, 2016, around 4:00 am, "staff responded to activated bed alarm" and found Mr. Boles "laying on his stomach on fall mat next to bed." Mr. Boles was assisted into the geri-chair by 3 staff members with use of a Hoyer lift.

On March 7, 2016, Mr. Boles' weight was 159.4 lbs.; a 30.6 lbs. drop since his admission to Bayview Manor.

On March 11, 2016, Mr. Boles was observed to be unresponsive, his eyes were fixed, and he did not resist staff when his arms were moved. His blood pressure was low at 60/40. The physician

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was contacted and ordered Mr. Boles be sent to Beaufort Memorial Hospital. Upon EMS arrival, he was noted to be unconscious but breathing and responding to pain. His oxygen saturation on room air was 70%, his carotid pulse was thready, and he remained unconscious, during EMS transport.

Upon arrival at Beaufort Memorial Hospital, Mr. Boles was treated for a urinary tract infection with possible sepsis. He remained hospitalized until March 15, 2016, when he was discharged back to Bayview Manor.

On March 19, 2016, due to his lethargic state, Mr. Boles' family requested he be sent to the hospital for additional evaluation. Upon EMS arrival, Mr. Boles was noted to be unresponsive to pain and would only grunt.

Mr. Boles was transported to Beaufort Memorial Hospital where he remained unresponsive. His recent medical history included an altered mental status for "2 days", and his admitting diagnosis included cerebral vascular accident. While hospitalized, on March 20, 2016, Mr. Boles' albumin was noted to be at 2.5. Mr. Boles remained in the hospital until March 23, 2016.

On April 4, 2016, his weight was recorded at 143 lbs. and on April 25, 2016, 139.4 lbs.

On May 28, 2016, Mr. Boles' sister, Viola Hackworth, notified Bayview Manor staff that Mr. Boles' left 5th toe was "black." Upon assessment, the nurse noted that his left 5th toe had a black area with a pink center. The nurse further noted that the right heel was soft but closed. Mr. Boles also had 3 areas to the right foot associated with unrelieved pressure. Orders were given for a wound care referral.

By June 1, 2016, the left 5th toe and the right heel were both classified as unstageable pressure ulcers with suspicion for deep tissue injury.

While at Bayview Manor, weight loss continued to be of concern. On June 3, 2016, the dietician documented a significant weight loss of 28.2% in the past 6 months. His estimated nutritional and fluid needs were calculated, and his fluid needs were determined to be between 1860 – 2170 ml/day.

On June 22, 2016, Mr. Boles had an additional area of skin breakdown surface to his buttocks and his left buttock was unstageable on June 30, 2016.

On June 30, 2016, Mr. Boles also had an unstageable area to the left ischial tuberosity, as well as an area of skin breakdown to the cleft of his left buttocks, which had a "very dark center," and an unstageable area to the right buttock. The unstageable pressure ulcers to the right heel and left 5th toe also continued to be present.

On July 2, 2016, his sister firmly requested that Mr. Boles be sent to the hospital because she was concerned that he was in pain, was losing weight, and worried the area to his sacrum may

be infected. Prior to transport to Beaufort Memorial Hospital, his blood pressure measured 96/56, his pulse was elevated at 112 beats/minute, and his temperature was 96.6 degrees.

His admitting diagnosis to Beaufort Memorial Hospital included altered mental status, Systemic Inflammatory Response Syndrome/SIRS, fever, unstageable sacral decubitus ulcer, and leukocytosis (WBC elevated at 12.6 on admission). He was treated with IV antibiotics and provided with wound care for his infected sacral ulcer with presumed sepsis and given narcotics to manage his wound-related pain. His Albumin levels at the hospital were 3.0 and 2.4. In addition, a Foley catheter was placed with recommendations to maintain the Foley, until the sacral ulcer had improved. Mr. Boles returned to Bayview Manor on July 8, 2016.

Upon readmission to Bayview Manor, on July 8, 2016, recent diagnoses included wound infection with notation of the presence of a Stage IV, 5 x 5 cm sacral ulceration, along with the continued presence of a left ischial tuberosity ulceration and an unstageable, "dark" right heel.

On July 16, 2016, Mr. Boles' sacral ulcer was treated by the Bayview Manor staff. During the treatment, nursing home staff noted that the Mr. Boles was "slow to respond" and that his sacral ulceration was "necrotic" and had a foul odor.

On July 18, 2016, his weight was recorded at 125.4 lbs.

On July 19, 2016, Dr. Edward McNeil evaluated Mr. Boles and spoke with his responsible party, Viola Hackworth, regarding possible PEG tube placement. Orders were given to send Mr. Boles to Beaufort Memorial Hospital for evaluation and possible feeding tube placement, due to poor appetite and weight loss; however, he returned later the same day without a feeding tube. Staff continued to feed him by mouth. On July 29, 2016, Mr. Boles was again sent to Beaufort Memorial Hospital for placement of a feeding tube.

On August 13, 2016, Mr. Boles appeared "deceased" and was unable to be aroused by the staff at Bayview Manor. Orders were given to send him to the hospital for evaluation and treatment.

Upon admission at Beaufort Memorial Hospital that day, Dr. Jeff Lee Polling noted that Mr. Boles had a Stage IV pressure ulcer to his sacrum. Mr. Boles' WBC was elevated at 12.8 and additional diagnosis included "increased somnolence." IV antibiotics were initiated in the emergency room (ER) at the hospital. Records also show a left ischial ulceration with some necrotic tissue measuring 4 x 4 cm and staged as a Stage III. The left ischial/buttocks pressure ulcer was debrided during this hospital stay. While hospitalized, Mr. Boles' Albumin level was recorded at 1.9.

On August 18, 2016, Mr. Boles returned to Bayview Manor from Beaufort Memorial Hospital with orders for IV antibiotics; however, nursing home staff were unable to provide these IV medications. On August 19, 2016, Mr. Boles returned to the hospital for provision of IV antibiotics.

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Upon readmission to Bayview Manor on August 20, 2016, Mr. Boles' skin was assessed by the Bayview Manor staff with notation of continued pressure ulcers to the right sacrum/buttock, along with "multiple black areas to feet." On August 30, 2016, Mr. Boles was seen by Dr. McNeil, who noted the presence of a Stage IV left buttock pressure ulcer and an unstageable, right buttock pressure ulceration.

On September 2, 2016, pressure ulcer tracking was amended to reflect that the ulceration previously and erroneously tracked as the right buttock should have been coded as the left buttock. The right buttock ulcer was documented as being resolved and the tracking changed to reflect the actual location of the pressure ulcer on the left buttock.

On September 7, 2016, Mr. Boles' weight was recorded at 124.7 lbs. Furthermore, on this same day, orders were given to obtain a wound culture and begin antibiotic therapy. On September 8, 2016, orders were given to obtain a wound care consultation. On September 9, 2016, the pressure ulceration to the left buttock/ischium (previously tracked as right buttock) had deteriorated, increased in size, and was infected as "malodorous or purulent drainage" was present.

On September 12, 2016, the sacral wound had a large amount of drainage and odor. Bayview Manor staff noted new orders for antibiotics related to "wound culture." Due to Mr. Boles' weight loss of 10 lbs. over the past month, orders were also given for a dietary consultation.

On September 13, 2016, Mr. Boles was sent to Beaufort Wound Care for evaluation and treatment of the left ischium/left buttocks ulceration. At the wound care center, orders were given to provide a low air loss mattress, a pressure relieving cushion to the wheelchair, limit sit time, and to turn and reposition Mr. Boles every 2 hours. Orders were also given to continue antibiotics. Mr. Boles was to be seen for follow-up at the wound care center on September 20th. On September 16, 2016, staff noted continued signs of infection to the left buttock/ischial pressure ulceration, as evidenced by "malodorous or purulent drainage" from the ulcer.

On September 20, 2016, Mr. Boles was transported by Personal Care Ambulance to Beaufort Wound Care. While at the wound care center, Mr. Boles developed tachycardia and tachypnea. As a result, he was sent to Beaufort Memorial Hospital where he was noted to be barely responsive with a Stage IV pressure ulceration to the left, medial lower buttock. Evaluation of this ulceration showed visible bone with tunneling in the wound bed. Additional pressure ulcerations included an unstageable, left lateral buttock ulcer covered by dry slough, along with deep tissue injuries and eschar covered areas to the feet. Diagnosis included Clostridium Difficile, sepsis, and a large, left buttock decubitus associated with osteomyelitis of the ischium. On September 27, 2016, he returned to Bayview Manor for continued care and treatment.

Upon readmission, Bayview staff noted pressure ulcerations to the left hip, left gluteal area, left lateral foot, heel, and bunion and 5th digit, right heel/lateral foot, and right inner malleolus.

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On October 6, 2016, in preparation for Hurricane Matthew, Mr. Boles was hospitalized at McLeod Regional Medical Center ("McLeod"), after his admission to Dundee Nursing Home was rejected due to Clostridium Difficile. Upon examination at McLeod, medical staff noted a "mostly right sided", tender, firm mass in the pelvis extending above the umbilicus and a large, open, infected, Stage IV left sacral/buttock pressure ulceration several centimeters away from his anus with yellow, purulent drainage, and openings in the subcutaneous tissue.

In addition, Mr. Boles had a Stage IV pressure ulcer to the right buttocks and several healing pressure ulcerations on both feet and heels. His admitting BUN (35), sodium (152), and white blood cell count (15.39) were elevated, while his Albumin was lower (3.1). McLeod's assessment found diffuse muscle wasting, contractures of the lower extremities, tachycardia, fever, and an abscess of the "deep muscles of the pelvis" very close to the "large decubitus wound in the left buttock." Further assessment also reflected an old, plugged feeding tube. To help treat the large pressure ulcer to his left sacral/buttock area, Mr. Boles underwent incision and drainage to evacuate the abscess and was placed on IV antibiotics. To remedy dehydration, Mr. Boles was placed on IV fluids. His diagnosis included leukocytosis, hypernatremia, sepsis secondary to ischial decubitus, dehydration, fever, acute volume depletion, left ischial abscess and concern for osteomyelitis, given his infectious markers (i.e. elevated WBC, abscess, tachycardia, fever, abscess) and elevation of his CRP.

On October 17, 2016, Mr. Boles was discharged from McLeod and returned to Bayview Manor with the continued presence of multiple pressure ulcerations. Upon readmission to the nursing home, Mr. Boles' weighed 129.8 lbs., which decreased to 121.7 lbs. in 2 days.

On December 14, 2016, Mr. Boles was found unresponsive by the Bayview Manor staff. CPR was attempted by the nursing home staff until EMS arrived and transported Mr. Boles to Beaufort Memorial Hospital where he passed away. According to his death certificate, Mr. Boles' cause of death was attributed to vascular collapse, sepsis, and osteomyelitis.

8.

NEGLIGENCE/BREACHES IN THE STANDARD OF CARE BY BAYVIEW MANOR

It is my professional opinion, which I express within a reasonable degree of nursing certainty, that the acts or omissions by Bayview Manor including any other entity or person responsible for managing, supervising, or operating the nursing home were negligent and below the applicable standard of care/standard of practice for long-term care facilities treating residents with the same or similar conditions as Eugene Boles.

The negligence and breaches of the standard of care with respect to Mr. Boles' care and treatment include but are not limited to the following:

A. FALLS

- **FAILURE TO PUT FORTH NECESSARY FALL PREVENTION MEAUSURES**

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The standard of care mandates that the resident's environment remains as free of accident hazards as possible and each resident receives adequate supervision and assistance devices to prevent accidents. While at Bayview Manor, Mr. Boles was a known risk for falls due to his physical and mental limitations. As such, staff had duty to assess, identify, and meet his needs in a timely, safe and effective manner. Despite this knowledge, Bayview Manor negligently failed to protect Mr. Boles from multiple falls, including, but not limited to, the following:

- November 2, 2015;
- November 9, 2015;
- January 24, 2016;
- January 27, 2016; and
- February 18, 2016.

The recurrent failure by the nursing home facility to protect Mr. Boles from falls occurred due to deficiencies in the nursing process, including improper and inadequate assessments, inadequate care plans and lack of appropriate fall interventions. Breaches of the applicable standard of care also included Bayview Manor staff's failure to place Mr. Boles in a supervised area during waking hours and failure to consult with the treating provider to timely obtain an order to provide a bed alarm. These failures resulted in harm to Mr. Boles.

B. CONTRACTURES

- **FAILURE TO PROVIDE PASSIVE RANGE OF MOTION**

The standard of care mandates that a nursing home facility put forth necessary measures to reduce the risk for contracture and/or to lessen the severity of the contractures that may be formed when a resident is non-ambulatory. Here, Mr. Boles was essentially chair-bound, required total care with his ADL needs, and had communication impairments. To reduce the risk for contractures, Bayview Manor failed to provide passive range of motion for Mr. Boles. As a result, he developed contractures of his lower extremities.

C. SKIN INTEGRITY

The standard of care mandates that a resident who enters a nursing home facility without pressure ulcers does not develop pressure unless the individual's clinical condition demonstrates that they were unavoidable. In the event pressure ulcers develop, the standard of care mandates that the resident receives necessary treatment and services to promote healing, prevent infection, and prevent new wound development. Further, nursing home staff must comply with orders regarding wound care, including implementation of applicable care plans.

- **FAILURE TO PROVIDE A WOUND CARE REFERRAL, AS PER ORDERS**

On May 28, 2016, orders were given for a wound care referral due to unstageable ulcerations on Mr. Boles' right heel and left 5th toe. The care plan was reviewed on July 21, 2016 to reflect that a wound care specialist would assess the wound on July 26, 2016.

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Following orders in May 2016, records do not indicate that Bayview Manor staff contacted the wound care center for an appointment nor was there any indication of Mr. Boles' being seen by the wound care center. The first indication that Mr. Boles was sent from Bayview Manor for a wound care center consultation occurred many months later on or about September 13, 2016.

- **FAILURE TO CLOSELY MONITOR THE RESIDENT FOR EARLY SIGNS OF PRESURE ULCER DEVELOPMENT**

On May 28, 2016, Mr. Boles' responsible party notified the Bayview Manor staff that Mr. Boles' left 5th toe was "black." Upon assessment, the nurse noted that his left 5th toe had a black area with a pink center. The nurse further noted that the right heel was soft but closed, and he had 3 areas to the right foot associated with pressure. Prior to notification of Bayview Manor staff by family of these areas, there was no documentation that the staff was aware that the pressure areas were present.

- **FAILURE TO PROVIDE HEEL PROTECTORS AT ALL TIMES**

On June 2, 2016, orders were given for heel protectors at all times to help with pressure relief. Although the August 2016 treatment sheets indicated that heel protectors were discontinued on August 13, 2016, there was no order to discontinue such use found. To confirm continuation of the order pertaining to the use of the heel protectors, the order for use of the pressure relieving devices was noted on both the August and September 2016 Monthly physician orders. Thus, the order for heel protectors remained in effect through the time of his transfer to the hospital on September 20, 2016. As such, staff had a duty to continue to apply heel protectors at all times, except when bathing. Staff failed to consistently apply them after August 12, 2016.

- **FAILURE TO CONSULT WITH THE HEALTHCARE PROVIDER TO OBTAIN ORDERS FOR CONTINUED USE OF HEEL PROTECTORS**

Upon Mr. Boles' return to the facility on September 27, 2016, heel protectors were not re-ordered. Bayview Manor staff had a duty to consult with the treating provider to obtain an order for continued use of the heel protectors, due to the presence of pressure ulcerations to the feet/heels.

- **FAILURE TO TURN AND REPOSITION AT LEAST EVERY 2 HOURS, AS ORDERED AND AS PER THE STANDARD OF CARE**

Mr. Boles was essentially chair-bound and non-ambulatory, during his stay at Bayview Manor. Due to his physical limitations, he required total care of 1-2 persons with his ADL needs. However, the Bayview Manor nursing staff failed to comply with physician's orders for consistently turning and repositioning, as orders were given on September 13, 2016 to turn and reposition Mr. Boles every two hours. The care plan also failed to direct staff of the frequency in which to turn Mr. Boles.

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- **FAILURE TO COMMUNICATE WORSENING OF AN ULCERATION TO THE TREATING PROVIDER**

On July 16, 2016, Mr. Boles' sacral ulcer was treated by staff. During the treatment, Bayview Manor staff noted that the sacral ulceration had a foul odor, along with necrotic tissue. In addition, Mr. Boles was "slow to respond." The physician visited on July 19, 2016 and saw Mr. Boles regarding feeding tube placement, but there was no documented evaluation of the ulceration during the visit, as staff failed to make the doctor aware of continued signs of infection to the sacral ulceration.

- **FAILURE TO COMMUNICATE PERTINENT INFORMATION TO THE TREATING PROVIDER REGARDING THE CONDITION OF THE SACRAL/LEFT BUTTOCK ULCERATION AND CONTINUED SIGNS OF INFECTION TO THE ULCERATION, WHILE BEING PROVIDED WITH ANTIBOITIC THERAPY**

Per the nursing notes, orders were given on September 7, 2016 by the Nurse Practitioner (NP), Deborah Szelepka, for a wound culture and to begin antibiotics (Augmentin). There was no progress note found in the medical records to reflect what the NP noted during her visit.

On September 9, 2016, the pressure ulcer tracking documented by Dawn Armstrong, RN, noted the presence of infection to the unstageable pressure ulcer to the left buttock. The infected left buttock ulceration had malodorous or purulent drainage present and was being treated for infection. The pressure ulcer tracking also indicated that the physician was notified on September 9, 2016 by Nurse Armstrong, but there is no indication in the nursing notes as to what the physician was notified of on that day.

On September 12, 2016, the sacral wound (likely in reference to the left buttock/ischium ulceration) had a large amount of drainage and odor, and orders were given by the treating provider to stop Augmentin and begin Cipro related to results of wound culture. Although new orders were given, there was no indication the physician or NP were informed of the large amount of drainage and odor from the wound or that the nursing staff requested that the physician or NP examine Mr. Boles.

On September 13, 2016, Mr. Boles was sent to the Wound Care Center for evaluation and treatment of the left ischium/left buttocks ulceration, and orders were given to continue Cipro.

On or around September 16, 2016, Nurse Armstrong noted continued signs of infection, as evidenced by malodorous or purulent drainage from the left buttock/ischial/sacral ulceration. However, Bayview Manor staff failed to make the treating provider aware of signs of continued infection to the ulceration to the left buttock/ischium.

Mr. Boles was sent from the wound care center to Beaufort Memorial Hospital on September 20, 2016. During his hospital stay, Mr. Boles was found to have "large hole" in his left buttock

with notation of this being a Stage IV, sacral/left buttock ulceration associated with osteomyelitis of the ischium/chronic pelvic Osteomyelitis.

- **FAILURE TO PROVIDE ANTIBIOTICS, AS ORDERED**

On September 7, 2016, due to signs of infection to the left buttock/ischium pressure ulceration, antibiotic therapy (Augmentin 875/125 mgs every 8 hours) was ordered by Nurse Practitioner, Deborah Szelepka, via feeding tube. This medication was to be initiated at 6:00 am on September 8, 2016 but was not started until 2:00 pm that day.

On September 27, 2016, Vancomycin 125 mg was ordered 4 times daily. This medication was not provided at 6 am on September 29, 2016 or September 30, 2016.

Mr. Boles was not in the facility from October 6, 2016 to October 17, 2016. He returned to Bayview on October 17, 2016. However, per one of the October 2016 MARs, Vancomycin was initialed as being provided from October 1, 2016 to October 15, 2016, even though Mr. Boles was not in the facility. As such, this information pertaining to the provision of antibiotics is inaccurate.

After his return to the facility, orders were given on October 26, 2016 to provide Vancomycin 250 mg/10 ml 4 times daily for 14 days. Per the October MAR, Vancomycin was provided from October 26, 2016 to October 31, 2016, but there was no documentation to support the provision of Vancomycin for an additional 7 days in November.

- **FAILURE TO PROVIDE HYGIENE, BATHING AND INCONTINENT CARE IN COMPLIANCE WITH THE WRITTEN PLAN OF CARE AND PHYSICIANS ORDERS**

Bayview Manor failed to comply with care plans including activities of daily living such bathing and toileting as follows:

- The ADL care plan informs staff to shower Mr. Boles twice weekly. Despite this plan of care, Bayview Manor staff failed to comply as documentation was inconsistent and did not show showers or bed baths being performed as planned.
- The written care plan informs staff to provide peri-care after each incontinent episode, including routine incontinence checks with peri-care as needed. In addition, a telephone order dated June 22, 2016 noted the need to provide "frequent changes", due to an irritated area on Mr. Boles' buttocks. Documentation was inconsistent to support the provision of incontinent care.

- **FAILURE TO PROVIDE TREATMENTS IN COMPLIANCE WITH PHYSICIAN'S ORDERS AND THE WRITTEN PLAN OF CARE**

Due to his physical and mental condition, Mr. Boles was a known risk for pressure ulceration development and skin breakdown was documented as early as December 29, 2015. Orders for use of a low air loss mattress should have been obtained on or prior to this date.

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Bayview Manor staff failed to timely obtain an order for the use of a low air loss mattress or implement other skin integrity interventions. Despite the presence of a left ischium/left buttocks ulceration, no order for such a device was given until Mr. Boles was seen by the Wound Care Center on September 13, 2016.

Bayview Manor's nursing staff also failed to comply with other doctor's orders and failed to adhere to written plans of care, which directed them to provide ordered treatments. Failures included but were not limited to the following:

- From December 26, 2015 – December 29, 2015, staff failed to provide barrier cream to Mr. Boles' left inner ankle.
- On May 28, 2016 and May 29, 2016, staff failed to provide skin prep to his right foot/heel.
- On August 22, 2016, treatments of skin prep, including Santyl and Duoderm, were not provided to Mr. Boles' sacrum.
- On November 5, 18, and 22, 2016, treatments were not provided to his left gluteal fold.

- **FAILURE TO PERFORM WEEKLY WOUND TRACKING AS PER THE STANDARD OF CARE AND THE WRITTEN PLAN OF CARE**

Pressure ulcer tracking should be initiated on the day an ulceration is identified and should continue weekly until the ulceration has healed. The care plan informs staff of the need for weekly measurements of pressure ulcerations. Bayview Manor staff failed to abide by the care plan on multiple occasions as weekly pressure ulcer tracking was not performed consistently. Failure to track pressure ulcerations were identified as follows:

- On June 30, 2016, the left ischial tuberosity ulceration was classified as unstageable but weekly pressure ulcer tracking was not consistently initiated.
- After July 18, 2016, pressure ulcer tracking was not completed for the right buttock pressure ulceration until August 9, 2016.
- Documentation shows Bayview Manor nursing staff changed the location of Mr. Boles' ulceration from the right buttock to the left on September 2, 2016, as previous records were erroneous or had conflicting information.
- On September 9, 2016, pressure ulcer tracking sheets reflected that the pressure ulcer had "Deteriorated." Yet, a week later, on September 16, 2016, the documentation denoted that the pressure ulcer had "Improved" and a follow-up visit to the wound clinic was to take place on September 20, 2016. Both the September 9th and September 16th pressure ulcer tracking sheets had a second date of September 18th in the upper right-hand corner, however, which created ambiguity as to the actual date of the assessment. There were other documents with conflicting information, as well.
- After September 16, 2016 (or September 18, 2016 – due to conflicting dates), weekly pressure ulcer tracking of the left buttock was inconsistently documented before his transfer out of the facility on October 6, 2016.
- Mr. Boles returned to Bayview Manor on October 17, 2016. Pressure ulcer tracking of the left buttock should have resumed but consistent tracking was not done. The next

pressure ulcer tracking entry pertaining to the left buttock included dates of both October 28, 2016 and November 7, 2016. Thus, records are incomplete and conflicting.

- The last pressure ulcer tracking assessment of the left buttock was dated of November 7, 2016. Consistent pressure ulcer tracking was not completed of the left buttock after November 7, 2016, even though there was no indication that the ulceration was healed, as the ulceration was still unstageable and measuring 7 x 4 x 0.10 cm.

D. NUTRITION

The standard of care mandates that a nursing home facility provide each resident with a nourishing, palatable, well balanced diet that meets the daily nutritional and special dietary needs of that resident to prevent malnutrition and prevent unnecessary weight loss.

- **FAILURE TO OBTAIN A DIETARY CONSULT, AS ORDERED**

On September 12, 2016, due to Mr. Boles' significant weight loss, orders were given to consult a dietician. Orders for dietary consultation were again given on September 19, 2016. Despite said orders, no consultation with dietary was obtained until September 28, 2016. Here, Bayview Manor negligently failed to provide adequate oversight, assessments and interventions related to Mr. Boles' nutrition status resulting in harm, including malnutrition and conditions to cause skin breakdown.

- **FAILURE TO TIMELY CONSULT WITH THE PHYSICIAN TO OBTAIN ORDERS TO IMPLEMENT DIETARY RECOMMENDATIONS**

On May 5, 2016, Bayview Manor staff was ordered to give Mr. Boles Sugar Free Med Pass 120 cc twice daily. On June 3, 2016, the Registered Dietician recommended an increase of Sugar Free Med Pass from 120 cc twice daily to 240 cc three times daily. The Registered Dietician also recommended the addition of 30 ml of Prostat twice daily. The Registered Dietician recommendations were not implemented, as the physician was not consulted for a change of orders on or around June 3, 2016.

As further part of Mr. Boles' dietary recommendations, the physician was to be informed by Bayview Manor's nursing staff of significant weight loss. On June 3, 2016, dietary personnel noted a significant weight loss for Mr. Boles; however, the nursing staff failed to comply with notification requirements.

On July 1, 2016, the Registered Dietician spoke with the nurse manager. The Registered Dietician gave the same recommendations as given previously on June 3rd (increase Prostat to 30 ml twice daily and Sugar Free Med Pass to 240 ml three times daily). At this time after nearly 1 month delay, Bayview Manor's nursing staff finally contacted the physician to obtain orders for dietary recommendations.

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- **FAILURE TO PROVIDE NUTRITION AND FLUIDS, AS ORDERED**

There were multiple incidents where Bayview Manor staff failed to provide nutritional and protein supplements, tube feedings and water flushes, as ordered:

- On July 1, 2016, orders were given to increase Sugar Free Med Pass from 120 twice daily to 240 cc three times a day. The Medication Administration Record (MAR) was changed to reflect the provision of Med Pass three times a day, but the MAR was incorrect, regarding the amount to be provided. The MAR noted continuation of 120 cc (not 240 cc) of Sugar Free Med Pass. Therefore, Mr. Boles was only provided with 120 cc instead of the ordered 240 cc on July 1, 2016 at 9:00 pm and on July 2, 2016 at 9:00 am.
- Glucerna nor water flushes were provided during the day shift on August 4, 2016, September 28, 2016, or September 30, 2016.
- Orders as of October 17, 2016, upon return from the hospital, were to provide Glucerna at 40 cc/hr. On October 25, 2016, the order changed to provide Glucerna at 50 cc/hr. There were three MARs for October 2016. Two of the MARs reflected that Glucerna was correctly provided from October 17th through the end of the month. However, another MAR for October 2016 denoted that Glucerna was incorrectly provided at 50 cc/hr, even before the order was given to increase the feeding from 40 to 50 cc/hr. In addition, during time he was hospitalized from October 6, 2016 – October 17, 2016, Glucerna and water flushes were initialed as being provided; staff could not have provided tube feedings at times when Mr. Boles was not in the facility.
- Documentation of Glucerna administration in November 2016 was not found.
- Documentation failed to consistently indicate whether meal substitutes were offered to Mr. Boles. Documentation also consistently failed to show when/if his intake was 50% or less at meals. Since meal intake was not consistently recorded, Bayview Manor staff had no way to determine when to offer Mr. Boles meal alternatives.
- Documentation failed to consistently indicate whether Bayview Manor staff provided bedtime snacks before Mr. Boles' feeding tube was inserted.
- The care plan directs Bayview Manor staff to provide nutritional supplements, tube feedings and water flushes as ordered. As previously noted, Bayview staff failed to consistently provide nutritional supplements in compliance with physician's orders. Bayview Manor nursing staff also failed to comply with Mr. Boles' care plan, which directed staff to feed him, record meal intake, and offer meal alternatives, when needed.

- **FAILURE TO RECORD MEAL INTAKE**

Documentation of daily percentages of meals consumed was inconsistent and/or incomplete.

- **FAILURE TO PROVIDE NECESSARY STAFF ASSISTANCE WITH MEALS/FEEDING**

Records do not consistently support that Bayview Manor staff provided total assistance to Mr. Boles during meals to ensure adequate intake and to prevent weight loss, even though required.

E. DEHYDRATION

The standard of care mandates that a nursing home facility provide each resident sufficient fluid intake to prevent dehydration.

- **FAILURE TO PROVIDE ADEQUATE FLUIDS**

Prior to insertion of the feeding tube on July 29, 2016, there was not consistent documentation that Bayview Manor staff provided Mr. Boles with sufficient fluids, including records calculating the amount of fluids provided daily on each shift.

- **FAILURE TO MAINTAIN INTAKE AND OUTPUT RECORDS AND PROVIDE SUFFICENT FLUIDS TO PREVENT DEHYDRATION FROM OCCURRING**

Mr. Boles was unable to obtain fluids independently and was reliant on Bayview Manor staff for provision of hydration needs. After insertion of the PEG tube on August 5, 2016, dietary personnel calculated his fluid intake should be 1980 cc/day. On September 6, 2016, his fluid needs were calculated as being between 1710 – 1995 cc/day. Upon admission to the hospital on October 6, 2016, Mr. Boles was dehydrated (BUN 35, Na 152). His feeding tube was also plugged. Dehydration of a tube fed resident, including the plug, shows that his fluid needs were not being met by Bayview Manor staff.

In addition, MARs records from October 2016 noted that water flushes and tube feedings were being provided during the time Mr. Boles was hospitalized from October 6, 2016 – October 17, 2016. Thus, this documentation was falsified. Lastly, there were no intake and output records to verify that Mr. Boles was provided with at least 1710 cc/day.

F. CHANGE IN CONDITION

The standard of care mandates that a nursing home facility immediately inform the resident, consult with the resident's physician, and inform the resident's responsible party of any significant change in the resident's physical or mental condition. Physical changes in condition which require notification of the above-referenced persons, include but are not limited to falls, development of contractures, development or worsening of pressure ulcers or other wounds, infections, weight loss, malnutrition and/or dehydration.

Throughout the course of Mr. Boles' residency, he experienced multiple changes in condition that required immediate notification of his physician and legal representative which is mandated by applicable regulations and the standard of care. From review of the nursing home records, it does not appear that significant changes in Mr. Boles' condition, as detailed above,

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were timely reported, if at all. Bayview Manor failed to timely recognize changes in Mr. Boles' condition and alert Mr. Boles' physician and responsible party of such changes. Ironically, there were several occasions where action was not taken by Bayview Manor until prompted to do so by the family.

For example, on or about March 19, 2016, around 1:00 pm, Mr. Boles' family requested that he be sent to the hospital due to his lethargic state. After notification of his change in condition by the family, which remained unchanged a few hours later, EMS was contacted to transport Mr. Boles to Beaufort Memorial Hospital for further care and treatment.

Upon arrival to the hospital, Mr. Boles was noted to be unresponsive to pain and would only grunt, when the examiners voice was raised loudly. Records state: "Bay View Nursing Home staff informed EMS that he had been like this for at least two days."

At Beaufort Memorial Hospital, the treating provider also noted that the family reported that Mr. Boles' change in condition began in the "last two days", and he had become "less responsive." Diagnosis at the hospital included altered mental status secondary to a recent CVA.

Likewise, records show the nursing home staff did not acknowledge the change in his condition in the medical record until 1:00 pm on March 19, 2016, though documentation confirms the Bayview Manor staff were aware of a change in condition, as it was reported to EMS that Mr. Boles had been "like this for at least two days." It is my opinion that CVA may have been prevented, if staff had acknowledged and informed the doctor of his change in condition, when the change was first noted.

As another example, on or about July 1, 2016, Mr. Boles was given Tylenol for a low-grade fever. The following day, his responsible party, Viola Hackworth, called and voiced concerns regarding Mr. Boles' status, due to pain, weight loss, and possible infection of his sacral ulceration. Mrs. Hackworth "firmly" told staff to send Mr. Boles to the hospital. The nurse on duty noted that Mr. Boles did not appear to be in any pain and his blood pressure was stable at 110/68. Just prior to transport, however, the nurse noted that Mr. Boles was tachycardic, as his pulse was elevated at 112 beats/minute, and his blood pressure was lowered at 96/56.

Mr. Boles was admitted to Beaufort Memorial Hospital on July 2, 2016. Upon admission, his diagnoses included altered mental status, Systemic Inflammatory Response Syndrome/SIRS, fever, an unstageable sacral decubitus ulcer, and leukocytosis (WBC elevated at 12.6 on admission). Blood cultures obtained at the hospital grew Staph but were considered to be "contaminant." He was treated with IV antibiotics and provided wound care for an infected sacral ulcer with presumed sepsis. Mr. Boles was also given narcotics to manage his wound-related pain. His Albumin levels at the hospital were below normal at 3.0 and 2.4. In addition, a Foley catheter was placed until his sacral ulcer had improved. Mr. Boles returned to Bayview Manor on July 8, 2016.

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G. MEDICAL RECORDS

The standard of care requires complete, accurate, accessible, and organized documentation of each resident's medical records. Such records must include sufficient information to identify the resident, a record of assessments, a comprehensive plan of care, screenings and evaluations, progress notes, and other service reports.

- **FAILURE TO DOCUMENT TRANSFER OUT OF THE FACILITY, CONDITION AT THE TIME OF TRANSFER, AND THE REASON FOR TRANSFER**

Bayview Manor nursing notes should show a transfer out of the facility and return to the facility from a hospital stay, doctor's office visit, and a leave of absence with family. Staff have a duty to document the whereabouts of the resident, when the resident is not in the facility, the condition of the resident at the time of transfer, and condition of the resident upon reentry. Failures by Bayview Manor to document Mr. Boles transfers include the following:

- On December 15, 2015, the nursing notes reflected that he returned to Bayview via EMS around 3 pm, but there was no prior indication that he had left Bayview or any notation of where he returned from.
- He was taken to the wound care center on September 20, 2016. From the WCC, it was inferred that he was sent to the hospital. At the hospital, he was noted to have suspected Osteomyelitis. There was no indication in the records from Bayview that he was sent to the WCC on September 20, 2016 or anything about his condition at the time of transfer to the WCC.
- On September 27, 2016, he returned to Bayview from BMH. After his return, there were no Daily Skilled Nursing notes with an assessment in the file. As the last Daily Skilled Nursing Note entry was written on September 19, 2016. In addition, the Nursing Note entry, before he was sent out of the facility due to Hurricane Matthew approaching the coastline, was written on September 28, 2016; no nursing note entries were recorded to reflect that he was being sent out due to the storm or anything about his condition, at the time of transfer.

- **FAILURE TO PROVIDE RELIABLE AND ACCURATE DOCUMENTATION**

Documentation of Bayview Manor staff failed to provide reliable and accurate information, including but not limited to the following:

- On July 2, 2016, Mr. Boles left the facility for Beaufort Memorial Hospital around 11:50 am. He was not in the facility at 9:00 pm that night. However, MARs indicate Bayview Manor staff administered Haldol and Mevacor at that time. Records also state staff provided Prostat at 9:00 pm and Mr. Boles consumed 100% of the supplement. The 9:00 pm medication pass and provision of Prostat is inaccurate documentation, as Mr. Boles was not in the facility at that time.
- On August 13, 2016, Mr. Boles left the facility for the hospital around 10:00 am. He was hospitalized from August 13, 2016 to August 18, 2016. However, there are entries in the Daily Skilled Nursing Notes for August 14, 2016, reflecting that Mr. Boles rested well during the night. August 2016 treatment sheet also notes the provision of barrier cream

on August 14, 2016, during the day shift. Such documentation is inaccurate, since Mr. Boles was admitted to the hospital.

- MARs in October 2016 also show that Glucerna and water flushes were provided during a time in which Mr. Boles was hospitalized (October 6, 2016 to October 17, 2016). Bayview Manor staff could not have provided tube feedings at times when Mr. Boles was not in the facility.
- Pressure ulcer tracking sheets on July 11, 2016 suggest weights recorded between June 28, 2016 – July 11, 2016 were added at dates other than what is recorded on the weight log.
- Similar weight discrepancies were identified on pressure ulcer tracking log in August, 2016.

- **FAILURE TO PROVIDE CONSISTENT DOCUMENTATION**

Documentation for Mr. Boles was not consistent, including but not limited to the following:

- On June 30, 2016, an order was given to start treatments of skin prep to the right buttock, and pressure ulcer tracking notes identify the pressure ulcer location on the right buttock. However, nursing notes for the same day reference implementation of treatment to the left buttock, which had a "very dark center." The location of the ulceration is conflicting.
- On August 23, 2016, an order was given to treat the right buttock with skin prep to the wound edges, cover wound bed with Silver Alginate, and apply Allevyn on Tuesday and Friday and PRN. However, the treatment sheets for August and September 2016 noted that the location of the ulceration was on the left buttock.
- Pressure ulcer tracking sheets noted that the left 5th toe and right heel ulcers were initially observed on June 1, 2016, but the nursing notes reflected that this change in condition was first observed on May 28, 2016, not June 1, 2016.

- **FAILURE TO PROVIDE COMPLETE AND ADEQUATE RECORDS**

Complete records were not provided; although, a complete set of any and all records was requested from the nursing home.

9.

Apart from breaching the standard of care, the conduct by Bayview Manor and all other entities or persons responsible for managing, supervising, or operating the nursing home or its staff also violated federal and state statues, rules and regulations including, but not limited to: provisions of the Code of Federal Regulations (42 C.F.R. § 483 *et seq.*), the South Carolina Nursing Home Regulations (S.C. Code Reg. 61-17), the South Carolina Nurse Practice Act (S.C. Code Ann. § 40-33-5 *et seq.*), and South Carolina Bill of Rights for Residents of Long-Term Care Facilities (S.C. Code Ann. § 44-81-10 *et seq.*).

10.

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It is my professional opinion that the negligence, breaches in the standard of care, and violations of state and federal law described in this Affidavit by Bayview Manor as summarized above, substantially caused and contributed to Mr. Eugene Boles' pressure ulcerations, falls, weight loss, malnutrition, contractures, urinary tract infection, and dehydration.

11.

This Affidavit is by no means to be construed as an exhaustive recitation of all my opinions with regard to the care and treatment of Eugene Boles, received at Bayview Manor. Moreover, I reserve the right to supplement, amend or change these opinions should additional information be brought to my attention.

FURTHER AFFIANT SAYETH NOT.

Mary Ann Hewston MPM, BSN, RN, NHA

Mary Ann Hewston, MPM, BSN, RN, NHA

Sworn to me and subscribed before this 4th Day of October, 2018.

Yvonne A Morda

Notary Public

My commission expires 8/28/2020.

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Yvonne A. Morda, Notary Public
City of Meadville, Crawford County
My Commission Expires Aug. 28, 2020
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
VIOLA M. HACKWORTH, as Personal Representative of the Estate of EUGENE BOLES A/K/A EUGENE N. BOLES, deceased,	)	C/A No. 2019-CP-07-00433
Plaintiff,	)	
versus	)	
BAYVIEW MANOR, LLC d/b/a BAYVIEW MANOR, EPIC MGT, LLC, EPIC GROUP, LIMITED PARTNERSHIP, TEDDIE SIMMONS; JOHN DOES, and RICHARD ROE CORPORATIONS,	)	**BAYVIEW MANOR, LLC d/b/a BAYVIEW MANOR, EPIC MGT, LLC, EPIC GROUP, LIMITED PARTNERSHIP, TEDDIE SIMMONS, JOHN DOES, AND RICHARD ROE CORPORATIONS' ANSWER TO PLAINTIFF'S COMPLAINT**
Defendants.	)	

Subject to and reserving all rights pursuant to the "NOTICE OF MOTION AND MOTION TO STAY ACTION AND COMPEL ARBITRATION; IN THE ALTERNATIVE MOTION FOR NONJURY TRIAL; AND MOTION FOR PROTECTIVE ORDER" ("Motion to Compel Arbitration") filed by the Defendants Bayview Manor, LLC d/b/a Bayview Manor, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations ("the Defendants"), the Defendants, answering the Complaint of Plaintiff, do hereby allege as follows:

1. All allegations contained in the Complaint which are not hereinafter admitted, qualified, or otherwise explained are denied.

FOR A FIRST DEFENSE

2. The Defendants are without sufficient information upon which to form a true and

accurate belief as to the allegations contained in the first two sentences of Paragraph 1, and therefore the same are denied. The Defendants deny the allegations contained in the third sentence of Paragraph 1 and further assert that Plaintiff's claims asserted in this action must be arbitrated for the reasons espoused in the Defendants' Motion to Compel Arbitration and any future memoranda, affidavit(s), and arguments which may be supplemented in support of the same.

3. The Defendants admit the allegations contained in Paragraph 2.

4. In response to the allegations contained in Paragraphs 3, 4, 5, and 6, the Defendants admit that (a) Bayview Manor, LLC ("Bayview") is an entity organized under the laws of South Carolina with its principal place of business in Beaufort County, South Carolina; (b) at the time of Mr. Boles' admission, Bayview was a skilled nursing home facility; (c) the Defendants may be served through their attorney A. Walker Barnes; (d) Epic MGT, LLC is a South Carolina limited liability company; (e) Epic Group, Limited Partnership is a North Carolina limited partnership; and (f) Teddie Simmons was employed by and was the Administrator for Bayview during part or all of Mr. Boles' residency at Bayview. The Defendants deny the remaining allegations contained in Paragraphs 3, 4, 5, and 6.

5. The Defendants deny the allegations contained in Paragraphs 7 and 8.

6. In response to the allegations contained in Paragraph 9, no specific allegation is made against the Defendants or any other person or entity, and therefore no response is required. To the extent Paragraph 9 could be construed to allege that the Defendants were negligent and/or proximately harmed Mr. Boles, the Defendants deny the same.

7. In response to the allegations contained in Paragraph 10, the Defendants admit that Bayview is an entity organized under the laws of South Carolina with its principal place of business in Beaufort County, South Carolina. The Defendants deny the remaining allegations contained in

Paragraph 10.

8. Paragraph 11 states conclusions of law to which no response is required.

9. In response to the allegations contained in Paragraph 12, the Defendants admit Bayview participated in the Medicare and Medicaid programs in 2015 and 2016. The remaining allegations of Paragraph 12 state conclusions of law to which no response is required.

10. The Defendants deny the allegations contained in Paragraphs 13, 14, and 15.

11. The Defendants admit the allegations contained in Paragraph 16.

12. The Defendants deny the allegations contained in Paragraphs 17, 18, 19 (including all subparts), 20, 21, 22, and 23.

13. In response to the allegations contained in Paragraphs 24 and 25, the Defendants crave reference to Mr. Boles' medical records and deny any allegations inconsistent therewith.

14. The Defendants deny as written the allegations contained in Paragraph 26.

15. The Defendants deny the allegations contained in Paragraph 27 (including all subparts).

16. The Defendants admit the allegations contained in Paragraph 28 to the extent they are directed to Bayview and Teddie Simmons. The Defendants deny the remaining allegations contained in Paragraph 28.

17. The Defendants deny the allegations contained in Paragraph 29, 30, and 31.

18. In response to the allegations contained in Paragraph 32, the Defendants admit that Bayview owed a duty of care to Mr. Boles to meet the applicable standard of care and that it met that duty. The remaining allegations contained in Paragraph 32 are denied.

19. The Defendants deny the allegations contained in Paragraphs 33, 34, 35, 36, 37 (including all subparts), 38, and 39.

20. In response to Paragraphs 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56, the Defendants crave reference to Mr. Boles' medical records and deny any allegations inconsistent therewith.

21. In response to Paragraph 57, the Defendants repeat and reallege all preceding paragraphs, as if fully restated herein.

22. In response to the allegations contained in Paragraph 58, the Defendants admit that Bayview owed a duty of care to Mr. Boles to meet the applicable standard of care and that it met that duty. The remaining allegations contained in Paragraph 58 are denied.

23. The Defendants deny the allegations contained in Paragraphs 59 (including all subparts), 60, 61, 62, 63, and 64.

24. In response to the allegations contained in Paragraph 65, the Defendants admit only that Plaintiff has attached an Affidavit to the Complaint. The Defendants deny (a) the remaining allegations contained in Paragraph 65 and (b) the allegations set forth in the Affidavit of Nurse Hewston.

25. The Defendants deny the allegations contained in Paragraphs 66 and 67.

26. In response to Paragraph 68, the Defendants repeat and reallege all preceding paragraphs, as if fully restated herein.

27. In response to the allegations contained in Paragraph 69, the Defendants admit that Bayview owed a duty of care to Mr. Boles to meet the applicable standard of care and that it met that duty. The remaining allegations contained in Paragraph 69 are denied.

28. The Defendants deny the allegations contained in Paragraphs 70 (including all subparts), 71, 72, 73, 74, and 75.

29. In response to Paragraph 76, the Defendants repeat and reallege all preceding

paragraphs, as if fully restated herein.

30. The Defendants deny the allegations contained in Paragraph 77.

31. The Defendants deny as written the allegations contained in Paragraph 78.

32. The Defendants deny the allegations contained in Paragraphs 79, 80 (including all subparts), 81, and 82.

33. In response to the allegations contained in Paragraph 83, the Defendants admit that Bayview and Teddie Simmons had a duty to be truthful to Mr. Boles and his family and they met that duty. Mr. Boles and his family did not have contact with any of the other defendants, and therefore the remaining allegations contained in Paragraph 83 are denied.

34. The Defendants deny the allegations contained in Paragraphs 84, 85, 86, 87, 88, and 89.

35. In response to Paragraph 90, the Defendants repeat and reallege all preceding paragraphs, as if fully restated herein.

36. The Defendants deny the allegations contained in Paragraphs 91, 92, 93, 94, and the WHEREFORE Paragraph (including all subparts) and further deny that Plaintiff is entitled to the relief prayed for in the Complaint.

FOR A SECOND DEFENSE

37. The Defendants hereby reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

38. Plaintiff's causes of action fail to state facts sufficient to constitute a cause of action and therefore should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

11. The Defendants hereby reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

12. Plaintiff's claim for punitive damages against the Defendants and any award of punitive damages against the Defendants would violate those clauses of the United States Constitution and the South Carolina Constitution related to privileges and immunities, due process and equal protection.

FOR A FOURTH DEFENSE

13. The Defendants hereby reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

14. Plaintiff's recovery in this matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damage Awards Act of 2005 which is codified at S.C. Code Sec. 15-32-200, *et seq* of the South Carolina Code of Laws (1976 as amended), and all pertinent provisions of that Act are pled as an affirmative defense in this action.

FOR A FIFTH DEFENSE

15. The Defendants hereby reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

16. The Defendants reserve their rights arising under §15-32-520, Code of Laws of South Carolina, as amended, as to all issues described therein, and Defendant pleads the limitations on punitive damages as set forth in §15-32-530, Code of Laws of South Carolina, as amended, as a defense.

FOR A SIXTH DEFENSE

17. The Defendants hereby reallege and incorporate the allegations set forth above to

the extent they are consistent with this defense.

18. At the time of Mr. Boles' admission, the Admissions Agreement and the Resident and Facility Binding Arbitration Agreement were signed agreeing to submit any controversies or disputes to Arbitration. Thus, this case should be dismissed or stayed pursuant to SCRCP 12(b)(1), 12(b)(3) and 12(b)(6), as well as pursuant to applicable State and Federal law, and this case should be submitted to Arbitration.

FOR A SEVENTH DEFENSE

19. The Defendants hereby reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

20. At the time of Mr. Boles' admission, an Admission Agreement was executed. The Admission Agreement contained a Waiver of Jury Trial provision. Thus, Plaintiff has waived the right to have this matter heard by a jury.

WHEREFORE, having fully answered the Complaint and asserting these affirmative defenses, the Defendants pray that the Complaint be dismissed with prejudice, that the Defendants be awarded their costs and disbursements associated with this matter, and such other relief as this Court may deem just and proper.

HOLCOMBE BOMAR, P.A.

By: s/A. Walker Barnes
A. Walker Barnes (S.C. Bar No. 78485)
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Spartanburg, SC 29304
(864) 594-5300
Attorneys for Defendants Bayview Manor, LLC d/b/a Bayview Manor, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations

April 8, 2019
Spartanburg, South Carolina

The Court: Next in line is Viola Hackworth vs. Bayview Manor, LLC. Mr. McAllister and Mr. Barnes. This is the Defendant's Motion?

Mr. Barnes: Your Honor, it's actually two motions.

The Court: A motion to conduct limited discovery?

Mr. Barnes: Yes, Your Honor.

The Court: Okay.

Mr. Barnes: I think they will effectively be rolled together. They are about the same issues.

The Court: Okay. So, it looks like Mr. Barnes, you filed the Motion to Compel arbitration?

Mr. Barnes: Yes, Your Honor. Walker Barnes on behalf of all Defendants. This is a Motion to Compel Arbitration in the alternative for a non jury trial and a Motion for Protective Order. I filed a memorandum on Friday, do you have a copy of it? Do you want me to give you a copy?

The Court: I always want a copy.

Mr. Barnes: Okay. The exhibits are right behind it.

The Court: All right.

Mr. Barnes: Briefly, Your Honor, the facts. In October of 2012, the Plaintiff in this case, Viola

Hackworth or actually her brother filed a Power of Attorney for his sister, Viola Hackworth, to be his attorney in fact, and approximately three years later Mr. Boles, the descendent who was treated at my facility here in Beaufort suffered a stroke, had dementia, had some confusion before entering into our facility. He was admitted into our facility in November of 2015. At the time of admission there is an Admission Agreement and Arbitration Agreement and we are going to talk about both of them. But, the Court should know, the primary basis for our motion is the Admission Agreement, which contains a arbitration clause and that's Exhibit A to the memo before you right now.

For full disclosure on Thursday, Plaintiff's filed a memorandum in opposition and raised one factual dispute that's worth talking about now and that is the Plaintiff disputes the dates of the signatures, they are saying they have produced some evidence saying that Ms. Hackworth was not in South Carolina on November 2 when the Admissions Agreement was signed, when it is showing to have been signed and November 3 when the Arbitration Agreement was signed. And, for purposes of today, Your Honor, we would contend that it does not matter. We will accept plaintiff's contention that it was not, in fact, signed on those dates and Plaintiffs have asserted she

would have been at the facility on November 6. So, we don't think that it matters. Plaintiffs have filed an affidavit by Ms. Hackworth in which she makes that contention of disputing the dates, the signature dates. In that Affidavit, what the Defendants would argue, is relevant, is that Ms. Hackworth is not disputed that she was her brother's attorney in fact, that she was involved in the admissions process, that she specifically approved the admission to Bayview Manor, that she actually signed the Admissions Agreement and the Arbitration Agreement or that the Power of Attorney gave her the authority to sign those documents. That is not denied by the Plaintiffs.

So the argument goes on our side as follows. It's the plain language of the Admissions Agreement, contains an optional arbitration clause that says it is optional and mark x here if you want to opt out of the arbitration clause provision. It is not marked out, therefore it is our contention that she agreed, on behalf of her brother, to mandatory arbitration in accordance with the Federal Arbitration Act. That is why we are here today, we obviously asked the Plaintiffs to submit to arbitration and they have denied the request. The plain language of the Admissions Agreement with the arbitration clause within it is our main argument. Alternatively, we would say the Arbitration Agreement merges into the

Admissions Agreement that's further support for this claim to be arbitrated and our other arguments are that Mr. Boles, the patient was a third party beneficiary to the Admissions Agreement and the Arbitration Agreement because the purpose of signing those documents was to provide services to them. If the basis for making a claim against us sounding in contract and negligence is the Agreement you can't just pick and chose which portions of the contract you like and obviously the Plaintiffs don't like the arbitration clause and therefore we would say that arbitration is required because he's a third party beneficiary and because that's the purpose of the contract was to benefit him.

Your Honor, admittedly there are plenty of appellant court decisions in South Carolina, as I'm sure you know, on both sides of the issue where arbitration is upheld. Arbitration is denied. I think all of the cases that deny arbitration are not just distinguishable but they are easily distinguishable. Here is why. The facts of this case that make it different than the instances such as in Hodge, 2018 Court of Appeals opinion and Thompson, a 2016 Court of Appeals opinion are as follows. In a lot of those cases the plaintiff was either competent at the time of admission. That is not contended here. In some cases there is no power of attorney of any

kind. In this case we have a power of attorney. In most of them, the argument is not that the Admissions Agreement is the basis for arbitration, it's that we have a separate Arbitration Agreement. Therefore the sister, you know, the son doesn't have any consideration for this separate Arbitration Agreement, but that's not what we have here. A lot of times the Admissions Agreements don't say one word about arbitration, but we have that here. We have in the Admissions Agreement at the time that Mr. Boles entered our facility, his power of attorney, his attorney in fact agreed to mandatory arbitration in the Federal Arbitration Act and so we would argue that there are simply no cases to support or that would support a denial of arbitration here.

The U.S. Supreme Court has weighed in our this issue and the arbitration is strongly favored as a contractual option for parties and furthermore, Your Honor, we've submitted, if you look at Exhibit D, the last exhibit that I handed up it is a affidavit from Lucy Caruso, who was the admissions director in 2015, at the time of Mr. Boles admission, and she has sworn to this Court that she would have explained the concept of arbitration to Ms. Hackworth, the Plaintiff, and would have literally, specifically explained her waiving a right to a jury trial on behalf of your brother. So, I think there is

already a presumption of validity to Arbitration Agreements and we've put forward evidence supporting the right or contractual right to arbitration. I'll sit down and shut up now.

The Court: No, I don't want you to. I've got a question to ask you about.

Mr. Barnes: Sure.

The Court: Right to a jury trial ...

Mr. Barnes: Yes.

The Court: ... in South Carolina. It is a constitutional right, correct?

Mr. Barnes: Yes, sir.

The Court: Okay. I've got a contract where this gentleman is giving up his constitutional right to a jury trial.

Mr. Barnes: Yes, Your Honor, and I think that is allowed.

The Court: What was the consideration?

Mr. Barnes: The consideration is the services provided by the facility. We're going to give you room and board. That is one provision of the Admissions Agreement but I would argue that is not the provision we are relying upon. The provision we are relying upon is the optional arbitration clause.

The Court: I really do understand your

argument. My question has always been, this Admission Agreement are they paying for room and board separately. I mean, are they billed for that?

Mr. Barnes: They are billed through Medicaid.

The Court: Yes.

Mr. Barnes: So, they are agreeing ... and for any medical services that might be needed.

The Court: Right. And Medicaid will pay those?

Mr. Barnes: Yes.

The Court: It's just always fascinated me and that's, this is not going to decide any thing one way or the other but I always like to talk to people that have arbitration things. If I am giving up a constitutional right to a jury trial, shouldn't I get separate consideration?

Mr. Barnes: I think that's a very interesting argument. I don't know if anybody has answered that definitively.

The Court: I haven't seen that either. I've had my arbitration decisions go both ways and I've had them treated differently as it went elsewhere.

Mr. Barnes: Right. I understand.

The Court: I was just courtesy. It seems odd to me. I understand that one of the reasons that we have Arbitration Agreements is to reduce the amount of Court

work that we have.

Mr. Barnes: Right.

The Court: Mr. Barnes, how many times have you seen civil trial dockets fall apart in your time as a lawyer?

Mr. Barnes: Very frequently.

The Court: Yeah. So, essentially one of the reasons for having arbitrations is to reduce trial time, that's really non-existent. I can't tell you how many times I go around the State and I've got Common Pleas and Common Pleas will last until about midday on Wednesday, you know, and that seems to be everywhere else. One of the rationales behind arbitration has been to reduce the docket but the docket has reduced itself without that.

Mr. Barnes: Personally, I don't like arbitration. I would like to litigate this case but ...

The Court: So, which brings me to, so you asked me for a alternative and one of the alternatives was that it be put on the non-jury docket, is that ...

Mr. Barnes: If the decision is to deny the Motion to Compel arbitration that would absolutely be our second alternative request but we would prefer to arbitrate the case and we think we have a contractual right to.

The Court: Okay. A very good argument. I

appreciate your letting me ask you those questions.

Mr Barnes: Oh, no. You're welcome.

The Court: Thank you, sir. All right. Yes, sir.

Mr. McAllister: Your Honor, Tim McAllister here on behalf of Plaintiff, Viola Hackworth, who is the personal representative of Mr. Eugene Boles, who is the decedent in this case.

Just to address this point that y'all just discussed prior to getting into my argument, I do want to point you to an Order that is made part of Exhibit Two. It's the first Order that we've attached to our Brief. I'm sorry, I sent the Brief to the Clerk but I did not bring an additional copy today.

Mr. Barnes: I have a copy for you.

The Court: Are you sure. Do you mind?

Mr. Barnes: No, no.

The Court: Did you mark it up and put little notes on the side about how wrong he was (laughter by all parties). You didn't do that. Mr. Barnes, do you need a minute? (Laughter by all parties).

Mr. Barnes: I should have. (Laughter by all parties).

The Court: Okay. Mr. McAllister, I'm sorry.

Mr. McAllister: This very agreement just a few

months ago in this court room, May 2018, Judge Buckner deemed that this Agreement was unenforceable based on that jury waiver provision. We've attached this particular Order to our Memorandum. It's the Holmes case v. Bayview Manor. It is up on appeal right now. But, just to read you a little bit from this Order, which I think is instructive if you turn to page 4 of 5 and again this is Exhibit 2 of Plaintiff's Response in Opposition. Counsel, in that case, when pushed by the Court on whether any additional consideration was present separate and apart from the admission of care counsel agreed there was none. And the Court went on to say the Defendants cannot have it both ways. They cannot on one hand argue that the waiver was not consideration for admission but on the other hand argue that admission was a valuable consideration for the waiver. That in itself is exactly the particular issue that you referenced and Judge Buckner has already ruled on this very issue and they took the position in that case to that effect.

Just going back to the arguments and I will explain in a little more detail why we take the issue with this particular motion and whether it is the FAA or the South Carolina Arbitration Code when an Arbitration Agreement is in dispute, the Defendant or the person bringing that motion has the burden of proving there is a

valid agreement. In this particular case, the Plaintiff does dispute that a valid agreement exist. If you look at Ms. Caruso's, the Admissions Director's affidavit, she goes into great detail ...

The Court: Where is that?

Mr. McAllister: This is going to be part of Defendant's Motion.

Mr. Barnes: Exhibit D.

The Court: Exhibit D?

Mr. Barnes: D as in dog; yes, sir.

The Court: Thank you Mr. Barnes.

Mr. McAllister: She goes into great detail and I can read a few points of this affidavit to the record about her interactions with our client on November 2 and November 3, 2015. Now, I know Defendant today take the position that dates don't matter, but when you are relying on a contract to support your Motion to Compel arbitration to waive her constitutional rights, we would argue that dates do matter and facts do matter. She goes into great detail. She says that on November 2, 2015, I met with Mr. Boles sister and Power of Attorney, Viola Hackworth and her brother Clifford Byers. She goes on to say, I personally presented Ms. Hackworth and Mr. Byers with admission documents. I described to Ms. Hackworth and Mr. Byers the terms of the agreement. I discussed

with Ms. Hackworth a separate Arbitration Agreement. Now, they claim that those are one in the same, those have merged even though their affidavit says they are separate. Then she goes on to say in Paragraph 10, on November 2, 2015, I knew that Ms. Hackworth was a designated Power of Attorney for Mr. Boles in her durable power of attorney position. Finally, I point the Court to paragraph 12. Ms. Hackworth signed the Admissions Agreement and advised that she wanted more time to come back and think about the Arbitration Agreement. I recall that Ms. Hackworth came to my office in the later part of the day on November 2, 2015 and the following day on November 3, 2015, Ms. Hackworth returned to Bayview, brought additional belongings to Mr. Boles and signed the Arbitration Agreement.

Well, we take the position and our affidavit supports this, Ms. Hackworth says I wasn't at the facility on November 2nd, November 3rd, 2015. None of this can be true. They go into great detail how this interaction, how she explained in great detail these Agreements to the Plaintiff so that she can waive her constitutional rights for her brother.

Ms. Hackworth lives in Pensacola, Florida. Ms. Hackworth has a child. Ms. Hackworth has work obligations. Ms. Hackworth testified in her affidavit

that I wasn't there on November 2nd and 3rd, 2015. I had to complete my work obligation. I had to make arrangements for my child and I flew from Pensacola to Atlanta on November 6th, a Friday. I got in the car with my sister and we drove four and a half hours to the facility arriving that night.

Now, Your Honor, we think when you move before the Court based on a contract with dates and affidavits that support those dates, those contracts and that affidavit must be accurate. I'm going to present to the Court and I've got a copy here for defense counsel and this is not made part of our motion, but this is part of the ...

Mr. McAllister: May I approach?

The Court: Yes, sir.

Mr. McAllister: This is part of the Admissions Agreement packet, sixty-three page packet that the Defendants have provided to us prior to today's motion and this is a copy of the Admissions Agreement. If you flip to the very last page there's a note and this note says, Eugene Boles, please disregard first contract, resident has POA who will sign him in on a later date. Where is that contract because we certainly don't have it in the record here. And that's our contention here, Your Honor, we do think dates matter and we think the contract

at issue matters and we don't think that the Defendants can move to compel us to arbitration or waive our constitutional right to a jury trial based on a document that there own notation says isn't the right document. And when a valid agreement doesn't exist a Plaintiff cannot be compelled to arbitration. The Case Law is clear on that.

Your Honor, I'll represent to you and I'm happy to pass up other instances but we flagged numerous instances in this sixty-three pages of business records that include Admissions Agreement and Arbitration Agreement where Ms. Hackworth wasn't signing documents on November 2. For instance, there is resuscitation designation page. The only signature on this page is Clifford ...

The Court: What page is that?

Mr. McAllister: I'm going to hand these up, Your Honor.

The Court: Okay.

Mr. McAllister: Now, if you remember in this affidavit of Ms. Curso, the Admissions Director who is very clear in her memory from four years ago about this patient and her POA. She said I knew, in paragraph 10, I knew that Ms. Hackworth was the designated Power of Attorney for Mr. Boles. Well, that begs the question,

why are you having a brother, who is not power of attorney, sign documents within your Admissions package. Don't see any signature from Ms. Boles there. There are documents throughout this Admissions package that showed Mr. Byers initials by pages including orientations and expectations check list and other documents, Your Honor. And, then there's also a check list at the very front of this Agreement, I'll hand that up. This was the coverage page to those documents and if you look at this check list and if you turn to page two you see very clearly that there is no arbitration agreement signed for and there is no indication that the above-information identified on pages one and two has been reviewed and copies received as requested by the POA. No signatures on that document. So, we have documents throughout their own records that show that the affidavits have been falsified and the agreements that have been put forth to compel us to arbitration can't be relied upon.

Now, just for the sake of argument, we think that there are clear grounds to deny this motion outright. We certainly think, at the very least, we should be entitled to discover the validity of these documents including any contract defenses and just to address a few of Mr. Barnes points. All of these arguments are more eloquently laid out in the orders that

are made part of our motion or our brief.

First and foremost, as discussed earlier, these jury waive provisions lack consideration and mutuality. Each one of these Orders that we've attached goes into this very discussion. A valid contract requires that both sides provide consideration. The Arbitration Agreement is only enforceable if it contains bargain for consideration and a mutuality of obligations between its parties. Each one of them goes in great detail about that.

There is no doubt that these agreements are separate. They have separate page numbers. In fact, the Arbitration Agreement is not numbered at all. They have separate titles. The Admissions Agreement offers a three day recision period, the Arbitration Agreement offers a thirty day recision period. Throughout you will see that the agreements are separate and distinct and that's even acknowledged in Defendants affidavit.

Your Honor, I also point you to in Judge Buckner's Order, this discussion about illegality and the fact that an Arbitration Agreement or provision can't be precondition for admission or continued admission at the facility and that is Federal law 42-CFR-43-12(D)3. That's another provision that prevents them making arbitration provisions conditions upon admission or continued

admission at a facility.

It appears that the Defendants take a little different approach today with respect to what that consideration is as they did previously in their discussion in the Holmes case we mentioned earlier.

Finally, Your Honor, the Defendants --- this Agreement, the Plaintiff contends, is totally unconscionable and we can go through all of these particular provisions and walk through one by one that absences a meaningful choice with oppressive terms but certainly here we have a situation according to the Defendants, that if you opt out of arbitration provision in the Admissions Agreement don't worry we've got you, and you're still going to waive your right to a jury trial in the same agreement. That's absence of meaningful choice, that's unconscionability.

We also have provisions within this Admissions Agreement that they say is the primary basis for their motion today that says attorneys fee and any legal actions or other proceedings brought by the facility to enforce or interpret any provision of this agreement or to enforce any remedy for breach thereof, the facility shall be entitled to receive reasonable attorneys fees and costs actually incurred in connection therewith including any appellant proceedings. This agreement also

allows a modification that changes unilaterally. This is the agreement that they say compels up to arbitration yet from time to time the facility made modified change or amended this agreement and will provide thirty day written notice of such changes to the resident. There is no opportunity for the resident or his personal representative to amend or modify this agreement. Again, that's unconscionable

Your Honor, we also contend that there are also issues with authority and whether or not wrongful death beneficiaries can be compelled to arbitrate but those are issues that are only right after appropriate discovery has elapsed.

The Court: And you want limited discovery just to ...

Mr. McAllister: We want all the discovery, Your Honor, with respect to the enforce ability of the Agreement and that goes to these contract defenses including unconscionability. Lack of consideration, mutuality, all those different of things as well as authority, Your Honor.

The Court: Okay.

Mr. McAllister: As we mentioned, we don't think there's any basis for the Court to compel arbitration in this matter and we think that the Court should deny it

based on the matters presented because there is no agreement of record to get us there.

The Court: Mr. McAllister, what about the option of putting this on a non-jury docket?

Mr. McAllister: Your Honor, we would prefer, obviously, to have a jury of our peers in Beaufort County. This case is an extremely bad case. Our affidavit in this case is about twenty-five pages. Every injury that you can possibly imagine occurred in this facility. Every negligent failure committed by this nursing facility and we think that it would be an injustice not to allow our clients to present these facts ...

The Court: To a jury?

Mr. McAllister: Yes, sir.

The Court: Of your peers?

Mr. McAllister: Yes, sir.

The Court: Okay.

Mr. Barnes: May I respond, Your Honor?

The Court: Yes, sir. And if you would address the limited discovery aspect too.

Mr. Barnes: Sure. I would imagine what he is asking for is factual discovery as to the Admissions Agreement and Arbitration Agreement. Is that what you want?

Mr. McAllister: Well, we'd like to explore every avenue that we're entitled to as far as ...

The Court: I think he just wants discovery. He's calling it limited so it doesn't sound bad.

Mr. Barnes: Okay.

The Court: Okay. I think I know what he wants. Thank you, sir.

Mr. Barnes: Just a few other issues, Your Honor, Judge Buckner ordered, and it is now on appeal, that is exclusively dealing with non-jury trial. It has nothing to do with arbitration. There were no arguments for arbitration. So we would argue it might be the same contract but that's not what was the issue in Judge Buckner's Order in that case, in general.

As far as the unconscionability and the absence of meaningful choice, Your Honor, Exhibit A again is Arbitration Agreement, I don't know how we can argue it's absence of meaningful choice when in bold font on the very last page of Exhibit A, it says underlined and bolded, **Optional Arbitration Clause**. This is clearly, there was a choice, Ms. Hackworth, the POA, could have xed out there and we would have accepted this patient. It was absolutely an opportunity not to agree to arbitration under the Admissions Agreement so we would take issue with that argument.

As far as the "falsified dates", as I said in the beginning of my argument, we are for purposes of today accepting the Plaintiff's argument. For full disclosure, Your Honor, I found out about this about 4:30 p.m. on Thursday was the first time that it was alleged that the dates were wrong. I left a voice mail with my former, my client's former employee who is in Ohio now. She was working night shift, got back to me yesterday late afternoon. I contemplated filing a supplemental affidavit, I couldn't get it done. I think, I don't want to reveal any attorney-client privileges, but I think what she would say is my affidavit relied upon the dates that I see in the Admissions Agreement and Arbitration Agreement. That's what I said three and a half years ago.

The Court: Mr. Barnes, your argument is regardless of the dates, she did sign it.

Mr. Barnes: She did sign it; yes, Your Honor. Furthermore, neither one of us has brought this up but it might even make sense, Plaintiff's version of the facts, of the dates, might make sense in light of this one document. Authorization for treatment, I think it was in the Admissions packet that he referred to earlier where Ms. Hackworth is dating it November 6, 2015. That's consistent with Plaintiff's Affidavit that Ms. Hackworth arrived to South Carolina on November 6th. Why the dates

says November 2nd and 3rd on the two Agreements, I can't explain but I don't think there is any falsification and the basis of her affidavit was because that is what it says in the documents. It's certainly no lack of candor on her part.

The Court: Thank y'all. All right. As always I appreciate being given stuff to read. I will get back to y'all. Okay.

Mr. Barnes: Thank you, Your Honor.

Mr. McAllister: Thank you, Your Honor.

(End of Hearing)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
VIOLA M. HACKWORTH, as Personal Representative of the Estate of EUGENE BOLES A/K/A EUGENE N. BOLES, deceased,	)	C/A No. 2019-CP-07-00433
Plaintiff,	)	
versus	)	
BAYVIEW MANOR, LLC d/b/a BAYVIEW MANOR, EPIC MGT, LLC, EPIC GROUP, LIMITED PARTNERSHIP, TEDDIE SIMMONS; JOHN DOES, and RICHARD ROE CORPORATIONS,	)	**NOTICE OF MOTION AND MOTION TO STAY ACTION AND COMPEL ARBITRATION; IN THE ALTERNATIVE MOTION FOR NONJURY TRIAL; AND MOTION FOR PROTECTIVE ORDER**
Defendants.	)	

TO: C. CALEB CONNOR, KENNETH L. CONNOR, A. KEITH McALISTER, JR., AND ANNE K. MOORE, ATTORNEYS FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendants Bayview Manor, LLC d/b/a Bayview Manor, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations ("Defendants"), through their undersigned counsel, will move, on the tenth day after service, or as soon as counsel can be heard, before the presiding judge of the Court of Common Pleas for Beaufort County, for an Order staying this action and compelling arbitration. This Motion is based on the terms and provisions of the arbitration clauses found in the Admissions Agreement (attached as **Exhibit A**) and the Resident and Facility Binding Arbitration Agreement (attached as **Exhibit B**) executed at the time of Eugene Boles' admission

to Bayview Manor, LLC's facility in November 2015. These agreements expressly provide that all disputes will be resolved by binding arbitration.

Accordingly, this action should be stayed, and the Court should order the dispute between the parties to be arbitrated in accordance with the terms of the arbitration agreements described above. This Motion is made pursuant to Rules 12(b)(1), 12(b)(3) and 12(b)(6) of the South Carolina Rules of Civil Procedure ("SCRCP"); the Federal Arbitration Act, 9 U.S.C. § 1, et seq.; and all applicable federal and South Carolina statutory and case law.

In the alternative, and only if its Motion to Compel Stay Action and Compel Arbitration is denied, the Defendants move for a non-jury trial pursuant to Rules 38 and 39, SCRCP. The Defendants are entitled to a non-jury trial as a result of the Waiver of Jury Trial provision in the Admissions Agreement.

This motion is supported by the Affidavits of Christy Drinkard (**Exhibit C**) and Lucy Caruso (**Exhibit D**) which have been filed and served contemporaneously with this Motion. Furthermore, this Motion is also supported by the pleadings, other affidavits, exhibits and legal memoranda which may be served and filed prior to, at, or after any hearing regarding this Motion.

The Defendants also move for a protective order under SCRCP 26(c) that the discovery and deposition notice served by Plaintiff on the Defendants not be had. Because this case is subject to binding arbitration, it is improper under the South Carolina Rules of Civil Procedure for Plaintiff to serve the Defendants with discovery requests and deposition notices.

The undersigned affirms that prior to filing this Motion, he communicated in writing with opposing counsel and has attempted in good faith to resolve this motion.

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HOLCOMBE BOMAR, P.A.

By: s/A. Walker Barnes

A. Walker Barnes (S.C. Bar No. 78485)
Post Office Drawer 1897
Spartanburg, SC 29304
(864) 594-5300
Attorneys for Defendants Bayview Manor, LLC d/b/a Bayview Manor, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations

April 8, 2019
Spartanburg, South Carolina

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Eugene Boles Admit Date 11/02/2015

ADMISSION AGREEMENT

This is an agreement between **Eugene Boles** (Resident") and Bayview Manor ("Facility"), for admission to our health care facility located at: 11 Todd Drive Beaufort SC 29902.

In this Agreement, when we speak of Resident, it means the Resident or Responsible Party. The Resident payor source is expected to be. (**MC=MEDICARE**, MCD=MEDICAID, PVT=PRIVATE, INS=INSURANCE, MPS=MEDICAID PEND, HSP=HOSPICE, VA=VETERAN'S AFFAIRS, RSP=RESPITE)

A copy of the Resident's Medicare card, Social Security card and other insurance cards must be provided at time of admission. If a copy is not provided by the Resident or the Responsible Party within three (3) days of admission, the Resident will be charged as a private pay resident.

Admission and Consent to Treat: The Resident agrees to be admitted to the Facility of his/her own free will. The Resident understands that the Facility cannot admit the Resident without physician orders.

The Resident consents to allow the Facility to provide care and treatment according to practice, policy and physician orders. The Resident has the right to withdraw this consent or refuse treatment.

Non-Discrimination Statement: This Facility will not deny admission, medical treatment or discriminate in any way based on color, race, sex, national origin, disability, or age. If you feel your Civil Rights have been violated in any way, please contact the Administrator of this Facility.

Physician's Care: The Resident agrees to select an attending physician who will visit regularly according to the Facility's policies, state and federal regulations and as dictated by the Resident's needs. He/She must have admitting privileges in the Facility. If the attending physician does not respond in case of an emergency, the Resident gives permission to the Facility to contact another physician. If the Resident does not wish to choose a physician, one of our staff physicians will be assigned to the Resident.

The Resident will be billed directly by the physician and the Facility will not be responsible for payment of this service. The Resident agrees to be responsible for all charges for all physician's services and any other services and treatments ordered by a physician, unless paid by Medicaid, Medicare, or other third party coverage. (See Authorizations and Acknowledgements to enter selection)

Hospital Transfers: If a doctor orders the Resident transferred to a hospital, the Facility will arrange for the transfer to the hospital. The Facility will also notify the Responsible Party, if possible, of the transfer. If the Resident is transferred, the Facility will hold the bed for the Resident as long as the Resident pays for the bed at a fee based on the then current daily rate.

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Blumberg No. 5114 DEFENDANT'S EXHIBIT A

Medicare will not pay to hold the bed and the resident is discharged. Medicaid may hold the bed for the Resident up to (10) days for a single hospital stay. If the Resident is hospitalized for more than 10 consecutive days, the Resident will be discharged. Medicaid will also hold a bed for the Resident up to 18 days per calendar year, if the Resident has a therapeutic pass from his/ her physician. Therapeutic leaves may be a maximum of 9 days and periods of leave may not be consecutive. The Resident or Responsible party may choose to hold the bed with private pay funds. (The Resident and Responsible Party must sign Bed Hold and Readmission Policy)

Hospitalization: If The Resident leaves the Facility to go into a hospital or for other medical reasons, the Facility will not charge the Resident past the day the Resident leaves unless the Resident wishes to reserve the bed for when the Resident returns.

Hospital Services: The Resident agrees to be responsible for all hospital charges if the Resident is taken to a hospital, unless paid by Medicaid, Medicare or other third party coverage. The Resident has the right to refuse treatment and to be informed of the consequences of the decision.
(See Authorizations and Acknowledgements to enter selection)

Refuse Treatment: The Resident has the right to refuse any medical treatment, as defined by law, and to be informed of the consequences of refusing treatment. The appropriate notification and documentation will be provided if the Resident communicates this wish.

Room Transfers: The Facility reserves the right to change the Resident's room or roommates when the Facility determines it is appropriate. The Facility will make changes if the Facility determines that is in the best interest of the Resident, other patients or the Facility, in accordance with state and federal regulations.

Discharge Arrangements: If The Resident is to be discharged, the Facility will notify the Resident, the Responsible Party, the attending physician, and the appropriate agencies at least 30 days prior to the date of discharge unless the Facility determines that an emergency exists or the Resident's needs can no longer be met in the Facility. The Facility's Case Management/Social Services Department will help the Resident make arrangements for his/her discharge.

Right to Leave Facility/Duration of Agreement: The Resident's stay with the Facility is voluntary. The Resident may leave the Facility at any time, provided the Resident gives the Facility adequate notice, so the Facility may obtain a discharge order from the Resident's physician. The Resident may terminate this agreement upon a five (5) day written notice to the Facility. Upon termination,

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Resident agrees to pay accrued charges up to and including the day of discharge. **Upon the effective date of termination of the agreement, the Resident must leave the Facility. Otherwise, this agreement will remain in effect until a different written agreement is executed. At no time does this mean that the Resident will be forced to remain in the Facility against his/her will.**

Refunds: If The Resident leaves the Facility, The Facility will refund any overpayment within 30 days. In the event of the Resident's death, refunds* and any of the Resident's personal property remaining in the Facility will be returned to the Resident's family or designee within 30 days.

Personal Needs Account: The Resident may leave personal spending money with the Facility. If the Resident wants a personal needs account maintained by the Facility, the Facility will not charge an additional fee for this service. The Facility will hold the Resident's funds in trust in accordance with applicable federal and South Carolina laws. The Resident and the Responsible Party may see the Facility's records of his/her account. Interest will be credited according to State and Federal regulations. The Facility will provide the Resident with a quarterly accounting of all funds held in trust in accordance with South Carolina law. (For this service, the Resident must sign authorization form, Resident Trust Management Account Agreement.)

Basic Charges: The Resident agrees to pay for routine care, room and board, unless The Resident receives Medicaid, Medicare or other third party coverage, at the rate of $ .00 per day as Basic Charges. Routine care and services included in the per diem rate are:

a. Room and board
b. Nursing services/personal care needed for Resident health, safety, and wellbeing as required by Facility license.
c. Linens bedding
d. Social Service consultations by the Facility Social Service Department
e. Oxygen on an emergency basis
f. Facility based Personal Needs Account for personal funds (if authorized)
g. Personal laundry service (see Extra Charge Sheet if applicable); excluding dry cleaning
h. Dietitian consultation and services
i. Therapeutic recreational activities
j. Pastoral care
k. Routine personal care Items

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This rate may be increased during the year; however, the Facility will notify the Resident of future rate changes thirty (30) days before they go into effect.

If the Resident receives Medicaid or Medicare, the cost of room and board and other services and supplies listed below will normally be paid for by the payer, however, the Resident is ultimately responsible.

If the Resident is receiving Medicaid the State has required the Resident to pay directly to the Facility the following (by the 10th of every month):

a. All resource monies as specified by the Department of Social Services
b. Adjustment as specified by the State
c. Previous balances prior to Medicaid approval
d. Other

As it may be necessary, the Resident agrees to provide the Facility with statements of his/her assets, debts, and income. If the Resident is not receiving Medicaid, Medicare or other third party payer, this statement will be confidential, unless law requires disclosure of information.

Supplemental Charges: Extra charges include, but are not limited to, the services and supplies described below. A list of the extra charges for services and supplies that are available to the Resident but are not covered by Medicare or Medicaid is included in this packet. The Facility will provide written notice to the Resident of any changes in the extra charges at least 14 days in advance or as otherwise required by South Carolina or Federal law.

***Diagnostic Consultant and Therapeutic Services**: The Resident agrees to have any diagnostic, consultant, or laboratory services or test ordered by his/her physician and agreed to by the Resident. Resident agrees to pay for these services unless paid for by Medicaid, Medicare, or other third party coverage.

* **Physical, Occupational and Speech Therapy and Private Duty Nurse/Sitters**: The Resident agrees to be responsible for any charges for Physical, Occupational and Speech Therapy, Private Duty Nurse and/or CNA services unless paid by Medicare, Medicaid, or other third party payer.

***Ambulance and Transportation Services**: The Resident agrees to be responsible for any charges for ambulances or other transportation the Resident may need, unless paid by Medicaid, Medicare, or other third party coverage.

***Medical Supplies**: The Resident agrees to be responsible for all charges for medicine, oxygen, dental, eyeglasses, hearing aids, medical appliances, expenses other that transportation connected with activities, etc., unless paid by Medicaid, Medicare, or other third party coverage.

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*Pharmacy Services: Pharmacy services are available through the Facility. The Resident may choose another pharmacy only if that Pharmacy will sign an agreement with the Facility to provide services in accordance with all applicable federal and state statutes and regulations and our requirements, including but not limited to: 24 hour service and delivery, labeling, unit dose form, and monitoring. The Facility is authorized to use generic name medications except as otherwise ordered, in writing, by the Resident's physician. See additional form for Brand-name requests) The Facility's Director of Nursing Services and the Consultant Pharmacist are authorized to destroy any excess or undesired medications in accordance with applicable law. The Resident agrees to pay for charges unless paid by Medicaid, Medicare, or other third party coverage.

Personal Items and Services: The Resident agrees to pay for personal items and services. These include: clothes, personal laundry not done at the Facility, barbers, hairdressers, toiletries, and sundries, which the Facility does not routinely provide. The Resident understands the Facility is not responsible for damage to personal clothing. (See Authorizations and Acknowledgements.)

Payment: The Resident agrees to pay one month's Basic Charges in advance, unless the Resident is receiving Medicaid, Medicare or other third party coverage. If the Resident is admitted during the month, the Resident will pay in advance for the remaining days of that month. The Facility will bill on the 28th of the month for the upcoming month and payment is due on the 10th of the month. Payment of Medicaid resource will be made in accordance with the Department of Public Welfare policy (or other state agency with authority). If, during the Resident's course of stay, there is a change of primary payer status, The Resident agrees to abide by payment terms or regulations governing that payer status.

Interest and Attorney's Fees: The Resident agrees to pay the Facility a late charge of 1.5% per month on any unpaid balances not paid within 30 days of billing. If the Facility hires an attorney to collect the bill, the Resident agrees to pay reasonable attorney's fees and the costs of collection.

Assignment of Benefits: The Resident authorizes the facility to receive benefit payments directly from Medicare, Medicaid, or other party insurance company.
(Signature required on Authorization for Assignments of Benefits)

Failure of Others to Pay: If any Resident charges are not paid for by insurance, anyone or any agency, the Resident agrees to pay them.

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Discontinuance of Medicaid: If the Resident receives Medicaid and it is discontinued, the Resident agrees to pay the then current Basic Charges and other charges for self-paying patients. Such charges will begin on the date Medicaid is discontinued.

Denial of Medicare and Medicaid: If the Resident applies for benefits under Medicare or Medicaid after the Resident becomes a patient, and the application is denied, the Resident agrees to pay the Facility for all charges from the day the Resident entered the Facility.

Failure to Pay the Facility's Bill: The Resident agrees to pay the Facility's bill upon receipt of the statement, or no later than the 1st of each month following the receipt of the statement. The Resident agrees to make arrangements to leave the Facility if bills are not paid as agreed. If the Resident does not make arrangements, then the Facility can make them for the Resident. If the need arises for the Facility to make such arrangements, the Facility will provide a notice of intent to discharge the Resident in accordance with state and federal regulations.

Failure to Pay Other Bills: The Resident agrees to pay the bill of others providing services or supplies. The Resident agrees to pay his/her bills within 15 days after billing, unless other acceptable arrangements are made in advance.

Telephone: Each Resident room is wired for telephone service. The Resident must make arrangement for service with the carrier of their choice. All costs for private telephone use are the responsibility of the Resident. In addition, a phone will be made available for the resident at a specific location within the facility. All long distance charges will be billed to the resident. As the telephone is for the use of all the residents on each unit, we ask that each resident be reasonable and considerate with individual demands for the unit telephone.

Valuables: The Resident agrees to be responsible for all valuables, money, appliances, and other personal property in his/her possession while the Resident is at the Facility. Although the Facility will work to see that misplaced belongings are recovered, the Facility is not responsible for replacing lost or stolen cell phones, computerized person assistance devices, IPods, radio, hearing aids, eyeglasses or dentures/partials(including, but not limited to the fore mentioned).

Guardianship: If the Resident, who has not had a guardian appointed by a court of law, is or becomes unable to make or communicate his/her medical decisions, as determined by the Resident's attending physician, the Facility shall

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notify the designated Healthcare Proxy, surrogate, or agent under a Durable Power of Attorney, if any. If neither has been appointed, the Facility and/or Resident's Responsible Party shall designate or determine a surrogate or Proxy in accordance with South Carolina law. The Facility and Resident acknowledge that above and beyond the surrogate or proxy's statutory abilities, the surrogate or proxy is authorized to bind the Resident to all terms in this agreement. If neither is available the Responsible Party agrees to initiate and maintain a proceeding in a court of competent jurisdiction to appoint a legal guardian. If the Responsible Party fails to do so, the Facility shall have the right, but not the obligation, to commence a legal proceeding to adjudicate the Resident incapacitated and to have the court appoint a guardian for the Resident. The cost of the legal proceedings, including attorney's fees, shall be paid by the Resident, Responsible Party or the Resident's estate.

Release of Medical and Other Information: The Resident agrees that the Facility can release all or part of his/her medical records to any agency or person with the right, by law, to review such records.

Patient Identification: The Facility is authorized to require a standard method of Patient identification, e.g., an identification bracelet and/or photographic print.

Photographs/ Video Technology: The Resident authorizes the Facility to take photographs of his/her person or portions thereof for medical or identification purposes. The Resident also understands that photographs may be taken during activities or special events and displayed in the Facility or in the Facility newsletter. Photographs are confidential and will not be released for other purposes without the Resident's written permission. (See Authorizations and Consents for further information) The Resident/ Responsible party understands that video technology of any type is prohibited in recognition of the privacy of the other residents, visitors and staff members.

Indemnification: The Facility is required by law to exercise reasonable care toward the Resident; however, the Facility is not an insurer of the health, safety, and welfare of the Resident and assumes no liability as such.
The Facility is not responsible for the health, safety, and welfare of any Resident who is away from the Facility with any person not directly employed by the Facility or when the Resident knowingly leaves the Facility against the medical advice of the Resident's attending physician or without the approval of the Facility, with or without the knowledge of the Facility.
The Resident shall defend, indemnify an hold the Facility harmless from any and all claims, demands, suit actions, and related costs and expenses, including without limitation attorney's fees made against the Facility by any person arising out of or relating to any damage or injury caused by the Resident to any person

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or the property of any person or entity (including the Facility).
The Resident or the Resident's estate is responsible for any damages caused to the Facility property beyond normal wear and tear, and shall pay for the repair and replacement of damaged property, based on the actual charge or cost to the Facility for such repair or replacement.

Liability: The Facility shall not be liable for injuries of any kind unless caused by the willful act or negligence of the Facility or the Facility's employees.

Compliance with Facility Rules and Regulations: The Resident agrees to comply with all Patient/Resident's Responsibilities established by the Facility. The Resident has read and been given a copy of the Facility's rules and regulations which set forth these responsibilities.

Advanced Directives: The Resident acknowledges receipt of information concerning advance directives and his/her rights to make decisions about medical care.

Liability Insurance: This Facility maintains a liability insurance policy with minimal coverage. This policy meets the requirements of all applicable state regulations relative to the licensure and certification for Medicare/Medicaid and other related programs.

Notice: Any notice, request, consent, waiver or other communication provided for or required by this Agreement shall be in writing and shall be delivered in person or sent by first-class mail, postage prepaid, return receipt requested, and deposited in the United States mail, addressed as follows:

Facility:
11 Todd Drive
Beaufort SC 29902

Resident:
Eugene Boles

Governing Law: This Agreement shall be interpreted and enforced in accordance with the laws of the State of South Carolina

Venue: In the event that any litigation arises under, or in any manner in relation to this Agreement, whether *ex contractu* or *ex delicto*, the venue of same shall lie exclusively in Beaufort County, South Carolina and no other location.

VH POA / CB Initial

Waiver of Jury Trial: (Please read carefully)
Resident hereby knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any litigation, including any counterclaim which Resident may assert, arising from or relating to this Agreement or any other document connected with this Agreement, or arising out of or relating to any of the said documents or any relationship between the Facility and Resident, including the Resident's admission itself, or any other course of conduct, course of dealing statements (whether verbal or written) or actions of the Facility or Resident.

Resident represents and warrants that the waiver contained in this Paragraph has been freely and voluntarily made after reviewing the same, or having had an opportunity to review the same, with counsel of Resident's choice.

Attorney's Fees: (Please read carefully)
In any legal action or other proceeding brought by the Facility to enforce or interpret any provision of this Agreement or to enforce any remedy for the breach thereof, the Facility shall be entitled to receive reasonable attorney's fees and costs actually incurred in connection therewith, including all costs and fees incurred in any appellate proceeding.

The Facility is also entitled to recover attorney's fees and costs, including all fees incurred in any appellate proceeding, for any legal action or proceeding brought by the Resident and/or responsible party upon a finding by the body before which the legal action or proceeding is brought that the Facility committed no wrongdoing.

Capacity: This Agreement has been executed by the Facility's duly authorized agent, and no officer, director, agent, or employee of the Facility shall have any personal liability under the Agreement, to the Resident under any circumstances.

Severability: The parties agree that should any provision of this Agreement be declared invalid by any court of competent jurisdiction, or rendered invalid by any statute or regulation, then such provision shall be severed from this Agreement and the remainder of this Agreement will remain binding and in full force. Titles and/or captions in this Agreement are for convenience only.

Assignability: (Please read carefully)
This Agreement is fully assignable by the Facility. In the event that the Facility is sold, or license is transferred such that a new licensee operates the Facility, this Agreement shall be automatically assigned to the new licensee and shall be fully binding upon both parties.

Withdrawal Period:
Each party to this agreement shall have three (3) business days from execution of this agreement to cancel the agreement by notifying the other party in writing, by certified mail return receipt or traceable overnight delivery, of its desire to cancel.

UH POA / GB Initial

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Guarantee: By his/her execution below, Responsible Party (jointly and full severally if more than one) hereby guarantees full compliance with the Agreement and full payment of all monies due by Resident under this Agreement, including all attorney's fees and court costs incurred by the Facility in the interpretation or enforcement of this Agreement, as well as in the enforcement of this Guarantee against Responsible Party. Venue of any such proceedings shall lie in* Beaufort County, South Carolina

Acknowledgement: By signing this Agreement, the Resident acknowledges: That the Resident has received a copy of entire agreement with any attachments.
That the Resident has been given an oral explanation of services provided and charges including services offered on an as needed basis including extra services.
That the Resident has been given an oral explanation of the bed reservation and refund policies set forth in this agreement.
That the Resident has received a copy of the rules and regulations, and an explanation of the Resident's responsibility to obey all reasonable rules and regulations and to respect the personal rights and private property of others.
That the Resident has received a copy of the Grievance Policy, Smoking Policy and Restraint Policy.
That the Resident has received a copy of the procedures of the state and district ombudsman councils.
That the Resident has received a copy of the transfer and discharge policies.
That the Resident has received a copy of the Federal and State Resident's Bill of Rights.
That the Resident has received a copy of the Privacy Act Statement.
That the Resident has received a copy of the (HIPPA) Health Insurance Privacy and Portability Act policies of this Facility.
That the Resident has received a copy of CMS Medicare DMEPOS Supplier Standards
That the Resident has received authorizations regarding, Resident Trust Fund, Pharmacy Part D, Care Plans, Vaccinations and Release of Information, Self-Administration of Medications and Assignment of Benefits .

Entire Agreement: This Agreement sets forth the entire understanding of the parties relating to the subject matter hereof, and supersedes all prior Agreements, understanding, and discussions relative to such subject matter, Resident acknowledges that in entering into this Agreement, Resident has not relied on any representation, warranties (whether express or implied) or covenants, other than those set forth herein. Nothing in this Agreement shall be construed to give any person or entity other than the parties hereto any rights to remedies.

VH POA /CB Initial

Agreement Modifications/Changes: From time to time the Facility may modify, change or amend this Agreement and will provide a thirty (30) day written notice of such changes to the Resident or Responsible Party.

Immoral/ Illegal review: As dictated by state and/or federal law a review for specific activity may be conducted (i.e. sexual predator).I have received a copy of Facility Responsibilities Regarding Convicted Sex Offenders,

Optional Arbitration Clause: Any action, dispute, claim or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims of violations of Resident's Rights) now existing or hereafter arising between the parties, in anyway arising from or relating to this Agreement governing the Resident's stay at the Facility, shall be resolved by binding arbitration. Such binding arbitration shall be governed by the provisions of the South Carolina Arbitration Code. As appropriate and in the event that the South Carolina Arbitration Code is deemed to not apply, binding arbitration shall be governed by the Federal Arbitration Act. **OPTIONAL: If the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only. I have X this clause _____initial.**

Resident and or Responsible Party has read or has been read and understands and agrees to all terms and conditions of this agreement unless specifically noted on the agreement.

By: Lucy Caruso 11/2/15
Signature of Facility Representative Date

Eugene Boles

Signature of Patient/Resident Date

Witness Date

Witness Date

Vicki Hathcock POA 11/2/15
Responsible Party Date

Clifford Byars 11/2/15
Signature of Responsible Party Date

Responsible Party is acting as:
_____ Conservator
_____ Power of Attorney
_____ Relative (state relationship)
_____ Other: _____

Billing Address:

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RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT
(READ CAREFULLY)

Pursuant to the terms of this Resident and Facility Binding Arbitration Agreement (this "Arbitration Agreement"), it is understood and agreed by _____ (the "Facility") and _____ (the "Resident" or "Resident's Authorized Representative", hereinafter referred to as the "Resident") that any legal dispute, controversy, demand or claim (hereinafter collectively referred to as "claim" or "claims") that arises out of or relates to that certain Resident Admission Agreement (the "Resident Admission Agreement") executed by the Resident and the Facility, or any service or health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the Federal Arbitration Act (a copy of which is attached hereto and incorporated into this Arbitration Agreement), and not by a lawsuit or resort to court process except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards.

The agreement to arbitrate contained in this Arbitration Agreement includes, but is not limited to, any claim for payment, nonpayment or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Resident Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract. However, this agreement to arbitrate shall not limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility or any appropriate state or federal agency.

The damages awarded, if any, in an arbitration conducted pursuant to this Arbitration Agreement shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action, including any prerequisites to, credit against or limitations on, such damages.

It is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.

All claims based in whole or in part on the same incident, transaction, or related course of care or services provided by the Facility to the Resident shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Facility or the Resident, and the claim is not presented in the arbitration proceeding.

Any notice required pursuant to this Arbitration Agreement shall be deemed given (i) upon hand delivery; or (ii) three (3) days after deposit in U.S. mail via certified mail, return receipt requested.

Lumberg No. 5114 DEFENDANT'S EXHIBIT B

This Arbitration Agreement is effective as of the date of admission of the Resident to the Facility. VH **(resident's initials).**

The Resident understands that (1) he/she has the right to seek legal counsel concerning this Arbitration Agreement, (2) the execution of this Arbitration Agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (3) this Arbitration Agreement may be rescinded by written notice given to the Facility by the Resident within thirty (30) days of signature. If not rescinded within thirty (30) days, this Arbitration Agreement shall remain in effect for all care and services rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility.

THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT THEY ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY.

Viola Hackworth POA 11/3/15
Resident/Representative Signature / Date

Lucy Caruso 11-3-15
Facility's Authority Agent / Date

Viola Hackworth, POA
Resident/Representative Printed Name

Lucy Caruso,
Admissions Director
Facility's Authorized Agent Printed Name

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
VIOLA M. HACKWORTH, as Personal Representative of the Estate of EUGENE BOLES A/K/A EUGENE N. BOLES, deceased,	)	C/A No. 2018-CP-07-00433
Plaintiff,	)	
versus	)	
BAYVIEW MANOR, LLC d/b/a BAYVIEW MANOR, EPIC MGT, LLC, EPIC GROUP, LIMITED PARTNERSHIP, TEDDIE SIMMONS; JOHN DOES, and RICHARD ROE CORPORATIONS,	)	**AFFIDAVIT OF CHRISTY DRINKARD**
Defendants.	)	

PERSONALLY APPEARED before me Christy Drinkard, who being sworn, deposes and says as follows:

1. I am an adult over the age of eighteen years. I submit this affidavit in connection with the "Notice of Motion and Motion to Stay Action and Compel Arbitration; in the Alternative Motion for Nonjury Trial; and Motion for Protective Order" filed by Defendants in the above-captioned action. I am fully competent to make this declaration, and if called to testify, I would state as follows.

2. I am the Administrator of Bayview Manor, LLC ("Bayview"). In this role, I am required to have knowledge about Bayview's business operations, which includes reviewing Bayview's past business records. Bayview is and was the licensed owner and operator of the

DEFENDANT'S EXHIBIT
Bluebeg No. 5114

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nursing facility known as Bayview Manor in Beaufort, South Carolina where Eugene N. Boles ("Mr. Boles") resided from November 2, 2015 until December 14, 2016.

3. Bayview was a Medicare certified facility in 2015 and 2016. Medicare is a federally administered program, and it made payments to Bayview in 2015 and 2016.

4. Bayview was a Medicaid certified facility in 2015 and 2016. The South Carolina Medicaid Program is partially funded by the federal government, and it made payments to Bayview in 2015 and 2016.

5. Bayview's requests for private insurance payments for services rendered to Bayview residents were sent in hard copy form via U.S. Mail to various private insurance companies, and insurance payments were issued by these insurance companies. The private insurance companies' offices that processed payments to Bayview are located in various states outside of South Carolina and they made payments to Bayview in 2015 and 2016.

6. The majority of food served to Bayview residents in 2015 and 2016 was supplied by US Foods from Charlotte, North Carolina.

7. In 2015 and 2016, Bayview utilized (1) Select Labs from Greensboro, North Carolina for its lab services; (2) Mobilex from Baltimore, Maryland for its radiology services; (3) Airgas from Atlanta, Georgia for its oxygen rental and supplies; (4) Briggs from Des Moines, Iowa for its medical forms; (5) Reliable from Asheville, North Carolina for the rental of specialty beds and pressure relief mattresses; (6) Ecolab from New York, New York for its laundry supplies; and (7) Quill from Philadelphia, Pennsylvania for business office supplies.

8. Bayview utilized other monthly services from outside South Carolina in 2015 and 2016, including American Healthtech, whose corporate office is in Ridgeland, Mississippi.

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9. Bayview had 170 licensed beds available in 2015 and 2016 for patient care, all of which were certified by, and participated in, the Medicare and Medicaid programs.

10. On November 2, 2015, the day of Mr. Boles' admission to Bayview, Mr. Boles, through his daughter and power of attorney, Viola Boles Hackworth ("Mrs. Hackworth"), entered into an Admission Agreement which contained an arbitration clause and waiver of jury trial clause (a true and accurate copy of which is attached as **Exhibit A**), along with a separate arbitration agreement (a true and accurate copy of which is attached as **Exhibit B**). These documents were all part of the admissions package and were kept in the course of a regularly conducted business activity, and it was the regular practice of Bayview to have these documents executed at or soon after the time of a resident's admission to the facility.

11. There is no written notice in Mr. Boles' file from Mrs. Hackworth, or anyone else from that matter, seeking to rescind these agreements.

12. The Admissions Director for Bayview at the time of Mr. Boles' admission was Lucy Caruso. She is no longer an employee of Bayview.

13. Part of her role as Admissions Director was to meet with incoming residents and/or their families to explain the admissions process, the admissions paperwork, and oversee the execution of the Admission Agreement, Arbitration Agreement and other admissions paperwork. Lucy Caruso executed the documents attached hereto on behalf of Bayview, and she was authorized to do so in her position as Admissions Director for Bayview.

14. Mrs. Hackworth was the designated power of attorney for Mr. Boles in her Durable Power of Attorney, a true and accurate copy of which is attached hereto as **Exhibit C**. This power of attorney was executed on October 3, 2012, more than three (3) years prior to Mr. Boles' admission to Bayview.

15. Finally, Bayview has possession of medical records, copies of which it can make available to the Court, indicating Mr. Boles had a history of stroke, left side hemiparesis, dementia, cognitive/memory deficits, impaired speech, diabetes, incontinency of bowel and bladder, and had severe confusion on the date of his admission to Bayview. These records were made at or near the time by a person with knowledge and were kept in the course of a regularly conducted business activity, and it was the regular practice of Bayview to maintain these documents in connection with the care and treatment of residents.

SIGNATURE FOLLOWS ON THE NEXT PAGE

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FURTHER DEPONENT SAYETH NOT.

Christy Drinkard

SWORN to and subscribed before me this 2nd day of APRIL, 2019.

Trista Hodge (SEAL)
Notary Public for South Carolina

My Commission Expires: September 4, 2023

TRISTA HODGE
Notary Public, State of South Carolina
My Commission Expires Sept. 4, 2023

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Eugene Boles Admit Date 11/02/2015

ADMISSION AGREEMENT

This is an agreement between **Eugene Boles** (Resident") and Bayview Manor ("Facility"), for admission to our health care facility located at: 11 Todd Drive Beaufort SC 29902.
In this Agreement, when we speak of Resident, it means the Resident or Responsible Party. The Resident payor source is expected to be. (**MC=MEDICARE**, MCD=MEDICAID, PVT=PRIVATE, INS=INSURANCE, MPS=MEDICAID PEND, HSP=HOSPICE, VA=VETERAN'S AFFAIRS, RSP=RESPITE)
A copy of the Resident's Medicare card, Social Security card and other insurance cards must be provided at time of admission. If a copy is not provided by the Resident or the Responsible Party within three (3) days of admission, the Resident will be charged as a private pay resident.

Admission and Consent to Treat: The Resident agrees to be admitted to the Facility of his/her own free will. The Resident understands that the Facility cannot admit the Resident without physician orders.
The Resident consents to allow the Facility to provide care and treatment according to practice, policy and physician orders. The Resident has the right to withdraw this consent or refuse treatment.

Non-Discrimination Statement: This Facility will not deny admission, medical treatment or discriminate in any way based on color, race, sex, national origin, disability, or age. If you feel your Civil Rights have been violated in any way, please contact the Administrator of this Facility.

Physician's Care: The Resident agrees to select an attending physician who will visit regularly according to the Facility's policies, state and federal regulations and as dictated by the Resident's needs. He/She must have admitting privileges in the Facility. If the attending physician does not respond in case of an emergency, the Resident gives permission to the Facility to contact another physician. If the Resident does not wish to choose a physician, one of our staff physicians will be assigned to the Resident.
The Resident will be billed directly by the physician and the Facility will not be responsible for payment of this service. The Resident agrees to be responsible for all charges for all physician's services and any other services and treatments ordered by a physician, unless paid by Medicaid, Medicare, or other third party coverage. (See Authorizations and Acknowledgements to enter selection)

Hospital Transfers: If a doctor orders the Resident transferred to a hospital, the Facility will arrange for the transfer to the hospital. The Facility will also notify the Responsible Party, if possible, of the transfer. If the Resident is transferred, the Facility will hold the bed for the Resident as long as the Resident pays for the bed at a fee based on the then current daily rate.

VH POA / CB Initial

DEFENDANT'S EXHIBIT A & C
Blumberg No. 5114
App. 205

Medicare will not pay to hold the bed and the resident is discharged. Medicaid may hold the bed for the Resident up to (10) days for a single hospital stay. If the Resident is hospitalized for more than 10 consecutive days, the Resident will be discharged. Medicaid will also hold a bed for the Resident up to 18 days per calendar year, if the Resident has a therapeutic pass from his/ her physician. Therapeutic leaves may be a maximum of 9 days and periods of leave may not be consecutive. The Resident or Responsible party may choose to hold the bed with private pay funds. (The Resident and Responsible Party must sign Bed Hold and Readmission Policy)

Hospitalization: If The Resident leaves the Facility to go into a hospital or for other medical reasons, the Facility will not charge the Resident past the day the Resident leaves unless the Resident wishes to reserve the bed for when the Resident returns.

Hospital Services: The Resident agrees to be responsible for all hospital charges if the Resident is taken to a hospital, unless paid by Medicaid, Medicare or other third party coverage. The Resident has the right to refuse treatment and to be informed of the consequences of the decision.
(See Authorizations and Acknowledgements to enter selection)

Refuse Treatment: The Resident has the right to refuse any medical treatment, as defined by law, and to be informed of the consequences of refusing treatment. The appropriate notification and documentation will be provided if the Resident communicates this wish.

Room Transfers: The Facility reserves the right to change the Resident's room or roommates when the Facility determines it is appropriate. The Facility will make changes if the Facility determines that is in the best interest of the Resident, other patients or the Facility, in accordance with state and federal regulations.

Discharge Arrangements: If The Resident is to be discharged, the Facility will notify the Resident, the Responsible Party, the attending physician, and the appropriate agencies at least 30 days prior to the date of discharge unless the Facility determines that an emergency exists or the Resident's needs can no longer be met in the Facility. The Facility's Case Management/Social Services Department will help the Resident make arrangements for his/her discharge.

Right to Leave Facility/Duration of Agreement: The Resident's stay with the Facility is voluntary. The Resident may leave the Facility at any time, provided the Resident gives the Facility adequate notice, so the Facility may obtain a discharge order from the Resident's physician. The Resident may terminate this agreement upon a five (5) day written notice to the Facility. Upon termination,

V/H POA ICB Initial

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Resident agrees to pay accrued charges up to and including the day of discharge. **Upon the effective date of termination of the agreement, the Resident must leave the Facility. Otherwise, this agreement will remain in effect until a different written agreement is executed. At no time does this mean that the Resident will be forced to remain in the Facility against his/her will.**

Refunds: If The Resident leaves the Facility, The Facility will refund any overpayment within 30 days. In the event of the Resident's death, refunds* and any of the Resident's personal property remaining in the Facility will be returned to the Resident's family or designee within 30 days.

Personal Needs Account: The Resident may leave personal spending money with the Facility. If the Resident wants a personal needs account maintained by the Facility, the Facility will not charge an additional fee for this service. The Facility will hold the Resident's funds in trust in accordance with applicable federal and South Carolina laws. The Resident and the Responsible Party may see the
Facility's records of his/her account. Interest will be credited according to State and Federal regulations. The Facility will provide the Resident with a quarterly accounting of all funds held in trust in accordance with South Carolina law. (For this service, the Resident must sign authorization form, Resident Trust Management Account Agreement.)

Basic Charges: The Resident agrees to pay for routine care, room and board, unless The Resident receives Medicaid, Medicare or other third party coverage, at the rate of $ .00 per day as Basic Charges. Routine care and services included in the per diem rate are:

a. Room and board
b. Nursing services/personal care needed for Resident health, safety, and wellbeing as required by Facility license.
c. Linens bedding
d. Social Service consultations by the Facility Social Service Department
e. Oxygen on an emergency basis
f. Facility based Personal Needs Account for personal funds (if authorized)
g. Personal laundry service (see Extra Charge Sheet if applicable); excluding dry cleaning
h. Dietitian consultation and services
i. Therapeutic recreational activities
j. Pastoral care
k. Routine personal care Items

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This rate may be increased during the year; however, the Facility will notify the Resident of future rate changes thirty (30) days before they go into effect.
If the Resident receives Medicaid or Medicare, the cost of room and board and other services and supplies listed below will normally be paid for by the payer, however, the Resident is ultimately responsible.
If the Resident is receiving Medicaid the State has required the Resident to pay directly to the Facility the following (by the 10th of every month):

a. All resource monies as specified by the Department of Social Services
b. Adjustment as specified by the State
c. Previous balances prior to Medicaid approval
d. Other

As it may be necessary, the Resident agrees to provide the Facility with statements of his/her assets, debts, and income. If the Resident is not receiving Medicaid, Medicare or other third party payer, this statement will be confidential, unless law requires disclosure of information.

Supplemental Charges: Extra charges include, but are not limited to, the services and supplies described below. A list of the extra charges for services and supplies that are available to the Resident but are not covered by Medicare or Medicaid is included in this packet. The Facility will provide written notice to the Resident of any changes in the extra charges at least 14 days in advance or as otherwise required by South Carolina or Federal law.

***Diagnostic Consultant and Therapeutic Services**: The Resident agrees to have any diagnostic, consultant, or laboratory services or test ordered by his/her physician and agreed to by the Resident. Resident agrees to pay for these services unless paid for by Medicaid, Medicare, or other third party coverage.

* **Physical, Occupational and Speech Therapy and Private Duty Nurse/Sitters**: The Resident agrees to be responsible for any charges for Physical, Occupational and Speech Therapy, Private Duty Nurse and/or CNA services unless paid by Medicare, Medicaid, or other third party payer.

***Ambulance and Transportation Services**: The Resident agrees to be responsible for any charges for ambulances or other transportation the Resident may need, unless paid by Medicaid, Medicare, or other third party coverage.

***Medical Supplies**: The Resident agrees to be responsible for all charges for medicine, oxygen, dental, eyeglasses, hearing aids, medical appliances, expenses other that transportation connected with activities, etc., unless paid by Medicaid, Medicare, or other third party coverage.

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*Pharmacy Services: Pharmacy services are available through the Facility. The Resident may choose another pharmacy only if that Pharmacy will sign an agreement with the Facility to provide services in accordance with all applicable federal and state statutes and regulations and our requirements, including but not limited to: 24 hour service and delivery, labeling, unit dose form, and monitoring. The Facility is authorized to use generic name medications except as otherwise ordered, in writing, by the Resident's physician. See additional form for Brand-name requests) The Facility's Director of Nursing Services and the Consultant Pharmacist are authorized to destroy any excess or undesired medications in accordance with applicable law. The Resident agrees to pay for charges unless paid by Medicaid, Medicare, or other third party coverage.

Personal Items and Services: The Resident agrees to pay for personal items and services. These include: clothes, personal laundry not done at the Facility, barbers, hairdressers, toiletries, and sundries, which the Facility does not routinely provide. The Resident understands the Facility is not responsible for damage to personal clothing. (See Authorizations and Acknowledgements.)

Payment: The Resident agrees to pay one month's Basic Charges in advance, unless the Resident is receiving Medicaid, Medicare or other third party coverage. If the Resident is admitted during the month, the Resident will pay in advance for the remaining days of that month. The Facility will bill on the 28th of the month for the upcoming month and payment is due on the 10th of the month. Payment of Medicaid resource will be made in accordance with the Department of Public Welfare policy (or other state agency with authority). If, during the Resident's course of stay, there is a change of primary payer status, The Resident agrees to abide by payment terms or regulations governing that payer status.

Interest and Attorney's Fees: The Resident agrees to pay the Facility a late charge of 1.5% per month on any unpaid balances not paid within 30 days of billing. If the Facility hires an attorney to collect the bill, the Resident agrees to pay reasonable attorney's fees and the costs of collection.

Assignment of Benefits: The Resident authorizes the facility to receive benefit payments directly from Medicare, Medicaid, or other party insurance company.
(Signature required on Authorization for Assignments of Benefits)

Failure of Others to Pay: If any Resident charges are not paid fot by insurance, anyone or any agency, the Resident agrees to pay them.

VH POA / CB Initial

Discontinuance of Medicaid: If the Resident receives Medicaid and it is discontinued, the Resident agrees to pay the then current Basic Charges and other charges for self-paying patients. Such charges will begin on the date Medicaid is discontinued.

Denial of Medicare and Medicaid: If the Resident applies for benefits under Medicare or Medicaid after the Resident becomes a patient, and the application is denied, the Resident agrees to pay the Facility for all charges from the day the Resident entered the Facility.

Failure to Pay the Facility's Bill: The Resident agrees to pay the Facility's bill upon receipt of the statement, or no later than the 1st of each month following the receipt of the statement. The Resident agrees to make arrangements to leave the Facility if bills are not paid as agreed. If the Resident does not make arrangements, then the Facility can make them for the Resident. If the need arises for the Facility to make such arrangements, the Facility will provide a notice of intent to discharge the Resident in accordance with state and federal regulations.

Failure to Pay Other Bills: The Resident agrees to pay the bill of others providing services or supplies. The Resident agrees to pay his/her bills within 15 days after billing, unless other acceptable arrangements are made in advance.

Telephone: Each Resident room is wired for telephone service. The Resident must make arrangement for service with the carrier of their choice. All costs for private telephone use are the responsibility of the Resident. In addition, a phone will be made available for the resident at a specific location within the facility. All long distance charges will be billed to the resident. As the telephone is for the use of all the residents on each unit, we ask that each resident be reasonable and considerate with individual demands for the unit telephone.

Valuables: The Resident agrees to be responsible for all valuables, money, appliances, and other personal property in his/her possession while the Resident is at the Facility. Although the Facility will work to see that misplaced belongings are recovered, the Facility is not responsible for replacing lost or stolen cell phones, computerized person assistance devices, IPods, radio, hearing aids, eyeglasses or dentures/partials(including, but not limited to the fore mentioned).

Guardianship: If the Resident, who has not had a guardian appointed by a court of law, is or becomes unable to make or communicate his/her medical decisions, as determined by the Resident's attending physician, the Facility shall

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notify the designated Healthcare Proxy, surrogate, or agent under a Durable Power of Attorney, if any. If neither has been appointed, the Facility and/or Resident's Responsible Party shall designate or determine a surrogate or Proxy in accordance with South Carolina law. The Facility and Resident acknowledge that above and beyond the surrogate or proxy's statutory abilities, the surrogate or proxy is authorized to bind the Resident to all terms in this agreement. If neither is available the Responsible Party agrees to initiate and maintain a proceeding in a court of competent jurisdiction to appoint a legal guardian. If the Responsible Party fails to do so, the Facility shall have the right, but not the obligation, to commence a legal proceeding to adjudicate the Resident incapacitated and to have the court appoint a guardian for the Resident. The cost of the legal proceedings, including attorney's fees, shall be paid by the Resident, Responsible Party or the Resident's estate.

Release of Medical and Other Information: The Resident agrees that the Facility can release all or part of his/her medical records to any agency or person with the right, by law, to review such records.

Patient Identification: The Facility is authorized to require a standard method of Patient identification, e.g., an identification bracelet and/or photographic print.

Photographs/ Video Technology: The Resident authorizes the Facility to take photographs of his/her person or portions thereof for medical or identification purposes. The Resident also understands that photographs may be taken during activities or special events and displayed in the Facility or in the Facility newsletter. Photographs are confidential and will not be released for other purposes without the Resident's written permission. (See Authorizations and Consents for further information) The Resident/ Responsible party understands that video technology of any type is prohibited in recognition of the privacy of the other residents, visitors and staff members.

Indemnification: The Facility is required by law to exercise reasonable care toward the Resident; however, the Facility is not an insurer of the health, safety, and welfare of the Resident and assumes no liability as such.
The Facility is not responsible for the health, safety, and welfare of any Resident who is away from the Facility with any person not directly employed by the Facility or when the Resident knowingly leaves the Facility against the medical advice of the Resident's attending physician or without the approval of the Facility, with or without the knowledge of the Facility.
The Resident shall defend, indemnify an hold the Facility harmless from any and all claims, demands, suit actions, and related costs and expenses, including without limitation attorney's fees made against the Facility by any person arising out of or relating to any damage or injury caused by the Resident to any person

VHPOA/CB Initial

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or the property of any person or entity (including the Facility).
The Resident or the Resident's estate is responsible for any damages caused to the Facility property beyond normal wear and tear, and shall pay for the repair and replacement of damaged property, based on the actual charge or cost to the Facility for such repair or replacement.

Liability: The Facility shall not be liable for injuries of any kind unless caused by the willful act or negligence of the Facility or the Facility's employees.

Compliance with Facility Rules and Regulations: The Resident agrees to comply with all Patient/Resident's Responsibilities established by the Facility. The Resident has read and been given a copy of the Facility's rules and regulations which set forth these responsibilities.

Advanced Directives: The Resident acknowledges receipt of information concerning advance directives and his/her rights to make decisions about medical care.

Liability Insurance: This Facility maintains a liability insurance policy with minimal coverage. This policy meets the requirements of all applicable state regulations relative to the licensure and certification for Medicare/Medicaid and other related programs.

Notice: Any notice, request, consent, waiver or other communication provided for or required by this Agreement shall be in writing and shall be delivered in person or sent by first-class mail, postage prepaid, return receipt requested, and deposited in the United States mail, addressed as follows:

Facility:
11 Todd Drive
Beaufort SC 29902

Resident:
Eugene Boles

Governing Law: This Agreement shall be interpreted and enforced in accordance with the laws of the State of South Carolina

Venue: In the event that any litigation arises under, or in any manner in relation to this Agreement, whether *ex contractu* or *ex delicto*, the venue of same shall lie exclusively in Beaufort County, South Carolina and no other location.

VH POA / CB Initial

Waiver of Jury Trial: (Please read carefully)
Resident hereby knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any litigation, including any counterclaim which Resident may assert, arising from or relating to this Agreement or any other document connected with this Agreement, or arising out of or relating to any of the said documents or any relationship between the Facility and Resident, including the Resident's admission itself, or any other course of conduct, course of dealing statements (whether verbal or written) or actions of the Facility or Resident.

Resident represents and warrants that the waiver contained in this Paragraph has been freely and voluntarily made after reviewing the same, or having had an opportunity to review the same, with counsel of Resident's choice.

Attorney's Fees: (Please read carefully)
In any legal action or other proceeding brought by the Facility to enforce or interpret any provision of this Agreement or to enforce any remedy for the breach thereof, the Facility shall be entitled to receive reasonable attorney's fees and costs actually incurred in connection therewith, including all costs and fees incurred in any appellate proceeding.

The Facility is also entitled to recover attorney's fees and costs, including all fees incurred in any appellate proceeding, for any legal action or proceeding brought by the Resident and/or responsible party upon a finding by the body before which the legal action or proceeding is brought that the Facility committed no wrongdoing.

Capacity: This Agreement has been executed by the Facility's duly authorized agent, and no officer, director, agent, or employee of the Facility shall have any personal liability under the Agreement, to the Resident under any circumstances.

Severability: The parties agree that should any provision of this Agreement be declared invalid by any court of competent jurisdiction, or rendered invalid by any statute or regulation, then such provision shall be severed from this Agreement and the remainder of this Agreement will remain binding and in full force. Titles and/or captions in this Agreement are for convenience only.

Assignability: (Please read carefully)
This Agreement is fully assignable by the Facility. In the event that the Facility is sold, or license is transferred such that a new licensee operates the Facility, this Agreement shall be automatically assigned to the new licensee and shall be fully binding upon both parties.

Withdrawal Period:
Each party to this agreement shall have three (3) business days from execution of this agreement to cancel the agreement by notifying the other party in writing, by certified mail return receipt or traceable overnight delivery, of its desire to cancel.

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Guarantee: By his/her execution below, Responsible Party (jointly and full severally if more than one) hereby guarantees full compliance with the Agreement and full payment of all monies due by Resident under this Agreement, including all attorney's fees and court costs incurred by the Facility in the interpretation or enforcement of this Agreement, as well as in the enforcement of this Guarantee against Responsible Party. Venue of any such proceedings shall lie in* Beaufort County, South Carolina

Acknowledgement: By signing this Agreement, the Resident acknowledges: That the Resident has received a copy of entire agreement with any attachments.
That the Resident has been given an oral explanation of services provided and charges including services offered on an as needed basis including extra services.
That the Resident has been given an oral explanation of the bed reservation and refund policies set forth in this agreement.
That the Resident has received a copy of the rules and regulations, and an explanation of the Resident's responsibility to obey all reasonable rules and regulations and to respect the personal rights and private property of others.
That the Resident has received a copy of the Grievance Policy, Smoking Policy and Restraint Policy.
That the Resident has received a copy of the procedures of the state and district ombudsman councils.
That the Resident has received a copy of the transfer and discharge policies.
That the Resident has received a copy of the Federal and State Resident's Bill of Rights.
That the Resident has received a copy of the Privacy Act Statement.
That the Resident has received a copy of the (HIPPA) Health Insurance Privacy and Portability Act policies of this Facility.
That the Resident has received a copy of CMS Medicare DMEPOS Supplier Standards
That the Resident has received authorizations regarding, Resident Trust Fund, Pharmacy Part D, Care Plans, Vaccinations and Release of Information, Self-Administration of Medications and Assignment of Benefits .

Entire Agreement: This Agreement sets forth the entire understanding of the parties relating to the subject matter hereof, and supersedes all prior Agreements, understanding, and discussions relative to such subject matter, Resident acknowledges that in entering into this Agreement, Resident has not relied on any representation, warranties (whether express or implied) or covenants, other than those set forth herein. Nothing in this Agreement shall be construed to give any person or entity other than the parties hereto any rights to remedies.

VH POA /CB Initial

Agreement Modifications/Changes: From time to time the Facility may modify, change or amend this Agreement and will provide a thirty (30) day written notice of such changes to the Resident or Responsible Party.

Immoral/ Illegal review: As dictated by state and/or federal law a review for specific activity may be conducted (i.e. sexual predator).I have received a copy of Facility Responsibilities Regarding Convicted Sex Offenders,

Optional Arbitration Clause: Any action, dispute, claim or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims of violations of Resident's Rights) now existing or hereafter arising between the parties, in anyway arising from or relating to this Agreement governing the Resident's stay at the Facility, shall be resolved by binding arbitration. Such binding arbitration shall be governed by the provisions of the South Carolina Arbitration Code. As appropriate and in the event that the South Carolina Arbitration Code is deemed to not apply, binding arbitration shall be governed by the Federal Arbitration Act. **OPTIONAL: If the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only. I have X this clause _____initial.**

Resident and or Responsible Party has read or has been read and understands and agrees to all terms and conditions of this agreement unless specifically noted on the agreement.

By: Lucy Carusso 11/2/15
Signature of Facility Representative Date

Eugene Boles

Signature of Patient/Resident Date

Witness Date

Witness Date

Vicki Hathcock POA 11/2/15
Responsible Party Date

Clifford Byas 11/2/15
Signature of Responsible Party Date

Responsible Party is acting as:
_____ Conservator
_____ Power of Attorney
_____ Relative (state relationship)
_____ Other: _____

Billing Address:

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RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT
(READ CAREFULLY)

Pursuant to the terms of this Resident and Facility Binding Arbitration Agreement (this "Arbitration Agreement"), it is understood and agreed by _____ (the "Facility") and _____ (the "Resident" or "Resident's Authorized Representative", hereinafter referred to as the "Resident") that any legal dispute, controversy, demand or claim (hereinafter collectively referred to as "claim" or "claims") that arises out of or relates to that certain Resident Admission Agreement (the "Resident Admission Agreement") executed by the Resident and the Facility, or any service or health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the Federal Arbitration Act (a copy of which is attached hereto and incorporated into this Arbitration Agreement), and not by a lawsuit or resort to court process except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards.

The agreement to arbitrate contained in this Arbitration Agreement includes, but is not limited to, any claim for payment, nonpayment or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Resident Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract. However, this agreement to arbitrate shall not limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility or any appropriate state or federal agency.

The damages awarded, if any, in an arbitration conducted pursuant to this Arbitration Agreement shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action, including any prerequisites to, credit against or limitations on, such damages.

It is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.

All claims based in whole or in part on the same incident, transaction, or related course of care or services provided by the Facility to the Resident shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Facility or the Resident, and the claim is not presented in the arbitration proceeding.

Any notice required pursuant to this Arbitration Agreement shall be deemed given (i) upon hand delivery; or (ii) three (3) days after deposit in U.S. mail via certified mail, return receipt requested.

This Arbitration Agreement is effective as of the date of admission of the Resident to the Facility. VH **(resident's initials).**

The Resident understands that (1) he/she has the right to seek legal counsel concerning this Arbitration Agreement, (2) the execution of this Arbitration Agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (3) this Arbitration Agreement may be rescinded by written notice given to the Facility by the Resident within thirty (30) days of signature. If not rescinded within thirty (30) days, this Arbitration Agreement shall remain in effect for all care and services rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility.

THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT THEY ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY.

Viola Hackworth POA 11/3/15
Resident/Representative Signature / Date

Lucy Caruso 11-3-15
Facility's Authority Agent / Date

Viola Hackworth, POA
Resident/Representative Printed Name

Lucy Caruso,
Admissions Director
Facility's Authorized Agent Printed Name

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PREPARED BY/RETURN TO:
EUGENE PARRS
SC BAR NO. 68608
HARVEY & BATTEY, P.A.
PO DRAWER 1107
BEAUFORT, SC 29901-1107

BEAUFORT COUNTY SC - ROD
BK 03181 PGS 1086-1097
FILE NUM 2012058852
10/10/2012 11:05:33 AM
REC'D BY R WEBB RCPT# 690959
RECORDING FEES 23.00

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STATE OF SOUTH CAROLINA)
) GENERAL DURABLE POWER OF ATTORNEY
COUNTY OF BEAUFORT)

KNOW ALL MEN BY THESE PRESENTS that as principal (the "Principal") I, **EUGENE BOLES**, a resident of the state and county aforesaid, have made, constituted and appointed and by these presents do make, constitute and appoint **VIOLA BOLES HACKWORTH** my true and lawful attorney-in-fact ("Attorney") for the purposes hereinafter set forth, but if she is unable to serve for any reason, I nominate and appoint **LINETTE HART**.

ARTICLE I

EMPOWERMENT OF ATTORNEY

My Attorney is authorized in Attorney's 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 provision of this Power of Attorney or by statute or general rules of law (and regardless of whether I am mentally incompetent or physically or mentally disabled or incapable of managing my property and income), with full power of substitution, as follows:

A. POWERS IN GENERAL

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. Unless otherwise provided herein, if more than one attorney-in-fact is appointed hereunder, each of them may act separately.

B. POWERS RELATING TO MANAGEMENT AND DISPOSITION OF ASSETS

1. To buy, receive, lease as lessor or lessee, accept or otherwise acquire property, both real and personal, tangible and intangible; to sell, convey, mortgage, grant options upon, hypothecate, pledge, transfer, exchange, quit-claim, or otherwise encumber or dispose of property, both real and personal, tangible and intangible; or to contract or agree for the acquisition, disposal, or encumbrance of any property whatsoever or any custody, possession, interest, or right therein for cash or credit and upon such terms, considerations and conditions as Attorney shall

Blumberg No. 5114 DEFENDANT'S EXHIBIT C

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think proper; and no person dealing with Attorney shall be bound to see to the application of any monies paid;

2. To take, hold, possess, invest or otherwise manage any or all of my real and personal property or any interest therein; to eject, remove or relieve tenants or other persons from, and recover possession of, such property by all lawful means; and to maintain, protect, preserve, insure, remove, store, transport, repair, build on, raze, rebuild, alter, modify, or improve the same or any part thereof, and/or to lease any property, real or personal for me or my benefit, as lessee, with or without option to renew; to collect, receive and receipt for rents, issues and profits of my property.

3. To make, endorse, accept, receive, sign, seal, execute, acknowledge, and deliver deeds, assignments, agreements, certificates, endorsements, hypothecations, checks, notes, mortgages, vouchers, receipts, consents, waivers, releases, undertakings, satisfactions, acknowledgments and such other documents or instruments in writing of whatever kind and nature as may be necessary, convenient, or proper in the premises;

4. To open and close bank accounts and brokerage accounts in my name; to make deposits and transfers to such accounts and to make withdrawals and distributions from such accounts.

5. To subdivide, develop or dedicate real property to public use or to make or obtain the vacation of plats and adjust boundaries, to adjust differences in valuation on exchange or partition by giving or receiving consideration, and to dedicate easements to public use without consideration.

6. To invest and reinvest all or any part of my property in any property and undivided interests in property, wherever located, including bonds, debentures, notes, secured or unsecured, stocks of corporations regardless of class, interests in general and limited partnerships, limited liability companies, real estate or any interest in real estate whether or not productive at the time of investment, interests in trusts, investment trusts, whether of the open and/or closed fund types, exchange traded funds (ETFs), and participation in common, collective or pooled trust funds or annuity contracts without being limited by any statute or rules of law concerning investments by fiduciaries;

7. To continue and operate any business owned by me and to do any and all things deemed needful or appropriate by Attorney, including the power to incorporate the business and to put additional capital into the business, for such time as Attorney shall deem advisable, without liability for loss resulting from the continuance or operation of the business except for Attorney's own willful misconduct or gross negligence; and to close out, liquidate, or sell the business at such time and upon such terms as Attorney shall deem best;

8. To transfer all of my stock and/or securities to my Attorney, as agent (with the beneficial ownership thereof remaining in me) if necessary or convenient in order to exercise the powers with respect to such stock and/or securities granted herein;

9. To sell or exercise stock subscription or conversion rights;

10. To refrain from voting or to vote shares of stock owned by me at shareholders, meeting in person or by special, limited, or general proxy and in general to exercise all the rights, powers and privileges of an owner in respect to any securities constituting my property;

11. To participate in any plan of reorganization or consolidation or merger involving any company or companies with respect to stock or other securities which I own and to deposit such stock or other securities under any plan of reorganization or with any protective committee and to delegate to such committee discretionary power with relation thereto, to pay a proportionate part of the expenses of such committee and any assessments levied under any such plan, to accept and retain new securities received by Attorney pursuant to any such plan, to exercise all conversion, subscription, voting and other rights, of whatsoever nature pertaining to such property, and to pay any amount or amounts of money as Attorney may deem advisable in connection therewith.

12. To purchase, maintain, surrender, collect, or cancel (a) life insurance or annuities of any kind on my life or the life of any one in whom I have an insurable interest, (b) liability insurance protecting me and my estate against third party claims (c) hospital insurance, medical insurance, Medicare supplemental insurance, custodial care insurance, long term care insurance, and disability income insurance for me or any of my dependents and (d) casualty insurance insuring assets of mine against loss or damage due to fire, theft, or other commonly insured risk; to pay all insurance premiums, to select any options under such policies, to increase coverage under any such policy, to borrow against any such policy, to pursue all insurance claims on my behalf, to adjust insurance losses, and the foregoing powers shall apply to private and public plans, including but not limited to Medicare, Medicaid, SSI and Worker's Compensation.

13. To represent me in all tax matters; to prepare, sign, and file federal state, and local income, gift and other tax returns of all kinds, including, where appropriate, joint returns, FICA returns, payroll tax returns, claims for refunds requests for extensions of time, to file returns and pay taxes due, to file extensions and waivers of applicable periods of limitation, protests and petitions to administrative agencies or courts; to collect and make such disposition of refunds as my Attorney shall deem appropriate, post bonds receive confidential information and contest deficiencies determined by the Internal Revenue Service or any other authority; to exercise any election I may have under federal, state or local tax law; to allocate any generation-skipping tax exemption to which I am entitled, and generally to represent me or obtain professional representation for me in all tax matters and proceedings of all kinds and for all periods before all officers of the Internal Revenue Service and state and local authorities and in any and all courts to engage compensate and discharge attorneys, accountants and other tax and financial advisers and consultants to represent or assist me in connection with any and all tax matters involving or in any way related to me or any property in which I have or may have an interest or responsibility; and on my behalf to execute IRS Form 2848 and appoint my Attorney or any suitable person selected by my attorney as my representative before the Internal Revenue Service.

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C. POWERS RELATING TO MANAGEMENT OF ASSETS

1. To prepare, execute and file single, joint or separate income and other tax returns and amended returns and declarations of estimated tax for any year or years; to prepare, execute and file gift tax returns reporting gifts made by me or by Attorney on my behalf for any year or years; to consent to any gift splitting election for any gift made by my spouse; to utilize or make any federal or state tax election; and to prepare, sign and file claims for refund of any tax and other governmental reports, applications, requests, and documents;

2. To deposit in my name and for my account, with any bank, credit union, or trust company or any building or savings and loan association or any other banking or similar institution, all moneys to which I am entitled or which may come into Attorney's hands as such attorney-in-fact, and all bills of exchange, drafts, checks, promissory notes and other securities for money payable belonging to me, and for that purpose to sign my name and endorse each and every such instrument for deposit or collection; and from time to time, or at any time, to withdraw any or all moneys deposited to my credit at any bank, credit union, or trust company or any building or savings and loan association or any other banking or similar institution having moneys belonging to me, and, in connection therewith, to draw checks or to make withdrawals in my name; to make, do, execute, acknowledge and deliver, for and upon my behalf and in my name, all such checks, notes and contracts;

3. To endorse, receive, and collect checks payable to my order drawn on the United States Treasury, Internal Revenue Service, or other fiscal officer or depository of the United States, or any sovereign state or authority, or any political subdivision or instrumentality thereof, or any private person, firm, corporation or partnership;

4. To have access at any time or times to any safe deposit box rented by me, wherever located, and to add or remove all or any part of the contents thereof, and to surrender or relinquish said safe deposit box, and any institution in which any such safe deposit box may be located shall not incur any liability to me or my estate as a result of permitting Attorney to exercise this power;

5. To make, do, and transact all and every kind of business of any nature or kind whatsoever, including the receipt, recovery, collection, payment, compromise, settlement, and adjustment of all accounts, claims, legacies, bequests, interests, dividends, annuities, demands, debts, taxes, and obligations, or any rebate, refund, or discount thereon, which may now or hereafter be due, owing, or payable by or to me;

6. To institute, prosecute, defend, abandon, compromise, arbitrate, and dispose of legal, equitable, or administrative hearings, actions, suits, attachments, arrests, distresses or other proceedings, or otherwise engage in litigation involving me, my property or any interests of mine;

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7. To borrow money and to encumber, mortgage or pledge any and all of my property in connection with the exercise of any power vested in Attorney; to use any credit and debit card held in my name to make such purchases and to sign such slips as may be necessary to use such credit and debit cards, to repay from any funds belonging to me any money borrowed and to pay for any purchases made or cash advanced using credit and debit cards issued to me.

8. To deal with Attorney in Attorney's individual, or any fiduciary, capacity, in buying and selling assets, in lending and borrowing money, and in all other transactions, irrespective of the occupancy by the same person of dual positions;

9. To employ and dismiss and compensate agents, accountants, investment advisers, brokers, attorneys-in-fact, attorneys-at-law, tax specialists, real estate agents and/or brokers, and other assistants and advisors deemed by Attorney needful for the proper administration of my property, and to do so without liability for any neglect, omission, misconduct, or default of any such agent or professional representative provided such agent or professional representative were selected and retained with reasonable care;

10. To apply for, settle, deposit and expend for my benefit any cash, rights or entitlements due me from any governmental agency or body, such as Supplemental Social Security Medicaid, Medicare, and Social Security Disability Insurance and for the purposes of receiving Social Security benefits, my Attorney is hereby appointed my "Representative Payee", to utilize all lawful means and methods to recover such assets and/or rights, to qualify me for such benefits and claim such benefits on my behalf, and to compromise claims and grant discharges in regard to the matters described herein.

11. To apply for a Certificate of Title upon, and endorse and transfer title thereto, any automobile, truck, pick-up, van, motorcycle or other motor vehicle, and to represent in such transfer assignment that the title to said motor vehicle is free and clear of all liens and encumbrances except those specifically set forth in such transfer assignment;

12. To insure my property against damage or loss and Attorney against liability with respect to third persons;

13. To pay and adjust debts incurred by me or by my attorney-in-fact in connection with any power authorized hereunder;

14. To take any elective share due me from my deceased spouse, if appropriate; to retain any property which I have the right to elect to retain; to file petitions pertaining to the election, and to take all other actions that my Attorney deems appropriate in order to effectuate the election, and if any such actions by my Attorney require the approval of any court, to seek such approval;

15. To transfer to the trustee of any revocable trust agreement made by me before or after the execution of this instrument, as to which trust I am, during my lifetime, a

primary income and principal beneficiary, any or all of my cash, property or interests in property, including any rights to receive income from any source.

16. To withdraw and/or receive the income or corpus of any trust over which I have a right of receipt or withdrawal; to request and receive the income or corpus of any trust with respect to which the trustee thereof has the discretionary power to make distributions to me or on my behalf, and to execute and deliver to such trustee or trustees a receipt and release or similar document for the income or corpus so received;

17. To renounce or resign any fiduciary position to which I have been or may be appointed, including but not limited to Personal Representative, trustee, guardian or attorney-in-fact, and to file an accounting with a court of competent jurisdiction or to otherwise settle such matters in the manner as my Attorney shall deem appropriate.

18. To renounce and disclaim any property or interest in property or powers to which for any reason and by any means I may become entitled, whether by gift, testate or intestate succession, or otherwise; to release or abandon any property or interest in property or powers which I may now or hereafter own, including any interests in or rights over trusts, including the right to alter, amend, revoke or terminate. In exercising such discretion, my Attorney shall consider any reduction in estate or inheritance taxes that may be due upon my death, and the effect of such renunciation or disclaimer upon persons interested in my estate and persons who would receive the renounced or disclaimed property; provided, however, that my Attorney shall make no disclaimer that is expressly prohibited by other provisions of this instrument.

19. To make gifts of my property, whether outright or with my retention of life use, to my spouse, my parents, my issue, and the issue of my parents, including my attorney-in-fact; the attorney-in-fact herein named also has the power to make gifts to those not included in the preceding sentence, including charitable organizations, but only in the pattern I have used in my lifetime.

20. To make, revoke, and revise all beneficiary designations, payment options, elections, and waivers regarding employee benefit plans and individual retirement accounts, whether as plan participant, as beneficiary, individual retirement account owner, or as spouse of a participant, including without limitation the waiver of qualified joint and survivor annuity and qualified pre-retirement survivor annuity benefits as provided in IRC §417.

D. <u>POWERS RELATING TO CUSTODY OF PERSON</u>

1. To establish where I shall reside, including the exact physical location, and the city, county, and state of residence and, if necessary, to make all necessary arrangements for me at any hospital, convalescent institution 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 and to report such address as my official address to the United States Post Office and any other person, firm, corporation or governmental agency as may be necessary, desirable, convenient or appropriate;

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2. To employ, dismiss and compensate medical personnel including physicians, surgeons, dentists, medical specialists, nurses, and paramedical assistants deemed by Attorney needful for the proper care, custody and control of my person and to do so without liability for any neglect, omission, misconduct or default of any such physician or other medical personnel, provided such physician or other medical personnel were selected and retained with reasonable care;

3. To authorize any and all kinds of medical procedures and treatment including but not limited to medication, therapy, surgical procedures, and dental care, and to consent to all such treatment, medication or procedures where such consent is required; to obtain the use of medical equipment, devices or other equipment and devices deemed by Attorney needful for proper care, custody and control of my person and to do so without liability for any neglect, omission, misconduct or fault with respect to such medical treatment or other matters authorized herein;

4. To obtain the disclosure of all documents relating to medical services provided by my physicians or other medical staff and obtain copies of my entire medical records or a portion thereof and all personal health information for any purpose that my Attorney-in-Fact deems appropriate. This waiver of privacy rights is intended to comply with any federal or state law relating to the privacy of my medical records, including without limitation the Health Insurance Portability and Accountability Act of 1996 (HIPAA) 42 U.S.C. §§ 1320d-1320d-8 and the HIPPA Privacy Rules, 45 CFR § 164. This authorization shall remain in effect until my death or until such time that this power of attorney is revoked.

5. To purchase, dispose of and abandon clothing, food, medicine, household, and personal effects of all kinds;

6. To arrange for transportation and travel for me for any purpose, including for medical treatment or recreation;

7. To make advance arrangements for funeral services including but not limited to purchase of a burial plot and marker and such other and related arrangement for services, flowers, ministerial services, transportation and other necessary, related, convenient or appropriate goods and services as my Attorney shall deem advisable or appropriate under the circumstances;

8. To apply for, elect, deposit and utilize on my behalf all benefits payable by any governmental body or agency, state, federal, county, city, or other and to obtain, make claim upon, collect and dispose of insurance and insurance proceeds for my care, custody and control;

9. To house (or provide for housing), support and maintain any animals which I own and to contract for and pay the expenses of proper veterinary care and treatment for such animals, or if the care and maintenance of such animals shall become unreasonably expensive or inappropriate in Attorney's opinion to dispose of such animals.

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ARTICLE II

TERMINATION, AMENDMENT, RESIGNATION AND REMOVAL

A. POWER NOT AFFECTED BY PRINCIPAL'S INCAPACITY

THIS POWER OF ATTORNEY SHALL NOT BE AFFECTED BY THE PHYSICAL DISABILITY OR MENTAL INCOMPETENCE OF THE PRINCIPAL WHICH RENDERS THE PRINCIPAL INCAPABLE OF MANAGING HIS OR HER OWN ESTATE. IT IS MY INTENT THAT THE AUTHORITY CONFERRED HEREIN SHALL BE EXERCISABLE NOTWITHSTANDING MY PHYSICAL DISABILITY OR MENTAL INCOMPETENCE.

B. TERMINATION

This power of attorney shall remain in full force and effect until the earlier of the following events: (i) Attorney has resigned as provided herein; (ii) I have revoked this General Power of Attorney by written instrument recorded in the public records of the county aforesaid, or (iii) a conservator shall have been appointed for me by a court of competent jurisdiction. This power of attorney may be amended by me at any time and from time to time but such amendment shall not be effective as to third persons dealing with Attorney without notice of such amendment unless such amendment shall have been recorded in the public records of the county aforesaid.

C. RESIGNATION

In the event that Attorney shall become unable or unwilling to serve or continue to serve, the Attorney may resign by delivering to me in writing an Attorney's resignation and recording the original in the public records of the county aforesaid. Upon such resignation and recording, Attorney shall thereupon be divested of all authority under this General Durable Power of Attorney.

D. REMOVAL

Any person named herein as Attorney may be removed by written instrument executed by me and recorded in the public records of the county aforesaid.

E. DELEGATION

My Attorney may by written instrument delegate any power granted hereunder to other persons. However, if more than one Attorney is currently serving, such delegation must be unanimous. Such delegation may be restricted or limited as provided by my Attorney, and may be made to be effective at a time in the future or upon the happening of specified event. My Attorney shall have full authority to revoke such delegation at any time. My Attorney may appoint a

successor attorney-in-fact hereunder, but only if no successor has been designated by me, or only if a successor named by me hereunder is deceased, incompetent, or withdraws upon written consent.

ARTICLE III

INCIDENTAL POWERS AND BINDING EFFECT

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 fully authorized by me and with the same force and effect as if done under my hand and seal and 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.

ARTICLE IV

MISCELLANEOUS

A. EXCULPATION

Attorney, Attorney's heirs, successors and assigns are hereby released and forever discharged from any and all liability upon any claim or demand of any nature whatsoever by me, my heirs or assigns, the beneficiaries under my will or under any trust which I have created or shall hereafter create or any person whomsoever on account of any action or failure to act of Attorney pursuant to this power of attorney, except for willful misconduct or gross negligence.

B. DEFINITIONS, NUMBER, AND GENDER

Whenever the word "Attorney" or any modifying or substituted pronoun therefor is used in this Power of Attorney, such words and respective pronouns shall include both the singular and the plural, the masculine, feminine and neuter gender thereof. Further, where necessary or appropriate in this Power of Attorney, the singular and plural forms shall be interchangeable, and words of any gender shall include all genders.

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C. SEVERABILITY

If any part of any provision of this Power of Attorney shall be invalid or unenforceable under applicable law, said part shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of said provision or the remaining provisions of this Power of Attorney.

D. COMPENSATION

Attorney shall be entitled to reimbursement for all reasonable costs and expenses actually incurred and paid by Attorney on my behalf pursuant to any provision of this Power of Attorney, but Attorney shall not be entitled to compensation for services rendered hereunder.

E. RESTRICTIONS

Unless provided otherwise herein, Attorney shall not satisfy the legal obligations of Attorney out of any property subject to this power of attorney.

F. RESERVATIONS

Notwithstanding any provision hereto to the contrary, Attorney shall have no power or authority whatever with respect to (a) any policy of insurance owned by me on the life of Attorney, and (b) any trust created by Attorney as to which I am a trustee.

G. NO POWER OF APPOINTMENT

It is my intention that no property subject to this Power of Attorney shall be includable in the gross estate (for federal or any state estate tax purposes) of my Attorney under the Internal Revenue Code of 1986, as amended, or any other applicable section, if any, of federal and/or state law. This Power of Attorney neither creates a power of appointment nor do my Attorney's actions hereunder constitute the exercise of a power of appointment.

H. NO DISRUPTION OF ESTATE PLAN

If it becomes necessary for my Attorney to liquidate and expend my assets in order to provide support for me, or if liquidation or conversion of assets becomes necessary for any other reason, whether specified in this instrument or otherwise, or such liquidation is deemed by my Attorney to be appropriate or convenient, I ask that my Attorney, to the extent reasonably possible, avoid disrupting the dispositive provisions of any estate plan of mine known to my Attorney, whether or not such estate plan is embodied in a Will, a Trust, non-probate property, or otherwise. If it is necessary to disrupt the dispositive provisions of such plan, then my Attorney shall use his best efforts to restore the dispositive provisions of such plan from other property I possess or may acquire if, as, and when the opportunity to do so becomes available. My Attorney shall make reasonable efforts to obtain and review my estate plan and any person having knowledge thereof or

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possession of any document implementing such estate plan is authorized to make disclosure thereof to my Attorney, and to furnish my Attorney with copies of such documents. In order to induce my Attorney to act hereunder, he shall be liable only in the case of his willful misconduct or gross negligence.

I. BOND

My Attorney shall serve without bond for the faithful performance of his or her duties hereunder.

J. SOUTH CAROLINA LAW

This Power of Attorney is made in accordance with South Carolina Statutes Section 62-5-501 and shall be controlled by the laws of South Carolina.

IN WITNESS WHEREOF, as principal, I have executed this Power of Attorney as of this 31st day of October, 2012, I have directed that photographic copies of this power be made which shall have the same force and effect as an original.

Eugene Boles (SEAL)
EUGENE BOLES

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STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

ATTESTATION

The foregoing General Power of Attorney was this 3rd day of October, 2012, signed, sealed, published and declared by **EUGENE BOLES**, the principal, as the principal's appointment and empowerment of an attorney-in-fact, in the presence of us who at the principal's request and in the principal's presence and in the presence of each other, have hereunto subscribed our names as witnesses hereto.

Witness of Beaufort County, South Carolina

Witness of Beaufort County, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

PROBATE

Personally appeared deponent and made oath that deponent saw the within named principal sign, seal and as the principal's act and deed deliver the within General Power of Attorney and that deponent, with other witness whose name is subscribed above, witnessed the execution thereof.

Witness

SWORN to before me this
3rd day of October, 2012.

(L.S.)
Notary Public for South Carolina

My Commission expires: 8/8/2013

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
VIOLA M. HACKWORTH, as Personal Representative of the Estate of EUGENE BOLES A/K/A EUGENE N. BOLES, deceased,	)	C/A No. 2018-CP-07-00433
Plaintiff,	)	
versus	)	**AFFIDAVIT OF LUCY CARUSO**
BAYVIEW MANOR, LLC d/b/a BAYVIEW MANOR, EPIC MGT, LLC, EPIC GROUP, LIMITED PARTNERSHIP, TEDDIE SIMMONS; JOHN DOES, and RICHARD ROE CORPORATIONS,	)	
Defendants.	)	

PERSONALLY APPEARED before me Lucy Caruso, who being sworn, deposes and says as follows:

1. I am an adult over the age of eighteen years. I am fully competent to make this declaration, and if called to testify, I would state as follows.

2. I am currently the Executive Director of The Suites at Continuing Healthcare of Niles, with facilities located in the state of Ohio.

3. I began working at Bayview Manor, LLC d/b/a Bayview Manor ("Bayview") in approximately January 2015. In approximately April 2015, I became the Admissions and Marketing Director of Bayview and remained in that role until approximately June 2017. Prior to working at Bayview, I worked at an assisted living facility now known as Brookdale in Hilton Head, working as the Program Director from approximately September 2012 until December 2014.

Blumberg No. 5114 DEFENDANT'S EXHIBIT App. 230

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4. Part of my role as Admissions and Marketing Director of Bayview was to meet with incoming residents and/or their families to explain the admissions process, the admissions paperwork, and oversee the execution of the admissions paperwork.

5. Prior to November 2, 2015, when Eugene N. Boles ("Mr. Boles") became a resident at Bayview, I recall that Mr. Boles had been placed for months on a waiting list to be admitted to Bayview.

6. On November 2, 2015, I was aware that Mr. Boles had a history of stroke, dementia, cognitive/memory deficits, and had severe confusion.

7. On November 2, 2015, I met with Mr. Boles' sister and Power of Attorney, Viola Boles Hackworth ("Mrs. Hackworth"), and Mr. Boles' brother, Clifford Byars ("Mr. Byars").

8. Mr. Boles was admitted to Bayview on November 2, 2015. In connection with the admission, I personally presented Mrs. Hackworth and Mr. Byars with the admissions documents. One of those documents was the Admission Agreement attached hereto as **Exhibit A**. I described to Mrs. Hackworth and Mr. Byars the terms of the agreement and both Mrs. Hackworth and Mr. Byars initialed each page confirming all the terms were reviewed and agreed upon. I explained the waiver of jury trial and arbitration provisions to them, and among other things told them that if Mrs. Hackworth agreed to these terms, she would be waiving Mr. Boles' right to have a jury hear any dispute.

9. I discussed with Mrs. Hackworth a separate Arbitration Agreement, a copy of which is attached hereto as **Exhibit B**. Here again, I explained that by signing this agreement, she would be waiving Mr. Boles' right to have a jury hear any dispute.

10. On November 2, 2015, I knew that Mrs. Hackworth was the designated power of attorney for Mr. Boles in her Durable Power of Attorney, a true and accurate copy of which is

attached hereto as **Exhibit C**. This power of attorney was executed on October 3, 2012, more than three (3) years prior to Mr. Boles' admission to Bayview.

11. Mrs. Hackworth was given as much time as she desired to read the Admission Agreement and Arbitration Agreement, and she was told that the arbitration provisions were optional, and she did not have to consent to them.

12. Mrs. Hackworth signed the Admissions Agreement and advised that she wanted more time to think about the Arbitration Agreement. I recall that Mrs. Hackworth came to my office in the later part of the day on November 2, 2015 and, the following day, on November 3, 2015, Mrs. Hackworth returned to Bayview, brought additional belongings of Mr. Boles, and signed the Arbitration Agreement.

13. Throughout the admissions process, Mrs. Hackworth listened carefully to what I told her, and there was nothing about her demeanor, questions, or behavior that suggested in any way that she did not understand what she was signing.

14. I executed the documents on behalf of Bayview.

15. At no time did while I was working at Bayview did Mrs. Hackworth seek to rescind these agreements.

SIGNATURE FOLLOWS ON THE NEXT PAGE

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FURTHER DEPONENT SAYETH NOT.

Lucy Caruso NKA Lucy Caruso Kuduba

SWORN to and subscribed before me this 1st day of April, 2019.

(SEAL)

Notary Public for Ohio

My Commission Expires:

NOTARY SEAL STATE OF OHIO

ATTY. JAMES A. DENNEY
1631 S. STATE STREET
GIRARD, OHIO 44420
MY COMMISSION HAS NO
EXPIRATION DATE

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ADMISSION AGREEMENT

This is an agreement between **Eugene Boles** (Resident") and Bayview Manor ("Facility"), for admission to our health care facility located at: 11 Todd Drive Beaufort SC 29902.
In this Agreement, when we speak of Resident, it means the Resident or Responsible Party. The Resident payor source is expected to be. (**MC=MEDICARE**, MCD=MEDICAID, PVT=PRIVATE, INS=INSURANCE, MPS=MEDICAID PEND, HSP=HOSPICE, VA=VETERAN'S AFFAIRS, RSP=RESPITE)
A copy of the Resident's Medicare card, Social Security card and other insurance cards must be provided at time of admission. If a copy is not provided by the Resident or the Responsible Party within three (3) days of admission, the Resident will be charged as a private pay resident.

Admission and Consent to Treat: The Resident agrees to be admitted to the Facility of his/her own free will. The Resident understands that the Facility cannot admit the Resident without physician orders.
The Resident consents to allow the Facility to provide care and treatment according to practice, policy and physician orders. The Resident has the right to withdraw this consent or refuse treatment.

Non-Discrimination Statement: This Facility will not deny admission, medical treatment or discriminate in any way based on color, race, sex, national origin, disability, or age. If you feel your Civil Rights have been violated in any way, please contact the Administrator of this Facility.

Physician's Care: The Resident agrees to select an attending physician who will visit regularly according to the Facility's policies, state and federal regulations and as dictated by the Resident's needs. He/She must have admitting privileges in the Facility. If the attending physician does not respond in case of an emergency, the Resident gives permission to the Facility to contact another physician. If the Resident does not wish to choose a physician, one of our staff physicians will be assigned to the Resident.
The Resident will be billed directly by the physician and the Facility will not be responsible for payment of this service. The Resident agrees to be responsible for all charges for all physician's services and any other services and treatments ordered by a physician, unless paid by Medicaid, Medicare, or other third party coverage. (See Authorizations and Acknowledgements to enter selection)

Hospital Transfers: If a doctor orders the Resident transferred to a hospital, the Facility will arrange for the transfer to the hospital. The Facility will also notify the Responsible Party, if possible, of the transfer. If the Resident is transferred, the Facility will hold the bed for the Resident as long as the Resident pays for the bed at a fee based on the then current daily rate.

VH POA / CB Initial

DEFENDANT'S EXHIBIT
Blumberg No. 5114
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Medicare will not pay to hold the bed and the resident is discharged. Medicaid may hold the bed for the Resident up to (10) days for a single hospital stay. If the Resident is hospitalized for more than 10 consecutive days, the Resident will be discharged. Medicaid will also hold a bed for the Resident up to 18 days per calendar year, if the Resident has a therapeutic pass from his/ her physician. Therapeutic leaves may be a maximum of 9 days and periods of leave may not be consecutive. The Resident or Responsible party may choose to hold the bed with private pay funds. (The Resident and Responsible Party must sign Bed Hold and Readmission Policy)

Hospitalization: If The Resident leaves the Facility to go into a hospital or for other medical reasons, the Facility will not charge the Resident past the day the Resident leaves unless the Resident wishes to reserve the bed for when the Resident returns.

Hospital Services: The Resident agrees to be responsible for all hospital charges if the Resident is taken to a hospital, unless paid by Medicaid, Medicare or other third party coverage. The Resident has the right to refuse treatment and to be informed of the consequences of the decision.
(See Authorizations and Acknowledgements to enter selection)

Refuse Treatment: The Resident has the right to refuse any medical treatment, as defined by law, and to be informed of the consequences of refusing treatment. The appropriate notification and documentation will be provided if the Resident communicates this wish.

Room Transfers: The Facility reserves the right to change the Resident's room or roommates when the Facility determines it is appropriate. The Facility will make changes if the Facility determines that is in the best interest of the Resident, other patients or the Facility, in accordance with state and federal regulations.

Discharge Arrangements: If The Resident is to be discharged, the Facility will notify the Resident, the Responsible Party, the attending physician, and the appropriate agencies at least 30 days prior to the date of discharge unless the Facility determines that an emergency exists or the Resident's needs can no longer be met in the Facility. The Facility's Case Management/Social Services Department will help the Resident make arrangements for his/her discharge.

Right to Leave Facility/Duration of Agreement: The Resident's stay with the Facility is voluntary. The Resident may leave the Facility at any time, provided the Resident gives the Facility adequate notice, so the Facility may obtain a discharge order from the Resident's physician. The Resident may terminate this agreement upon a five (5) day written notice to the Facility. Upon termination,

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Resident agrees to pay accrued charges up to and including the day of discharge. **Upon the effective date of termination of the agreement, the Resident must leave the Facility. Otherwise, this agreement will remain in effect until a different written agreement is executed. At no time does this mean that the Resident will be forced to remain in the Facility against his/her will.**

Refunds: If The Resident leaves the Facility, The Facility will refund any overpayment within 30 days. In the event of the Resident's death, refunds* and any of the Resident's personal property remaining in the Facility will be returned to the Resident's family or designee within 30 days.

Personal Needs Account: The Resident may leave personal spending money with the Facility. If the Resident wants a personal needs account maintained by the Facility, the Facility will not charge an additional fee for this service. The Facility will hold the Resident's funds in trust in accordance with applicable federal and South Carolina laws. The Resident and the Responsible Party may see the Facility's records of his/her account. Interest will be credited according to State and Federal regulations. The Facility will provide the Resident with a quarterly accounting of all funds held in trust in accordance with South Carolina law. (For this service, the Resident must sign authorization form, Resident Trust Management Account Agreement.)

Basic Charges: The Resident agrees to pay for routine care, room and board, unless The Resident receives Medicaid, Medicare or other third party coverage, at the rate of $ .00 per day as Basic Charges. Routine care and services included in the per diem rate are:

a. Room and board
b. Nursing services/personal care needed for Resident health, safety, and wellbeing as required by Facility license.
c. Linens bedding
d. Social Service consultations by the Facility Social Service Department
e. Oxygen on an emergency basis
f. Facility based Personal Needs Account for personal funds (if authorized)
g. Personal laundry service (see Extra Charge Sheet if applicable); excluding dry cleaning
h. Dietitian consultation and services
i. Therapeutic recreational activities
j. Pastoral care
k. Routine personal care Items

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This rate may be increased during the year; however, the Facility will notify the Resident of future rate changes thirty (30) days before they go into effect.
If the Resident receives Medicaid or Medicare, the cost of room and board and other services and supplies listed below will normally be paid for by the payer, however, the Resident is ultimately responsible.
If the Resident is receiving Medicaid the State has required the Resident to pay directly to the Facility the following (by the 10th of every month):

a. All resource monies as specified by the Department of Social Services
b. Adjustment as specified by the State
c. Previous balances prior to Medicaid approval
d. Other

As it may be necessary, the Resident agrees to provide the Facility with statements of his/her assets, debts, and income. If the Resident is not receiving Medicaid, Medicare or other third party payer, this statement will be confidential, unless law requires disclosure of information.

Supplemental Charges: Extra charges include, but are not limited to, the services and supplies described below. A list of the extra charges for services and supplies that are available to the Resident but are not covered by Medicare or Medicaid is included in this packet. The Facility will provide written notice to the Resident of any changes in the extra charges at least 14 days in advance or as otherwise required by South Carolina or Federal law.

***Diagnostic Consultant and Therapeutic Services**: The Resident agrees to have any diagnostic, consultant, or laboratory services or test ordered by his/her physician and agreed to by the Resident. Resident agrees to pay for these services unless paid for by Medicaid, Medicare, or other third party coverage.

* **Physical, Occupational and Speech Therapy and Private Duty Nurse/Sitters**: The Resident agrees to be responsible for any charges for Physical, Occupational and Speech Therapy, Private Duty Nurse and/or CNA services unless paid by Medicare, Medicaid, or other third party payer.

***Ambulance and Transportation Services**: The Resident agrees to be responsible for any charges for ambulances or other transportation the Resident may need, unless paid by Medicaid, Medicare, or other third party coverage.

***Medical Supplies**: The Resident agrees to be responsible for all charges for medicine, oxygen, dental, eyeglasses, hearing aids, medical appliances, expenses other that transportation connected with activities, etc., unless paid by Medicaid, Medicare, or other third party coverage.

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*Pharmacy Services: Pharmacy services are available through the Facility. The Resident may choose another pharmacy only if that Pharmacy will sign an agreement with the Facility to provide services in accordance with all applicable federal and state statutes and regulations and our requirements, including but not limited to: 24 hour service and delivery, labeling, unit dose form, and monitoring. The Facility is authorized to use generic name medications except as otherwise ordered, in writing, by the Resident's physician. See additional form for Brand-name requests) The Facility's Director of Nursing Services and the Consultant Pharmacist are authorized to destroy any excess or undesired medications in accordance with applicable law. The Resident agrees to pay for charges unless paid by Medicaid, Medicare, or other third party coverage.

Personal Items and Services: The Resident agrees to pay for personal items and services. These include: clothes, personal laundry not done at the Facility, barbers, hairdressers, toiletries, and sundries, which the Facility does not routinely provide. The Resident understands the Facility is not responsible for damage to personal clothing. (See Authorizations and Acknowledgements.)

Payment: The Resident agrees to pay one month's Basic Charges in advance, unless the Resident is receiving Medicaid, Medicare or other third party coverage. If the Resident is admitted during the month, the Resident will pay in advance for the remaining days of that month. The Facility will bill on the 28th of the month for the upcoming month and payment is due on the 10th of the month. Payment of Medicaid resource will be made in accordance with the Department of Public Welfare policy (or other state agency with authority). If, during the Resident's course of stay, there is a change of primary payer status, The Resident agrees to abide by payment terms or regulations governing that payer status.

Interest and Attorney's Fees: The Resident agrees to pay the Facility a late charge of 1.5% per month on any unpaid balances not paid within 30 days of billing. If the Facility hires an attorney to collect the bill, the Resident agrees to pay reasonable attorney's fees and the costs of collection.

Assignment of Benefits: The Resident authorizes the facility to receive benefit payments directly from Medicare, Medicaid, or other party insurance company.
(Signature required on Authorization for Assignments of Benefits)

Failure of Others to Pay: If any Resident charges are not paid for by insurance, anyone or any agency, the Resident agrees to pay them.

VH POA / CB Initial

Discontinuance of Medicaid: If the Resident receives Medicaid and it is discontinued, the Resident agrees to pay the then current Basic Charges and other charges for self-paying patients. Such charges will begin on the date Medicaid is discontinued.

Denial of Medicare and Medicaid: If the Resident applies for benefits under Medicare or Medicaid after the Resident becomes a patient, and the application is denied, the Resident agrees to pay the Facility for all charges from the day the Resident entered the Facility.

Failure to Pay the Facility's Bill: The Resident agrees to pay the Facility's bill upon receipt of the statement, or no later than the 1st of each month following the receipt of the statement. The Resident agrees to make arrangements to leave the Facility if bills are not paid as agreed. If the Resident does not make arrangements, then the Facility can make them for the Resident. If the need arises for the Facility to make such arrangements, the Facility will provide a notice of intent to discharge the Resident in accordance with state and federal regulations.

Failure to Pay Other Bills: The Resident agrees to pay the bill of others providing services or supplies. The Resident agrees to pay his/her bills within 15 days after billing, unless other acceptable arrangements are made in advance.

Telephone: Each Resident room is wired for telephone service. The Resident must make arrangement for service with the carrier of their choice. All costs for private telephone use are the responsibility of the Resident. In addition, a phone will be made available for the resident at a specific location within the facility. All long distance charges will be billed to the resident. As the telephone is for the use of all the residents on each unit, we ask that each resident be reasonable and considerate with individual demands for the unit telephone.

Valuables: The Resident agrees to be responsible for all valuables, money, appliances, and other personal property in his/her possession while the Resident is at the Facility. Although the Facility will work to see that misplaced belongings are recovered, the Facility is not responsible for replacing lost or stolen cell phones, computerized person assistance devices, IPods, radio, hearing aids, eyeglasses or dentures/partials(including, but not limited to the fore mentioned).

Guardianship: If the Resident, who has not had a guardian appointed by a court of law, is or becomes unable to make or communicate his/her medical decisions, as determined by the Resident's attending physician, the Facility shall

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notify the designated Healthcare Proxy, surrogate, or agent under a Durable Power of Attorney, if any. If neither has been appointed, the Facility and/or Resident's Responsible Party shall designate or determine a surrogate or Proxy in accordance with South Carolina law. The Facility and Resident acknowledge that above and beyond the surrogate or proxy's statutory abilities, the surrogate or proxy is authorized to bind the Resident to all terms in this agreement. If neither is available the Responsible Party agrees to initiate and maintain a proceeding in a court of competent jurisdiction to appoint a legal guardian. If the Responsible Party fails to do so, the Facility shall have the right, but not the obligation, to commence a legal proceeding to adjudicate the Resident incapacitated and to have the court appoint a guardian for the Resident. The cost of the legal proceedings, including attorney's fees, shall be paid by the Resident, Responsible Party or the Resident's estate.

Release of Medical and Other Information: The Resident agrees that the Facility can release all or part of his/her medical records to any agency or person with the right, by law, to review such records.

Patient Identification: The Facility is authorized to require a standard method of Patient identification, e.g., an identification bracelet and/or photographic print.

Photographs/ Video Technology: The Resident authorizes the Facility to take photographs of his/her person or portions thereof for medical or identification purposes. The Resident also understands that photographs may be taken during activities or special events and displayed in the Facility or in the Facility newsletter. Photographs are confidential and will not be released for other purposes without the Resident's written permission. (See Authorizations and Consents for further information) The Resident/ Responsible party understands that video technology of any type is prohibited in recognition of the privacy of the other residents, visitors and staff members.

Indemnification: The Facility is required by law to exercise reasonable care toward the Resident; however, the Facility is not an insurer of the health, safety, and welfare of the Resident and assumes no liability as such.
The Facility is not responsible for the health, safety, and welfare of any Resident who is away from the Facility with any person not directly employed by the Facility or when the Resident knowingly leaves the Facility against the medical advice of the Resident's attending physician or without the approval of the Facility, with or without the knowledge of the Facility.
The Resident shall defend, indemnify an hold the Facility harmless from any and all claims, demands, suit actions, and related costs and expenses, including without limitation attorney's fees made against the Facility by any person arising out of or relating to any damage or injury caused by the Resident to any person

VH POA / CB Initial

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or the property of any person or entity (including the Facility).
The Resident or the Resident's estate is responsible for any damages caused to the Facility property beyond normal wear and tear, and shall pay for the repair and replacement of damaged property, based on the actual charge or cost to the Facility for such repair or replacement.

Liability: The Facility shall not be liable for injuries of any kind unless caused by the willful act or negligence of the Facility or the Facility's employees.

Compliance with Facility Rules and Regulations: The Resident agrees to comply with all Patient/Resident's Responsibilities established by the Facility. The Resident has read and been given a copy of the Facility's rules and regulations which set forth these responsibilities.

Advanced Directives: The Resident acknowledges receipt of information concerning advance directives and his/her rights to make decisions about medical care.

Liability Insurance: This Facility maintains a liability insurance policy with minimal coverage. This policy meets the requirements of all applicable state regulations relative to the licensure and certification for Medicare/Medicaid and other related programs.

Notice: Any notice, request, consent, waiver or other communication provided for or required by this Agreement shall be in writing and shall be delivered in person or sent by first-class mail, postage prepaid, return receipt requested, and deposited in the United States mail, addressed as follows:

Facility:
11 Todd Drive
Beaufort SC 29902

Resident:
Eugene Boles

Governing Law: This Agreement shall be interpreted and enforced in accordance with the laws of the State of South Carolina

Venue: In the event that any litigation arises under, or in any manner in relation to this Agreement, whether *ex contractu* or *ex delicto*, the venue of same lie exclusively in Beaufort County, South Carolina and no other location.

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Waiver of Jury Trial: (Please read carefully)
Resident hereby knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any litigation, including any counterclaim which Resident may assert, arising from or relating to this Agreement or any other document connected with this Agreement, or arising out of or relating to any of the said documents or any relationship between the Facility and Resident, including the Resident's admission itself, or any other course of conduct, course of dealing statements (whether verbal or written) or actions of the Facility or Resident.

Resident represents and warrants that the waiver contained in this Paragraph has been freely and voluntarily made after reviewing the same, or having had an opportunity to review the same, with counsel of Resident's choice.

Attorney's Fees: (Please read carefully)
In any legal action or other proceeding brought by the Facility to enforce or interpret any provision of this Agreement or to enforce any remedy for the breach thereof, the Facility shall be entitled to receive reasonable attorney's fees and costs actually incurred in connection therewith, including all costs and fees incurred in any appellate proceeding.

The Facility is also entitled to recover attorney's fees and costs, including all fees incurred in any appellate proceeding, for any legal action or proceeding brought by the Resident and/or responsible party upon a finding by the body before which the legal action or proceeding is brought that the Facility committed no wrongdoing.

Capacity: This Agreement has been executed by the Facility's duly authorized agent, and no officer, director, agent, or employee of the Facility shall have any personal liability under the Agreement, to the Resident under any circumstances.

Severability: The parties agree that should any provision of this Agreement be declared invalid by any court of competent jurisdiction, or rendered invalid by any statute or regulation, then such provision shall be severed from this Agreement and the remainder of this Agreement will remain binding and in full force. Titles and/or captions in this Agreement are for convenience only.

Assignability: (Please read carefully)
This Agreement is fully assignable by the Facility. In the event that the Facility is sold, or license is transferred such that a new licensee operates the Facility, this Agreement shall be automatically assigned to the new licensee and shall be fully binding upon both parties.

Withdrawal Period:
Each party to this agreement shall have three (3) business days from execution of this agreement to cancel the agreement by notifying the other party in writing, by certified mail return receipt or traceable overnight delivery, of its desire to cancel.

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Guarantee: By his/her execution below, Responsible Party (jointly and full severally if more than one) hereby guarantees full compliance with the Agreement and full payment of all monies due by Resident under this Agreement, including all attorney's fees and court costs incurred by the Facility in the interpretation or enforcement of this Agreement, as well as in the enforcement of this Guarantee against Responsible Party. Venue of any such proceedings shall lie in* Beaufort County, South Carolina

Acknowledgement: By signing this Agreement, the Resident acknowledges: That the Resident has received a copy of entire agreement with any attachments.
That the Resident has been given an oral explanation of services provided and charges including services offered on an as needed basis including extra services.
That the Resident has been given an oral explanation of the bed reservation and refund policies set forth in this agreement.
That the Resident has received a copy of the rules and regulations, and an explanation of the Resident's responsibility to obey all reasonable rules and regulations and to respect the personal rights and private property of others.
That the Resident has received a copy of the Grievance Policy, Smoking Policy and Restraint Policy.
That the Resident has received a copy of the procedures of the state and district ombudsman councils.
That the Resident has received a copy of the transfer and discharge policies.
That the Resident has received a copy of the Federal and State Resident's Bill of Rights.
That the Resident has received a copy of the Privacy Act Statement.
That the Resident has received a copy of the (HIPPA) Health Insurance Privacy and Portability Act policies of this Facility.
That the Resident has received a copy of CMS Medicare DMEPOS Supplier Standards
That the Resident has received authorizations regarding, Resident Trust Fund, Pharmacy Part D, Care Plans, Vaccinations and Release of Information, Self-Administration of Medications and Assignment of Benefits .

Entire Agreement: This Agreement sets forth the entire understanding of the parties relating to the subject matter hereof, and supersedes all prior Agreements, understanding, and discussions relative to such subject matter, Resident acknowledges that in entering into this Agreement, Resident has not relied on any representation, warranties (whether express or implied) or covenants, other than those set forth herein. Nothing in this Agreement shall be construed to give any person or entity other than the parties hereto any rights to remedies.

VH POA /CB Initial

Agreement Modifications/Changes: From time to time the Facility may modify, change or amend this Agreement and will provide a thirty (30) day written notice of such changes to the Resident or Responsible Party.

Immoral/ Illegal review: As dictated by state and/or federal law a review for specific activity may be conducted (i.e. sexual predator).I have received a copy of Facility Responsibilities Regarding Convicted Sex Offenders,

Optional Arbitration Clause: Any action, dispute, claim or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims of violations of Resident's Rights) now existing or hereafter arising between the parties, in anyway arising from or relating to this Agreement governing the Resident's stay at the Facility, shall be resolved by binding arbitration. Such binding arbitration shall be governed by the provisions of the South Carolina Arbitration Code. As appropriate and in the event that the South Carolina Arbitration Code is deemed to not apply, binding arbitration shall be governed by the Federal Arbitration Act. **OPTIONAL: If the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only. I have X this clause _____initial.**

Resident and or Responsible Party has read or has been read and understands and agrees to all terms and conditions of this agreement unless specifically noted on the agreement.

By: Leah Caruso 11/2/15
Signature of Facility Representative Date

Eugene Boles

_____
Signature of Patient/Resident Date

_____
Witness Date

_____
Witness Date

Viola Hawkins POA 11/2/15
Responsible Party Date

Clifford Byas 11/2/15
Signature of Responsible Party Date

Responsible Party is acting as:
_____ Conservator
_____ Power of Attorney
_____ Relative (state relationship)
_____ Other: _____

Billing Address:

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RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT
(READ CAREFULLY)

Pursuant to the terms of this Resident and Facility Binding Arbitration Agreement (this "Arbitration Agreement"), it is understood and agreed by _____ (the "Facility") and _____ (the "Resident" or "Resident's Authorized Representative", hereinafter referred to as the "Resident") that any legal dispute, controversy, demand or claim (hereinafter collectively referred to as "claim" or "claims") that arises out of or relates to that certain Resident Admission Agreement (the "Resident Admission Agreement") executed by the Resident and the Facility, or any service or health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the Federal Arbitration Act (a copy of which is attached hereto and incorporated into this Arbitration Agreement), and not by a lawsuit or resort to court process except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards.

The agreement to arbitrate contained in this Arbitration Agreement includes, but is not limited to, any claim for payment, nonpayment or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Resident Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract. However, this agreement to arbitrate shall not limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility or any appropriate state or federal agency.

The damages awarded, if any, in an arbitration conducted pursuant to this Arbitration Agreement shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action, including any prerequisites to, credit against or limitations on, such damages.

It is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.

All claims based in whole or in part on the same incident, transaction, or related course of care or services provided by the Facility to the Resident shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Facility or the Resident, and the claim is not presented in the arbitration proceeding.

Any notice required pursuant to this Arbitration Agreement shall be deemed given (i) upon hand delivery; or (ii) three (3) days after deposit in U.S. mail via certified mail, return receipt requested.

DEFENDANT'S EXHIBIT BD
Bateberg No. 5114

This Arbitration Agreement is effective as of the date of admission of the Resident to the Facility. VH **(resident's initials).**

The Resident understands that (1) he/she has the right to seek legal counsel concerning this Arbitration Agreement, (2) the execution of this Arbitration Agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (3) this Arbitration Agreement may be rescinded by written notice given to the Facility by the Resident within thirty (30) days of signature. If not rescinded within thirty (30) days, this Arbitration Agreement shall remain in effect for all care and services rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility.

THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT THEY ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY.

Viola Hackworth POA 11/3/15
Resident/Representative Signature / Date

Lucy Caruso 11-3-15
Facility's Authority Agent / Date

Viola Hackworth, POA
Resident/Representative Printed Name

Lucy Caruso,
Admissions Director
Facility's Authorized Agent Printed Name

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12/23 HW 3160

PREPARED BY/RETURN TO:
EUGENE PARRS
SC BAR NO. 68608
HARVEY & BATTEY, P.A.
PO DRAWER 1107
BEAUFORT, SC 29901-1107

BEAUFORT COUNTY SC - ROD
BK 03181 PGS 1086-1097
FILE NUM 2012058852
10/10/2012 11:05:33 AM
REC'D BY R WEBB RCPT# 690959
RECORDING FEES 23.00

STATE OF SOUTH CAROLINA)
) GENERAL DURABLE POWER OF ATTORNEY
COUNTY OF BEAUFORT)

KNOW ALL MEN BY THESE PRESENTS that as principal (the "Principal") I, **EUGENE BOLES**, a resident of the state and county aforesaid, have made, constituted and appointed and by these presents do make, constitute and appoint **VIOLA BOLES HACKWORTH** my true and lawful attorney-in-fact ("Attorney") for the purposes hereinafter set forth, but if she is unable to serve for any reason, I nominate and appoint **LINETTE HART**.

ARTICLE I

EMPOWERMENT OF ATTORNEY

My Attorney is authorized in Attorney's 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 provision of this Power of Attorney or by statute or general rules of law (and regardless of whether I am mentally incompetent or physically or mentally disabled or incapable of managing my property and income), with full power of substitution, as follows:

A. POWERS IN GENERAL

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. Unless otherwise provided herein, if more than one attorney-in-fact is appointed hereunder, each of them may act separately.

B. POWERS RELATING TO MANAGEMENT AND DISPOSITION OF ASSETS

1. To buy, receive, lease as lessor or lessee, accept or otherwise acquire property, both real and personal, tangible and intangible; to sell, convey, mortgage, grant options upon, hypothecate, pledge, transfer, exchange, quit-claim, or otherwise encumber or dispose of property, both real and personal, tangible and intangible; or to contract or agree for the acquisition, disposal, or encumbrance of any property whatsoever or any custody, possession, interest, or right therein for cash or credit and upon such terms, considerations and conditions as Attorney shall

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think proper; and no person dealing with Attorney shall be bound to see to the application of any monies paid;

2. To take, hold, possess, invest or otherwise manage any or all of my real and personal property or any interest therein; to eject, remove or relieve tenants or other persons from, and recover possession of, such property by all lawful means; and to maintain, protect, preserve, insure, remove, store, transport, repair, build on, raze, rebuild, alter, modify, or improve the same or any part thereof, and/or to lease any property, real or personal for me or my benefit, as lessee, with or without option to renew; to collect, receive and receipt for rents, issues and profits of my property.

3. To make, endorse, accept, receive, sign, seal, execute, acknowledge, and deliver deeds, assignments, agreements, certificates, endorsements, hypothecations, checks, notes, mortgages, vouchers, receipts, consents, waivers, releases, undertakings, satisfactions, acknowledgments and such other documents or instruments in writing of whatever kind and nature as may be necessary, convenient, or proper in the premises;

4. To open and close bank accounts and brokerage accounts in my name; to make deposits and transfers to such accounts and to make withdrawals and distributions from such accounts.

5. To subdivide, develop or dedicate real property to public use or to make or obtain the vacation of plats and adjust boundaries, to adjust differences in valuation on exchange or partition by giving or receiving consideration, and to dedicate easements to public use without consideration.

6. To invest and reinvest all or any part of my property in any property and undivided interests in property, wherever located, including bonds, debentures, notes, secured or unsecured, stocks of corporations regardless of class, interests in general and limited partnerships, limited liability companies, real estate or any interest in real estate whether or not productive at the time of investment, interests in trusts, investment trusts, whether of the open and/or closed fund types, exchange traded funds (ETFs), and participation in common, collective or pooled trust funds or annuity contracts without being limited by any statute or rules of law concerning investments by fiduciaries;

7. To continue and operate any business owned by me and to do any and all things deemed needful or appropriate by Attorney, including the power to incorporate the business and to put additional capital into the business, for such time as Attorney shall deem advisable, without liability for loss resulting from the continuance or operation of the business except for Attorney's own willful misconduct or gross negligence; and to close out, liquidate, or sell the business at such time and upon such terms as Attorney shall deem best;

8. To transfer all of my stock and/or securities to my Attorney, as agent (with the beneficial ownership thereof remaining in me) if necessary or convenient in order to exercise the powers with respect to such stock and/or securities granted herein;

9. To sell or exercise stock subscription or conversion rights;

10. To refrain from voting or to vote shares of stock owned by me at shareholders, meeting in person or by special, limited, or general proxy and in general to exercise all the rights, powers and privileges of an owner in respect to any securities constituting my property;

11. To participate in any plan of reorganization or consolidation or merger involving any company or companies with respect to stock or other securities which I own and to deposit such stock or other securities under any plan of reorganization or with any protective committee and to delegate to such committee discretionary power with relation thereto, to pay a proportionate part of the expenses of such committee and any assessments levied under any such plan, to accept and retain new securities received by Attorney pursuant to any such plan, to exercise all conversion, subscription, voting and other rights, of whatsoever nature pertaining to such property, and to pay any amount or amounts of money as Attorney may deem advisable in connection therewith.

12. To purchase, maintain, surrender, collect, or cancel (a) life insurance or annuities of any kind on my life or the life of any one in whom I have an insurable interest, (b) liability insurance protecting me and my estate against third party claims (c) hospital insurance, medical insurance, Medicare supplemental insurance, custodial care insurance, long term care insurance, and disability income insurance for me or any of my dependents and (d) casualty insurance insuring assets of mine against loss or damage due to fire, theft, or other commonly insured risk; to pay all insurance premiums, to select any options under such policies, to increase coverage under any such policy, to borrow against any such policy, to pursue all insurance claims on my behalf, to adjust insurance losses, and the foregoing powers shall apply to private and public plans, including but not limited to Medicare, Medicaid, SSI and Worker's Compensation.

13. To represent me in all tax matters; to prepare, sign, and file federal state, and local income, gift and other tax returns of all kinds, including, where appropriate, joint returns, FICA returns, payroll tax returns, claims for refunds requests for extensions of time, to file returns and pay taxes due, to file extensions and waivers of applicable periods of limitation, protests and petitions to administrative agencies or courts; to collect and make such disposition of refunds as my Attorney shall deem appropriate, post bonds receive confidential information and contest deficiencies determined by the Internal Revenue Service or any other authority; to exercise any election I may have under federal, state or local tax law; to allocate any generation-skipping tax exemption to which I am entitled, and generally to represent me or obtain professional representation for me in all tax matters and proceedings of all kinds and for all periods before all officers of the Internal Revenue Service and state and local authorities and in any and all courts to engage compensate and discharge attorneys, accountants and other tax and financial advisers and consultants to represent or assist me in connection with any and all tax matters involving or in any way related to me or any property in which I have or may have an interest or responsibility; and on my behalf to execute IRS Form 2848 and appoint my Attorney or any suitable person selected by my attorney as my representative before the Internal Revenue Service.

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C. POWERS RELATING TO MANAGEMENT OF ASSETS

1. To prepare, execute and file single, joint or separate income and other tax returns and amended returns and declarations of estimated tax for any year or years; to prepare, execute and file gift tax returns reporting gifts made by me or by Attorney on my behalf for any year or years; to consent to any gift splitting election for any gift made by my spouse; to utilize or make any federal or state tax election; and to prepare, sign and file claims for refund of any tax and other governmental reports, applications, requests, and documents;

2. To deposit in my name and for my account, with any bank, credit union, or trust company or any building or savings and loan association or any other banking or similar institution, all moneys to which I am entitled or which may come into Attorney's hands as such attorney-in-fact, and all bills of exchange, drafts, checks, promissory notes and other securities for money payable belonging to me, and for that purpose to sign my name and endorse each and every such instrument for deposit or collection; and from time to time, or at any time, to withdraw any or all moneys deposited to my credit at any bank, credit union, or trust company or any building or savings and loan association or any other banking or similar institution having moneys belonging to me, and, in connection therewith, to draw checks or to make withdrawals in my name; to make, do, execute, acknowledge and deliver, for and upon my behalf and in my name, all such checks, notes and contracts;

3. To endorse, receive, and collect checks payable to my order drawn on the United States Treasury, Internal Revenue Service, or other fiscal officer or depository of the United States, or any sovereign state or authority, or any political subdivision or instrumentality thereof, or any private person, firm, corporation or partnership;

4. To have access at any time or times to any safe deposit box rented by me, wherever located, and to add or remove all or any part of the contents thereof, and to surrender or relinquish said safe deposit box, and any institution in which any such safe deposit box may be located shall not incur any liability to me or my estate as a result of permitting Attorney to exercise this power;

5. To make, do, and transact all and every kind of business of any nature or kind whatsoever, including the receipt, recovery, collection, payment, compromise, settlement, and adjustment of all accounts, claims, legacies, bequests, interests, dividends, annuities, demands, debts, taxes, and obligations, or any rebate, refund, or discount thereon, which may now or hereafter be due, owing, or payable by or to me;

6. To institute, prosecute, defend, abandon, compromise, arbitrate, and dispose of legal, equitable, or administrative hearings, actions, suits, attachments, arrests, distresses or other proceedings, or otherwise engage in litigation involving me, my property or any interests of mine;

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7. To borrow money and to encumber, mortgage or pledge any and all of my property in connection with the exercise of any power vested in Attorney; to use any credit and debit card held in my name to make such purchases and to sign such slips as may be necessary to use such credit and debit cards, to repay from any funds belonging to me any money borrowed and to pay for any purchases made or cash advanced using credit and debit cards issued to me.

8. To deal with Attorney in Attorney's individual, or any fiduciary, capacity, in buying and selling assets, in lending and borrowing money, and in all other transactions, irrespective of the occupancy by the same person of dual positions;

9. To employ and dismiss and compensate agents, accountants, investment advisers, brokers, attorneys-in-fact, attorneys-at-law, tax specialists, real estate agents and/or brokers, and other assistants and advisors deemed by Attorney needful for the proper administration of my property, and to do so without liability for any neglect, omission, misconduct, or default of any such agent or professional representative provided such agent or professional representative were selected and retained with reasonable care;

10. To apply for, settle, deposit and expend for my benefit any cash, rights or entitlements due me from any governmental agency or body, such as Supplemental Social Security Medicaid, Medicare, and Social Security Disability Insurance and for the purposes of receiving Social Security benefits, my Attorney is hereby appointed my "Representative Payee", to utilize all lawful means and methods to recover such assets and/or rights, to qualify me for such benefits and claim such benefits on my behalf, and to compromise claims and grant discharges in regard to the matters described herein.

11. To apply for a Certificate of Title upon, and endorse and transfer title thereto, any automobile, truck, pick-up, van, motorcycle or other motor vehicle, and to represent in such transfer assignment that the title to said motor vehicle is free and clear of all liens and encumbrances except those specifically set forth in such transfer assignment;

12. To insure my property against damage or loss and Attorney against liability with respect to third persons;

13. To pay and adjust debts incurred by me or by my attorney-in-fact in connection with any power authorized hereunder;

14. To take any elective share due me from my deceased spouse, if appropriate; to retain any property which I have the right to elect to retain; to file petitions pertaining to the election, and to take all other actions that my Attorney deems appropriate in order to effectuate the election, and if any such actions by my Attorney require the approval of any court, to seek such approval;

15. To transfer to the trustee of any revocable trust agreement made by me before or after the execution of this instrument, as to which trust I am, during my lifetime, a

primary income and principal beneficiary, any or all of my cash, property or interests in property, including any rights to receive income from any source.

16. To withdraw and/or receive the income or corpus of any trust over which I have a right of receipt or withdrawal; to request and receive the income or corpus of any trust with respect to which the trustee thereof has the discretionary power to make distributions to me or on my behalf, and to execute and deliver to such trustee or trustees a receipt and release or similar document for the income or corpus so received;

17. To renounce or resign any fiduciary position to which I have been or may be appointed, including but not limited to Personal Representative, trustee, guardian or attorney-in-fact, and to file an accounting with a court of competent jurisdiction or to otherwise settle such matters in the manner as my Attorney shall deem appropriate.

18. To renounce and disclaim any property or interest in property or powers to which for any reason and by any means I may become entitled, whether by gift, testate or intestate succession, or otherwise; to release or abandon any property or interest in property or powers which I may now or hereafter own, including any interests in or rights over trusts, including the right to alter, amend, revoke or terminate. In exercising such discretion, my Attorney shall consider any reduction in estate or inheritance taxes that may be due upon my death, and the effect of such renunciation or disclaimer upon persons interested in my estate and persons who would receive the renounced or disclaimed property; provided, however, that my Attorney shall make no disclaimer that is expressly prohibited by other provisions of this instrument.

19. To make gifts of my property, whether outright or with my retention of life use, to my spouse, my parents, my issue, and the issue of my parents, including my attorney-in-fact; the attorney-in-fact herein named also has the power to make gifts to those not included in the preceding sentence, including charitable organizations, but only in the pattern I have used in my lifetime.

20. To make, revoke, and revise all beneficiary designations, payment options, elections, and waivers regarding employee benefit plans and individual retirement accounts, whether as plan participant, as beneficiary, individual retirement account owner, or as spouse of a participant, including without limitation the waiver of qualified joint and survivor annuity and qualified pre-retirement survivor annuity benefits as provided in IRC §417.

D. POWERS RELATING TO CUSTODY OF PERSON

1. To establish where I shall reside, including the exact physical location, and the city, county, and state of residence and, if necessary, to make all necessary arrangements for me at any hospital, convalescent institution 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 and to report such address as my official address to the United States Post Office and any other person, firm, corporation or governmental agency as may be necessary, desirable, convenient or appropriate;

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2. To employ, dismiss and compensate medical personnel including physicians, surgeons, dentists, medical specialists, nurses, and paramedical assistants deemed by Attorney needful for the proper care, custody and control of my person and to do so without liability for any neglect, omission, misconduct or default of any such physician or other medical personnel, provided such physician or other medical personnel were selected and retained with reasonable care;

3. To authorize any and all kinds of medical procedures and treatment including but not limited to medication, therapy, surgical procedures, and dental care, and to consent to all such treatment, medication or procedures where such consent is required; to obtain the use of medical equipment, devices or other equipment and devices deemed by Attorney needful for proper care, custody and control of my person and to do so without liability for any neglect, omission, misconduct or fault with respect to such medical treatment or other matters authorized herein;

4. To obtain the disclosure of all documents relating to medical services provided by my physicians or other medical staff and obtain copies of my entire medical records or a portion thereof and all personal health information for any purpose that my Attorney-in-Fact deems appropriate. This waiver of privacy rights is intended to comply with any federal or state law relating to the privacy of my medical records, including without limitation the Health Insurance Portability and Accountability Act of 1996 (HIPAA) 42 U.S.C. §§ 1320d-1320d-8 and the HIPPA Privacy Rules, 45 CFR § 164. This authorization shall remain in effect until my death or until such time that this power of attorney is revoked.

5. To purchase, dispose of and abandon clothing, food, medicine, household, and personal effects of all kinds;

6. To arrange for transportation and travel for me for any purpose, including for medical treatment or recreation;

7. To make advance arrangements for funeral services including but not limited to purchase of a burial plot and marker and such other and related arrangement for services, flowers, ministerial services, transportation and other necessary, related, convenient or appropriate goods and services as my Attorney shall deem advisable or appropriate under the circumstances;

8. To apply for, elect, deposit and utilize on my behalf all benefits payable by any governmental body or agency, state, federal, county, city, or other and to obtain, make claim upon, collect and dispose of insurance and insurance proceeds for my care, custody and control;

9. To house (or provide for housing), support and maintain any animals which I own and to contract for and pay the expenses of proper veterinary care and treatment for such animals, or if the care and maintenance of such animals shall become unreasonably expensive or inappropriate in Attorney's opinion to dispose of such animals.

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ARTICLE II

TERMINATION, AMENDMENT, RESIGNATION AND REMOVAL

A. POWER NOT AFFECTED BY PRINCIPAL'S INCAPACITY

THIS POWER OF ATTORNEY SHALL NOT BE AFFECTED BY THE PHYSICAL DISABILITY OR MENTAL INCOMPETENCE OF THE PRINCIPAL WHICH RENDERS THE PRINCIPAL INCAPABLE OF MANAGING HIS OR HER OWN ESTATE. IT IS MY INTENT THAT THE AUTHORITY CONFERRED HEREIN SHALL BE EXERCISABLE NOTWITHSTANDING MY PHYSICAL DISABILITY OR MENTAL INCOMPETENCE.

B. TERMINATION

This power of attorney shall remain in full force and effect until the earlier of the following events: (i) Attorney has resigned as provided herein; (ii) I have revoked this General Power of Attorney by written instrument recorded in the public records of the county aforesaid, or (iii) a conservator shall have been appointed for me by a court of competent jurisdiction. This power of attorney may be amended by me at any time and from time to time but such amendment shall not be effective as to third persons dealing with Attorney without notice of such amendment unless such amendment shall have been recorded in the public records of the county aforesaid.

C. RESIGNATION

In the event that Attorney shall become unable or unwilling to serve or continue to serve, the Attorney may resign by delivering to me in writing an Attorney's resignation and recording the original in the public records of the county aforesaid. Upon such resignation and recording, Attorney shall thereupon be divested of all authority under this General Durable Power of Attorney.

D. REMOVAL

Any person named herein as Attorney may be removed by written instrument executed by me and recorded in the public records of the county aforesaid.

E. DELEGATION

My Attorney may by written instrument delegate any power granted hereunder to other persons. However, if more than one Attorney is currently serving, such delegation must be unanimous. Such delegation may be restricted or limited as provided by my Attorney, and may be made to be effective at a time in the future or upon the happening of specified event. My Attorney shall have full authority to revoke such delegation at any time. My Attorney may appoint a

successor attorney-in-fact hereunder, but only if no successor has been designated by me, or only if a successor named by me hereunder is deceased, incompetent, or withdraws upon written consent.

ARTICLE III

INCIDENTAL POWERS AND BINDING EFFECT

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 fully authorized by me and with the same force and effect as if done under my hand and seal and 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.

ARTICLE IV

MISCELLANEOUS

A. EXCULPATION

Attorney, Attorney's heirs, successors and assigns are hereby released and forever discharged from any and all liability upon any claim or demand of any nature whatsoever by me, my heirs or assigns, the beneficiaries under my will or under any trust which I have created or shall hereafter create or any person whomsoever on account of any action or failure to act of Attorney pursuant to this power of attorney, except for willful misconduct or gross negligence.

B. DEFINITIONS, NUMBER, AND GENDER

Whenever the word "Attorney" or any modifying or substituted pronoun therefor is used in this Power of Attorney, such words and respective pronouns shall include both the singular and the plural, the masculine, feminine and neuter gender thereof. Further, where necessary or appropriate in this Power of Attorney, the singular and plural forms shall be interchangeable, and words of any gender shall include all genders.

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C. SEVERABILITY

If any part of any provision of this Power of Attorney shall be invalid or unenforceable under applicable law, said part shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of said provision or the remaining provisions of this Power of Attorney.

D. COMPENSATION

Attorney shall be entitled to reimbursement for all reasonable costs and expenses actually incurred and paid by Attorney on my behalf pursuant to any provision of this Power of Attorney, but Attorney shall not be entitled to compensation for services rendered hereunder.

E. RESTRICTIONS

Unless provided otherwise herein, Attorney shall not satisfy the legal obligations of Attorney out of any property subject to this power of attorney.

F. RESERVATIONS

Notwithstanding any provision hereto to the contrary, Attorney shall have no power or authority whatever with respect to (a) any policy of insurance owned by me on the life of Attorney, and (b) any trust created by Attorney as to which I am a trustee.

G. NO POWER OF APPOINTMENT

It is my intention that no property subject to this Power of Attorney shall be includable in the gross estate (for federal or any state estate tax purposes) of my Attorney under the Internal Revenue Code of 1986, as amended, or any other applicable section, if any, of federal and/or state law. This Power of Attorney neither creates a power of appointment nor do my Attorney's actions hereunder constitute the exercise of a power of appointment.

H. NO DISRUPTION OF ESTATE PLAN

If it becomes necessary for my Attorney to liquidate and expend my assets in order to provide support for me, or if liquidation or conversion of assets becomes necessary for any other reason, whether specified in this instrument or otherwise, or such liquidation is deemed by my Attorney to be appropriate or convenient, I ask that my Attorney, to the extent reasonably possible, avoid disrupting the dispositive provisions of any estate plan of mine known to my Attorney, whether or not such estate plan is embodied in a Will, a Trust, non-probate property, or otherwise. If it is necessary to disrupt the dispositive provisions of such plan, then my Attorney shall use his best efforts to restore the dispositive provisions of such plan from other property I possess or may acquire if, as, and when the opportunity to do so becomes available. My Attorney shall make reasonable efforts to obtain and review my estate plan and any person having knowledge thereof or

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possession of any document implementing such estate plan is authorized to make disclosure thereof to my Attorney, and to furnish my Attorney with copies of such documents. In order to induce my Attorney to act hereunder, he shall be liable only in the case of his willful misconduct or gross negligence.

I. BOND

My Attorney shall serve without bond for the faithful performance of his or her duties hereunder.

J. SOUTH CAROLINA LAW

This Power of Attorney is made in accordance with South Carolina Statutes Section 62-5-501 and shall be controlled by the laws of South Carolina.

IN WITNESS WHEREOF, as principal, I have executed this Power of Attorney as of this 31st day of October, 2012, I have directed that photographic copies of this power be made which shall have the same force and effect as an original.

Eugene Boles (SEAL)
EUGENE BOLES

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STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

ATTESTATION

The foregoing General Power of Attorney was this 3rd day of October, 2012, signed, sealed, published and declared by **EUGENE BOLES**, the principal, as the principal's appointment and empowerment of an attorney-in-fact, in the presence of us who at the principal's request and in the principal's presence and in the presence of each other, have hereunto subscribed our names as witnesses hereto.

Witness of Beaufort County, South Carolina

Witness of Beaufort County, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

PROBATE

Personally appeared deponent and made oath that deponent saw the within named principal sign, seal and as the principal's act and deed deliver the within General Power of Attorney and that deponent, with other witness whose name is subscribed above, witnessed the execution thereof.

Witness

SWORN to before me this
3rd day of October, 2012.

(L.S.)
Notary Public for South Carolina

My Commission expires: 8/8/2013

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
VIOLA M. HACKWORTH, as Personal Representative of the Estate of EUGENE BOLES a/k/a EUGENE N. BOLES, deceased,	)	C. A. No. 2018-CP-07-00433
Plaintiff,	)	**MOTION TO CONDUCT LIMITED DISCOVERY**
vs.	)	
BAYVIEW MANOR, LLC d/b/a BAYVIEW MANOR, EPIC MGT, LLC, EPIC GROUP, LIMITED PARTNERSHIP, TEDDIE SIMMONS, JOHN DOES, and RICHARD ROE CORPORATIONS,	)	
Defendants.	)	

PLEASE TAKE NOTICE that Plaintiff Viola M. Hackworth ("Plaintiff" or "Ms. Hackworth"), as the Personal Representative of the Estate of Eugene Boles a/k/a Eugene N. Boles ("Mr. Boles"), deceased, hereby moves this Court for an Order to allow limited discovery regarding the enforceability of the purported arbitration agreement at issue in this action.

By way of procedural and factual background, this is a wrongful death action commenced by Plaintiff on March 1, 2019, due to the death of Mr. Boles as a result of alleged negligent care and treatment he received by Defendants while a resident at Bayview Manor, LLC located at 11 Todd Drive, Beaufort, South Carolina ("Bayview Manor"). On March 11, 2019, Plaintiff's counsel requested by email the opportunity to conduct limited discovery regarding the enforceability of a purported arbitration agreement signed by Mr. Bole's sister, Ms. Hackworth. Defendants declined Plaintiff's request on March 14, 2019, due to arbitration waiver concerns. On April 8, 2019, Defendants filed their motion to stay action and compel arbitration; in the alternative

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motion for nonjury trial; and motion for protective order ("MTCA"). By their MTCA, Defendants seek the benefit of arbitration based on an unenforceable arbitration agreement.

In the interest of judicial economy and resources, Plaintiff contends that the Court should first allow the parties to conduct limited discovery regarding the circumstances and use of arbitration agreements by Bayview Manor and the enforceability of the purported arbitration agreement, including but not limited to: depositions of Rule 30(b)(6) corporate representatives and individuals associated with Bayview Manor such as Lucy Caruso (former Admissions Director) and Christy Drinkard (Administrator), who submitted affidavits on behalf of Bayview Manor in support of Defendants' MTCA; and the exchange of limited interrogatories and requests for production. Then, if necessary, proceed with a hearing on the MTCA.

For the reasons set forth above, Plaintiff respectfully requests the Court grant the Motion to Conduct Limited Discovery and enter the attached proposed order that allows the parties until July 15, 2019 to conduct the requested limited discovery and then set the hearing on the MTCA for the next available date after July 15, 2019.

This the 30th day of April, 2019.

CONNOR & CONNOR, LLC

s/ Allen Keith McAlister, Jr.

C. Caleb Connor, SC Bar No. 100517
Kenneth L. Connor, SC Bar No. 100298
A. Keith McAlister, Jr., SC Bar No. 78213
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Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing **MOTION TO CONDUCT LIMITED DISCOVERY** upon the following counsel of record in this action by email and electronic filing as follows:

W. McElhaney White, Esq.
A. Walker Barnes, Esq.
HOLCOMBE BOMAR, P.A.
101 W. St. John Street, Suite 200
Spartanburg, SC 29306

Respectfully submitted, this 30th day of April, 2019.

s/ Allen Keith McAlister, Jr.
A. Keith McAlister, Jr., SC Bar No. 78213
CONNOR & CONNOR, LLC

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
VIOLA M. HACKWORTH, as Personal Representative of the Estate of EUGENE BOLES a/k/a EUGENE N. BOLES, deceased, Plaintiff, vs. BAYVIEW MANOR, LLC d/b/a BAYVIEW MANOR; EPIC MGT, LLC; EPIC GROUP, Limited Partnership; TEDDIE SIMMONS; JOHN DOES; and RICHARD ROE CORPORATIONS, Defendants.	)	C/A No. 2019-CP-07- 00433 **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY ACTION AND COMPEL ARBITRATION; IN THE ALTERNATIVE MOTION FOR NONJURY TRIAL; AND MOTION FOR PROTECTIVE ORDER**

COMES NOW Plaintiff Viola M. Hackworth, as Personal Representative of the Estate of Eugene Boles a/k/a Eugene N. Boles, deceased, and files her Response in Opposition to Defendants' Motion to Stay Action and Compel Arbitration; In the Alternative Motion for Nonjury Trial; And Motion for Protective Order ("Motion"), showing the court as follows[1]:

I. BACKGROUND

This is a wrongful death action instituted pursuant to S.C. Code Ann. § 15-79-125 by Viola M. Hackworth ("Plaintiff" or "Mrs. Hackworth"), as Personal Representative of the Estate of Eugene Boles a/k/a Eugene N. Boles ("Mr. Boles"). As set forth in the Complaint, Mr. Boles died as a result of negligent care he received while a resident at Bayview Manor, LLC ("Bayview" or

[1] On March 11, 2019, Plaintiff requested by email an opportunity to conduct limited discovery regarding the enforceability of the purported arbitration agreement. On March 14, 2019, Defendants declined Plaintiff's request due to fear of waiver by engaging in litigation. On April 8, 2019, Defendants filed the instant Motion. After the Defendants' Motion was filed, Plaintiff filed its own Motion to Conduct Limited Discovery ("MCLD") on April 30, 2019. For purposes of Plaintiff's MCLD (which is scheduled for the same hearing), Plaintiff incorporates by reference this memorandum and arguments of counsel.

the "Facility") located at 11 Todd Drive, Beaufort, South Carolina. In her Complaint, Plaintiff alleges that Defendants Epic Mgt, LLC, Epic Group, Limited Partnership, and Teddie Simmons owned, maintained, managed, and/or operated Bayview (collectively as "Defendants") during Mr. Boles' residency. (*See* Compl. ¶¶ 2-10.) By their motion, Defendants seek the benefit of arbitration based on an unenforceable arbitration agreement purportedly signed by Mr. Boles' sister, Mrs. Hackworth.

In connection with Mr. Boles' admission to Bayview, Defendants' claim that their Admissions and Marketing Director, Lucy Caruso, "met with Mr. Boles' sister and Power of Attorney, Viola Boles Hackworth[,] and [her] brother, Clifford Byars[,]" on November 2, 2015. (Affidavit of Lucy Caruso at ¶ 7 (April 1, 2019)). Ms. Caruso also attests in detail that she "personally presented Mrs. Hackworth and Mr. Byars with the admissions documents" and "discussed with Mrs. Hackworth a separate Arbitration Agreement." *Caruso Aff.* at ¶¶ 8-9. Ms. Caruso further states "Mrs. Hackworth signed the Admissions Agreement [on November 2, 2015] and advised that she wanted more time to think about the Arbitration Agreement," returning "the following day, on November 3, 2015 . . . and signed the Arbitration Agreement." *Id.* at ¶ 12.

However, the representations made by sworn affidavit in support of Defendants' Motion are falsified. Mrs. Hackworth was not present at Bayview on November 2, 2015 nor did she meet with Bayview representatives on November 3, 2015. (Affidavit of Viola Hackworth at ¶ 5 (May 31, 2019) **[Exhibit 1]**. Rather, after completing work obligations and making childcare arrangements, Mrs. Hackworth flew from Pensacola, Florida, to Atlanta, Georgia, where she met her sister, Dorothy Williams, at the end of that week. *Id.* at ¶ 6-7. Then, they drove to South Carolina arriving in Beaufort on the evening of November 6, 2015. *Id.* at ¶ 7. Attached to Mrs.

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Hackworth's affidavit is documentation in support of her testimony, which directly contradicts Defendants' assertions relied upon to support their Motion. *See Id*. at ¶ 6, Attachments A & B.

In addition to disputing the false statements attested to by Defendants' representatives, Plaintiff opposes Defendants' Motion, including Defendants' purported agreement to arbitrate and their claim for a jury trial waiver in the admission agreement, based upon basic contract principles. Admission and arbitration agreements are subject to the same defenses applicable to all other contracts. Applying general (and basic) principles of contract law, Plaintiff contests whether a contract even exists in this case. Further, other factors, defects, and defenses recognized in the State of South Carolina may render the purported agreements or certain provisions unenforceable. Accordingly, Plaintiff contends the Motion should be denied; or in the alternative, postponed until full discovery into to the issue of the existence and enforceability of the purported agreements is complete.[2]

II. ARGUMENT AND CITATION OF AUTHORITY

The party seeking to force arbitration has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008).[3] Of those courts that have decided this question, most have held the proponent of the waiver bears the burden, reasoning that the jury trial right is fundamental, and should not be waived absent clear evidence. *See e.g., Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) ("Where waiver is claimed under a contract executed before litigation is contemplated, we agree

[2] Plaintiff withholds argument and reserves the right to completely explore, brief, and present defenses to contract, including but not limited to: validity of the purported contracts; failure of the purported contracts for lack of consideration or mutuality; actual and apparent authority of Mrs. Hackworth; unconscionability of the purported contracts; illegality of the purported contracts; and whether or not Mrs. Hackworth could bind the Estate of Mr. Boles.

[3] For purposes of reference, Plaintiff has attached several relevant trial court orders which deny similar motions to compel arbitration based upon the same or similar agreements. *See e.g.*, Judge P. Buckner Order, *Estate of D. Holmes v. Bayview Manor, LLC*, et al., 2017-CP-07-02636 (May 15, 2018) **[Exhibit 2]**.

with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed.")

A party seeking judicial enforcement of a contract bears the burden of persuasion. *Hinson-Barr, Inc. v. Pinckard*, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986). Defendant carries the burden to prove a valid and enforceable arbitration agreement was signed in a "knowing, voluntary and intentional" capacity. In interpreting a jury trial waiver narrowly, some courts have also emphasized "the basic principle that ambiguities in a contract are construed against the drafting party." *Nat'l Acceptance Co. v. Myca Products, Inc.*, 381 F. Supp. 269, 271 (W.D. Pa. 1974). When faced with a motion to compel arbitration that is opposed based on whether an agreement to arbitrate has been made between the parties, the court must give to the opposing party the benefit of all reasonable doubts and inferences that may arise. *See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980).

General principles of contract law apply to arbitration agreements. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2011); *Grant v. Magnolia Manor-Greenwood, Inc.*, 387 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). If the elements of offer, acceptance, and consideration are not present, no contract exists. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Arbitration agreements are also subject to the same defenses applicable to all other contracts. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010) (*quoting Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). "[T]rial courts consider 'general contract defenses to ensure' a meeting of the minds to arbitrate existed, and that such an agreement was not the result of 'fraud, duress, [or] unconscionability.'" *York v. Dodgeland*, 406 S.C. 67, 78, 749 S.E.2d 1139, 145 (2013) (*citing Zabinksi v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001)). "The general

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rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Berkebile v. Outen*, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993). Thus, "[a]rbitration will be denied if a court determines no agreement to arbitrate existed." *Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007); S.C. Code Ann. § 15-48-20(a).

A. Inaccurate Testimony and Inconsistent Dates

Alarmingly, the Facility's Administrator, Christy Drinkard, and its Admission's Director, Lucy Caruso, falsified their affidavits, in an effort to compel this matter to arbitration. Here, Defendants' Motion, relying upon testimony of their former Admission's Director, wrongly claims Mrs. Hackworth "signed the Admissions Agreement" on **November 2, 2015** and then "returned to Bayview" and "signed the Arbitration Agreement" on **November 3, 2015**. L. Caruso Aff. ¶¶ 12. Likewise, Ms. Drinkard attests, "as part of the admissions package," Mrs. Hackworth[4] "entered into an Admission Agreement which contained an arbitration clause and waiver of jury trial clause . . . along with a separate arbitration agreement" on November 2, 2015. (C. Drinkard Affidavit at ¶ 10 (April 2. 2019)).

Contrary to Defendants' Motion and Ms. Caruso and Drinkard's assertions, Mrs. Hackworth confirms, with supporting documentation, that she was not present at the Facility on November 2, 2015 or November 3, 2015. Hackworth Aff. at ¶ 6. Instead, she was in Florida. *Id.* at ¶¶ 6-7. She also was not present with Mr. Byars as claimed by Defendants' representatives. *Id.* at ¶ 7. Therefore, Defendants' Motion should be denied as it is supported by fraudulent affidavits.

B. Missing Parties

[4] Ms. Drinkard also inaccurately refers to Mrs. Hackworth as Mr. Boles' "daughter"; however, she is his sister.

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Defendants Epic Mgt, LLC, Epic Group, Limited Partnership, and Teddie Simmons, although named in Plaintiff's Complaint and joining in Defendants' Motion, are also not signees/parties to the purported Arbitration Agreement. Arbitration Agreement at p. 2 (unnumbered) **[Exhibit 3]**. In fact, the purported Arbitration Agreement fails to identify the parties allegedly bound by the contract, including the **"Facility"** or **"Resident"**:

RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT
(READ CAREFULLY)

Pursuant to the terms of this Resident and Facility Binding Arbitration Agreement (this "Arbitration Agreement"), it is understood and agreed by _____ (the "Facility") and _____ (the "Resident" or "Resident's Authorized Representative", hereinafter referred to as the "Resident") that any legal dispute, controversy, demand or claim (hereinafter collectively referred to as "claim" or "claims") that arises out of or relates to that certain Resident Admission Agreement (the "Resident Admission Agreement") executed by the Resident and the Facility, or any service or health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the Federal Arbitration Act (a copy of which is attached hereto and incorporated into this Arbitration Agreement), and not by a lawsuit or resort to court process except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards.

Id. at p. 1 (unnumbered). There is no indication whatsoever that the purported Arbitration Agreement applies to Bayview. Additionally, no representative of the Estate of Mr. Boles is a signee/party either.[5]

Because it is unclear who may be party to the purported Arbitration Agreement, at the most basic level of contract law, no agreement can be said to exist. Without evidence of an agreement

[5] As stated above, Plaintiff withholds argument regarding the arbitrability of claims brought on behalf of the Estate of Mr. Boles and requests an opportunity for full and complete discovery of this issue. *Thompson v. Pruitt Corp*., 416 S.C. 43, 56, 784 S.E.2d 679 (Ct. App. 2016).

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signed by identifiable parties, including persons with appropriate authority[6], there is nothing to be enforced. Thus, Defendants' Motion should be denied.

C. Reliance upon False Affidavits

According to the United States Supreme Court, "fraud on the court" is "a wrong against the institutions set up to protect and safeguard the public." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944). The term is used to describe a variety of improper acts that may lead to sanctions under the rules of civil procedure or pursuant to a court's inherent powers in managing its docket, including but not limited to suppressing evidence, altering or fabricating evidence, suborning perjury, or proceeding under a false name. *See e.g., Eppes v. Snowden*, 656 F.Supp. 1267, 1273 (E.D. Ky. 1986)*; Stanley Shenker & Assocs. v. World Wrestling Fed'n. Entm't*, 48 Conn.Supp. 357 (Conn. Super. Ct. 2003); *Rockdale Mgmt. Co. v. Shawmut Bank, N.A.*, 418 Mass. 596, 598, 638 N.E.2d 29, 31 (Mass. 1994).

Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure ("S.C. R. Civ. P."), "[e]very pleading, motion or other paper" filed "constitutes a certificate" that upon "information and belief there is good ground to support it [and] it is not interposed for delay." If a pleading or motion does not comply with S.C. R. Civ. P. 11, "it shall be stricken." *Id.* Under Rule 11, "a party and/or the party's attorney may be sanctioned for filing a frivolous . . . motion [or] other paper[,] for making frivolous arguments" or "for filing a pleading, motion, or other paper in bad faith (i.e., to cause unnecessary delay) whether or not there is good ground to support it." *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996); *See Link v. School District of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990). Where an affidavit is submitted to the court that is "false" and does

[6] Again, Plaintiff withholds argument of whether or not the "Power of Attorney" granted Mrs. Hackworth conferred sufficient authority to waive Mr. Boles' constitutional right to a jury trial.

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not have "good ground to support it," sanctions may be imposed. *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 19, 633 S.E.2d 722, 729 (2006).

Here, to support their Motion to compel arbitration and waive Mr. Boles' Constitutional rights, Defendants rely upon affidavits which are patently false. As established by Mrs. Hackworth's affidavit and supporting documentation, Defendants provide dates and describe events in great detail which did not occur. Accordingly, Defendants' Motion should be denied, and Defendants should be sanctioned, including reasonable attorney's fees and costs in defending this Motion.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion should be denied and sanctions should be levied against Defendants for perpetrating fraud on this Court. In the alternative, Plaintiff requests complete discovery into the enforceability of the purported Arbitration Agreement, including the applicability of all available defenses, defects, and other considerations and an opportunity to submit additional briefs upon completion of such discovery.

Respectfully submitted, this the 6th day of June, 2019.

CONNOR & CONNOR, LLC

s/ A. Keith McAlister, Jr.
C. Caleb Connor, SC Bar No. 100517
Kenneth L. Connor, SC Bar No. 100298
A. Keith McAlister, Jr., SC Bar No. 78213
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Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY ACTION AND COMPEL ARBITRATION; IN THE ALTERNATIVE MOTION FOR NONJURY TRIAL; AND MOTION FOR PROTECTIVE ORDER upon the following counsel of record in this action by email and electronic filing as follows:

W. McElhaney White, Esq.
A. Walker Barnes, Esq.
HOLCOMBE BOMAR, P.A.
101 W. St. John Street, Suite 200
Spartanburg, SC 29306

Respectfully submitted, this 6th day of May, 2019.

s/ A. Keith McAlister, Jr.
A. Keith McAlister, Jr., SC Bar No. 78213
CONNOR & CONNOR, LLC

STATE OF FLORIDA
ESCAMBIA COUNTY

AFFIDAVIT OF VIOLA M. HACKWORTH

I, the undersigned, being duly sworn and state upon my oath as follows:

1. My name is Viola M. Hackworth and I am over the age of eighteen (18). I reside at 20 North 71st Avenue in Pensacola, Florida.
2. I am the sister of Eugene Boles whose date of birth was May 25, 1947. My brother passed away on December 14, 2016.
3. After suffering a stroke, my brother, Eugene Boles, was initially admitted to Beaufort Memorial Hospital on October 27, 2015. After a short hospital stay, he was transferred to Bayview Manor for nursing and rehabilitative care. He was admitted to Bayview Manor on Monday, November 2, 2015.
4. I have reviewed the affidavits of Bayview Manor representatives, Christy Drinkard and Lucy Caruso, and after review, it is clear their sworn statements were falsified.
5. Despite sworn assertions made by facility representatives, I was not present at Bayview Manor during my brother Eugene Bole's admission on November 2, 2015, nor did I return to the facility to sign an arbitration agreement on November 3, 2015.
6. Due to childcare concerns as well as work obligations, I was not able to travel from my home in Florida to South Carolina until the end of that week. See **Attachment A** (my work schedule for the week of November 2, 2015). I also made bank deposits that week at Central Credit Union of Florida, which only has branches on the Florida Panhandle. See **Attachment B**.

EXHIBIT 1

7. In leaving Florida, I flew to Atlanta, Georgia, where I joined my sister, Dorothy Williams. My sister and I then drove approximately 4.5 hours to Beaufort, South Carolina, arriving on the evening of Friday, November 6, 2015. My other brother, Clifford Byars, was not present with us at this time.

8. Because I was not present at Bayview Manor on November 2 and 3, 2015, the affidavits submitted to the Court by Bayview Manor representatives cannot be relied upon in support of Defendants' motion.

This 31st day of May, 2019.

Barbara Zell Atkins
Signature

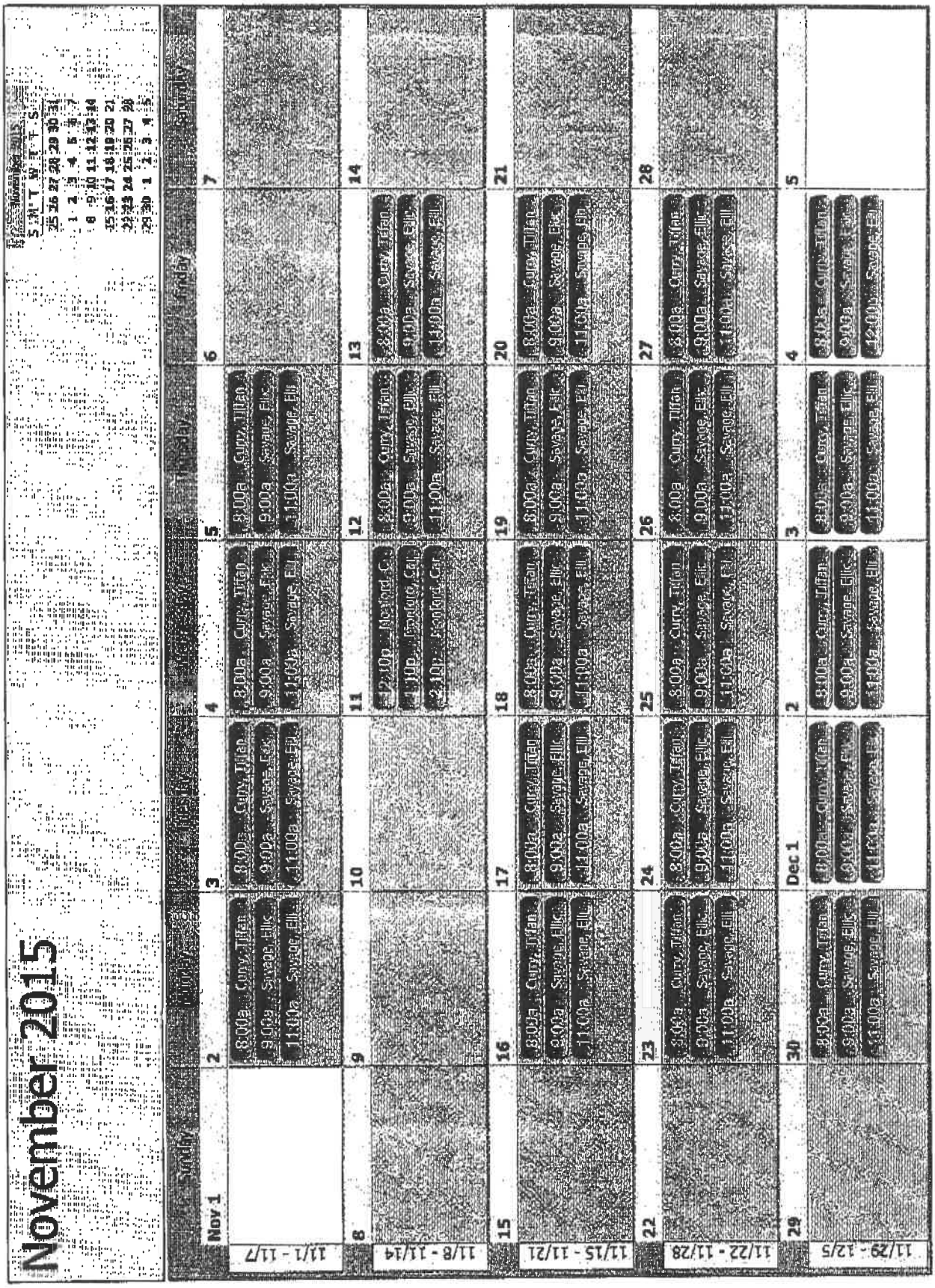
Viola M Hackworth
Viola M. Hackworth

Sworn and subscribed before me
This 31st day of May, 2019.

BARBARA ZELL ATKINS
Notary Public - State of Florida
Commission # GG 239038
My Comm. Expires Jul 17, 2022
Bonded through National Notary Assn.

Barbara Zell Atkins
NOTARY PUBLIC
My commission expires: 7/17/2022

Viola Hackworth



0000055107 HACKWORTH,VIOLA Transaction Summary

04/29/2019

Post Date	ID	Eff Date	Transaction	Trans Amt	Balance Chg	Int/Pnlty	Fees	New Balance	Description	Prev Available
11/30/2015	S 0002	11/30/2015	Cash Withdr...	[redacted]	[redacted]	0.00	0.00	[redacted]		[redacted]
11/30/2015	S 0002	11/30/2015	Transfer Dep...			0.00	0.00		From Share 0001	
11/30/2015	S 0001	11/30/2015	Withdrawal T...			0.00	0.00		To Share 0002	
			Check 01 1111924 Disbursed							
11/23/2015	S 0001	11/23/2015	Check Withd...	[redacted]	[redacted]	0.00	0.00	[redacted]		[redacted]
11/19/2015	S 0002	11/19/2015	Cash Withdr...			0.00	0.00			
			Check 01 1111828 Disbursed							
			Check 01 1111827 Disbursed							
11/19/2015	S 0002	11/19/2015	Check Deposit	[redacted]	[redacted]	0.00	0.00	[redacted]		[redacted]
11/16/2015	S 0008	[11/15/2015]	Withdrawal T...	0.56		0.00	0.00		To Share 0002	
11/16/2015	S 0002	[11/15/2015]	Transfer Dep...	0.56		0.00	0.00		From Share 0008	
			%% APY Earned 0.23% 10/01/15 to 11/14/15							
11/16/2015	S 0008	[11/15/2015]	Dividend Dep...	[redacted]	[redacted]	0.00	0.00	[redacted]	.250%	[redacted]
11/13/2015	S 0002	11/13/2015	Cash Withdr...			0.00	0.00			
			COINSTAR							
11/13/2015	S 0002	11/13/2015	Deposit	[redacted]	[redacted]	0.00	0.00	[redacted]		[redacted]
11/13/2015	S 0002	11/13/2015	Cash Withdr...			0.00	0.00			
			Check 01 1111643 Disbursed 175.00							
11/13/2015	S 0002	11/13/2015	Check Withd...	[redacted]	[redacted]	0.00	0.00	[redacted]		[redacted]
11/13/2015	S 0002	11/13/2015	Cash Deposit			0.00	0.00			
			Check 01 1111556 Disbursed							
11/10/2015	S 0001	11/10/2015	Check Withd...	[redacted]	[redacted]	0.00	0.00	[redacted]		[redacted]
11/10/2015	S 0001	11/10/2015	Withdrawal T...			0.00	0.00		To Loan 0100	
11/10/2015	L 0100	11/10/2015	Transfer Pay...			18.90	0.00		From Share 0001	
			CO: SSA TREAS 310							
			TYPE: XXSOC SEC ID: 9031036030							
11/10/2015	S 0001	11/10/2015	ACH Deposit	[redacted]	[redacted]	0.00	0.00	[redacted]	SA TREAS 310	[redacted]
11/05/2015	S 0002	11/05/2015	Cash Withdr...			0.00	0.00			
11/05/2015	S 0002	11/05/2015	Check Deposit			0.00	0.00			
11/03/2015	S 0001	11/03/2015	Cash Withdr...			0.00	0.00			
			%% ACH ECC PPD							
			CO: MODERN WOODMEN							
			TYPE: INSPREMIUM ID: 1361493430							
11/03/2015	S 0002	11/03/2015	ACH Withdra...	[redacted]	[redacted]	0.00	0.00	[redacted]	MODERN WOODMEN	[redacted]
11/01/2015	L 0100	11/01/2015	Insurance Ad...			0.00	0.00		SINGLE LIFE INS	

Attachment B

App. 274

ELECTRONICALLY FILED - 2018 May 15 12:01 PM - BEAUFORT - COMMON PLEAS - CASE#2017CP0702636

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOR THE 14TH JUDICIAL CIRCUIT

CASE NO: 2017-CP-07-02636

JOSEPH HOLMES, as Personal Representative of the ESTATE OF DAVID HOLMES,

Plaintiff(s),

v.

BAYVIEW MANOR, LLC, d/b/a BAYVIEW MANOR; EPIC GROUP, LP; and EPIC GENERAL, LLC,

Defendant(s).

ORDER DENYING DEFENDANTS' MOTION FOR NON JURY TRIAL

THIS MATTER is before the Court on Defendants' Motion for Non-Jury Trial. Arguments were held on April 25, 2018 in the Beaufort County Courthouse. Present at the call of the case was attorney Eric M. Poulin, representing the Plaintiff, and attorney W. McElhaney White, representing the Defendants. For the following reasons, Defendants' Motion is respectfully **DENIED.**

BACKGROUND

The Decedent, David Holmes, was a resident of Defendants' long term care facility. Decedent was first admitted on December 2, 2014, and re-admitted on February 17, 2015. Decedent was incompetent during both admissions. At each admission, Decedent's family signed an Admission Agreement.[1] The Admission Agreements contained the following provision:

[1] Plaintiff argues that the family members lacked authority to sign these Admission Agreements to the extent they contain jury waiver clauses. However, because the Court finds this waiver was invalid and unenforceable in the first instance, it is not necessary to discuss the issues of authority or agency.

EXHIBIT 2

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Waiver of Jury Trial: (Please read carefully)
Resident hereby knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any litigation, including any counterclaim which Resident may assert, arising from or relating to this Agreement or any other document connected with this Agreement, or arising out of or relating to any of the said documents or any relationship between the Facility and Resident, including the Resident's admission itself, or any other course of conduct, course of dealing statements (whether verbal or written) or actions of the facility or Resident.

Resident represents and warrants that the waiver contained in this Paragraph has been freely and voluntarily made after reviewing the same, or having had an opportunity to review the same, with counsel of Resident's choice.

The Admission Agreements also contained an Arbitration Clause which states that arbitration is "Optional" and allows the person signing to decline by marking an "X." At each admission, the family declined arbitration by marking an "X." Upon Decedent's death, his Estate brought this medical negligence action against the Defendants and requested a jury trial. Defendants now seek to invoke the jury waiver clause of the Admission Agreements, and seek an order setting this case for non-jury disposition.

LAW

An illegal contract is unenforceable. Berkebile v. Outen, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993). "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Id. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full. See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15. Moreover, such facilities, in the case of an individual who is entitled to medical assistance, must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under

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the state plan…any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility." 42 U.S.C. § 1396r(c)(5)(A)(iii).

Finally, it is well settled that to be valid and enforceable, a contract must be supported by valuable consideration. Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct.App.1984)("[a] contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act."). Consideration may consist of "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998).

ANALYSIS

In the instant case, it is undisputed that Decedent was a Medicare and Medicaid beneficiary while residing at Defendants' facility and that the facility was billing and accepting payment from Medicare and Medicaid for Decedent's care.[2] Therefore, the question of enforceability turns, in part, on whether the jury waiver provision was a mandatory part of the Admission Agreement and a required pre-condition to admission. During arguments, counsel for Defendants was unable or unwilling to take a position on this issue. However, in light of the following analysis, the Court finds that this provision is unenforceable in either case.

If the jury waiver provision was a required pre-condition to admission, then this requirement was a clear violation of Federal Law. 42 U.S.C. § 1396r(c)(5)(A)(iii) prohibits a

[2] During the hearing, counsel for Defendants stated his belief that Decedent was Medicare eligible but only "Medicaid pending" during his stay. However, Mr. White has since confirmed that Decedent was, in fact, Medicaid eligible during his stay.

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facility such as Defendants' from soliciting or accepting "any other consideration" as a condition to admission outside of the Medicaid payments when admitting a patient in Decedent's position. By requiring Decedent's family to waive his right to a jury trial as a condition of admission, Defendants' were requiring and accepting consideration in addition to Medicaid payments. Therefore, the jury waiver clause would be unenforceable due to its illegality.

Alternatively, if the jury waiver was not a precondition to admission, then it fails for lack of consideration. As noted, the waiver, as written, works only in one direction. When asked during arguments what the consideration for the waiver might be, counsel for Defendants argued only that the admission was the consideration for the waiver. When pushed on whether any additional consideration was present (separate and apart from the admission and care) counsel agreed there was none. Here, Defendants cannot have it both ways. They cannot, on the one hand, argue that the waiver was not consideration for the admission but, on the other, argue that the admission was valuable consideration for the waiver. For the waiver to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not.

CONCLUSION

Therefore, we are left with a clause that, if a pre-condition to admission, is unenforceable under the doctrines of illegality; if not a precondition to admission, void for lack of consideration. For these reasons, Defendants' Motion for Non-Jury trial is respectfully **DENIED.**

IT IS SO ORDERED!

Dated this ____ day of May, 2018
Walterboro, S.C.

The Honorable Perry M. Buckner, III
Presiding Judge, 14th Judicial Circuit

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Beaufort Common Pleas

Case Caption:	David Holmes Estate Of , plaintiff, et al VS Bayview Manor Llc , defendant, et al
Case Number:	2017CP0702636
Type:	Order/Jury Trial

It is so Ordered

s/ Perry M Buckner III 2122

ELECTRONICALLY FILED - 2019 Feb 05 4:37 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Estate of Mozana Clinkscales, by and through the appointed Personal Representative Charlie E. Clinkscales, Individually, and on behalf of Statutory Beneficiaries, Plaintiffs, v. Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville, Defendants.	IN THE COURT OF COMMON PLEAS C.A. No: 2018-CP-23-05088 **ORDER DENYING MOTION TO COMPEL ARBITRATION**

This matter came before the Court on December 18, 2018 for Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville's Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and reviewed the parties' legal memoranda, for the reasons more fully set forth below, the Court hereby denies the Motion to Compel Arbitration as to "Survival Action" and the "Wrongful Death Action".

I. BACKGROUND

This matter arises out of two civil actions --- a Survival Action and a Wrongful Death action. Both actions involve allegations of nursing home neglect and corporate negligence resulting in the wrongful death of Mozana Clinkscales ("Decedent"). Charlie Clinkscales was Decedent's son and serves as the personal representative of Decedent's estate. The claims are brought against the nursing home facility THI of South Carolina at Magnolia Place at Greenville, LLC (d/b/a Magnolia Place – Greenville), as well as Fundamental Clinical and Operational Services, LLC (which Defendants assert provided "clinical services" to the facility), and

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Fundamental Administrative Services, LLC (which Defendants assert provided "administrative services" to the facility), these latter two entities being hereinafter referred to as the "Corporate Defendants."

Plaintiffs allege that while the Corporate Defendants did not provide direct care or services to Decedent, they are indispensable parties and proper Defendants in this matter because their control over the Facility directly affected the quality of care received by Decedent. Plaintiffs allege the Corporate Defendants are related entities[1] of the nursing home and have a significant relationship in the operation and management of the nursing home, and derive significant economic benefits from its revenue.[2] Agency law extends the right to enforce an arbitration award against agents, sister corporations, subsidiaries, and parent/ownership entities of a contracting party "where the interests of such parties are directly related to, if not congruent with, those of a signatory."[3] Plaintiffs allege the Corporate Defendants should be included in the arbitration proceedings if the Court compels arbitration because the Court finds the Corporate Defendants were intended beneficiaries of the Arbitration Agreement as the allegations against them are based on the same facts and are inherently inseparable from the claims made against the Facility.[4]

Decedent was admitted to Magnolia Place-Greenville ("Facility") on January 15, 2011 according to the original Admission Agreement. The Admission Agreement governed the type of care Decedent would receive at the Facility and Decedent's financial obligation to pay for those

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[1] Related entity is an industry term that means the entities are have common ownership, management, and control.

[2] A parent company has been forced to arbitrate under a theory of equitable estoppel even though the parent company was not a party to the agreement when the subsidiary was a party to the agreement. Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000) quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988)) (citing Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993). Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App., 2012).

[3] Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (1993) (citing Isidor Paiwonsky Associates, Inc. v. Sharp Properties, 998 F.2d 145, 155 (3d Cir. 1993)).

[4] Int'l Paper Co. v. Schwabedissen Maschenen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000); see also Pearson v. Hilton Head Hospital, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012).

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services. On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement"[5] provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Decedent's admission to the Facility. The date on this document is January 15, 2011.

A contract called "Arbitration Agreement" was signed on August 30, 2013. This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and Decedent, provides for alternative dispute resolution to any claim a party may bring against another arising out of Decedent's care at the Facility. Defendant has admitted agreeing to arbitrate was not a prerequisite to admission at the Facility or a condition of admission. The Arbitration Agreement was allegedly signed by Charlie Clinkscales on **August 30, 2013**—more than 30 months after the original Admission Agreement was signed.

II. BURDEN OF PROOF

The party seeking to force arbitration has the burden of establishing the existence of a valid arbitration agreement.[6] Of those courts that have decided this question, most have held the proponent of the waiver bears the burden, reasoning that the jury trial right is fundamental, and should not be waived absent clear evidence.[7] A party seeking judicial enforcement of a contract

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[5] "I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties and may not be amended except by written agreement of the parties."

[6] See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008).

[7] See e.g., Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986) ("Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed."); Nat'l Equip. Rental Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (implying that party defending waiver bears burden of proof); Luis Acosta, Inc. v. Citibank, N.A., 920 F. Supp. 15, 18 (D.P.R. 1996) (rejecting a waiver, after concluding that "the burden of proving the waiver of such a fundamental right properly rests upon the party seeking to enforce such a waiver"); Phoenix Leasing Inc. v. Sure Broadcasting, Inc., 843 F. Supp. 1379, 1384 (D. Nev. 1994) ("An informal survey indicates the majority of courts having considered this question followed the approach in Leasing Service [and placed

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bears the burden of persuasion.[8] Defendant carries the burden to prove a valid and enforceable arbitration agreement was signed in a "knowing, voluntary and intentional" capacity. In interpreting a jury trial waiver narrowly, some courts have also emphasized "the basic principle that ambiguities in a contract are construed against the drafting party."[9] When faced with a motion to compel arbitration that is opposed based on whether an agreement to arbitrate has been made between the parties, the court must give to the opposing party the benefit of all reasonable doubts and inferences that may arise.[10] Pro-arbitration policy does not validate a contract that lacks the building blocks of a binding contract. Whether the parties agreed to arbitrate is a question of substantive state law.[11] In Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007), the Supreme Court stated: "Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis."

The parties agree the FAA applies and that it represents pro-arbitration federal policy. "Congress's purpose in enacting the FAA was "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."[12] However, the policy only applies in instances where a valid arbitration agreement has been established. See 9 U.S.C. § 4. ("The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement…is not in issue."). When the parties dispute the existence of a valid arbitration agreement, the presumption in favor of arbitration

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burden of proof on proponent of waiver]."); Smyly v. Hyundai Motor Am., 762 F. Supp. 428, 429 (D. Mass. 1991) (concluding that "since it is a waiver of a constitutional right," proponent of waiver bears burden of showing agreement was made knowingly and intentionally).

[8] Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986).

[9] Nat'l Acceptance Co., 381 F. Supp. at 271).

[10] See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir. 1980).

[11] Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

[12] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

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disappears.[13] The FAA requires state courts enforce arbitration agreements unless the agreement is otherwise revocable under existing legal or equitable principles. 9 U.S.C. § 2. Moreover, while it is true the U.S. Supreme Court has held that the FAA "leaves no place for the exercise of discretion," the Court also cited the FAA's savings provision that denies enforcement of agreements susceptible to the general contract defenses of fraud, duress, and unconscionability.[14] The FAA requires the Court to look to South Carolina law to decide the threshold questions of contract formation.[15] The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.[16] Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.[17] Arbitration agreements may thus be invalidated by generally applicable contract defenses, such as vagueness, indefiniteness, lack of consideration, fraud, duress, or unconscionability. Id. A court should only decide as a matter of law whether the parties entered into an agreement to arbitrate when there is no genuine issue of material fact concerning the formation of the agreement.[18] In determining whether adequate consideration exists in a contract or arbitration agreement under the FAA guided by principles of contract law, we must examine and stay within the confines of the four corners of the instrument.[19]

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[13] Dumais v. American Golf Corp., 299 F.3d 1216, 1220 (10th Cir. 2002).
[14] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).
[15] Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").
[16] See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir. 2001).
[17] Rent-A-Center, West. Inc., 130 S. Ct at 2776; Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").
[18] See Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1283 (10th Cir. 1997).
[19] State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)).

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III. LEGAL REASONING

A. *The Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances.*

The necessary elements of a contract are an offer, acceptance, and valuable consideration.[20] To be legally enforceable, a contract must have an offer, acceptance, consideration, and mutual assent or meeting of the minds on all material terms. It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration.[21] "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."[22] Consideration is a promise to do something that a party has no legal obligation to do or to forbear from doing something it has a legal right to do. A valid contract requires that both sides provide consideration. The Arbitration Agreement is only enforceable if it contains bargained for consideration and a mutuality of obligations between its parties. The Court finds these essential contract formation requirements are not met here. Many of the arguments Defendant raises in support of the Arbitration Agreement are misguided because they conflate the Arbitration Agreement and the Admission Agreement which, for the reasons discussed above, are distinct documents that do not merge.

The Arbitration Agreement was signed on August 30, 2013, but the Admission Agreement was signed on January 15, 2011.[23] Thus, the Admission Agreement and Arbitration Agreement

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[20] Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003).
[21] Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984).
[22] Plantation A.O., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)).
[23] No family member had Power of Attorney when Mozana was admitted on January 15, 2011.

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are separate contracts that do not merge.[24] Our Supreme Court in Coleman refused to apply the merger doctrine when language in the contracts "recognized the 'separateness' of the admission and arbitration agreements."[25] Our Supreme Court went further in Thompson and Hodge applying Coleman and providing further examples of factors demonstrating "separateness" and preventing merger including the fact that the Arbitration Agreement was not necessary for admission and that *there was no bargain for exchange nor consideration to the Arbitration Agreement.*[26]

An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. "this Admission Agreement *or* in the Arbitration Agreement."[27] In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "Arbitration Agreement" atop its first page, these factors further "indicate the parties' intent for it to stand by itself as an independent contract."[28] Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home.[29]

The "Admission Agreement" in this case contains an "Entire Agreement" provision stating that "this Agreement represents the entire agreement" related to admission to the Facility. Thus, "Agreement" is a defined term in this contract and, as stated in the contract's opening paragraph, is limited to the "Admission Agreement," not the separate Arbitration Agreement. Like in Hodge, the separate contracts have separate signature pages and separate pagination—i.e. the Admission

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[24] See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014).

[25] 407 S.C. at 355, 755 S.E.2d at 455.

[26] 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

[27] Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

[28] Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

[29] Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

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Agreement ends with "Page 12 of 12" while the Arbitration Agreement is "Page 1 of 1." As in Thompson, the arbitration agreement states its independence with its "Arbitration Agreement" title. To the extent there are any ambiguities in this contract language, they must be resolved against merger.[30] The Facility was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired. In sum, the Facility cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit. Where a contract lacks valuable consideration, the contract will be deemed unenforceable. No valuable consideration exists in this case. There was no consideration given for Charlie Clinkscales to sign the Arbitration Agreement, because Mozana Clinkscales had already been admitted and received care.

In its most elemental sense, the doctrine of mutuality of obligation means that unless both parties to a contract are bound by its terms, neither is bound. Mutuality of obligation in bilateral contracts is but another way of stating that consideration is essential. 25 Richard Lord, Williston on Contracts § 67:42 at 332 (4th ed.2002)). Mutuality becomes a nonissue when consideration has otherwise been conferred upon one of the parties. There exists a lack of mutuality that makes the Arbitration Agreement unenforceable. The mutuality requirement is satisfied if each party has given sufficient consideration for the other's promise—something of value. Valuable consideration for a contract consists of some right, interest, profit or benefit accruing to one party or undertaken by the other. Where there is a mutual promise to arbitrate, there must be additional consideration. The mutual promise to arbitrate is illusory and of no benefit to Decedent or Plaintiff. The agreement provides that claims primarily brought by patients, such as those for medical malpractice, claims arising from the provision of services by defendant, and

[30] Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685 (citing Coleman).

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elder abuse claims are to be arbitrated. Defendants argue the Arbitration Agreement meets the mutuality requirement because both sides are forced to arbitrate. However, while the Arbitration Agreement purports to require arbitration for any "dispute over care," the reality is that this obligation falls almost exclusively on the patient. It is virtually inconceivable that Defendants would sue its patient regarding a dispute over care. Since admission is unavailable as a "direct benefit" to support estoppel, Defendants would be required to point to some benefit Mrs. Clinkscales received from the Arbitration Agreement alone. Any such attempt to find a benefit would have been futile given the Court of Appeals' unambiguous ruling in Thompson which held that "any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial."[31] The contract is also silent as to any consideration exchanged between the parties. The Arbitration Agreement itself contains insufficient consideration in the form of a mutual exchange of promises to arbitrate. There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the Admission Agreement. Admission can be the "direct benefit" that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract.

In sum, Defendants have not met their burden to prove merger, consideration, or any other benefit for the Arbitration Agreement. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a single contract. If the jury waiver was not a precondition to admission, then it fails for lack of consideration. The Court finds it would

[31] 416 S.C. at 60, 784 S.E.2d at 688 (emphasis added).

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be inconsistent for Defendants to argue that agreeing to arbitrate was not consideration for the admission but, on the other, argue that the admission was valuable consideration to support arbitration. For the proposed arbitration contract to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party, when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself.

The Arbitration Agreement was not part of the Admission Agreement and thus, separate consideration was required for the Arbitration Agreement to be valid. See Thompson v. THI of N.M. at Casa Arena Blanca, LLC, No. CIV 05-1331 JB/LCS, 2006 WL 4061187, at *12 (D.N.M. Sept. 12, 2006); THI of N.M. at Vida Encantada, LLC v. Archuleta, No. CIV 11-399 LH/ACT, 2013 WL 2387752 (D.N.M., 2013).

Plaintiffs also rely upon the fact that the federal government at the time prohibited a nursing home from requiring a current resident to sign an arbitration agreement as a condition of continued residency, relying on a policy set forth by the Center for Medicaid and State Operations ("CMS") on January 9, 2003. The memorandum states: "A current resident is not obligated to sign a new admission agreement that contains binding arbitration. Federal regulations, at 42 C.F.R. § 483.12(a)(2) limit the circumstances under which a facility may discharge or transfer a resident."

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The Court is further persuaded by Plaintiff's argument that to construe admission as valid consideration to support the Arbitration Agreement would be inconsistent with federal law. The parties agree Decedent was a Medicare and Medicaid beneficiary while residing at Defendants' facility and that the facility was billing and accepting payment from Medicare and Medicaid for Decedent's care. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full and *expressly forbid* acceptance of additional consideration for nursing home services. See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15. Such facilities must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan…any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility." 42 U.S.C. § 1396r(c)(5)(A)(iii).

It is undisputed that this Federal Medicare and State Medicaid law applies to the Defendants' nursing home in this case. The fact is if a facility were to charge an additional five dollar fee to Medicaid beneficiaries as a condition for any reason, this would be strictly prohibited. Therefore, a facility should not be able to demand a waiver of a constitutional right as the price of admission. See Berkebile v. Outen, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993) (noting general rule that courts will not enforce a contract which is "violative of public policy, statutory law, or provisions of the Constitution").

B. *The Arbitration Agreement does not govern the wrongful death claim*

The Court further finds the Arbitration Agreement should not include the wrongful death cause of action because no one with legal authority could enter an agreement that waives the right to a jury trial on behalf of Decedent's statutory beneficiaries. Only the court-appointed personal representative can waive the beneficiaries' rights.

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A wrongful death claim is separate from a Decedent's personal injury/survival claim and an individual's wrongful death beneficiaries are defined by statute. S.C. Code Ann. § 15-51-20 (1977). South Carolina law provides that a wrongful death claim exists for the statutory beneficiaries, and that such claims are distinct and separate claims from those that are brought under the survival statute.[32] It appears the question of whether a wrongful death action is subject to mandatory arbitration pursuant to the terms of a contract is one of first impression in South Carolina, and there is a split in authority in other jurisdictions. This Court finds persuasive the reasoning of those jurisdictions that have held that an arbitration agreement executed by a decedent cannot bind the decedent's statutory beneficiaries who were not parties to the agreement.[33]

For example, in Ping v. Beverly Enterprises, the Supreme Court of Kentucky held:

> [W]e are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. It is something else entirely, however, to say that incidental beneficiaries of a contract-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants.

376 S.W.3d 581, 599-600 (Ky. 2012).

In line with these principles, the Court finds the Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the

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[32] See Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914).

[33] See e.g., Woodall v. Avalon Core Ctr.-Fed. Way, LLC, 231 P.3d 1252, 1258 (Wash. App. Div. 1 2010) (refusing to compel arbitration of wrongful claim because wrongful death claim never belonged to decedent); Lawrence v. Beverly Manor, 273 S.W.3d 525, 528-29 (Mo. 2009) (en banc); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007) (concluding decedent "could not restrict his beneficiaries to arbitration of their wrongful death claims, because he held no right to those claims"); Bybee v. Abdulla, 189 P.3d 40, 43 (Utah 2003) ("a decedent does not have the power to contract away the wrongful death action of his heirs").

Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries. Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, South Carolina's federal district court has analyzed this issue in the damages context.[34] Boyle concluded wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims from that of the survival action.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings, is DENIED.

AND IT IS SO ORDERED.

Signature to Follow

[34] Boyle v. U.S., 944 F.Supp.2d 577 (D.S.C. 2012).

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Greenville Common Pleas

Case Caption: Mozana Clinkscales , plaintiff, et al vs. Fundamental Clinical And Operational Services LLC , defendant, et al

Case Number: 2018CP2305088

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No.: 2018-CP-23-00119 & 2018-CP-23-00120
	)	
Marlene Wilson, Individually and as Personal Representative of the Estate of Kenneth Wilson,	)	
	)	
Plaintiff,	)	**ORDER**
	)	
v.	)	
	)	
NHC Healthcare/Mauldin, LLC, National Healthcare Corporation, NHC/OP, LP, Bon Secours St. Francis Health System, Inc., Bon Secours Health System, Inc.,	)	
	)	
Defendant(s).	)	

This matter came before the Court on Defendants National Healthcare Corporation' and NHC/OP, LP's (hereinafter "Nursing Home Defendants") Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda for the reasons more fully set forth below, the Court hereby denies the Defendants' Motion to Dismiss and to Compel Arbitration.

BACKGROUND

This matter arises out of two civil actions – a survival action and a wrongful death action. Both actions involve allegations of nursing home negligence and corporate negligence resulting in the death of Kenneth Wilson (hereinafter "Decedent"). Marlene Wilson (hereinafter "Daughter") was Decedent's daughter and serves as Personal Representative of Decedent's estate. On April 6, 2015, Decedent was admitted to NHC Mauldin for short-term rehabilitation after undergoing a hip arthroplasty at St. Francis

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Hospital. Plaintiff alleges that as a result of Nursing Home Defendants' negligence, Decedent developed necrotic and infected bedsores, became dehydrated, suffered from nutritional compromise, and developed multiple infections which went untreated, all of which Plaintiff alleges caused Decedent's injuries and death.

At the time of admission, Daughter signed an Agreement to Arbitrate and Waive Jury Trial ("Arbitration Agreement"). The Arbitration Agreement was signed by Jennifer Balon for "The Center" and by Daughter for "The Patient". The Arbitration Agreement provides that the parties agree to follow the dispute resolution procedures set forth in the Arbitration Agreement which include the waiver of a jury trial and the requirement that the parties submit to binding arbitration all disputes against each other which exceed an amount in controversy over $7,500.00.

Plaintiff filed the Notice of Intent to File Suit on September 14, 2017. The parties engaged in the mandatory pre-suit mediation on December 28, 2017. Plaintiff then filed the Summons and Complaint on January 5, 2018 and served same. Nursing Home Defendants filed this Motion to Dismiss and to Compel Arbitration on February 28, 2018. Nursing Home Defendants contend that this Arbitration Agreement requires that this Court order that this case be dismissed and that the claims be submitted to binding arbitration in accordance with the Arbitration Agreement. Plaintiff contends that the Arbitration Agreement is unenforceable under state contract law and this Court agrees for the various reasons set forth hereinbelow.

LEGAL ANALYSIS AND CONCLUSIONS

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance

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Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,78,749 S.E.2d 139, 144 (Ct. App. 2013). Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

I. Daughter had No Authority to Sign the Arbitration Agreement for Decedent

Because Decedent did not sign the Arbitration Agreement, Daughter was required to have authority to execute the Arbitration Agreement for the Arbitration Agreement to be enforceable. Daughter had no such authority. The legal consequences of an agent's actions can only be attributed to the principal when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 598 S.E.2d 717, 359 S.C. 635, 642 (Ct. App. 2004). In the present case, neither actual or apparent authority exists for Daughter.

A. No Actual Agency/Authority

While it is true that Daughter held a "Power of Attorney" on behalf of Decedent, this Power of Attorney did not confer the necessary authority to execute an arbitration agreement on Decedent's behalf. This document is titled "Power of Attorney" and is not

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identified a "General Durable Power of Attorney." More importantly, the document does not confer sufficient authority to enter into contracts generally, to enter into releases on behalf of Decedent, to waive the constitutional right to a jury trial, nor does it include the "catch all provision giving the attorney-in-fact the authority 'to sign any and all releases or consent required.'" Sovereign Healthcare of Tampa v. Schmitt, 195 So. 3d, 1175 (Fla. Dist. Ct. App. 2016).

The powers and authorities which Daughter held were specifically delineated in the Power of Attorney. These powers granted to Daughter the authority to make decisions regarding financial matters and decisions regarding healthcare.

This analysis is akin to that in Hodge v. UniHealth Post-Acute Care of Bamberg, 2018 S.C. App. LEXIS 13. As noted in Hodge, "'This limited range of acts performed on the [decedent]'s behalf suggest, at most, [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that.'" Id at 29 quoting Dickerson v. Longoria, 95 A.2d 721, 743, 414 Md. 419 (2010). The Hodge court further noted that the authority to sign healthcare documents does not include the authority to sign an arbitration agreement. Hodge at 40. Our courts have held a healthcare power of attorney does not provide authority to sign an arbitration agreement. Hodge v. UniHealth Post-Acute Care of Bamberg, 2018 S.C. App. LEXIS 13; Thompson v. Pruitt Corp., 784 S.E.2d, 679, 416 S.C. 43, 55 (Ct. App. 2016), *cert. denied*, S.C. Sup. Ct. Order dated Dec. 2, 2016.

Furthermore, the South Carolina Supreme Court has held that "The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby

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waiving the principal's right of access to the courts and to a jury trial." Hodge at 37 quoting Thompson at 55, 784 S.E.2d at 686. As previously indicated, this Power of Attorney did not have the "catch all" language of many general powers of attorney and does not encompass the executing of an agreement to resolve legal claims by arbitration and waiving a jury trial, but rather, deals with the limited circumstances enumerated therein of making financial or healthcare decisions for Decedent. Therefore, no actual authority existed for Daughter to sign the Arbitration Agreement.

B. No Apparent Agency/Authority NAAA

Daughter did not have apparent authority/agency to execute the Arbitration Agreement on behalf of the Decedent. Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations". Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649, S.E.2d 488, 491 (2007). Apparent authority exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that a person of ordinary prudence, reasonably familiar with business usages and custom is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption. Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 399 S.E.2d 430 (Ct. App. 1990), *rev'd on other grounds*.

South Carolina law requires that to prove apparent authority, the Defendants must show "… (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made

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by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists.

Nursing Home Defendants have presented no evidence that Decedent represented, implicitly or explicitly, to the Nursing Home Defendants that Daughter had the authority to enter into the Arbitration Agreement on his behalf. The Affidavit presented by Plaintiff reflects that Decedent was not present when Daughter signed the Arbitration Agreement as he was still in the hospital. The Affidavit further reflects that Decedent was never aware that Daughter had signed the Arbitration Agreement and never authorized Daughter to sign such contracts or agreements. Further, based upon the Affidavit of Daughter and the records submitted as exhibits at the hearing, Decedent was confused from the effects of the anesthesia and had "moderate" mental impairment.

It should further be noted that despite the fact that Decedent's mental impairment improved to "cognitively intact", according to Nursing Home Defendants' own records during his admission, Defendants never requested that Decedent sign the Arbitration Agreement personally. Further, the Arbitration Agreement does not reflect any authority which Daughter had to execute such agreement despite the Arbitration Agreement's own requirement that any such authority be delineated.

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Nursing Home Defendants must also show a detrimental change of position. It should also be noted that the Arbitration Agreement is separate from the Admissions Agreement. The facility cannot show that it changed its position for the worse as required to prove any apparent authority/agency as reflected in Hodge.

Because Decedent did not consciously or impliedly represent that Daughter was his agent and because there was no change of position by the Nursing Home Defendants, Nursing Home Defendants cannot show that Daughter had apparent authority/agency to execute the Arbitration Agreement on behalf of Decedent.

II. The Arbitration Agreement is Unenforceable Against the Decedent's Wrongful Death Statutory Beneficiaries

It is the conclusion and order of this Court that the Arbitration Agreement is unenforceable for the above-stated reasons. However, even if Daughter had actual or apparent authority/agency to sign the Arbitration Agreement on behalf of Decedent, the Arbitration Agreement is unenforceable against the Decedent's wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries.

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement by its own terms is an agreement between "Kenneth Wilson ('patient')" and "NHC Healthcare/Mauldin, LLC ('center')". While at some point during Decedent's admission to the facility, he might have had the authority to

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bind himself and his claims to arbitration but was never given the chance. However, even if Decedent had agreed to arbitration, he did not have the legal authority to bind his statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are Daughter on behalf of Decedent and NHC Healthcare/Mauldin, LLC. No other persons are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims.

However, even if the Arbitration Agreement did contemplate the wrongful death statutory beneficiaries' claims, Decedent and/or Daughter had no authority to waive the statutory beneficiaries' claims. Daughter signed the Arbitration Agreement in her *individual capacity*. However, as the Hodge court noted, actions taken by Daughter in her *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors. Daughter's Affidavit reflects that other statutory beneficiaries exist in this case.

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, 944 F.Supp.2d 577 (D.S.C. 2012). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

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Many other states have come to this same conclusion, Daniels v. Sunrise Senior Living, Inc., 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2013) (Wrongful Death claims not bound to arbitration), Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by arbitration agreement.) As previously discussed, the only parties executing this Agreement were Daughter purportedly on behalf of Decedent and employee as an Agent for NHC Mauldin. NHC Mauldin would contend that this agreement is binding on the non-signatory statutory beneficiaries simply because it contends the Arbitration Agreement says so.

However, as the Supreme Court of Kentucky said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises, Inc.:

> [A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third-party are appropriately subjected the contract's arbitration provisions, at least where the tort and contract are significantly intertwined. See, In re Weekley Homes, L.P., 180 S.W. 3d 127 (Tex. 2005) (negligent repair claim by homeowner's daughter against contractor was subject to repair contract's arbitration clause because daughter, although a non-party, was direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contact-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely be being mentioned in the contract as potential claimants. This is

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> what Beverly purports to do. Arbitration is a matter of contract, however, it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79,83, 123 S. Ct. 588, 154 L. Ed.2d 491 (2002) ("[A]rbitration 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", Citation and internal quotation marks omitted.) Since Beverly's theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a "third party beneficiary" of the arbitration agreement, we reject it out of hand.

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (KY 2012).

Likewise, NHC-Mauldin's mentioning of "employees, agents, representatives, affiliates, fiduciaries, medical directors, officers, directors, governing bodies, management companies, insurers, attorneys, predecessors, successors, assigns, third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated, arising out of or in any way related or connected to the patient's stay and the care provided at the Center", as being bound by the Arbitration Agreement does not make it so. It is no more than an *ipse elixir* which Defendants expect this Court to embrace. The law simply does not permit a party to cut off the rights of a non-signatory to an agreement who receives no benefit thereunder.

The wrongful death claims are separate claims apart from the Decedent's claims. According to South Carolina's Wrongful Death Act:

> "Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person

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> who would have been liable, if death had not ensued shall be liable to an action for damages."

South Carolina Code Annotated §15-51-10 (1977)

> The wrongful death beneficiaries are as follows:
>
> "Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused."

South Carolina Code Annotated §15-51-20 (Supp. 2001)

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of the Decedent, society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989).

The wrongful death claim is a separate claim from the claims a decedent might bring on his own behalf under the survival statute. In Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated "necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions." Id. at 31. See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court's ruling noting that survival claims are independent of wrongful death claims), Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

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The Pennsylvania Superior Court in Pisano v. Extended Homes, Inc., operating under the fictitious name Belaire Health 84 Rehabilitation Center, 2013 PA Super 232, 77 A.3d 651, 662 (PA 2013) affirmed the trial court decision that the nursing home arbitration agreement did not apply to the statutory beneficiaries' wrongful death claim. The Court noted the wrongful death and survival actions are not derivative of each other but are flowing from the same underlining tortious conduct. Like the South Carolina statute, Pennsylvania's wrongful death statute provides that the right of action exists only for the benefit of the spouse, children, parents, or parents of the deceased. Id. at 656. The Pennsylvania Court further held that since the wrongful death claim is independent of the survival action and because the wrongful death statute does not characterize the wrongful death claim as that of a third-party beneficiary, that the trial court properly refused to compel arbitration to the non-signatory wrongful death beneficiaries who were not parties to the arbitration agreement.

Likewise, in Bybee v. Abdulla, M.D., 189. P.3d 40, 2008 UT 35 (Utah, 2008), the Supreme Court of Utah held that an agreement to arbitrate that was signed by the decedent cannot extend to the statutory beneficiaries of a wrongful death claim. The Utah Supreme Court noted that certain defenses from the decedent's personal injury action may be raised against the heirs of a wrongful death action such as comparative negligence and statutes of limitations as key common characteristics. However, as the Supreme Court of Utah noted, both of these defenses go to the viability of the underlying personal injury action. The Court further stated that "by contract, an agreement to bind heirs to arbitrate disputes does not implicate the viability of underlying claims." Id. at 47, citing Horwich v. Superior Court, 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P. 2d 927, 935 (1999). The Utah Supreme Court

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went on to note that "we have never intended to suggest, however, that because Decedent is the master of his claim he may by contract expose his unwilling heirs to any imaginable defense." Bybee v. Abdulla, M.D. at 46. The Utah Supreme Court further held that the defenses against the decedent's claim which are less likely to be found enforceable against the heirs' claims in a wrongful death action "are contract provisions that purport to affect the rights of heirs that do not affect the existence of the decedent's personal injury claim during his lifetime. The arbitration agreement...falls squarely within this category and is, therefore, unenforceable against the heir." Id. at 47.

The Court of Appeals in Washington in Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 231 P. 3d 1252 (Wash. App. Div. 1 2010) held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." Id. quoting Satomi Owners Association v. Satomi, LLC, 167 Wash. 2d 781, 225 P.3d 213 (2009). The Washington Court of Appeals further noted that the wrongful death claims asserted in that case were not on behalf of the estate just as South Carolina's wrongful death claims are not on behalf of the estate. The Washington Court of Appeals further discussed the Supreme Court of Ohio's ruling in Peters v. Columbus Steel Casting Co., 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), wherein the Supreme Court of Ohio held that the wrongful death claim of a spouse who was Administrator of her husband's estate was not subject to the Decedent's arbitration agreement. The Washington Court of Appeals in discussing Peters, stated "In sum, the decedent's agreement was an agreement 'to arbitrate his claims against the company,' and thus the provision in the agreement binding the decedent's heirs applied to a survival action. But the decedent could not 'restrict his beneficiaries to arbitration of their

wrongful death claims because he held no right to those claims." Woodall v. Avalon Care Center - Federal Way, LLC at 929. In the Washington Court of Appeals' analysis, the Court concluded that the wrongful death beneficiaries could not be bound to the arbitration agreement which they did not sign.

Therefore, even if Daughter had actual or apparent authority/agency to execute the Arbitration Agreement, the Arbitration Agreement did not include the wrongful death statutory beneficiaries' claims within the scope of the Arbitration Agreement, nor did Decedent and/or Daughter have authority to bind the wrongful death statutory beneficiaries' claims to the Arbitration Agreement. As a result, the Arbitration Agreement cannot reach the claims of the wrongful death statutory beneficiaries.

WHEREFORE, for the reasons stated herein, the Court denies Defendants' Motion to Dismiss and Motion to Compel Arbitration.

IT IS SO ORDERED.

_____
The Honorable Michael G. Nettles
Presiding Judge

Greenville, South Carolina
Date: _____

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Greenville Common Pleas

Case Caption: Marlene Wilson , plaintiff, et al vs. NHC Healthcare/Mauldin LLC , defendant, et al

Case Number: 2018CP2300120

Type: Order/Other

So Ordered

s/ Michael Nettles

IN THE STATE OF SOUTH CAROLINA) COUNTY OF CHARLESTON)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO: 2017-CP-10-5984
VICTOR RAWL as Personal Representative of the ESTATE OF VERA BROWN, Plaintiff, v. WEST ASHLEY REHABILITATION AND NURSING CENTER-CHARLESTON, SC, LLC d/b/a HEARTLAND OF WEST ASHLEY REHAB AND NURSING CENTER, Defendant.	ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION

This matter came before the court on March 21, 2018 on Defendant's Motion to Dismiss and Compel Arbitration. For the reasons set forth below, Defendant's Motion to Dismiss and Compel Arbitration is **DENIED.**

BACKGROUND FACTS

Vera Brown was admitted to Defendant's facility on August 25, 2014. Upon admission, Ms. Brown was asked to sign admission paperwork as well as the Arbitration Agreement, which was separate from the admission paperwork. The Arbitration Agreement was not necessary for admission. Additionally, there was no bargain for exchange nor consideration in Ms. Brown's agreement to the Arbitration Agreement. Ms. Brown passed away approximately four (4) days after her admission into Defendant's facility, while under Defendant's care.

LEGAL ANALYSIS

While there is a presumption in favor of arbitration agreements, this presumption only applies where there is a valid arbitration agreement. EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v.

Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 D.E.2d 581 (2003). However, not all arbitration clauses are enforceable. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreement. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'"). Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

A. The Arbitration Agreement lacks valuable consideration and is unenforceable where there was no additional consideration in Plaintiff's agreement to the Arbitration Agreement and future promises are not valuable consideration.

The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d 161, 166 (S.C. 2003) "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)). Where a contract lacks valuable consideration, the contract will be deemed unenforceable.

Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Riedman Corp. v. Jarosh, 290 S.C. 252, 253, 349 S.E.2d 404, 405 (1986); see also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274-5 (4th Cir. 1997). However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confides of the four corners of the instrument. State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). Therefore, our courts must assess whether the arbitration agreement itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate.

In the case at hand, it is clear that the Arbitration Agreement lacks valuable consideration. Paragraph 3 of the Arbitration Agreement states that the FAA applies to the Agreement. Therefore, we must look at state law to decide the threshold question of contract formation and whether consideration exists. Munoz, 343 S.C. at 542 S.E.2d 360, 364; Towles, 338 S.C. at 37, 524 S.E.2d at 844; Rent-A-Center, West, Inc, 561 U.S. at 130 S. Ct. at 2776, 177 L.Ed.2d 403; Simpson, 373 S.C at 14, 644 S.E.2d at 663. Upon admission Ms. Brown was asked to sign the admission paperwork. Ms. Brown then signed the Arbitration Agreement separate from the admission paperwork. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. In fact, the Arbitration Agreement states "[t]he patient will receive services in this center whether or not this agreement is signed." Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party,

when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself. Consequently, where the Arbitration Agreement is guided by the FAA and principles of contract law - the Arbitration Agreement is unenforceable where the Arbitration Agreement lacks valuable consideration.

B. Plaintiff's agreement to the Arbitration Agreement was unconscionable in the absence of meaningful choice on part of Plaintiff due to the one-sided contract provisions, the relative disparity in the parties' bargaining power, and the Defendants relative sophistication over Plaintiff's decedent.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the agreement. S.C. Code Ann. § 36–2–302(1) (2003).

In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that courts must determine whether a contract is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. See Carlson v. General

Motors Corp., 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," id. at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17A Am.Jur.2d Contracts § 279 (2004))).

In the case at hand, it is clear that the Arbitration Agreement is unconscionable because Vera Brown lacked absence of meaningful choice and the terms in the Arbitration Agreement are oppressive, one-sided terms. Vera Brown was admitted into Defendants' facility on August 25, 2014. She passed away at Defendants' facility four (4) days later on August 29, 2014. Upon admission the standard Arbitration Agreement form was presented to an ill Vera Brown on a take-it-or leave it basis. Ms. Brown did not contribute to the drafting of the Arbitration Agreement or possess the bargaining power to negotiate the terms of the Arbitration Agreement. See Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms). Nevertheless, finding a contract to be one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable. Lackey, 330 S.C. at 395, 498 S.E.2d at 902.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). In determining whether there

is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power; the parties' relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id.

In the case at hand, there was an inherent disparity in bargaining power between the parties as this was a transaction between an ill patient who died four (4) days after executing the Arbitration Agreement and a commercial entity. Vera Brown was transferred from the hospital via ambulance to Defendants' facility with diagnosis that included chronic kidney disease, Anemia, dementia, urinary tract infection, upper respiratory disease, acute kidney failure, congestive heart failure, hypertension, weakness, and difficulty in walking. She was also marked as a fall risk.

Furthermore, the arbitration agreement was inconspicuously buried in the admission paperwork and "hastily" presented to Ms. Brown for her signature. This is evident by the "x's" where Ms. Brown was asked to print and sign her name, and date. Moreover, Vera Brown's injuries include death as this is a wrongful death claim.

Moreover, we must also consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences. The loss of the right to a jury trial is an obvious result of arbitration. However, this particular arbitration clause also required Vera Brown to forego certain remedies that were otherwise required by statute. While certain phrases are in bold, the arbitration clauses in their entirety are written in the standard small print, and embedded in paragraphs one (1) through fourteen (14). The Court cannot ignore the inconspicuous nature of these provisions, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Ms. Brown by law.

Therefore, this Court denies Defendant's Motion to Dismiss and Compel Arbitration where the Arbitration Agreement is guided under the FAA and principles of contract law because the Arbitration Agreement lacks valuable consideration and was unconscionable.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss and Compel Arbitration is **DENIED.**

IT IS SO ORDERED!

Dated this 27 day of April 2018

The Honorable Dianne Goodstein
Presiding Judge, Ninth Judicial Circuit

RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT
(READ CAREFULLY)

Pursuant to the terms of this Resident and Facility Binding Arbitration Agreement (this "Arbitration Agreement"), it is understood and agreed by _____ (the "Facility") and _____ (the "Resident" or "Resident's Authorized Representative", hereinafter referred to as the "Resident") that any legal dispute, controversy, demand or claim (hereinafter collectively referred to as "claim" or "claims") that arises out of or relates to that certain Resident Admission Agreement (the "Resident Admission Agreement") executed by the Resident and the Facility, or any service or health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the Federal Arbitration Act (a copy of which is attached hereto and incorporated into this Arbitration Agreement), and not by a lawsuit or resort to court process except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards.

The agreement to arbitrate contained in this Arbitration Agreement includes, but is not limited to, any claim for payment, nonpayment or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Resident Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract. However, this agreement to arbitrate shall not limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility or any appropriate state or federal agency.

The damages awarded, if any, in an arbitration conducted pursuant to this Arbitration Agreement shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action, including any prerequisites to, credit against or limitations on, such damages.

It is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.

All claims based in whole or in part on the same incident, transaction, or related course of care or services provided by the Facility to the Resident shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Facility or the Resident, and the claim is not presented in the arbitration proceeding.

Any notice required pursuant to this Arbitration Agreement shall be deemed given (i) upon hand delivery; or (ii) three (3) days after deposit in U.S. mail via certified mail, return receipt requested.

EXHIBIT
3

This Arbitration Agreement is effective as of the date of admission of the Resident to the Facility. VH **(resident's initials).**

The Resident understands that (1) he/she has the right to seek legal counsel concerning this Arbitration Agreement, (2) the execution of this Arbitration Agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (3) this Arbitration Agreement may be rescinded by written notice given to the Facility by the Resident within thirty (30) days of signature. If not rescinded within thirty (30) days, this Arbitration Agreement shall remain in effect for all care and services rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility.

THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT THEY ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY.

Viola Hackworth POA 11/3/15
Resident/Representative Signature / Date

Lucy Caruso 11-3-15
Facility's Authority Agent / Date

Viola Hackworth, POA
Resident/Representative Printed Name

Lucy Caruso,
Admissions Director
Facility's Authorized Agent Printed Name

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
VIOLA M. HACKWORTH, as Personal Representative of the Estate of EUGENE BOLES A/K/A EUGENE N. BOLES, deceased,	)	C/A No. 2019-CP-07-00433
Plaintiff,	)	
	)	
versus	)	**MEMORANDUM IN SUPPORT OF "MOTION TO STAY ACTION AND COMPEL ARBITRATION; IN THE ALTERNATIVE MOTION FOR NONJURY TRIAL; AND MOTION FOR PROTECTIVE ORDER"**
	)	
BAYVIEW MANOR, LLC d/b/a BAYVIEW MANOR, EPIC MGT, LLC, EPIC GROUP, LIMITED PARTNERSHIP, TEDDIE SIMMONS; JOHN DOES, and RICHARD ROE CORPORATIONS,	)	
Defendants.	)	

Defendants Bayview Manor, LLC d/b/a Bayview Manor ("Bayview"), Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations ("Defendants") submit this Memorandum in Support of their "Motion to Stay Action and Compel Arbitration; in the Alternative Motion for Nonjury Trial; and Motion for Protective Order" filed on April 8, 2019.

FACTUAL BACKGROUND

On October 3, 2012, Eugene N. Boles ("Mr. Boles") executed a General Durable Power of Attorney ("Power of Attorney") appointing his sister Viola M. Hackworth ("Mrs. Hackworth" or "Plaintiff") as his attorney-in-fact. Mr. Boles' Power of Attorney was recorded in the Beaufort County Probate Court on October 10, 2012 and specifically gave Plaintiff the power to "establish where [Mr. Boles] shall reside, including the exact physical location, and the city, county, and state

of residence and, if necessary, to make all necessary arrangements for [Mr. Boles] at any hospital, convalescent institution nursing home or similar establishment…" Power of Attorney, p. 6, Section D.1.

On November 2, 2015, after suffering a stroke in October 2015, Mr. Boles was admitted to Bayview. As a part of the admissions process to Bayview, Mrs. Hackworth executed on behalf of Mr. Boles an ADMISSION AGREEMENT (attached as **Exhibit A**) and a separate RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT (attached as **Exhibit B**).

On June 6, 2019, for the first time, Plaintiff alleged in a filing with this Court that the handwritten dates appearing immediately beside Plaintiff's signatures on the ADMISSION AGREEMENT and RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT are incorrect. However, Plaintiff's Affidavit fails to dispute or deny that:

- Plaintiff is Mr. Boles' attorney-in-fact;
- Plaintiff was involved in the process to admit Mr. Boles to Bayview;
- Plaintiff specifically approved of Mr. Boles' admission to Bayview;
- Plaintiff actually signed the ADMISSION AGREEMENT and RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT; or
- the scope of Mr. Boles' Power of Attorney granted Plaintiff the authority to execute the ADMISSION AGREEMENT and RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT on Mr. Boles' behalf.

The ADMISSION AGREEMENT contained a Waiver of Jury Trial and an Optional Arbitration Clause which mandate the arbitration of any action, dispute, claim or controversy of any kind. (Exhibit A, p. 23 and p. 25). The Optional Arbitration Clause has a sentence that is highlighted in bold font and reads: "**OPTIONAL: If the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only."** (Exhibit A, p. 25) (emphasis in original). Plaintiff did not initial or mark an X by the Optional Arbitration Clause, and thus agreed

to resolve all disputes by binding arbitration. Plaintiff signed the ADMISSION AGREEMENT and initialed every single page of the 11-page document.

The RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT states that "any legal dispute, controversy, demand or claim . . . shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the Federal Arbitration Act." (Exhibit B, p. 1, paragraph 1). Plaintiff signed the RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT.

Christy Drinkard ("Mrs. Drinkard") is Bayview's current Administrator and has submitted an Affidavit to this Court (attached as **Exhibit C**). Other than to claim the handwritten dates next to Plaintiff's signatures on the ADMISSION AGREEMENT and RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT are incorrect, Plaintiff has not disputed any other portion of Mrs. Drinkard's Affidavit. As Bayview's Administrator, Mrs. Drinkard is required to have knowledge about Bayview's business operations, which includes reviewing its past business records. Mrs. Drinkard has sworn to this Court that:

- Bayview was a Medicare certified facility in 2015 and 2016 and made payments to Bayview in 2015 and 2016;
- The South Carolina Medicaid Program is partially funded by the federal government, and it made payments to Bayview in 2015 and 2016;
- Bayview's requests for private insurance payments for services rendered to Bayview residents were sent in hard copy form via U.S. Mail to various private insurance companies, and insurance payments were issued by these insurance companies;
- The private insurance companies' offices that processed payments to Bayview are located in various states outside of South Carolina, and they made payments to Bayview in 2015 and 2016;
- The majority of food served to Bayview residents in 2015 and 2016 was supplied by US Foods from Charlotte, North Carolina;

- In 2015 and 2016, Bayview utilized (1) Select Labs (Greensboro, NC) for its lab services; (2) Mobilex (Baltimore, MD) for its radiology services; (3) Airgas (Atlanta, GA) for its oxygen rental and supplies; (4) Briggs (Des Moines, IA) for its medical forms; (5) Reliable (Asheville, NC) for the rental of specialty beds and pressure relief mattresses; (6) Ecolab (New York, NY) for its laundry supplies; (7) Quill Philadelphia, PA) for business office supplies; and (8) other monthly services from outside South Carolina, including American Healthtech (Ridgeland, MS);

- Bayview had 170 licensed beds available in 2015 and 2016 for patient care, all of which were certified by, and participated in, the Medicare and Medicaid programs;

- The ADMISSION AGREEMENT and RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT are a part of the admissions package and were kept in the course of a regularly conducted business activity, and it was the regular practice of Bayview to have these documents executed at or soon after the time of a resident's admission to the facility;

- There is no written notice in Mr. Boles' file from Mrs. Hackworth, or anyone else, seeking to rescind these agreements;

- The Admissions Director for Bayview at the time of Mr. Boles' admission was Lucy Caruso, and Mrs. Caruso is no longer an employee of Bayview;

- Part of Mrs. Caruso's role as Admissions Director was to meet with incoming residents and/or their families to explain the admissions process, the admissions paperwork, and oversee the execution of the ADMISSION AGREEMENT, RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT, and other admissions paperwork;

- Mrs. Caruso executed the ADMISSION AGREEMENT and RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT on behalf of Bayview, and she was authorized to do so in her position as Admissions Director;

- Plaintiff was the designated attorney-in-fact for Mr. Boles, and Mr. Boles' Power of Attorney was executed more than three (3) years prior to Mr. Boles' admission to Bayview;

- Bayview has possession of medical records, copies of which it can make available to the Court should it so desire, indicating Mr. Boles had a history of stroke, left side hemiparesis, dementia, cognitive/memory deficits, impaired speech, diabetes, incontinency of bowel and bladder, and had severe confusion on the date of his admission to Bayview; and

- These records were made at or near the time by a person with knowledge and were kept in the course of a regularly conducted business activity, and it was the regular practice

of Bayview to maintain these documents in connection with the care and treatment of residents.

Id.

Lucy Caruso was Bayview's Admissions Director in November 2015 and executed the ADMISSION AGREEMENT and RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT on behalf of Bayview and has submitted an Affidavit to this Court (attached as **Exhibit D**). Other than to claim the dates appearing by her signatures are incorrect and that her brother Clifford Byars ("Mr. Byars") was not present with Plaintiff at Bayview during the admissions process, Plaintiff has not disputed any other portion of Mrs. Caruso's Affidavit. Mrs. Caruso has sworn to this Court that:

- She began working at Bayview in approximately January 2015 and in approximately April 2015 became the Admissions and Marketing Director of Bayview and remained in that role until approximately June 2017;

- Part of her role as Bayview's Admissions and Marketing Director was to meet with incoming residents and/or their families to explain the admissions process, the admissions paperwork, and oversee the execution of the admissions paperwork;

- Prior to November 2, 2015, when Mr. Boles became a resident at Bayview, she recalls that Mr. Boles had been placed for months on a waiting list to be admitted to Bayview;

- On November 2, 2015, she was aware that Mr. Boles had a history of stroke, dementia, cognitive/memory deficits, and had severe confusion;

- On November 2, 2015, she met with Plaintiff and Mr. Byars;

- In connection with Mr. Boles' November 2, 2015 admission to Bayview, she personally presented Plaintiff with the ADMISSION AGREEMENT and RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT;

- She described to Plaintiff the terms of the ADMISSION AGREEMENT and Plaintiff initialed each page confirming all the terms were reviewed and agreed upon;

- She explained the waiver of jury trial and arbitration provisions to Plaintiff, and among other things told them that if Plaintiff agreed to these terms, she would be waiving Mr. Boles' right to have a jury hear any dispute;

- She discussed with Plaintiff the separate RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT and explained that by signing this agreement, Plaintiff would be waiving Mr. Boles' right to have a jury hear any dispute;

- On November 2, 2015, she knew Plaintiff was the power of attorney for Mr. Boles;

- Plaintiff was given as much time as she desired to read the ADMISSION AGREEMENT and RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT, and she was told that the arbitration provisions were optional, and she did not have to consent to them;

- Mrs. Hackworth signed the ADMISSION AGREEMENT and advised that she wanted more time to think about the RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT;

- She recalls that Plaintiff came to her office in the later part of the day on November 2, 2015 and, the following day, on November 3, 2015, Mrs. Hackworth returned to Bayview, brought additional belongings of Mr. Boles, and signed the RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT;

- Throughout the admissions process, Plaintiff listened carefully to what she told her, and there was nothing about her demeanor, questions, or behavior that suggested in any way that Plaintiff did not understand what she was signing; and

- At no time did while she was working at Bayview did Plaintiff seek to rescind these agreements.

Id.

Plaintiff alleges in the Complaint that multiple falls, contractures, pressure ulcers, pain and suffering, and the death of Mr. Boles on December 14, 2016 were proximately caused by the Defendants. Plaintiff filed her Complaint on March 1, 2019 alleging causes of actions for professional negligence, ordinary/simple negligence, negligent misrepresentation, punitive damages, vicarious liability, wrongful death, and survivorship. Plaintiff bases her claims on Mr. Boles' care and treatment while a resident of Bayview.

Plaintiff has refused to arbitrate in accordance with the terms of the ADMISSION AGREEMENT or the RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT, and Defendants now move this Court to issue an Order staying these proceedings and enforcing

the ADMISSION AGREEMENT and RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT by referring this matter to arbitration.

ARGUMENT

I. There is an Enforceable Arbitration Agreement

a. The Plain Language of the ADMISSION AGREEMENT and RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT Binds Plaintiff.

Plaintiff executed the ADMISSION AGREEMENT on behalf of Mr. Boles and agreed to the following pertinent terms:

> **Waiver of Jury Trial: (Please read carefully)**
> Resident hereby knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any litigation, including any counterclaim which Resident may assert, arising from or relating to this Agreement or any other document connected with this Agreement, or arising out of or relating to any of the said documents or any relationship between the Facility and Resident, including the Resident's admission itself, or any other course of conduct, course of dealing statements (whether verbal or written) or actions of the Facility or Resident. Resident represents and warrants that the waiver contained in this Paragraph has been freely and voluntarily made after reviewing the same, or having had an opportunity to review the same, with counsel of Resident's choice.

Exhibit A, p. 23 (emphasis in original).

> **Optional Arbitration Clause**: Any action, dispute, claim or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims of violations of Resident's Rights) now existing or hereafter arising between the parties, in anyway arising from or relating to this Agreement governing the Resident's stay at the Facility, shall be resolved by binding arbitration. Such binding arbitration shall be governed by the provisions of the South Carolina Arbitration Code. As appropriate and in the event that the South Carolina Arbitration Code is deemed to not apply, binding arbitration shall be governed by the Federal Arbitration Act. **OPTIONAL: If the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only."**

Exhibit A, p. 25 (emphasis in original).

Plaintiff did not initial or mark an X by the Optional Arbitration Clause, and thus agreed to resolve all disputes by binding arbitration. Plaintiff signed the ADMISSION AGREEMENT and initialed every single page of the 11-page document.

While Defendants' position is that the Court must stay this action and compel arbitration under the arbitration clause in the ADMISSION AGREEMENT, to the extent the Court is unwilling to compel arbitration under that clause, Defendants alternatively argue the RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT was merged into and with the ADMISSION AGREEMENT and requires that Plaintiff's claims be arbitrated for all the reasons argued in connection with the arbitration clause of the ADMISSIONS AGREEMENT described above.

Plaintiff executed the RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT on behalf of Mr. Boles and agreed to the following pertinent terms:

> "any legal dispute, controversy, demand or claim . . . shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the Federal Arbitration Act . . . and not by a lawsuit or resort to court process . . . "

Exhibit B, p. 1, paragraph 1.

> "The agreement to arbitrate contained in this Arbitration Agreement includes, but is not limited to, any claim for payment, nonpayment or refund for services rendered to the Resident by the Facilities, violations of any right granted to the Resident by law or by the Resident Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract."

Exhibit B, p. 1, paragraph 2.

> "It is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident."

Exhibit B, p. 1, paragraph 4.

> "**THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT THEY ARE GIVING UP AND WAIVING THEIR**

CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND JURY."

Exhibit B, p. 2, paragraph 3 (emphasis in original).

Plaintiff argues in her June 6, 2019 brief that because the name of the facility and the name of the resident were not filled out at the top of the RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT, the agreement is invalidated. However, in addition to the fact that Defendants' primary basis for compelling arbitration is under the ADMISSIONS AGREEMENT, it is also undisputed that both Plaintiff and Lucy Caruso signed the RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT. Unless Plaintiff can point to another resident to whom she was signing this agreement as Power of Attorney, her argument is without merit. Furthermore, the RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT specifically refers to the ADMISSION AGREEMENT, which unequivocally identifies Mr. Boles as the resident.

b. Plaintiff is Equitably Estopped from Denying the Existence of an Enforceable Admission Agreement.

The ADMISSION AGREEMENT served as the foundation for Mr. Boles' admission to Bayview and the duties and obligations which Mr. Boles and Bayview had to one another. Bayview agreed to provide Mr. Boles with care and treatment, and Mr. Boles agreed to pay for the care and treatment. Without the ADMISSION AGREEMENT, there would have been no relationship between the parties.

All of Plaintiff's claims are dependent on the duties which arise from the terms of the ADMISSION AGREEMENT. Plaintiff cannot disclaim the arbitration clause which is a part of the ADMISSION AGREEMENT, while at the same time assert claims arising under other terms of the ADMISSION AGREEMENT, and Plaintiff should be equitably estopped from doing so.

The doctrine of equitable estoppel "exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision." Southern Ill. Beverage, Inc. v. Hansen Beverage Co., 2007 WL 3046273 at *11 (S.D. Ill. 2007). The Fourth Circuit has held that "no party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein." United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001); see also Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act." (internal quotation marks omitted)). It would be manifestly inequitable to permit a party to claim the other has failed to perform on its contractual obligations, while at the same time allowing that party to avoid the arbitration provisions of the contract upon which the party bases its claims, when such claims are in the scope of the arbitration provisions. Hughes Masonry Co. v. Greater Clark County School Bldg. Corp., 659 F.2d 836, 838-39 (7th Cir. 1981). In other words, Plaintiff cannot "have it both ways" by relying upon certain terms of the Admission Agreement when it works to his advantage and repudiating others when it works to his disadvantage. Id.

In the case THI of South Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. 2011), the United States District Court of South Carolina addressed this issue directly. Deborah Wiggins executed an admissions contract for the admission of her father, Earl Hall, into the Magnolia Manor nursing home. After a dispute arose, Magnolia Manor moved to compel arbitration of the dispute. Wiggins countered by arguing the admissions contract was unenforceable because there was nothing in the record to indicate she had authority to act as agent

for her father, to legally bind her father, or to waive her father's right to a jury trial. One of Magnolia Manor's arguments in response was that Wiggins, as personal representative of her father's estate, was estopped from denying the contract formation. Id. at *5.

The court noted that it was undisputed that the contract was signed by an immediate family member of Hall for the purpose of obtaining residential care for him at Magnolia Manor. After the contract was executed, Hall became a resident and received the benefits provided for under the admissions contract. The court then held that when Magnolia Manor performed in reliance on the terms of the admissions contract, and Hall received the benefits under the admissions contract, it would be inequitable for Hall's estate to avoid the arbitration provision within the admissions contract. The court ruled that Hall's estate was equitably estopped from disclaiming the enforceability of the admissions contract and the arbitration provision contained therein. Id. at *6.

Plaintiff in the instant case has brought claims arising from services rendered to Mr. Boles under the ADMISSION AGREEMENT. Plaintiff's allegations fall within the scope of the arbitration clause in the ADMISSION AGREEMENT between the parties. In accordance with the foregoing law, Plaintiff cannot assert claims against Defendants arising under the ADMISSION AGREEMENT while repudiating the arbitration clause. Plaintiff should be estopped from doing so, and this Court should enforce the ADMISSION AGREEMENT and its arbitration clause by staying this action and compelling arbitration.

c. Mr. Boles is a Third-Party Beneficiary.

Mr. Boles, while not a signatory to the ADMISSION AGREEMENT, is a third-party beneficiary of the agreement. It is clear from the plain language of the ADMISSION AGREEMENT that Mr. Boles was an intended beneficiary and the purpose of the agreement was

to ensure Bayview would provide the services laid out therein. Mr. Boles did, in fact, receive those services.

Mr. Boles is therefore obligated to arbitrate any claims within the scope of the agreements, regardless of whether those claims are brought by a legal representative. See Trinity Mission Health & Rehabilitation of Clinton v. Estate of Scott, 19 So.3d 735 (Miss. Ct. App. 2008.) (holding that a non-signatory, deceased mother, was an intended third-party beneficiary of a nursing home admission agreement that included an arbitration provision; and the arbitration provisions were enforceable against her sister, who signed the admission agreement, since it was evident that the admissions agreement clearly was intended to provide benefits to her mother as a resident of the facility; accordingly the court held that mother was a third-party beneficiary of the contract; therefore, plaintiff was bound to arbitrate any claims within the scope of the arbitration provision).

The court in Wiggins also addressed this same issue. It noted under South Carolina law, a third-party beneficiary is someone the contracting parties intended to directly benefit. As explained above, although Hall did not sign the admission agreement, he was named as the resident to be admitted to Magnolia Manor. The admission agreement referred to benefits and responsibilities of Hall, Magnolia Manor and the fiduciary, and Hall's care was the essential purpose of the admission agreement. The court held that Hall was the intended third-party beneficiary of the admission agreement signed by Wiggins in her capacity as an immediate family member, and that Hall and his estate were bound to the arbitration clause in the admission agreement. Id. at *6.

It follows that Mr. Boles and his estate are bound to arbitrate all claims against Bayview as a result of his status as a third-party beneficiary under the ADMISSION AGREEMENT.

II. Federal Arbitration Act Mandates Enforcement of this Agreement.

The Federal Arbitration Act ("FAA") requires that:

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

9 U.S.C. § 2.

The arbitration clause in the ADMISSION AGREEMENT provides that the arbitration shall be governed by the provisions of the South Carolina Arbitration Code, and in the event that it is deemed not to apply, the arbitration shall be governed by the FAA. Section 15-48-10(b)(4) of the South Carolina Code provides that the South Carolina Arbitration Code shall not apply to any claim arising out of personal injury based on contract or tort. Thus, the South Carolina Arbitration Code does not apply; instead, the FAA is controlling in the instant case. Furthermore, the RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT also mandates arbitration "in accordance with the FAA." Exhibit B, p. 1, paragraph 1.

The FAA expresses a strong national policy in favor of arbitration and "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor or arbitration." Moses H. Cone Mem'l. Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927 (1983). The FAA enforces arbitration agreements as written to prevent a party from avoiding their contractual obligations to arbitrate. Stokes v. Metropolitan Life Ins. Co., 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002); see also Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985). Additionally, the FAA's purpose was to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and place them on the same footing as other

contracts." Volt Informational Serv., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 474 (1989) (citation and internal quotation marks omitted).

Under the FAA, arbitration is required when there is a valid arbitration agreement and a dispute exists which is within the scope of the agreement. Under the arbitration clause of the ADMISSION AGREEMENT and the entire RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT, both prongs are satisfied. First, the ADMISSION AGREEMENT and RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT are valid contracts, for the reasons presented in Section I, supra. Secondly, as will be discussed immediately below, Plaintiff's claims are within the scope of the arbitration clauses.

a. Scope of the Arbitration Clauses

Plaintiff's claims are clearly within the scope of the Arbitration Clause of the ADMISSION AGREEMENT, as well as the RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT. The Arbitration Clause of the ADMISSION AGREEMENT provides in part: "Any action, dispute, claim or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims of violations of Resident's Rights) now existing or hereafter arising between the parties, in anyway arising from or relating to this Agreement governing the Resident's stay at the Facility, shall be resolved by binding arbitration." Exhibit A, p. 25.

The RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT states:

> "any legal dispute, controversy, demand or claim . . . shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the Federal Arbitration Act . . . and not by a lawsuit or resort to court process . . . "

Exhibit B, p. 1, paragraph 1.

> "The agreement to arbitrate contained in this Arbitration Agreement includes, but is not limited to, any claim for payment, nonpayment or refund for services rendered to the Resident by the Facilities, violations of any right granted to the Resident by law or by the

> Resident Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract."

Exhibit B, p. 1, paragraph 2.

Plaintiff's claims include causes of actions for professional negligence, ordinary/simple negligence, negligent misrepresentation, punitive damages, vicarious liability, wrongful death, and survivorship, all which allegedly stem from the care and treatment received by Mr. Boles while at Bayview. All these causes of action are included within the scope of the arbitration clauses quoted above. Thus, there can be no dispute from the plain language of the arbitration clauses that all the allegations contained in Plaintiff's Complaint fall under the types of disputes to be arbitrated under the arbitration clauses.

b. Interstate Commerce is Satisfied

The FAA applies to written arbitration agreements which evidence a transaction involving interstate commerce. 9 U.S.C. § 2. This requirement is broadly construed so as to be coextensive with congressional power to regulate under the Commerce Clause. Comanche Indian Tribe of Okla. v. 49, LLC, 391 F.3d 1129, 1132 (10th Cir. 2004). The interstate commerce requirement under the FAA includes contracts relating to interstate commerce. Id. The interstate commerce requirement is met if "in the aggregate the economic activity in question would represent 'a general practice...subject to federal control.'" Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56-57, 123 S.Ct. 2037 (2003) (citation omitted).

The interstate commerce requirement under the FAA is met in the present case on multiple grounds. As noted in Bayview Administrator Christy Drinkard's Affidavit, at the time of Mr. Boles' residency, (1) Bayview received payments from Medicare, Medicaid, and private insurers from other states; (2) the majority of food served at Bayview came from Charlotte, North Carolina;

and (3) Bayview obtained lab and radiology services, oxygen rental and supplies, medical forms, specialty beds and mattresses, laundry supplies and other items from out-of-state. Exhibit C.

In Dean v. Heritage Healthcare of Ridgeway, LLC et al., 408 S.C. 371, 759 S.E.2d 727 (2014), the South Carolina Supreme Court found that a nursing home residency agreement implicated interstate commerce by requiring the facility to provide the resident with food and medical supplies which were instruments of interstate commerce. Id. at 381-82, 759 S.E.2d at 732-733. The ADMISSION AGREEMENT at issue in the case at bar required Bayview to provide Mr. Boles room and board, medical supplies, and many other goods and services, all of which were instruments of interstate commerce. Exhibit A.

In accordance with the forgoing, the FAA's interstate commerce requirement is satisfied in the present case.

III. The Proceedings Must be Stayed.

Defendants also request that these proceedings be stayed pending completion of arbitration. The FAA requires a stay under the following circumstances:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of action until such arbitration has been had in accordance with the terms of the agreement[.]
>
> 9 U.S.C. § 3.

Accordingly, Defendants ask this Court to stay all judicial proceedings pending arbitration in accordance with the arbitration clause. See Stokes v. Metropolitan Life Ins. Co., 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) (holding "the FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in

writing for such arbitration' upon the application of one of the parties" (citation omitted)); 9 U.S.C. § 3.

IV. Defendants are Entitled to a Protective Order.

On or about March 1, 2019, Plaintiff served Defendants with Plaintiff's First Set of Interrogatories, Requests for Production, Requests for Admission and a Deposition Notice of Defendant(s). Defendants responded by objecting to the discovery requests primarily on the basis that this case is subject to arbitration, and thus this civil case and the discovery requests were improper. Defendants are entitled under Rule 26(c), South Carolina Rules of Civil Procedure, to an order from this Court that Defendants are not required to respond to Plaintiff's discovery requests or deposition notice.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that their Motion to Stay Action and Compel Arbitration and for Protective Order be granted, and that this Court issue an Order accordingly.

HOLCOMBE BOMAR, P.A.

By: s/A. Walker Barnes
A. Walker Barnes (S.C. Bar No. 78485)
Post Office Drawer 1897
Spartanburg, SC 29304
(864) 594-5300
Attorneys for Defendants Bayview Manor, LLC d/b/a Bayview Manor, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations

June 7, 2019
Spartanburg, South Carolina

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Exhibit A

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Eugene Boles Admit Date 11/02/2015

ADMISSION AGREEMENT

This is an agreement between **Eugene Boles** (Resident") and Bayview Manor ("Facility"), for admission to our health care facility located at: 11 Todd Drive Beaufort SC 29902.

In this Agreement, when we speak of Resident, it means the Resident or Responsible Party. The Resident payor source is expected to be. (**MC=MEDICARE**, MCD=MEDICAID, PVT=PRIVATE, INS=INSURANCE, MPS=MEDICAID PEND, HSP=HOSPICE, VA=VETERAN'S AFFAIRS, RSP=RESPITE)

A copy of the Resident's Medicare card, Social Security card and other insurance cards must be provided at time of admission. If a copy is not provided by the Resident or the Responsible Party within three (3) days of admission, the Resident will be charged as a private pay resident.

Admission and Consent to Treat: The Resident agrees to be admitted to the Facility of his/her own free will. The Resident understands that the Facility cannot admit the Resident without physician orders.

The Resident consents to allow the Facility to provide care and treatment according to practice, policy and physician orders. The Resident has the right to withdraw this consent or refuse treatment.

Non-Discrimination Statement: This Facility will not deny admission, medical treatment or discriminate in any way based on color, race, sex, national origin, disability, or age. If you feel your Civil Rights have been violated in any way, please contact the Administrator of this Facility.

Physician's Care: The Resident agrees to select an attending physician who will visit regularly according to the Facility's policies, state and federal regulations and as dictated by the Resident's needs. He/She must have admitting privileges in the Facility. If the attending physician does not respond in case of an emergency, the Resident gives permission to the Facility to contact another physician. If the Resident does not wish to choose a physician, one of our staff physicians will be assigned to the Resident.

The Resident will be billed directly by the physician and the Facility will not be responsible for payment of this service. The Resident agrees to be responsible for all charges for all physician's services and any other services and treatments ordered by a physician, unless paid by Medicaid, Medicare, or other third party coverage. (See Authorizations and Acknowledgements to enter selection)

Hospital Transfers: If a doctor orders the Resident transferred to a hospital, the Facility will arrange for the transfer to the hospital. The Facility will also notify the Responsible Party, if possible, of the transfer. If the Resident is transferred, the Facility will hold the bed for the Resident as long as the Resident pays for the bed at a fee based on the then current daily rate.

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Blumberg No. 5114 DEFENDANT'S EXHIBIT A

Medicare will not pay to hold the bed and the resident is discharged. Medicaid may hold the bed for the Resident up to (10) days for a single hospital stay. If the Resident is hospitalized for more than 10 consecutive days, the Resident will be discharged. Medicaid will also hold a bed for the Resident up to 18 days per calendar year, if the Resident has a therapeutic pass from his/ her physician. Therapeutic leaves may be a maximum of 9 days and periods of leave may not be consecutive. The Resident or Responsible party may choose to hold the bed with private pay funds. (The Resident and Responsible Party must sign Bed Hold and Readmission Policy)

Hospitalization: If The Resident leaves the Facility to go into a hospital or for other medical reasons, the Facility will not charge the Resident past the day the Resident leaves unless the Resident wishes to reserve the bed for when the Resident returns.

Hospital Services: The Resident agrees to be responsible for all hospital charges if the Resident is taken to a hospital, unless paid by Medicaid, Medicare or other third party coverage. The Resident has the right to refuse treatment and to be informed of the consequences of the decision.
(See Authorizations and Acknowledgements to enter selection)

Refuse Treatment: The Resident has the right to refuse any medical treatment, as defined by law, and to be informed of the consequences of refusing treatment. The appropriate notification and documentation will be provided if the Resident communicates this wish.

Room Transfers: The Facility reserves the right to change the Resident's room or roommates when the Facility determines it is appropriate. The Facility will make changes if the Facility determines that is in the best interest of the Resident, other patients or the Facility, in accordance with state and federal regulations.

Discharge Arrangements: If The Resident is to be discharged, the Facility will notify the Resident, the Responsible Party, the attending physician, and the appropriate agencies at least 30 days prior to the date of discharge unless the Facility determines that an emergency exists or the Resident's needs can no longer be met in the Facility. The Facility's Case Management/Social Services Department will help the Resident make arrangements for his/her discharge.

Right to Leave Facility/Duration of Agreement: The Resident's stay with the Facility is voluntary. The Resident may leave the Facility at any time, provided the Resident gives the Facility adequate notice, so the Facility may obtain a discharge order from the Resident's physician. The Resident may terminate this agreement upon a five (5) day written notice to the Facility. Upon termination,

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Resident agrees to pay accrued charges up to and including the day of discharge. **Upon the effective date of termination of the agreement, the Resident must leave the Facility. Otherwise, this agreement will remain in effect until a different written agreement is executed. At no time does this mean that the Resident will be forced to remain in the Facility against his/her will.**

Refunds: If The Resident leaves the Facility, The Facility will refund any overpayment within 30 days. In the event of the Resident's death, refunds* and any of the Resident's personal property remaining in the Facility will be returned to the Resident's family or designee within 30 days.

Personal Needs Account: The Resident may leave personal spending money with the Facility. If the Resident wants a personal needs account maintained by the Facility, the Facility will not charge an additional fee for this service. The Facility will hold the Resident's funds in trust in accordance with applicable federal and South Carolina laws. The Resident and the Responsible Party may see the Facility's records of his/her account. Interest will be credited according to State and Federal regulations. The Facility will provide the Resident with a quarterly accounting of all funds held in trust in accordance with South Carolina law. (For this service, the Resident must sign authorization form, Resident Trust Management Account Agreement.)

Basic Charges: The Resident agrees to pay for routine care, room and board, unless The Resident receives Medicaid, Medicare or other third party coverage, at the rate of $ .00 per day as Basic Charges. Routine care and services included in the per diem rate are:

a. Room and board
b. Nursing services/personal care needed for Resident health, safety, and wellbeing as required by Facility license.
c. Linens bedding
d. Social Service consultations by the Facility Social Service Department
e. Oxygen on an emergency basis
f. Facility based Personal Needs Account for personal funds (if authorized)
g. Personal laundry service (see Extra Charge Sheet if applicable); excluding dry cleaning
h. Dietitian consultation and services
i. Therapeutic recreational activities
j. Pastoral care
k. Routine personal care Items

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This rate may be increased during the year; however, the Facility will notify the Resident of future rate changes thirty (30) days before they go into effect.

If the Resident receives Medicaid or Medicare, the cost of room and board and other services and supplies listed below will normally be paid for by the payer, however, the Resident is ultimately responsible.

If the Resident is receiving Medicaid the State has required the Resident to pay directly to the Facility the following (by the 10th of every month):

a. All resource monies as specified by the Department of Social Services
b. Adjustment as specified by the State
c. Previous balances prior to Medicaid approval
d. Other

As it may be necessary, the Resident agrees to provide the Facility with statements of his/her assets, debts, and income. If the Resident is not receiving Medicaid, Medicare or other third party payer, this statement will be confidential, unless law requires disclosure of information.

Supplemental Charges: Extra charges include, but are not limited to, the services and supplies described below. A list of the extra charges for services and supplies that are available to the Resident but are not covered by Medicare or Medicaid is included in this packet. The Facility will provide written notice to the Resident of any changes in the extra charges at least 14 days in advance or as otherwise required by South Carolina or Federal law.

***Diagnostic Consultant and Therapeutic Services**: The Resident agrees to have any diagnostic, consultant, or laboratory services or test ordered by his/her physician and agreed to by the Resident. Resident agrees to pay for these services unless paid for by Medicaid, Medicare, or other third party coverage.

* **Physical, Occupational and Speech Therapy and Private Duty Nurse/Sitters**: The Resident agrees to be responsible for any charges for Physical, Occupational and Speech Therapy, Private Duty Nurse and/or CNA services unless paid by Medicare, Medicaid, or other third party payer.

***Ambulance and Transportation Services**: The Resident agrees to be responsible for any charges for ambulances or other transportation the Resident may need, unless paid by Medicaid, Medicare, or other third party coverage.

***Medical Supplies**: The Resident agrees to be responsible for all charges for medicine, oxygen, dental, eyeglasses, hearing aids, medical appliances, expenses other that transportation connected with activities, etc., unless paid by Medicaid, Medicare, or other third party coverage.

VH POA / CB Initial

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*Pharmacy Services: Pharmacy services are available through the Facility. The Resident may choose another pharmacy only if that Pharmacy will sign an agreement with the Facility to provide services in accordance with all applicable federal and state statutes and regulations and our requirements, including but not limited to: 24 hour service and delivery, labeling, unit dose form, and monitoring. The Facility is authorized to use generic name medications except as otherwise ordered, in writing, by the Resident's physician. See additional form for Brand-name requests) The Facility's Director of Nursing Services and the Consultant Pharmacist are authorized to destroy any excess or undesired medications in accordance with applicable law. The Resident agrees to pay for charges unless paid by Medicaid, Medicare, or other third party coverage.

Personal Items and Services: The Resident agrees to pay for personal items and services. These include: clothes, personal laundry not done at the Facility, barbers, hairdressers, toiletries, and sundries, which the Facility does not routinely provide. The Resident understands the Facility is not responsible for damage to personal clothing. (See Authorizations and Acknowledgements.)

Payment: The Resident agrees to pay one month's Basic Charges in advance, unless the Resident is receiving Medicaid, Medicare or other third party coverage. If the Resident is admitted during the month, the Resident will pay in advance for the remaining days of that month. The Facility will bill on the 28th of the month for the upcoming month and payment is due on the 10th of the month. Payment of Medicaid resource will be made in accordance with the Department of Public Welfare policy (or other state agency with authority). If, during the Resident's course of stay, there is a change of primary payer status, The Resident agrees to abide by payment terms or regulations governing that payer status.

Interest and Attorney's Fees: The Resident agrees to pay the Facility a late charge of 1.5% per month on any unpaid balances not paid within 30 days of billing. If the Facility hires an attorney to collect the bill, the Resident agrees to pay reasonable attorney's fees and the costs of collection.

Assignment of Benefits: The Resident authorizes the facility to receive benefit payments directly from Medicare, Medicaid, or other party insurance company.
(Signature required on Authorization for Assignments of Benefits)

Failure of Others to Pay: If any Resident charges are not paid for by insurance, anyone or any agency, the Resident agrees to pay them.

VH POA / CB Initial

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Discontinuance of Medicaid: If the Resident receives Medicaid and it is discontinued, the Resident agrees to pay the then current Basic Charges and other charges for self-paying patients. Such charges will begin on the date Medicaid is discontinued.

Denial of Medicare and Medicaid: If the Resident applies for benefits under Medicare or Medicaid after the Resident becomes a patient, and the application is denied, the Resident agrees to pay the Facility for all charges from the day the Resident entered the Facility.

Failure to Pay the Facility's Bill: The Resident agrees to pay the Facility's bill upon receipt of the statement, or no later than the 1st of each month following the receipt of the statement. The Resident agrees to make arrangements to leave the Facility if bills are not paid as agreed. If the Resident does not make arrangements, then the Facility can make them for the Resident. If the need arises for the Facility to make such arrangements, the Facility will provide a notice of intent to discharge the Resident in accordance with state and federal regulations.

Failure to Pay Other Bills: The Resident agrees to pay the bill of others providing services or supplies. The Resident agrees to pay his/her bills within 15 days after billing, unless other acceptable arrangements are made in advance.

Telephone: Each Resident room is wired for telephone service. The Resident must make arrangement for service with the carrier of their choice. All costs for private telephone use are the responsibility of the Resident. In addition, a phone will be made available for the resident at a specific location within the facility. All long distance charges will be billed to the resident. As the telephone is for the use of all the residents on each unit, we ask that each resident be reasonable and considerate with individual demands for the unit telephone.

Valuables: The Resident agrees to be responsible for all valuables, money, appliances, and other personal property in his/her possession while the Resident is at the Facility. Although the Facility will work to see that misplaced belongings are recovered, the Facility is not responsible for replacing lost or stolen cell phones, computerized person assistance devices, IPods, radio, hearing aids, eyeglasses or dentures/partials(including, but not limited to the fore mentioned).

Guardianship: If the Resident, who has not had a guardian appointed by a court of law, is or becomes unable to make or communicate his/her medical decisions, as determined by the Resident's attending physician, the Facility shall

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notify the designated Healthcare Proxy, surrogate, or agent under a Durable Power of Attorney, if any. If neither has been appointed, the Facility and/or Resident's Responsible Party shall designate or determine a surrogate or Proxy in accordance with South Carolina law. The Facility and Resident acknowledge that above and beyond the surrogate or proxy's statutory abilities, the surrogate or proxy is authorized to bind the Resident to all terms in this agreement. If neither is available the Responsible Party agrees to initiate and maintain a proceeding in a court of competent jurisdiction to appoint a legal guardian. If the Responsible Party fails to do so, the Facility shall have the right, but not the obligation, to commence a legal proceeding to adjudicate the Resident incapacitated and to have the court appoint a guardian for the Resident. The cost of the legal proceedings, including attorney's fees, shall be paid by the Resident, Responsible Party or the Resident's estate.

Release of Medical and Other Information: The Resident agrees that the Facility can release all or part of his/her medical records to any agency or person with the right, by law, to review such records.

Patient Identification: The Facility is authorized to require a standard method of Patient identification, e.g., an identification bracelet and/or photographic print.

Photographs/ Video Technology: The Resident authorizes the Facility to take photographs of his/her person or portions thereof for medical or identification purposes. The Resident also understands that photographs may be taken during activities or special events and displayed in the Facility or in the Facility newsletter. Photographs are confidential and will not be released for other purposes without the Resident's written permission. (See Authorizations and Consents for further information) The Resident/ Responsible party understands that video technology of any type is prohibited in recognition of the privacy of the other residents, visitors and staff members.

Indemnification: The Facility is required by law to exercise reasonable care toward the Resident; however, the Facility is not an insurer of the health, safety, and welfare of the Resident and assumes no liability as such.
The Facility is not responsible for the health, safety, and welfare of any Resident who is away from the Facility with any person not directly employed by the Facility or when the Resident knowingly leaves the Facility against the medical advice of the Resident's attending physician or without the approval of the Facility, with or without the knowledge of the Facility.
The Resident shall defend, indemnify an hold the Facility harmless from any and all claims, demands, suit actions, and related costs and expenses, including without limitation attorney's fees made against the Facility by any person arising out of or relating to any damage or injury caused by the Resident to any person

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or the property of any person or entity (including the Facility).
The Resident or the Resident's estate is responsible for any damages caused to the Facility property beyond normal wear and tear, and shall pay for the repair and replacement of damaged property, based on the actual charge or cost to the Facility for such repair or replacement.

Liability: The Facility shall not be liable for injuries of any kind unless caused by the willful act or negligence of the Facility or the Facility's employees.

Compliance with Facility Rules and Regulations: The Resident agrees to comply with all Patient/Resident's Responsibilities established by the Facility. The Resident has read and been given a copy of the Facility's rules and regulations which set forth these responsibilities.

Advanced Directives: The Resident acknowledges receipt of information concerning advance directives and his/her rights to make decisions about medical care.

Liability Insurance: This Facility maintains a liability insurance policy with minimal coverage. This policy meets the requirements of all applicable state regulations relative to the licensure and certification for Medicare/Medicaid and other related programs.

Notice: Any notice, request, consent, waiver or other communication provided for or required by this Agreement shall be in writing and shall be delivered in person or sent by first-class mail, postage prepaid, return receipt requested, and deposited in the United States mail, addressed as follows:

Facility:
11 Todd Drive
Beaufort SC 29902

Resident:
Eugene Boles

Governing Law: This Agreement shall be interpreted and enforced in accordance with the laws of the State of South Carolina

Venue: In the event that any litigation arises under, or in any manner in relation to this Agreement, whether *ex contractu* or *ex delicto*, the venue of same shall lie exclusively in Beaufort County, South Carolina and no other location.

VH POA / CB Initial

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Waiver of Jury Trial: (Please read carefully)
Resident hereby knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any litigation, including any counterclaim which Resident may assert, arising from or relating to this Agreement or any other document connected with this Agreement, or arising out of or relating to any of the said documents or any relationship between the Facility and Resident, including the Resident's admission itself, or any other course of conduct, course of dealing statements (whether verbal or written) or actions of the Facility or Resident.

Resident represents and warrants that the waiver contained in this Paragraph has been freely and voluntarily made after reviewing the same, or having had an opportunity to review the same, with counsel of Resident's choice.

Attorney's Fees: (Please read carefully)
In any legal action or other proceeding brought by the Facility to enforce or interpret any provision of this Agreement or to enforce any remedy for the breach thereof, the Facility shall be entitled to receive reasonable attorney's fees and costs actually incurred in connection therewith, including all costs and fees incurred in any appellate proceeding.

The Facility is also entitled to recover attorney's fees and costs, including all fees incurred in any appellate proceeding, for any legal action or proceeding brought by the Resident and/or responsible party upon a finding by the body before which the legal action or proceeding is brought that the Facility committed no wrongdoing.

Capacity: This Agreement has been executed by the Facility's duly authorized agent, and no officer, director, agent, or employee of the Facility shall have any personal liability under the Agreement, to the Resident under any circumstances.

Severability: The parties agree that should any provision of this Agreement be declared invalid by any court of competent jurisdiction, or rendered invalid by any statute or regulation, then such provision shall be severed from this Agreement and the remainder of this Agreement will remain binding and in full force. Titles and/or captions in this Agreement are for convenience only.

Assignability: (Please read carefully)
This Agreement is fully assignable by the Facility. In the event that the Facility is sold, or license is transferred such that a new licensee operates the Facility, this Agreement shall be automatically assigned to the new licensee and shall be fully binding upon both parties.

Withdrawal Period:
Each party to this agreement shall have three (3) business days from execution of this agreement to cancel the agreement by notifying the other party in writing, by certified mail return receipt or traceable overnight delivery, of its desire to cancel.

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Guarantee: By his/her execution below, Responsible Party (jointly and full severally if more than one) hereby guarantees full compliance with the Agreement and full payment of all monies due by Resident under this Agreement, including all attorney's fees and court costs incurred by the Facility in the interpretation or enforcement of this Agreement, as well as in the enforcement of this Guarantee against Responsible Party. Venue of any such proceedings shall lie in* Beaufort County, South Carolina

Acknowledgement: By signing this Agreement, the Resident acknowledges: That the Resident has received a copy of entire agreement with any attachments.
That the Resident has been given an oral explanation of services provided and charges including services offered on an as needed basis including extra services.
That the Resident has been given an oral explanation of the bed reservation and refund policies set forth in this agreement.
That the Resident has received a copy of the rules and regulations, and an explanation of the Resident's responsibility to obey all reasonable rules and regulations and to respect the personal rights and private property of others.
That the Resident has received a copy of the Grievance Policy, Smoking Policy and Restraint Policy.
That the Resident has received a copy of the procedures of the state and district ombudsman councils.
That the Resident has received a copy of the transfer and discharge policies.
That the Resident has received a copy of the Federal and State Resident's Bill of Rights.
That the Resident has received a copy of the Privacy Act Statement.
That the Resident has received a copy of the (HIPPA) Health Insurance Privacy and Portability Act policies of this Facility.
That the Resident has received a copy of CMS Medicare DMEPOS Supplier Standards
That the Resident has received authorizations regarding, Resident Trust Fund, Pharmacy Part D, Care Plans, Vaccinations and Release of Information, Self-Administration of Medications and Assignment of Benefits .

Entire Agreement: This Agreement sets forth the entire understanding of the parties relating to the subject matter hereof, and supersedes all prior Agreements, understanding, and discussions relative to such subject matter, Resident acknowledges that in entering into this Agreement, Resident has not relied on any representation, warranties (whether express or implied) or covenants, other than those set forth herein. Nothing in this Agreement shall be construed to give any person or entity other than the parties hereto any rights to remedies.

VH POA /CB Initial

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Agreement Modifications/Changes: From time to time the Facility may modify, change or amend this Agreement and will provide a thirty (30) day written notice of such changes to the Resident or Responsible Party.

Immoral/ Illegal review: As dictated by state and/or federal law a review for specific activity may be conducted (i.e. sexual predator).I have received a copy of Facility Responsibilities Regarding Convicted Sex Offenders,

Optional Arbitration Clause: Any action, dispute, claim or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims of violations of Resident's Rights) now existing or hereafter arising between the parties, in anyway arising from or relating to this Agreement governing the Resident's stay at the Facility, shall be resolved by binding arbitration. Such binding arbitration shall be governed by the provisions of the South Carolina Arbitration Code. As appropriate and in the event that the South Carolina Arbitration Code is deemed to not apply, binding arbitration shall be governed by the Federal Arbitration Act. **OPTIONAL: If the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only. I have X this clause _____initial.**

Resident and or Responsible Party has read or has been read and understands and agrees to all terms and conditions of this agreement unless specifically noted on the agreement.

By: Lucy Caruso 11/2/15
Signature of Facility Representative Date

Eugene Boles

_____
Signature of Patient/Resident Date

_____
Witness Date

_____
Witness Date

Vicki Hathcock POA 11/2/15
Responsible Party Date

Clifford Byars 11/2/15
Signature of Responsible Party Date

Responsible Party is acting as:
_____ Conservator
_____ Power of Attorney
_____ Relative (state relationship)
_____ Other: _____

Billing Address:

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Exhibit B

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RESIDENT AND FACILITY BINDING ARBITRATION AGREEMENT
(READ CAREFULLY)

Pursuant to the terms of this Resident and Facility Binding Arbitration Agreement (this "Arbitration Agreement"), it is understood and agreed by _____ (the "Facility") and _____ (the "Resident" or "Resident's Authorized Representative", hereinafter referred to as the "Resident") that any legal dispute, controversy, demand or claim (hereinafter collectively referred to as "claim" or "claims") that arises out of or relates to that certain Resident Admission Agreement (the "Resident Admission Agreement") executed by the Resident and the Facility, or any service or health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the Federal Arbitration Act (a copy of which is attached hereto and incorporated into this Arbitration Agreement), and not by a lawsuit or resort to court process except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards.

The agreement to arbitrate contained in this Arbitration Agreement includes, but is not limited to, any claim for payment, nonpayment or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Resident Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract. However, this agreement to arbitrate shall not limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility or any appropriate state or federal agency.

The damages awarded, if any, in an arbitration conducted pursuant to this Arbitration Agreement shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action, including any prerequisites to, credit against or limitations on, such damages.

It is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.

All claims based in whole or in part on the same incident, transaction, or related course of care or services provided by the Facility to the Resident shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Facility or the Resident, and the claim is not presented in the arbitration proceeding.

Any notice required pursuant to this Arbitration Agreement shall be deemed given (i) upon hand delivery; or (ii) three (3) days after deposit in U.S. mail via certified mail, return receipt requested.

Kimberg No. 5114 DEFENDANT'S EXHIBIT B

This Arbitration Agreement is effective as of the date of admission of the Resident to the Facility. VH **(resident's initials).**

The Resident understands that (1) he/she has the right to seek legal counsel concerning this Arbitration Agreement, (2) the execution of this Arbitration Agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (3) this Arbitration Agreement may be rescinded by written notice given to the Facility by the Resident within thirty (30) days of signature. If not rescinded within thirty (30) days, this Arbitration Agreement shall remain in effect for all care and services rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility.

THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT THEY ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY.

Viola Hackworth POA 11/3/15
Resident/Representative Signature / Date

Lucy Caruso 11-3-15
Facility's Authority Agent / Date

Viola Hackworth, POA
Resident/Representative Printed Name

Lucy Caruso,
Admissions Director
Facility's Authorized Agent Printed Name

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Exhibit C

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
VIOLA M. HACKWORTH, as Personal Representative of the Estate of EUGENE BOLES A/K/A EUGENE N. BOLES, deceased,	)	C/A No. 2018-CP-07-00433
Plaintiff,	)	
versus	)	
BAYVIEW MANOR, LLC d/b/a BAYVIEW MANOR, EPIC MGT, LLC, EPIC GROUP, LIMITED PARTNERSHIP, TEDDIE SIMMONS; JOHN DOES, and RICHARD ROE CORPORATIONS,	)	**AFFIDAVIT OF CHRISTY DRINKARD**
Defendants.	)	

PERSONALLY APPEARED before me Christy Drinkard, who being sworn, deposes and says as follows:

1. I am an adult over the age of eighteen years. I submit this affidavit in connection with the "Notice of Motion and Motion to Stay Action and Compel Arbitration; in the Alternative Motion for Nonjury Trial; and Motion for Protective Order" filed by Defendants in the above-captioned action. I am fully competent to make this declaration, and if called to testify, I would state as follows.

2. I am the Administrator of Bayview Manor, LLC ("Bayview"). In this role, I am required to have knowledge about Bayview's business operations, which includes reviewing Bayview's past business records. Bayview is and was the licensed owner and operator of the

nursing facility known as Bayview Manor in Beaufort, South Carolina where Eugene N. Boles ("Mr. Boles") resided from November 2, 2015 until December 14, 2016.

3. Bayview was a Medicare certified facility in 2015 and 2016. Medicare is a federally administered program, and it made payments to Bayview in 2015 and 2016.

4. Bayview was a Medicaid certified facility in 2015 and 2016. The South Carolina Medicaid Program is partially funded by the federal government, and it made payments to Bayview in 2015 and 2016.

5. Bayview's requests for private insurance payments for services rendered to Bayview residents were sent in hard copy form via U.S. Mail to various private insurance companies, and insurance payments were issued by these insurance companies. The private insurance companies' offices that processed payments to Bayview are located in various states outside of South Carolina and they made payments to Bayview in 2015 and 2016.

6. The majority of food served to Bayview residents in 2015 and 2016 was supplied by US Foods from Charlotte, North Carolina.

7. In 2015 and 2016, Bayview utilized (1) Select Labs from Greensboro, North Carolina for its lab services; (2) Mobilex from Baltimore, Maryland for its radiology services; (3) Airgas from Atlanta, Georgia for its oxygen rental and supplies; (4) Briggs from Des Moines, Iowa for its medical forms; (5) Reliable from Asheville, North Carolina for the rental of specialty beds and pressure relief mattresses; (6) Ecolab from New York, New York for its laundry supplies; and (7) Quill from Philadelphia, Pennsylvania for business office supplies.

8. Bayview utilized other monthly services from outside South Carolina in 2015 and 2016, including American Healthtech, whose corporate office is in Ridgeland, Mississippi.

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9. Bayview had 170 licensed beds available in 2015 and 2016 for patient care, all of which were certified by, and participated in, the Medicare and Medicaid programs.

10. On November 2, 2015, the day of Mr. Boles' admission to Bayview, Mr. Boles, through his daughter and power of attorney, Viola Boles Hackworth ("Mrs. Hackworth"), entered into an Admission Agreement which contained an arbitration clause and waiver of jury trial clause (a true and accurate copy of which is attached as **Exhibit A**), along with a separate arbitration agreement (a true and accurate copy of which is attached as **Exhibit B**). These documents were all part of the admissions package and were kept in the course of a regularly conducted business activity, and it was the regular practice of Bayview to have these documents executed at or soon after the time of a resident's admission to the facility.

11. There is no written notice in Mr. Boles' file from Mrs. Hackworth, or anyone else from that matter, seeking to rescind these agreements.

12. The Admissions Director for Bayview at the time of Mr. Boles' admission was Lucy Caruso. She is no longer an employee of Bayview.

13. Part of her role as Admissions Director was to meet with incoming residents and/or their families to explain the admissions process, the admissions paperwork, and oversee the execution of the Admission Agreement, Arbitration Agreement and other admissions paperwork. Lucy Caruso executed the documents attached hereto on behalf of Bayview, and she was authorized to do so in her position as Admissions Director for Bayview.

14. Mrs. Hackworth was the designated power of attorney for Mr. Boles in her Durable Power of Attorney, a true and accurate copy of which is attached hereto as **Exhibit C**. This power of attorney was executed on October 3, 2012, more than three (3) years prior to Mr. Boles' admission to Bayview.

15. Finally, Bayview has possession of medical records, copies of which it can make available to the Court, indicating Mr. Boles had a history of stroke, left side hemiparesis, dementia, cognitive/memory deficits, impaired speech, diabetes, incontinency of bowel and bladder, and had severe confusion on the date of his admission to Bayview. These records were made at or near the time by a person with knowledge and were kept in the course of a regularly conducted business activity, and it was the regular practice of Bayview to maintain these documents in connection with the care and treatment of residents.

SIGNATURE FOLLOWS ON THE NEXT PAGE

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FURTHER DEPONENT SAYETH NOT.

Christy Drinkard

SWORN to and subscribed before me this 2nd day of APRIL, 2019.

Trista Hodge (SEAL)
Notary Public for South Carolina

My Commission Expires: September 4, 2023

TRISTA HODGE
Notary Public, State of South Carolina
My Commission Expires Sept. 4, 2023

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Exhibit D

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
VIOLA M. HACKWORTH, as Personal Representative of the Estate of EUGENE BOLES A/K/A EUGENE N. BOLES, deceased,	)	C/A No. 2018-CP-07-00433
Plaintiff,	)	
versus	)	**AFFIDAVIT OF LUCY CARUSO**
BAYVIEW MANOR, LLC d/b/a BAYVIEW MANOR, EPIC MGT, LLC, EPIC GROUP, LIMITED PARTNERSHIP, TEDDIE SIMMONS; JOHN DOES, and RICHARD ROE CORPORATIONS,	)	
Defendants.	)	

PERSONALLY APPEARED before me Lucy Caruso, who being sworn, deposes and says as follows:

1. I am an adult over the age of eighteen years. I am fully competent to make this declaration, and if called to testify, I would state as follows.

2. I am currently the Executive Director of The Suites at Continuing Healthcare of Niles, with facilities located in the state of Ohio.

3. I began working at Bayview Manor, LLC d/b/a Bayview Manor ("Bayview") in approximately January 2015. In approximately April 2015, I became the Admissions and Marketing Director of Bayview and remained in that role until approximately June 2017. Prior to working at Bayview, I worked at an assisted living facility now known as Brookdale in Hilton Head, working as the Program Director from approximately September 2012 until December 2014.

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4. Part of my role as Admissions and Marketing Director of Bayview was to meet with incoming residents and/or their families to explain the admissions process, the admissions paperwork, and oversee the execution of the admissions paperwork.

5. Prior to November 2, 2015, when Eugene N. Boles ("Mr. Boles") became a resident at Bayview, I recall that Mr. Boles had been placed for months on a waiting list to be admitted to Bayview.

6. On November 2, 2015, I was aware that Mr. Boles had a history of stroke, dementia, cognitive/memory deficits, and had severe confusion.

7. On November 2, 2015, I met with Mr. Boles' sister and Power of Attorney, Viola Boles Hackworth ("Mrs. Hackworth"), and Mr. Boles' brother, Clifford Byars ("Mr. Byars").

8. Mr. Boles was admitted to Bayview on November 2, 2015. In connection with the admission, I personally presented Mrs. Hackworth and Mr. Byars with the admissions documents. One of those documents was the Admission Agreement attached hereto as **Exhibit A**. I described to Mrs. Hackworth and Mr. Byars the terms of the agreement and both Mrs. Hackworth and Mr. Byars initialed each page confirming all the terms were reviewed and agreed upon. I explained the waiver of jury trial and arbitration provisions to them, and among other things told them that if Mrs. Hackworth agreed to these terms, she would be waiving Mr. Boles' right to have a jury hear any dispute.

9. I discussed with Mrs. Hackworth a separate Arbitration Agreement, a copy of which is attached hereto as **Exhibit B**. Here again, I explained that by signing this agreement, she would be waiving Mr. Boles' right to have a jury hear any dispute.

10. On November 2, 2015, I knew that Mrs. Hackworth was the designated power of attorney for Mr. Boles in her Durable Power of Attorney, a true and accurate copy of which is

attached hereto as **Exhibit C**. This power of attorney was executed on October 3, 2012, more than three (3) years prior to Mr. Boles' admission to Bayview.

11. Mrs. Hackworth was given as much time as she desired to read the Admission Agreement and Arbitration Agreement, and she was told that the arbitration provisions were optional, and she did not have to consent to them.

12. Mrs. Hackworth signed the Admissions Agreement and advised that she wanted more time to think about the Arbitration Agreement. I recall that Mrs. Hackworth came to my office in the later part of the day on November 2, 2015 and, the following day, on November 3, 2015, Mrs. Hackworth returned to Bayview, brought additional belongings of Mr. Boles, and signed the Arbitration Agreement.

13. Throughout the admissions process, Mrs. Hackworth listened carefully to what I told her, and there was nothing about her demeanor, questions, or behavior that suggested in any way that she did not understand what she was signing.

14. I executed the documents on behalf of Bayview.

15. At no time did while I was working at Bayview did Mrs. Hackworth seek to rescind these agreements.

SIGNATURE FOLLOWS ON THE NEXT PAGE

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FURTHER DEPONENT SAYETH NOT.

Lucy Caruso NKA Lucy Caruso Kuruba

Lucy Caruso

SWORN to and subscribed before me this 1st day of April, 2019.

(SEAL)

Notary Public for Ohio

My Commission Expires:

NOTARIAL SEAL STATE OF OHIO

ATTY. JAMES A. DENNEY
1631 S. STATE STREET
GIRARD, OHIO 44420
MY COMMISSION HAS NO
EXPIRATION DATE

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
VIOLA M. HACKWORTH, as Personal Representative of the Estate of EUGENE BOLES A/K/A EUGENE N. BOLES, deceased, *Plaintiff,* versus BAYVIEW MANOR, LLC d/b/a BAYVIEW MANOR, EPIC MGT, LLC, EPIC GROUP, LIMITED PARTNERSHIP, TEDDIE SIMMONS; JOHN DOES, and RICHARD ROE CORPORATIONS, *Defendants.*	)	C/A No. 2019-CP-07-00433 **NOTICE OF MOTION AND MOTION TO ALTER OR AMEND**

TO: C. CALEB CONNOR, KENNETH L. CONNOR, A. KEITH McALISTER, JR., AND ANNE K. MOORE, ATTORNEYS FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that pursuant to Rule 59(e), SCRCP and applicable common law, the Defendants, through their undersigned counsel, will move on the tenth (10th) day after service hereof, at 10:00 a.m., or as soon thereafter as counsel can be heard, before the presiding judge of the Court of Common Pleas for Beaufort County, to alter and/or amend the Court's July 26, 2019 Form 4 Order Denying Defendants' "Motion to Stay Action and Compel Arbitration; in the Alternative Motion for Nonjury Trial; and Motion for Protective Order" ("Motion to Compel Arbitration") regarding the above-referenced lawsuit filed on behalf of Eugene Boles a/k/a Eugene N. Boles, deceased ("Mr. Boles").

More particularly and out of an abundance of caution, Defendants expressly raise and seek a ruling on their arguments set forth in their Motion to Compel Arbitration (filed on April 8, 2019 and incorporated herein), their Memorandum in Support of the Motion to Compel Arbitration

(filed on June 7, 2019 and incorporated herein), all affidavits and exhibits to the Motion to Compel Arbitration and Memorandum in Support of same (incorporated herein), and arguments made at the June 11, 2019 hearing (incorporated herein). These arguments include, but are not limited to:

- Mr. Boles' 2012 Power of Attorney appointing his sister Viola M. Hackworth ("Plaintiff") as attorney-in-fact specifically gave Plaintiff the power to make all necessary arrangements for Mr. Boles at a nursing home, including his 2015 admission to Bayview Manor, LLC.

- The Admission Agreement executed on behalf of Mr. Boles by Plaintiff and Plaintiff's brother (Clifford Byars) is valid on its face and:
    - contained a Waiver of Jury Trial and an Optional Arbitration Clause which mandates the arbitration of any action, dispute, claim or controversy of any kind;
    - has a sentence that is highlighted in bold font and reads: "**OPTIONAL: If the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only**" (emphasis in original); and
    - Plaintiff did not initial or mark an X by the Optional Arbitration Clause, and thus agreed to resolve all disputes by binding arbitration.

- The Federal Arbitration Act mandates enforcement of the Admission Agreement because (a) all of Plaintiff's claims are within the scope of the arbitration clause of the Admission Agreement as well as the Arbitration Agreement; and (b) interstate commerce is satisfied.

- Plaintiff does not dispute or deny that:
    - Plaintiff is and was Mr. Boles' attorney-in-fact;
    - Plaintiff and Clifford Byars were involved in the process to admit Mr. Boles to Bayview;
    - Plaintiff and Clifford Byars specifically approved Mr. Boles' admission to Bayview;
    - Plaintiff and Clifford Byars actually signed the Admission Agreement;
    - Plaintiff actually signed the Arbitration Agreement; and
    - the scope of Mr. Boles' Power of Attorney granted Plaintiff the authority to execute the Admission Agreement and Arbitration Agreement on Mr. Boles' behalf.

- Plaintiff is equitably estopped from denying the existence of an enforceable Admission Agreement.

- Mr. Boles was a third-party beneficiary of the Admission Agreement.

- The Resident and Facility Binding Arbitration Agreement ("Arbitration Agreement") executed on behalf of Mr. Boles by Plaintiff is valid on its face and merged into and with the Admission Agreement.

- Plaintiff and Clifford Byars had statutory authority to execute the Admission Agreement pursuant to the South Carolina Adult Health Care Consent Act.

This Motion is also supported by the pleadings, affidavits on file, exhibits on file, legal memoranda which may be served and filed, and the entire record herein.

HOLCOMBE BOMAR, P.A.
P.O. Box 1897
Spartanburg, SC 29304
(864) 594-5300

By: s/A. Walker Barnes
A. Walker Barnes (S.C. Bar No. 78485)

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

August 5, 2019

ELECTRONICALLY FILED - 2019 Aug 10 7:36 AM - BEAUFORT - COMMON PLEAS - CASE#2019CP0700433

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
VIOLA M. HACKWORTH, as Personal Representative of the Estate of EUGENE BOLES a/k/a EUGENE N. BOLES, deceased,	)	C/A No. 2019-CP-07- 00433
Plaintiff,	)	**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO ALTER OR AMEND**
vs.	)	
BAYVIEW MANOR, LLC d/b/a BAYVIEW MANOR; EPIC MGT, LLC; EPIC GROUP, Limited Partnership; TEDDIE SIMMONS; JOHN DOES; and RICHARD ROE CORPORATIONS,	)	
Defendants.	)	

COMES NOW Plaintiff Viola M. Hackworth, as Personal Representative of the Estate of Eugene Boles a/k/a Eugene N. Boles, deceased, by and through counsel, and files her Response in Opposition to Defendants' Motion to Alter or Amend ("Motion"). For the following reasons, Defendants' Motion should be denied:

1. **Defendants' mischaracterize Plaintiff's position, including but not limited to facts that Plaintiff considers in dispute.**

Defendants' Motion mischaracterizes Plaintiff's position. Despite Defendants' assertion that Plaintiff does not dispute or deny certain information, Plaintiff made clear by her Affidavit, through her brief in opposition to Defendants' underlying motion to compel arbitration, and argument of counsel during the hearing[1] that Plaintiff disputes the accuracy of averments made by Defendants and calls into question documents submitted to the Court, including the Affidavits of

[1] Plaintiff incorporates by reference her prior submissions to the Court, including written and oral argument, affidavit, and supporting exhibits and documentation, filed June 6, 2019.

ELECTRONICALLY FILED - 2019 Aug 10 7:36 AM - BEAUFORT - COMMON PLEAS - CASE#2019CP0700433

Administrator Christy Drinkard and Admissions Director Lucy Caruso ("Affidavits") and the existence and validity of an enforceable arbitration agreement dated November 2 or 3, 2015.

2. The Court's Order was appropriate as Defendants offered no clear and competent evidence to support their motion to compel the parties to arbitration.

Defendants' Motion seeks "a ruling on their arguments" of their underlying Motion to Stay Action and Compel Arbitration; In the Alternative Motion for Nonjury Trial; And Motion for Protective Order; however, the Court appropriately denied Defendants' underlying motion by Form 4 Order entered July 26, 2019.

The party seeking to force arbitration has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). Absent clear evidence, a party's fundamental right to a jury trial should not be waived. *See e.g., Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986). Thus, "[a]rbitration will be denied if a court determines no agreement to arbitrate existed." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007); S.C. Code Ann. § 15-48-20(a).

To date, Defendants have offered no competent evidence to establish any valid and enforceable arbitration agreement existed or to justify waiver of Plaintiff or Mr. Boles' Constitutional right to a jury trial. As argued at length during the hearing, Defendants relied upon falsified Affidavits to support their underlying motion. Additionally, Defendants' own documentation illustrates that another contract exists that supersedes those purported agreements submitted to the Court.

A. During the hearing, Defendants acknowledged their Affidavits were inaccurate and not based on good ground.

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"Every pleading, motion or other paper" filed "constitutes a certificate" that "there is good ground to support it [and] it is not interposed for delay." Rule 11(a), SCRCP. Where an affidavit does not have good ground to support it, it "shall be stricken." *Id.*; *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 19, 633 S.E.2d 722, 729 (2006).

Here, Defendants' Affidavits contained numerous details regarding the admissions process of Eugene N. Boles including, but not limited to, vivid descriptions of purported events and interactions with Plaintiff on November 2 and 3, 2015 that did not occur.[2] Plaintiff confronted Defendants' false assertions with an affidavit and corroborating documentation, which showed that she was not present at the facility and did not have the purported interactions on November 2, 2015 or November 3, 2015 as alleged. When presented with conflicting testimony and corroborating evidence, counsel for the Defendants acknowledged that their Affidavits may not have been accurate.

Such inaccuracies call into the question the entirety of the Affidavits as the Court cannot distinguish between fraudulent details and what might be credible. Thus, the foundation of Defendants' underlying motion is destroyed, and it was appropriately denied by the Court.

B. Defendants failed to offer into evidence another contract, which apparently superseded the purported admission and arbitration agreements.

Defendants bear the burden of establishing the existence of a valid arbitration agreement. During the hearing, Plaintiff offered into evidence a notation from Defendants' records, which instructed the parties to "disregard [the] first contract. . . ." Despite this instruction, no additional contract was submitted by Defendants to clarify the record. To date, the record remains unclear as to what other contract was signed, who signed it, what its terms provided, and whether or not it

[2] Plaintiff incorporates by reference her previously filed affidavit dated May 31, 2019.

ELECTRONICALLY FILED - 2019 Aug 10 7:36 AM - BEAUFORT - COMMON PLEAS - CASE#2019CP0700433

contained any arbitration provision. Thus, Defendants failed to establish a valid arbitration agreement existed, and the Court appropriately denied Defendants' underlying motion.

3. Even if the Court were to consider the purported admission and arbitration agreements, the Court's Order was appropriate because the agreements were subject to contract defects or defenses.

Although Plaintiff requested (and reserved the right) an opportunity to fully explore contract defects and defenses through discovery[3], the purported admission and arbitration agreements are unenforceable under South Carolina contract law defenses, including but not limited to failure for lack of consideration[4], lack of merger[5], lack of mutuality, illegality, and unconscionability.

Arbitration agreements are subject to the same defenses applicable to all other contracts. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010). When a party disputes the existence of a valid arbitration agreement, any presumption in favor of arbitration disappears. *Dumais v. American Golf Corp*., 299 F.3d 1216, 1220 (10th Cir. 2002). Even where the Federal Arbitration Act (FAA) applies, the Court must still review the

[3] On March 11, 2019, Plaintiff requested by email an opportunity to conduct limited discovery regarding the enforceability of the purported arbitration agreement. On March 14, 2019, Defendants declined Plaintiff's request due to "fear of waiver" by engaging in litigation. On April 8, 2019, Defendants filed their underlying motion. After the Defendants' motion was filed, Plaintiff filed its own Motion to Conduct Limited Discovery ("MCLD") on April 30, 2019. Defendants cannot use their refusal to engage in discovery regarding the enforceability of the purported agreements as a shield and a sword. On one hand, Defendants claim that they cannot engage in discovery for fear of waiver, while on the other hand, they unilaterally assert that potential defects to contract (i.e., merger, authority, etc.) do not exist in their motion. Allowing such an approach would be unjust.

[4] As referenced during the hearing, by requiring Mr. Boles' family to waive his right to a jury trial as a condition of admission, Defendants' were requiring and accepting consideration in addition to Medicaid payments. Therefore, the jury waiver clause would be unenforceable due to its illegality. Alternatively, if the jury waiver provisions were not a precondition to admission, then they fail for lack of consideration.

[5] As explained by our Supreme Court in *Coleman*, the merger doctrine is not applicable when language in the contracts "recognized the 'separateness' of the admission and arbitration agreements." *Coleman v. Mariner Health Care, Inc*., 407 S.C. 346, 355, 755 S.E.2d 455 (2014). Moreover, in *Thompson* and *Hodge*, our Courts provided further examples of factors demonstrating "separateness" and preventing merger, including the fact that the arbitration agreement at issue was not necessary for admission and that *there was no bargain for exchange nor consideration to the arbitration agreement*. *Thompson v. Pruitt Corp*., 416 S.C. 43, 52, 784 S.E.2d 679 (Ct. App. 2016); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 563, 813 S.E.2d 292, 302 (Ct. App. 2018) (*cert. denied* Aug. 21, 2018). Here, Defendants' purported agreements do not merge and include different titles, different governing law provisions, an "entirety of agreement" provision, and distinct page numbers, among other conflicting provisions.

threshold question of contract formation, including defects such as lack of mutual assent and want of consideration as well as other grounds existing at law or equity, such as fraud, duress, and unconscionability. *Munoz v. Green Tree Fin. Corp*., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts'"); *Sydnor v. Conseco Fin. Servicing Corp*., 252 F.3d.302 (4th Cir. 2001).

South Carolina courts will not enforce unconscionable contracts or unconscionable terms within a contract. "[U]nconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007).

Here, Defendants' purported agreements are clearly unconscionable. Defendants unfairly utilize multiple agreements with conflicting material terms, including subsequent, internal jury waiver provisions, in an apparent effort to confuse the resident (or their representative) with the hope that one such waiver will later survive judicial scrutiny. Defendants' purported agreements also include one-sided, oppressive terms relating to "Attorney's Fees" and "Agreement Modifications/Changes." For example, the purported admission agreement provides that Defendants are entitled to fees and costs for "any legal action or other proceeding" brought to "interpret any provision of this Agreement" or in connection with "any appellate proceeding." The purported agreements also provide Defendants the unilateral right to "modify, change, or amend" at any time.

Accordingly, the Court's Order was appropriate because the purported agreements were subject to contract defects or defenses.

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CONCLUSION

For the foregoing reasons, Defendants' Motion to Alter or Amend should be denied.

Respectfully submitted, this the 10th day of August, 2019.

CONNOR & CONNOR, LLC

s/ A. Keith McAlister, Jr.
C. Caleb Connor, SC Bar No. 100517
Kenneth L. Connor, SC Bar No. 100298
A. Keith McAlister, Jr., S.C. Bar No. 78213
Anne K. Moore, SC Bar No. 101018
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Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO ALTER OR AMEND upon the following counsel of record in this action by email and electronic filing as follows:

W. McElhaney White, Esq.
A. Walker Barnes, Esq.
HOLCOMBE BOMAR, P.A.
101 W. St. John Street, Suite 200
Spartanburg, SC 29306

Respectfully submitted, this 10th day of August, 2019.

s/ A. Keith McAlister, Jr.
A. Keith McAlister, Jr., SC Bar No. 78213
CONNOR & CONNOR, LLC

ELECTRONICALLY FILED - 2019 Sep 09 11:35 AM - BEAUFORT - COMMON PLEAS - CASE#2019CP0700433

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

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.

NOTICE OF APPEAL

Appellants Bayview Manor, LLC d/b/a Bayview Manor, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations appeal (a) the Order (**enclosed**) Denying Defendants' "Motion to Stay Action and Compel Arbitration; in the Alternative Motion for Nonjury Trial; and Motion for Protective Order" ("Motion to Compel Arbitration") entered by The Honorable Edgar W. Dickson and filed July 26, 2019 and (b) as well as the Order (**enclosed**) Denying Defendants' Motion to Alter or Amend entered by The Honorable Edgar W. Dickson and filed August 20, 2019.

Appellants received written notice of the entry of the Order Denying Defendants' Motion to Compel Arbitration on July 26, 2019 and received written notice of the entry of the Order

Denying Defendants' Motion to Alter or Amend on August 20, 2019.

HOLCOMBE BOMAR, P.A.
P.O. Box 1897
Spartanburg, SC 29304
(864) 594-5300

By: s/ A. Walker Barnes

A. Walker Barnes (S.C. Bar No. 78485)
Attorneys for Appellants

Spartanburg, SC
September 9, 2019

***Other Counsel of Record**:*

C. Caleb Connor, Esq.
Kenneth L. Connor, Esq.
A. Keith McAlister, Jr., Esq.
Anne K. Moore, Esq.
CONNOR & CONNOR, LLC
302 Park Avenue, SE
Aiken, South Carolina 29801
Attorneys for Respondent

ELECTRONICALLY FILED - 2019 Sep 09 11:35 AM - BEAUFORT - COMMON PLEAS - CASE#2019CP0700433

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

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.

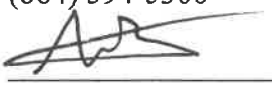
Bayview Manor, LLC d/b/a Bayview Manor, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations, ... Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that on the 9th day of September, 2019, he has served counsel for Respondent with a copy of the **NOTICE OF APPEAL** in this matter by mailing copies of the same by United States mail, postage prepaid, to the following addresses:

C. Caleb Connor, Esq.
Kenneth L. Connor, Esq.
A. Keith McAlister, Jr., Esq.
Anne K. Moore, Esq.
CONNOR & CONNOR, LLC
302 Park Avenue, SE
Aiken, South Carolina 29801

HOLCOMBE BOMAR, P.A.
P.O. Box 1897
Spartanburg, SC 29304
(864) 594-5300

By: 

A. Walker Barnes (S.C. Bar No. 78485)
Attorneys for Appellants

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A. Walker Barnes
Todd R. Flippin
Ayla Luers Connor

Neville Holcombe, 1902-1983
Horace L. Bomar, 1912-1994

September 9, 2019

VIA FEDEX OVERNIGHT
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations
C.A. No. 2019-CP-07-00433
Our File No. 15378

Dear Ms. Kitchings:

Please find enclosed for filing in the above case, the following:

(1) One (1) original and one (1) copy of the Notice of Appeal of Appellants;

(2) One (1) original and one (1) copy of the Proof of Service of the same;

(3) Two (2) copies of the Orders which are to be challenged on appeal; and

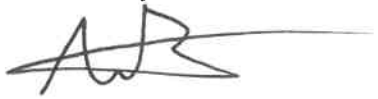
(4) a law firm check representing the filing fee of $250.00.

Please note that pursuant to Rule 203(d)(1)(B), SCACR, we have electronically filed the Notice of Appeal with the Beaufort County Clerk of Court's Office on September 9, 2019, meaning that the Beaufort County Clerk of Court has notice of this appeal.

Please do not hesitate to contact me if you have any questions or concerns. Otherwise, please file the originals of the Notice of Appeal, Proof of Service, and copy of each Order and return to me the clocked copies to me via the self-addressed stamped envelopes.

By copy of this letter and the attached enclosures, I am hereby serving other counsel of record with the enclosed filings.

Sincerely,



A. Walker Barnes

Enclosures

cc: C. Caleb Connor, Esq.
Kenneth L. Connor, Esq.
A. Keith McAlister, Jr., Esq.
Anne K. Moore, Esq.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0700433

Viola M Hackworth et al
PLAINTIFF(S)

Bayview Manor Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

that the Defendant's Motion to Stay Action is DENIED; the Defendant's Motion to Compel Arbitration is DENIED; and the Defendant's motion for a protective order is DENIED.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/26/2019 .

Eugene N Boles Estate
Eugene Boles

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2019 Jul 26 11:25 AM - BEAUFORT - COMMON PLEAS - CASE#2019CP0700433

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2019 Jul 26 11:25 AM - BEAUFORT - COMMON PLEAS - CASE#2019CP0700433

ELECTRONICALLY FILED - 2019 Jul 26 11:25 AM - BEAUFORT - COMMON PLEAS - CASE#2019CP0700433

Beaufort Common Pleas

Case Caption:	Viola M Hackworth , plaintiff, et al VS Bayview Manor Llc , defendant, et al
Case Number:	2019CP0700433
Type:	Order/Electronic Form 4

So Ordered

s/ Edgar W. Dickson #2153

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0700433

Viola M Hackworth et al
PLAINTIFF(S)

Bayview Manor Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

After careful consideration, the Court respectfully denies the Defendant's Motion to alter or amend the denial of its previous Motion to Stay Action and Compel Arbitration; its motion for a nonjury trial; and motion for protective order.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/20/2019 .

Eugene N Boles Estate
Eugene Boles

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2019 Aug 20 2:58 PM - BEAUFORT - COMMON PLEAS - CASE#2019CP0700433

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2019 Aug 20 2:58 PM - BEAUFORT - COMMON PLEAS - CASE#2019CP0700433

ELECTRONICALLY FILED - 2019 Aug 20 2:58 PM - BEAUFORT - COMMON PLEAS - CASE#2019CP0700433

Beaufort Common Pleas

Case Caption:	Viola M Hackworth , plaintiff, et al VS Bayview Manor Llc , defendant, et al
Case Number:	2019CP0700433
Type:	Order/Electronic Form 4

So Ordered

s/ Edgar W. Dickson #2153