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.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on March 15, 2023. (App. p. 1). Counsel for Petitioner certifies that the Petition for Rehearing was made on March 28, 2023, and denied on June 5, 2023. (App. pp. 9, 17).

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in finding the Admission Agreement was a valid agreement containing an enforceable arbitration provision.

II. Whether the Court of Appeals erred in finding Petitioner Viola M. Hackworth had authority to execute a pre-dispute arbitration agreement.

STATEMENT OF THE CASE

This is an appeal from a circuit court order denying Respondents Bayview Manor, LLC d/b/a Bayview Manor, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons's (Respondents) motion to compel arbitration. After a hearing whereby Petitioner argued Respondents failed to set forth credible evidence to establish the existence of a valid and enforceable arbitration agreement, the lower court issued a Form 4 Order denying Respondents' motion. The Court of Appeals reversed, finding that Petitioner had authority to enter into an arbitration agreement on Eugene Boles behalf, the Admission Agreement between the parties was a valid contract, and the arbitration provision from the Admission Agreement is an enforceable agreement to arbitrate. (App. 1-8). The Court did not rule on the enforceability of the separate Arbitration Agreement. (App. 5).

Petitioner is the surviving sister of the decedent, Mr. Eugene Boles. (App. 263). On October 3, 2012, Mr. Boles executed a general durable power of attorney that lists specific powers related to his property and assets the Petitioner may take on Mr. Boles' behalf. (App.

205). The language of the power of attorney does not encompass authority to agree to arbitration or waive Mr. Boles' right to a jury trial.

Mr. Boles was admitted to the Respondents' facility Bayview Manor on November 2, 2015, for skilled nursing and rehabilitative care after suffering a stroke. (App. 104, 110, 136). 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*.

The facility's Admissions and Marketing Director, Ms. Caruso, attested that she "met" with Petitioner and her brother, Clifford Byars ("Mr. Byars"), and "personally presented" admissions paperwork on November 2 and 3, 2015. (App. 230-233, ¶¶ 7-8, 12). Ms. Caruso swore that Petitioner 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. (App. 231, ¶¶ 8-9; App. 174, lines 10-24). Ms. Caruso had Mr. Byars sign and initial the documents, despite his known lack of authority. (App. 231-232, ¶¶ 8, 10). Ms. Caruso further swore that Petitioner "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." (App. 232, ¶ 12).

In light of Respondents' detailed sworn testimony, including vivid descriptions of supposed interactions with Petitioner on November 2 and 3, 2015, Petitioner filed a counter-affidavit with corroborating documentation, which illustrates "[n]one of [those details] can be true." (App. 271-272, ¶¶ 4, 8; App. 173, lines 16-19). Contrary to Respondents' assertions,

Petitioner 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." (App. 271, ¶ 5). Rather, due to childcare concerns and work obligations, Petitioner did not travel from her home in Florida to South Carolina until November 6, 2015. *Id.* at ¶ 6. To reinforce her sworn testimony, Petitioner offered her work schedule as well as bank statements from that time period. (App. 273-274). Moreover, her brother, Mr. Byars, was not with her at this time, despite contrary claims by Ms. Caruso. (App. 272, ¶ 7).

Respondents moved to compel arbitration based upon two (2) separate agreements, the Admission Agreement and Arbitration Agreement, which contain conflicting arbitration provisions. (App. 184). 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). (App. 187-197). The parties to the agreement are "Eugene Boles ('Resident')" and "Bayview Manor ('Facility')." (App. 187). Ms. Caruso apparently signed[1] on behalf of the Facility on November 2, 2015. (App. 197). No "Responsible Party" is identified or defined, the purported signatures of Petitioner and Mr. Byars are dated 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." (App. 194). 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. (App. 195).

[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.

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*.

The Admission Agreement also includes separate jury waiver and arbitration clauses. (App. 195, 197). 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. (App. 195). 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.

(App. 197).

The Admission Agreement's 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*.

The agreement also authorizes the Facility to "modify, change or amend this Agreement" at any time in its sole discretion. (App. 197). Remarkably, this agreement Respondents rely upon was followed in the Admissions packet by a note that stated, "Please disregard first contract, resident has POA who will sign him in on a later date." (App. 174, lines 10-24).

The separate Arbitration Agreement is a two (2) page document found in admissions packet but is not numbered. (App. 198-199). It fails to identify the parties to the agreement and leaves placeholders for the "Facility" and the "Resident" or "Resident's Authorized Representative" incomplete. (App. 198). 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*. Petitioner's purported signature is dated November 3, 2015, a date she remained in Florida. *Id*. The Court of Appeals did not rule on the enforceability of this separate agreement.

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. (App. 136-141). 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. (App. 141). 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. (App. 111, ¶ 27; App. 141-153). On December 14, 2016, Mr. Boles was found unresponsive by Bayview Manor staff. (App. 116, ¶ 56; App. 141). 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.

On March 1, 2019, Petitioner filed this action in the Beaufort County Court of Common Pleas, and on April 8, 2019, Respondents filed a motion to dismiss and compel arbitration and attached an Admission Agreement, Arbitration Agreement, and affidavits of two employees, Christy Dinkard and Lucy Caruso. (App. pp. 171-245). Petitioner filed a response in opposition arguing *inter alia* that Respondents' false statements attested to by their representatives failed to set forth credible evidence to establish the existence of a valid and enforceable arbitration agreement, and argued that other factors, defects and defenses rendered the purported agreements and/or certain provisions unenforceable. (App. 3). Petitioner submitted her affidavit as well the Arbitration Agreement which did not identify who the agreement was between. (App. pp. 254, 258, 303).

On June 11, 2019, the Honorable Edgar Dickson, held a hearing on Respondents' motion. (App. p. 149). On July 26, 2019, the lower court filed a Form 4 Order denying Respondents' Motions to Stay Action and Compel Arbitration. (App. p. 82). On August 5, 2019, Respondents filed a Motion to Alter or Amend, which the lower court denied on August 20, 2019 "after careful consideration". (App. p. 85).

The Court of Appeals reversed the lower court in an unpublished opinion. (App. pp. 1-8). It held the general durable power of attorney agreement gave Petitioner the authority to enter into an arbitration agreement. (App. p. 4). It found Petitioner and Bayview Manor formed an arbitration agreement when they signed the Admission Agreement despite Respondents' false representations to the lower court, evidence in the record that the Admission Agreement was to be "disregarded", and Petitioner's arguments that the arbitration provision in the Admission Agreement is unlawful. (App. p. 5-6). The Court of Appeals found the date next to the signatures on the Admission Agreement were immaterial to whether Petitioner formed an agreement and understood the contents. (App. p. 5). As to the arbitration provision from the Admission Agreement, the court found it valid under the "separability" doctrine, and stated "we find nothing in the language of the arbitration provision demonstrates unconscionability," or "one-sided or oppressive terms". (App. p. 6). Finally, the Court of Appeals held that to the extent the lower court's denial of the motion was a sanction, it was an error. (App. p. 7).

ARGUMENT

This Court should grant this petition for writ of certiorari and reverse the Court of Appeals' opinion in its entirety.

I. THE ADMISSION AGREEMENT IS NOT A VALID AGREEMENT CONTAINING AN ENFORCEABLE ARBITRATION PROVISION

The Court of Appeals erred in finding that the Admission Agreement was a valid agreement containing an enforceable arbitration provision and disregarded the standard of review and the burden of proof in reaching its decision. "A circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Arredondo v. SNH SE Ashley River Tenant, LLC et al.*, 433 S.C. 69 at 74-75, 856 S.E.2d 550 at 553 (Dec. 6, 2021); *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016). Further, Respondents bore 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 "[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). Respondents' motion, brief in support, and oral argument lacked credible, foundational evidence necessary to establish the existence of a valid arbitration agreement, and the arbitration provision in the Admissions Agreement is unlawful. The lower court's denial of Respondents' motion was factually and legally correct.

A. Lack of Credible, Foundation Evidence

The lower court correctly found no valid agreement to arbitrate and denied Respondents' motion. The Court of Appeals' opinion to the contrary disregards the any evidence standard of review and Respondents' burden of proof.

Petitioner maintains that no credible evidence exists in the record to confirm the existence of a valid agreement to arbitrate. To compel this matter to arbitration, Respondents relied upon and presented to the lower court sworn testimony of their former Admission's Director, Ms. Caruso, which was categorically false. (App. 230-233). 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."

(App. 231-232, ¶¶ 7-8, 10-13).[2] After reviewing Respondents' Motion and their false affidavits, Petitioner submitted a counter-affidavit with corroborating documentation, which illustrated Ms. Caruso's statements were "false" and "[could not] be relied upon." (App. 272, ¶ 8; App. 171, line 20-p. 175, line 7).

Petitioner 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. (App. 271, ¶ 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. (App. 271-272, ¶¶ 6-7). Petitioner's testimony was also corroborated by documentation, including her work schedule and bank statements. (App. 271-274, ¶ 6). There is no evidence in the record to support Respondents' factual basis for their motion.

[2] 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. (App. 202, ¶ 10).

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.

(App. 163, line 22- p. 164, line 2). After oral argument of Petitioner's counsel, Respondents' counsel reiterated their concession to Petitioner'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. . . .

(App. 182, lines 1-3). 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. . . ." (App. 182, line 25-p. 183, line 2).

The Court of Appeals' opinion suggests there is no dispute that Petitioner signed the Admission Agreement asserted by Respondents. However, Petitioner asserts that the evidence in the record from Respondents is false and not worthy of belief. (App. 271-272, 173: lines 16-18). Respondents' own attorney acknowledges the same. The Affidavits from Respondents' employees and the purported Admission Agreement itself state that Petitioner signed such agreement on a date when she was not present at Bayview Manor, or even present in the state of South Carolina. (App. 187-199, 200-258). Respondents refused Petitioner's requests to discovery on this matter, and failed to create any record to establish a valid contract was entered into. (App. 262-317). Therefore, there is no credible evidence in the record that the Admission Agreement is valid.

Further, there is evidence in the record that the Admission Agreement relied upon by Respondents was to be "disregarded". (App. 366, 174: line 10, 175: line 7). The lower 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. The Court of Appeals' 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).

South Carolina's Constitution guarantees that the right to a trial by jury "shall be preserved inviolate." S.C. Const. art. I, § 14.[3] For the lower court to compel arbitration and waive such a fundamental right, Respondents bear the burden of establishing the existence of a valid contract. *Hinson-Barr*, 292 S.C. at 268. To do so, Respondents must submit credible evidence for the lower court's consideration. Here, Respondents admittedly submitted false affidavits of facility personnel that were "directly contradicted" by Petitioner's testimony and corroborating evidence. *Russell*, 370 S.C. at 19. Moreover, as explained in more detail below, Respondents submitted purported contractual documents that were either back-dated, falsified, or documented as "to be disregarded" due to the fact that the resident has a POA who was not present. (App. 174, lines 10-24; App. 179, line 23-p. 180, line 2). However, rather than withdraw their Motion because it lacked good faith support, Respondents stated the fabrication of testimonial and documentary evidence "does not matter," and insisted that the lower court should compel arbitration anyway. (App. 163, line 22-p. 164, line 2). Respondents offered no credible evidence for which the lower court could rely to find the existence of a valid contract; thus, the lower court was precluded from compelling arbitration and waiving Mr. Boles' and Petitioner's right to a jury trial.

The Court of Appeals' decision as to a valid agreement being made is contrary to the standard of review and the evidence in the record. This Court should grant the petition and reverse.

[3] In fact, Appellants acknowledged South Carolina afforded this right during the hearing. (App. 167, lines 8-12).

B. Arbitration provision of the Admission Agreement is Unlawful and Unenforceable

Even if there were sufficient evidence to find the Admission Agreement was a valid contract, the arbitration provision contained in the Admission Agreement is unlawful and unenforceable. Again, Respondents bear the burden of establishing the existence of a valid arbitration agreement. *Hinson-Barr*, 292 S.C. at 268. 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. Sub-sections 1 and 4 require that the facility 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) and (4). The Court of Appeals held that the consideration Petitioner received was the Respondents' agreement to the arbitration provision. However, this finding is directly controverted by Respondents in the record. When asked by the circuit court judge what the consideration was, Respondents' counsel stated, "The consideration is the services provided by the facility. We're going to give you room and board." (App. 167, lines 19-24). This directly violates the federal requirements laid out in sub-sections 1 and 4 of the regulation. Respondents 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.

Additionally, sub-sections 2 and 3 require that the facility 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, further making the arbitration provision unlawful. Petitioner 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 before the Court of Appeals. Petitioner has maintained throughout briefing and arguments that the

arbitration provision of the Admission Agreement is invalid and unenforceable. (App. 264, footnote 2, 172: line 1-2, 174: lines 19-25, 175: 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).

The arbitration provision in the Admission Agreement relied upon by the Court of Appeals in its opinion is violative of the Federal regulations governing nursing homes who participate in Medicare. Again, Respondents offered no credible evidence that a "enforceable" and "valid" arbitration agreement exists. The Court of Appeals' decision as to this issue is contrary to the standard of review and the evidence in the record. This Court should grant the petition and reverse.

II. PETITIONER DID NOT HAVE AUTHORITY TO EXECUTE THE ARBITRATION AGREEMENT AND WAIVE A JURY TRIAL

The Court of Appeals erred in finding Petitioner had authority to execute an arbitration agreement and waive a jury trial right. Its decision is based upon 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 determine whether the General Durable Power of Attorney authorized Petitioner to execute the pre-dispute Binding Arbitration Agreement, a court must look to the specific language of the power of attorney. *Arredondo*, at 75, at 554.

Article I of the Power of Attorney provides Petitioner:

> 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… (App. 218)

The most general statement of Petitioner's authority under the document is discretion with respect to property. Under this Court's holding in *Arredondo*, this discretion did not apply to a property right that did not exist at the time Petitioner 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 Petitioner 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 Petitioner allegedly signed it. *Id.* at 79, 556.

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

- 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.
- Paragraph 1 under Section B authorizes Petitioner to convey or transfer property. (App. 218). This Court 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 Petitioner to convey or transfer property did not grant her authority to sign an arbitration agreement.
- Paragraph 3 under Section B authorizes Petitioner to make, sign, execute, acknowledge agreements, waivers and releases as may be necessary, convenient, or proper in the

premises. (App. 219). 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 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 Petitioner arrived in South Carolina.

- Paragraph 6 under Section C authorizes Petitioner 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 Petitioner allegedly signed the agreement before any potential legal claim accrued, this provision does not grant her authority to sign such agreements. *Id.* at 84-85, 558-559.
- Paragraph 18 under Section C authorizes Petitioner 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 Petitioner authority to sign the arbitration agreement because the pre-dispute arbitration contract does not relate to any property rights of Mr. Boles. *Arredondo*, at 78, 555.

The power of attorney did not confer authority for Petitioner to execute an arbitration agreement or waive Mr. Boles' right to a jury trial. While the General Durable Power of Attorney gave Petitioner significant authority to make property decisions for Mr. Boles, the mere title of the document did not increase her 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 assets as granted by the provisions of the Power of Attorney. The Court should grant the petition and reverse the Court of Appeals' decision to the contrary.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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