THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2017-CP-26-01351
Appellate Case No. 2018-000188

Orveletta Alston as Personal Representative of the Estate of Willie Earl Alston, Sr.,.....Respondent,

v.

Conway Manor, LLC, Raymond Tiller, and John and Jane Does 1-10,..... Appellants.

INITIAL APPELLANTS' BRIEF OF CONWAY MANOR, LLC, RAYMOND TILLER, AND JOHN AND JANE DOES 1-10

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II. Whether the trial court erred in failing to order arbitration because Respondent is estopped from denying the validity of the arbitration provision while simultaneously asserting claims founded in the duties arising out of other sections of the Admission Agreement.

III. Whether the trial court erred in failing to order arbitration because Mr. Alston was the intended and direct beneficiary of the admission agreement which contains the arbitration provision.

IV. Whether the trial court erred in failing to order arbitration pursuant to the Federal Arbitration Act because Mr. Alston's daughter had statutory and regulatory authority to entered into the Admission Agreement and the Respondent's claims fall within the scope of the arbitration provision contained therein.

V. Whether the trial court erred in failing to order arbitration because the Admission Agreement and the Facility Binding Arbitration Agreement merged, meaning that the Facility Binding Arbitration Agreement also requires arbitration.

STATEMENT OF THE CASE

On March 2, 2017, Orveletta Alston as Personal Representative of the Estate of Willie Earl Alston, Jr. ("Respondent") filed a Summons and Complaint against Conway Manor, LLC ("Conway Manor"), Raymond Tiller, and John and Jane Does 1-10 (collectively, "Appellants"). [Complaint.] Respondent alleged Appellants provided care to Willie Earl Alston, Jr. ("Mr. Alston") which fell below the standard of care in 2015 – 2016. Appellants timely answered on April 12, 2017, denying liability. [Answer.]

On June 21, 2017, Appellants filed a Notice of and Motion to Stay Action and Compel Arbitration and for a Protective Order ("Motion") [Notice of and Motion to Stay Action and Compel Arbitration.] The Motion was based on the terms and provisions of the arbitration clauses found in the Admission Agreement ("Admission Agreement") and the Resident and Facility Binding Arbitration Agreement. [Appellants' Memorandum in Support of Motion to Stay Action

and Compel Arbitration and for Protective Order, Ex. A and B.]

Appellants prepared and filed detailed memoranda of law addressing the Motion to Compel Arbitration. [Appellants' Memo in Support; Appellants' Supplemental Memorandum in Support of Defendants' Motion to Stay Action and Compel Arbitration and For Protective Order]. On November 1, 2017, The Honorable Larry B. Hyman, Jr. (the "trial court") heard the Motion to Compel Arbitration. [Transcript.] By order dated January 11, 2018 and filed January 17, 2018, the trial court denied the Motion to Compel Arbitration. [Order.] On February 8, 2018, Appellants filed their Notice of Appeal. [Notice of Appeal.]

STATEMENT OF THE FACTS

On December 17, 2015, Kimberly Alston-Wood ("Ms. Alston-Wood"), as Mr. Alston's daughter and responsible party, executed the Admission Agreement on behalf of Mr. Alston for his admission to Conway Manor. [Memo in Support, Ex. A.] Within the Admission Agreement, Ms. Alston-Wood expressly acknowledged and represented that she was "authorized to bind the Resident to all terms in this [Admission] Agreement." [Memo in Support, Ex. A, p. 31.] The Admission Agreement contained an arbitration clause which required the arbitration of any action, dispute, claim or controversy of any kind. [Memo in Support, Ex. A.] 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 the original).

[Memo. in Support, Ex. A.]

Wendy Lynch, as Admissions Coordinator, executed the Admission Agreement on behalf of Conway Manor. [Memo in Support, Ex. B.] Pursuant to the arbitration clause in the Admission Agreement, the parties agreed to arbitrate any disputes arising out of Mr. Alston's care and treatment at Conway Manor. [Memo. in Support, Ex. A.]

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 must be overturned because Ms. Alston-Wood had capacity to enter the Admission Agreement containing the arbitration provision at issue pursuant to both the Adult Health Consent Act and the South Carolina Bill of Rights for Residents of Long-Term Care Facilities.

The trial court erred in finding that Ms. Alston-Wood lacked authority to bind Mr. Alston to the arbitration provision contained in the Admission Agreement (the "arbitration provision").

Just as she represented to Conway Manor in executing the admission[1], Ms. Alston-Wood had authority to bind Mr. Alston to arbitration provision pursuant to the South Carolina's Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10, et seq. ("AHCCA") and the South Carolina Bill of Rights for Residents of Long-Term Care Facilities ("Bill of Rights").[2]

a. Ms. Alston-Wood had authority to bind Respondent[3] to the arbitration provision pursuant to the AHCCA because the arbitration provision was contained within the Admission Agreement.

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). A daughter is authorized to consent to health care on behalf of a patient pursuant to the AHCCA. S.C. Code Ann. § 44-66-30(A)(5).

Pursuant to Section 44-66-20(8), Conway Manor appropriately determined Mr. Alston was

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[1] Contrary to the trial court's reading of the Admission Agreement [Order, p. 3], Ms. Alston-Wood did in fact represent in the Admission Agreement that she was "authorized to bind the Resident to all terms in this [Admission] Agreement." [Memo in Support, Ex. A, p. 31.]

[2] The trial court holds in its Order that Ms. Alston-Wood did not have apparent authority to enter into a binding contract on behalf of Mr. Alston. Appellants have not contended that apparent authority applies in this case. Thus, no argument will be devoted to that topic.

[3] Throughout this brief when Appellants state that the arbitration provision and/or Facility Binding Arbitration Agreement binds Respondent, Appellant refers to Respondent's claims on behalf of Mr. Alston's Estate because the Estate stands in the shoes of Mr. Alston, 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.").

unable to make health care decisions on his own behalf as evidenced by the "Level of Comprehension" form. Two physicians examined Mr. Alston and opined that he was not able to comprehend the Resident's Rights and Responsibilities, nor was he able to make health care decisions. [Memo in Support, Ex. C.] This finding was consistent with Mr. Alston's admitting physician noting that one of his medical conditions included Alzheimer's dementia. [Memo in Support, Ex. D.]

Pursuant to Section 44-66-30 of the South Carolina Code, Ms. Alston-Wood, as the daughter of Mr. Alston, had statutory authority to act as an agent on Mr. Alston's behalf in making "health care" decisions, which included placing him at Conway Manor and executing all paperwork on Mr. Alston's behalf associated with his placement in Conway Manor.[4] 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

[4] Within its Order, the Trial Court raised on its own volition that neither Respondent nor Appellants had argued that Mr. Alston's wife (Respondent) was not reasonably available, was unwilling to make decisions, or was unable to make healthcare decisions for Mr. Alston pursuant to S.C. Code Ann. § 44-66-30(D). [Order, p. 4.] Because the trial court noted that neither party raised the issue and because the trial court did not reach a conclusion on the issue, Appellants understand that portion of the Order had no bearing on the trial court's decision. Out of an abundance of caution, however, Appellants note that based upon Ms. Alston-Woods' acknowledgment and representation within the Admission Agreement that that she was "authorized to bind the Resident to all terms in this [Admission] Agreement" [Admission Agreement, p. 31], it was reasonable for Appellants to presume that any person of higher authority under the AHCCA was not reasonably available, was not willing to make health care decisions for Mr. Alston, or was unable to consent for some other reason.

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 correctly 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 arbitration agreement.

Unlike Coleman, the arbitration provision which Appellants seek to enforce is contained within the Admission Agreement and is not separate agreement. The Admission Agreement,

pursuant to which Mr. Alston was admitted to Conway Manor, contained the terms under which Conway Manor would provide long term care health services to Mr. Alston and how those services would be paid for. For instance, it was agreed that Conway Manor would provide care and treatment according to practice, policy and physician orders; a physician would be chosen to provide care to Mr. Alston in the facility; and Mr. Alston 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 others. [Memo in Support, Ex. A, p. 25, 27 - 29].

Thus, unlike the situation in the Coleman case described above 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 Ms. Alston-Wood in the case at bar. Therefore, applying the reasoning set forth in Coleman, the AHCCA empowered Ms. Alston-Wood to sign the Admission Agreement on behalf of Mr. Alston and bind him all the provisions of that contract, including the arbitration provision.[5]

b. Ms. Alston-Wood had authority to bind Respondent to the arbitration provision because Ms. Alston-Wood was Mr. Alston's representative pursuant to the Bill of Rights.

Finally, the trial court held the Bill of Rights did not confer legal authority on Ms. Alston-Wood to enter into a contract on behalf of her father, holding instead that Mr. Alston's wife, as next of kin, would be his proper representative under that statute. This too was error.

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[5] The trial court also cited to Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016) in support of its ruling. The facts in Thompson were very similar to the facts in Coleman. In Thompson, the court was faced with separate admission and arbitration agreements. Like the Coleman court, it held the son who executed the agreements on behalf of his mother had no authority under the AHCCA to execute the arbitration agreement. It further held the admission and arbitration agreements did not merge. Thompson at 416 S.C. 43, 784 S.E.2d at 683-685. The Thompson case therefore is also distinguishable from the present case.

Ms. Alston-Wood possessed statutory authority as Mr. Alston's "representative" under the Bill of Rights. See S.C. Code Ann. § 44-81-10, et seq. Under the Bill of Rights, a "representative" is defined as "a resident's legal guardian, committee, or next of kin or other person acting as agent of a resident who does not have a legally appointed guardian." S.C. Code Ann. § 44-81-30(3). There is no statutory priority, and thus anyone acting in one of those capacities qualifies as a representative under the Bill of Rights.

The Bill of Rights further provides that a "resident's representative must be given by the facility a written and oral explanation of the rights, grievance procedures, and enforcement provisions of this chapter before or at the time of admission to a long-term care facility. Written acknowledgment of the receipt of the explanation by the resident or the resident's representative must be made a part of the resident's file." S.C. Code Ann. § 44-81-40(A).

Since Mr. Alston did not have a legally appointed guardian at the time of his admission, Ms. Alston-Wood was his representative and agent pursuant to the Bill of Rights. This is evidenced by the fact that Ms. Alston-Wood, as Mr. Alston's representative, received the statutorily required information from the facility at the time of Mr. Alston's admission and signed a written acknowledgment reflecting this in accordance with the foregoing code section. [Admission Agreement]. Acting as Mr. Alston's agent under the Bill of Rights, Ms. Alston-Wood signed the Admission Agreement as Mr. Alston's representative, binding Mr. Alston and all those claiming by or through him to arbitration pursuant to the arbitration provision.

II. 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 Conway Manor agreed to provide the care and treatment to Mr. Alston which now is at issue in this lawsuit. The Respondent,

therefore, 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 same Agreement.[6]

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.

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[6] The trial court's analysis of the equitable estoppel doctrine under Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 682 S.E.2d 1 (Ct.App. 2009) is misplaced. Appellants do not rely upon that form of equitable estoppel in the Motion to Compel. Instead, Appellants argue Respondent should not be allowed to receive the benefit of the Admission Agreement while at the same time repudiate the arbitration provision contained therein.

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, Deborah Wiggins executed an admissions contract containing an arbitration clause for the admission of her father, Earl Hall, into a 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 further held that because 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.[7]

[7] Appellants note that the Court of Appeals in Thompson declined to apply the doctrine of equitable estoppel in this setting where the admission agreement and the arbitration agreement were separate documents. See Thompson, 416 S.C. 43, 784 S.E.2d 679. It is noteworthy, however, that the Thompson Court used facts reflective of the present case to distinguish from the situation it faced with separate agreements. In discussing arbitration cases where courts have applied equitable estoppel, the Thompson Court noted the nonsignatory's contractual benefit typically arose from another provision in the same contract that includes the arbitration provision, rather than an alleged benefit arising only under a separately executed arbitration agreement. 416 S.C. at 59, 784 S.E.2d at 688. Here, in the case at bar, there were contractual benefits directed to Mr. Alston in terms of

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

All the 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.

III. The trial court erred in denying Appellants' Motion because Mr. Alston was the intended and direct beneficiary of the Admission Agreement containing the arbitration provision.

Even if Ms. Alston-Wood had not had statutory and regulatory authority to enter the Admission Agreement and even if 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. Alston was a third-party beneficiary of the Admission Agreement.

Mr. Alston, 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. Alston was an intended beneficiary and the purpose of the Admission Agreement was to ensure Conway Manor would provide the services laid out therein. Mr. Alston did, in fact, receive those

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the care and services he received under the Admission Agreement which also contained the arbitration provision.

services. The trial court agreed, finding "Mr. Alston did benefit from the Admissions Agreement to the facility...." [Order, p. 6.] Mr. Alston, therefore, is obligated to arbitrate any claims within its scope, regardless of whether those claims are brought by a legal representative.

Appellants' position is supported by South Carolina federal district court opinion in Wiggins applying South Carolina law. See 2011 WL 4089435. As set forth above, in Wiggins, Deborah Wiggins executed an admissions contract containing an arbitration clause for the admission of her father, Earl Hall, into the Magnolia Manor 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 correctly 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.[8]

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

IV. The trial court improperly denied Appellants' Motion because the Federal Arbitration Act mandates arbitration since Ms. Alston-Wood had authority to enter

[8] 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).

the Admission Agreement and the Respondent's claims fall within the scope of the arbitration provision.

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 provision 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. [Memo in Support, Ex. A, p. 35.] 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 or 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. See, supra, Arguments I, II, and III. Second, as will be discussed immediately below, Respondent's claims are within the scope of the arbitration provision.

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

Respondent's claims are clearly within the scope of the Arbitration provision. 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.

Respondent's claims include negligence, negligence per se, fraud and misrepresentation, violation of the South Carolina Unfair Trade Practices Act, wrongful death and survivorship, all which allegedly stem from the care and treatment received by Mr. Alston under the Admission Agreement. [Complaint.] All 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 the 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) (citation omitted).

The interstate commerce requirement under the FAA is met in the present case on multiple grounds. As noted in Conway Manor Administrator Raymond Tiller's Affidavit, at the time of Mr. Alston's residency, (1) Conway Manor received payments from Medicare, Medicaid, and private insurers from other states; (2) the majority of food served at Conway Manor came from Charlotte, North Carolina; (3) Conway 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; and (4) Conway Manor treated residents who came from other states. [Memo in Support, Ex. E.]

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 Conway Manor to provide Mr. Alston room and board, medical supplies, and many other goods and services, all of which were instruments of interstate commerce. [Memo in Support, Ex. A.].

In accordance with the forgoing, the FAA's interstate commerce requirement is satisfied in the present case.

V. **The trial court erred in denying Appellants' Motion because the Admission Agreement and the Facility Binding Arbitration Agreement merged, meaning that the Facility Binding Arbitration Agreement also requires arbitration.**

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 – VI above. Out of an abundance of caution, Appellants also argue that Respondent is compelled to arbitrate her action against Appellants based upon Ms. Alston-Wood's execution of the Facility Binding Arbitration Agreement ("Arbitration Contract") at the same time as the Admission Agreement [Memo in Support, Ex. B.]

Unlike Coleman and Thompson, the Admission Agreement and Arbitration Contract 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 Contract, the Arbitration Contract is enforceable and mandates arbitration based on the grounds set forth in Arguments I – VI above.

CONCLUSION

Respondent is bound to arbitrate her claims against Appellants. The Admission Agreement and Arbitration Agreement are enforceable; the claims asserted by Respondent are within the scope of the arbitration clauses; and the FAA mandates that the claims be arbitrated. 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.

Respectfully submitted this 4th day of June, 2018.

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PROOF OF SERVICE

The undersigned hereby certifies that on the 4th day of June 2018, he has served counsel for Appellant with a copy of **INITIAL APPELLANTS' BRIEF OF CONWAY MANOR, LLC, RAYMOND TILLER, AND JOHN AND JANE DOES 1-10** in this matter by mailing copies of the same by United States mail, postage prepaid, to the following addresses:

D. Nathan Hughey
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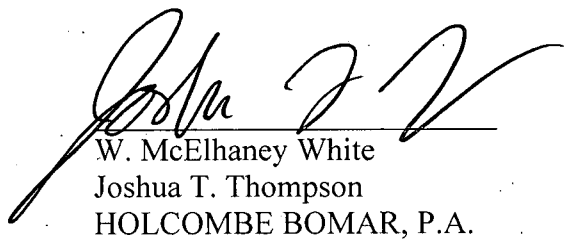

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Horace L. Bomar, 1912-1994

June 4, 2018

(VIA HAND DELIVERY)
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Orveletta Alston as Personal Representative of the Estate of Willie Earl Alston, Sr. v. Conway Manor, LLC, Raymond Tiller, and John and Jane Does 1-10
C. A Number: 2018-000188
Our File No.: 14526

Dear Ms. Kitchings:

Please find enclosed for filing in the above case, the following:

(1) One (1) original and one (1) copy of the Initial Appellants' Brief of Conway Manor, LLC, Raymond Tiller, and John and Jane Does 1 - 10;

(2) One (1) original and one (1) copy of the Proof of Service of the same;

(3) One (1) original and one (1) copy of the Appellants' Designation of Matter to be Included in the Record on Appeal; and

(4) One (1) original and one (1) copy of the Proof of Service of the same.

Please do not hesitate to contact me if you have any questions or concerns. Otherwise, please file the originals of the Initial Appellants' Brief, Proof of Service, Designation of Matter, and Proof of Service Notice of Appeal, Proof of Service, and return to me the clocked copies of the same to me via my courier.

By copy of this letter and the attached enclosures, I am hereby serving other counsel of record with the enclosed filings.

Sincerely,

Joshua T. Thompson

Enclosures

C: D. Nathan Hughey, Esq. (via U.S. Mail)
A. Stuart Hudson, Esq. (via U.S. Mail)
Bradley H. Banyas, Esq. (via U.S. Mail)
Earnest LaTony Dessausure, Esq. (via U.S. Mail)
W. McElhaney White, Esq. (via email only) (w/o enclosures)

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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