THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Larry B. Hyman, Jr., Circuit Court Judge

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 BRIEF OF RESPONDENT

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V. Whether the lower court correctly held the Admission Agreement and Facility Binding Arbitration Agreement did not merge because the terms of the agreements recognize their separateness.

STATEMENT OF THE CASE

This case arises out of decedent Willie Earl Alston, Sr.'s, residency at Appellant Conway Manor, LLC's assisted living facility and his subsequent death. On March 2, 2017, Respondent Orveletta Alston as Personal Representative of the Estate of Willie Earl Alston, Sr., ("Respondent") filed a Complaint against Appellants Conway Manor, LLC, Raymond Tiller, and John and Jane Does 1-10 (collectively "Appellants") asserting causes of action for negligence, negligence *per se*, fraud and misrepresentation, violation of the South Carolina Unfair Trade Practices Act, wrongful death, and survival. (Cmplt.). On April 12, 2017, Appellants filed an Answer. (Ans.).

On June 21, 2017, Appellants filed a Notice of and Motion to Stay Action and Compel Arbitration and for Protective Order. (Not. of Mot.). On August 11, 2017, Appellants filed a

Memorandum in Support of Motion to Stay Action and Compel Arbitration and for Protective Order. (Defs. Memo. in Supp.). On October 27, 2017, Respondent filed a Memorandum in Opposition to Motion to Compel Arbitration. (Pl. Memo. in Opp.). On November 1, 2017, Appellants filed a supplemental memorandum in support of the motion to compel arbitration. The Honorable Larry B. Hyman, Jr., held a hearing on November 1, 2017, and entered an Order denying the motion on January 17, 2018. (Order). On February 8, 2018, Appellants filed a Notice of Appeal. (Not.).

FACTS

Mr. Alston was admitted to Conway Manor on December 17, 2015. (Cmplt. p. 8 ¶ 30). He suffered from a history of stroke and Alzheimer's disease, could not get out of bed, and used a wheelchair for mobility. (Exh. D to Def. Memo. in Supp. Mot.). At the time of his admission, two doctors found Mr. Alston could not comprehend the Resident's Right and Responsibilities of the facility and could not make health care decisions. (Exh. C to Def. Memo. in Supp. Mot.).

Wendy Lynch, admissions coordinator for Conway Manor, met with Kimberly Alston-Wood, Mr. Alston's daughter, to execute the admission paperwork. (Exh. B. to Def. Memo. in Supp. Mot.). Despite the fact that his wife, Orveletta Alston, was alive and the legal representative for Mr. Alston, Mrs. Alston-Wood signed two documents: (1) Admission Agreement and (2) Resident and Facility Binding Arbitration Agreement.

The Admission Agreement contains an arbitration provision. The Admission Agreement signed by Mrs. Alston-Wood leaves blank the name of the "Resident" and the Resident's address for mailing any necessary notices. (Exh. A to Not. of Mot. pp. 25, 32; Exh. A to Pl. Memo. in Opp.). It is signed by Mrs. Alston-Wood as "Responsible Party" but leaves blank her capacity as Responsible Party among the choices of conservator, power of attorney, relative, or other. *Id.* at p.

35. The last page of the Admission Agreement states "The legal designee shall supply the Facility with a copy of the Power of Attorney, Durable Power of Attorney, Guardianship, or other legal document, which permits him/her to act as the legal designee for the Resident." (Exh. A to Defs.' Memo. in Supp. Mot. p. 35). There is no such document in the record, and it is undisputed Mrs. Alston-Wood was not Mr. Alston's representative, conservator, durable power of attorney, or appointed guardian. (Tr. pp. 5-6; Order p. 2).

Orveletta Alston submitted an affidavit to the lower court stating: "At the time of Willie Earl Alston, Sr.'s admission to Conway Manor, I was his wife and made medical decisions for him." (Exh. A to Pl.'s Memo. in Opp. ¶ 3). She further stated: "I never signed an arbitration agreement on behalf of Willie Earl Alston, Sr. nor waived his right to a jury trial. No one but me had that power as of the time of admission to the Defendant's facility . . . ." *Id.* at ¶ 4.

The arbitration provision is the last paragraph of the Admission Agreement. (Exh. A to Defs.' Memo. in Supp. of Mot. p. 35). It is entitled "***Optional*** Arbitration Clause." *Id.* (emphasis added). It 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 anyway arising from or relating to this Agreement governing the Resident's stay a[t] the Facility, shall be governed by the provisions of the South Carolina Arbitration Code." *Id.* The last sentence is in bold font and states: "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." *Id.*

While at Conway Manor, Mr. Alston developed pressure sores. *Id.* at ¶ 31. The sores became infected and caused pain and suffering, the decline of Mr. Alston's health and, ultimately, his death. *Id.*; Exh. A to Cmplt. ¶¶ 6-8. He died on April 22, 2016. (Pl. Memo. in Opp. p. 1).

On March 2, 2017, Respondent filed a Complaint against Conway Manor, Raymond Tiller, and John and Jane Does 1-10 asserting causes of action for wrongful death, survival, negligence, negligence *per se*, fraud and misrepresentation, and violation of the South Carolina Unfair Trade Practices Act. (Cmplt.). Raymond Tiller is the administrator of Conway Manor. (Cmplt. p. 1 ¶ 3; Ans. p. 1 ¶ 3). Appellants answered, generally denying liability and asserting the case is subject to arbitration. (Ans.). Appellants filed a motion to compel arbitration arguing there is a valid arbitration agreement that Mrs. Alston-Wood had statutory authority to execute on behalf of Mr. Alston under the South Carolina Adult Health Care Consent Act ("the Act"), S.C. Code Ann. §§ 44-66-10, *et seq.*, and the South Carolina Bill of Rights for Residents of Long-Term Care Facilities ("Bill of Rights"), S.C. Code Ann. §§ 44-81-10, *et seq.*, Respondent should be equitably estopped from challenging the validity of the arbitration provision, and Mr. Alston is a third-party beneficiary to the agreement. (Def. Memo. in Supp. of Mot.).

Respondent filed a Memorandum in Opposition to the Motion to Compel Arbitration arguing the arbitration provision is not enforceable because Mrs. Alston-Wood had no statutory authority to sign the admission agreement on Mr. Alston's behalf since his wife, Orveletta Alston, was the person with priority under the Act to make health care decisions and his representative under the Bill of Rights. (Pl.'s Memo. in Opp. pp. 2, 6-8). Respondent argued Conway Manor's decision to put the arbitration provision in the admission agreement does not change the nature of an arbitration provision from a legal decision to a health care decision under the Act, Respondent is not equitably estopped from challenging the enforceability of the arbitration provision, and Mr.

Alston was a third party beneficiary only as to health care he received and not as to the arbitration provision.[1] *Id.* at pp. 3-5.

The lower court denied Appellants' motion to compel arbitration. It held that, under the Act, Mrs. Alston and not Mrs. Alston-Wood had priority to make health care decisions for Mr. Alston based on the order of priority stated in the Act. (Order pp. 3-4). Similarly, the Court held the Bill of Rights made Mrs. Alston and not Mrs. Alston-Wood the representative of Mr. Alston because Mrs. Alston, as his wife, was his next of kin. *Id.* at p. 4. In addition to finding Mrs. Alston-Wood lacked statutory authority to execute the admission agreement, the Court further found that the Act, even if it conferred some authority, does not grant the authority to enter into an arbitration provision because that is a legal and not a health care decision. *Id.* at pp. 4-5. The lower court held Mr. Alston was not a third-party beneficiary of the arbitration provision and Respondent is not equitably estopped from denying the arbitration provision, and the Federal Arbitration Act does not require enforcement of the arbitration provision. (Order pp. 6-9). The lower court also held the admission agreement did not merge with the resident and facility binding arbitration agreement. *Id.* at p. 6. Appellants did not file a Rule 59(e), SCRCP, motion to reconsider.

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[1] Respondent also argued the wrongful death beneficiaries are not bound to the arbitration provision. (Pl.'s Memo. in Opp. pp. 9-10). The parties addressed this issue at the hearing but the lower court did not rule on it. *Holy Loch Distribs. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000) ("In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court.") Appellants did not file a Rule 59(e), SCRCP, motion on this issue and do not list it as an issue on appeal or discuss it in the Argument of their brief. *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) ("Post-trial motions . . . are used to preserve those that have been raised to the trial court but not yet ruled upon by it."). Therefore, it is not an issue on appeal. Appellants state in a footnote of their brief that any reference made to whether Respondent is bound to the arbitration provision refers to the Estate. (Br. of App. p. 4 n.3). Respondent asserts this does not raise an issue as to whether the wrongful death beneficiaries are bound to arbitration.

STANDARD OF 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, 790 S.E.2d at 3. "Although [a court is] constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis." *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007).

ARGUMENT

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Aiken v. World Fin. Corp.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007). Mr. Alston did not agree to arbitrate any dispute with Appellants because, *inter alia*, neither he nor anyone with authority on his behalf executed the admission agreement or resident and facility arbitration agreement. The Court should affirm the lower court's decision to deny Appellants' motion to compel arbitration. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appear in the Record on Appeal.").

I. THE LOWER COURT CORRECTLY HELD MRS. ALSTON-WOOD LACKED AUTHORITY TO BIND MR. ALSTON TO ARBITRATION

The lower court found Mrs. Alston-Wood did not have statutory authority under either the Act or the Bill of Rights to bind Mr. Alston to the arbitration provision and that the Act does not provide authority to anyone to bind a patient to an arbitration provision. The Court should affirm these independent holdings of the lower court. First, Ms. Alston-Wood has no statutory authority[2] under the Act and, even if she had authority, it did not include the ability to bind Mr. Alston to

[2] It is undisputed that Ms. Alston-Wood did not have apparent authority. (Br. of App. p. 4 n.2).

arbitration. Second, she also does not have statutory authority under the Bill of Rights to bind Mr. Alston to arbitration.

A. Mrs. Alston-Wood Did Not have Priority Under the Act

The lower court correctly held that Mrs. Alston-Wood did not have priority under the Act to make health care decisions for Mr. Alston. Mrs. Alston, as his spouse, had priority under the Act and, therefore, she was the one with statutory authority to act on Mr. Alston's behalf.

> Where a patient is unable to consent, decisions concerning his health care may be made by the following persons ***in the following order of priority***:
>
> (1) a guardian appointed by the court pursuant to Article 5, Part 3 of the South Carolina Probate Code, if the decision is within the scope of the guardianship;
>
> (2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant to Section 62-5-501, if the decision is within the scope of his authority;
>
> (3) a person given priority to make health care decisions for the patient by another statutory provision;
>
> (4) ***a spouse of the patient*** unless the spouse and the patient are separated pursuant to one of the following:
>
> (a) entry of a pendente lite order in a divorce or separate maintenance action;
>
> (b) formal signing of a written property or marital settlement agreement; or
>
> (c) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;
>
> (5) ***an adult child of the patient***, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
>
> (6) a parent of the patient;
>
> (7) an adult sibling of the patient, or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation;
>
> (8) a grandparent of the patient, or if the patient has more than one grandparent, a majority of the grandparents who are reasonably available for consultation;

> (9) any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient, or if the patient has more than one other adult relative, a majority of those other adult relatives who are reasonably available for consultation.

S.C. Code Ann. § 44-66-30(A) (emphasis added). Under the plain language of the statute, a spouse has priority over an adult child. In this case, Mr. Alston had a living spouse to make health care decisions for him. Therefore, Ms. Alston-Wood, as his adult child, had no authority to make his health care decisions.

Appellants knew Mrs. Alston-Wood lacked authority and proceeded at their own risk to have her execute the admission documents. State law and Appellants' own document require that Appellants determine the legal authority of a person executing a document on behalf of a patient. *See* S.C. Code Ann. § 44-66-30(B) ("Documentation of efforts to locate a decision maker who is a person identified in subsection (A) must be recorded in the patient's medical record."); Exh. A to Def. Memo. in Supp. Mot. p. 35 ("The legal designee shall supply the Facility with a copy of the Power of Attorney, Durable Power of Attorney, Guardianship, or other legal document, which permits him/her to act as the legal designee for the Resident."). Appellants violated this requirement. On the signature page of the admission agreement, it provides a space for the signatory to designate their authority, and it is blank on Mr. Alston's admission agreement. (Exh. A to Def. Memo. in Supp. Mot. p. 35).

Appellants argue that any person listed in the Act is authorized to consent to health care on behalf of the patient. *See* Br. of App. p. 4 ("A daughter is authorized to consent to health care on behalf of a patient pursuant to the [Act].") However, this ignores and eliminates the words "order of priority" in § 44-66-30 and, instead of applying the list in order of priority, interprets the statute as meaning that any one of the listed persons may make a health care decision for a patient. This interpretation is incorrect for at least three reasons. First, it is contrary to the rules of statutory

construction and interpretation applying the plain language of a statute. *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will."); *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 7-8, 809 S.E.2d 223, 226 (2018) ("Appellate courts must follow a statute's plain and unambiguous language, and when the language is clear, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." (internal quotation marks omitted)). Second, interpreting the statute as Appellants argue would affect the interpretation of numerous statutes that contain and refer to an order of priority. *See, e.g.*, S.C. Code Ann. § 14-3-620 (entitled "Order and priority of hearing cases" and addressing "the order in which cases shall be docketed and the priority thereof"); S.C. Code Ann. § 36-9-322 ("Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules: . . . "); S.C. Code Ann. § 59-110-30 ("Of the funds made available for Critical Needs Nursing Initiative Fund, amounts must be used for the following nursing initiatives in recommended priority order: . . . "); S.C. Code Ann. § 62-3-203(a) ("[P]ersons who are not disqualified have priority for appointment [as a personal representative] in the following order: . . . ."). Third, Appellants' interpretation will result in conflicts among family members and other persons listed in § 44-66-30 as to who has the right to make a health care decision. This is a result the statute is intended to avoid.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014), supports the lower court's interpretation of "order of priority" as meaning that a higher listed person has a first right to a lower listed person such that a lower listed person has authority only when those listed above him or her are eliminated. After listing the persons in order of priority in § 44-66-30(A), the Supreme Court stated "Sister was authorized to make health care decisions for Decedent ***only***

because Decedent had no guardian or attorney-in-fact, no other individual had statutory priority, and she had neither a spouse, a parent, nor an adult child." *Coleman*, 407 S.C. at 351, 755 S.E.2d at 453 (emphasis added). "As the individual ***with priority*** under 44-66-30(A), Sister was authorized to 'make decisions concerning Decedent's health care . . . .'" *Id.* (quoting § 44-66-30(A)) (emphasis added). Stated differently, if the decedent in *Coleman* had a spouse, parent, or adult child, that person and not sister would have been the one with priority authorized to make health care decisions.

The Court should affirm the lower court's decision to follow the plain language of the order of priority and hold Mrs. Alston-Wood did not have any statutory authority under § 44-66-30.

B. The Act Does Not Provide Authority to Any Person to Bind a Patient to Arbitration

Even if Mrs. Alston-Wood had priority, and therefore authority, under the Act, it does not provide statutory authority for her, or any person, to bind a patient to arbitration. The lower court correctly held the Act does not authorize a surrogate to enter into an arbitration agreement. (Order pp. 3-5).

The Act provides authority for a surrogate to make "decisions concerning his health care" for a patient who is "unable to consent." S.C. Code Ann. § 44-66-30(A). "'Unable to consent' means unable to appreciate the nature and implications of the patient's condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner." § 44-66-20(8).

> "Health care" means a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. Health care 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.

§ 44-66-20(1). In *Coleman*, the Supreme Court held "[t]hat the Act contemplates that the surrogate's authority extends primarily to traditional health care decisions, and only secondarily to the financial decisions necessitated by those decisions." 407 S.C. at 353, 755 S.E.2d at 454. It further held an "arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution" and, therefore, the surrogate decision maker under § 44-66-30 "did not have capacity to bind Decedent to this voluntary arbitration agreement." *Id.* at 354, 755 S.E.2d at 454; *see also Thompson v. Pruitt Corp.*, 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016) ("The Act confers authority on a health care surrogate to consent on the patient's behalf 'to the provision or withholding of health care' and to make financial decisions obligating the patient to pay for the medical care provided." (quoting *Coleman*, 407 S.C. at 351-52, 755 S.E.2d at 453)).

The same result is warranted in this case. The arbitration provision in the admission agreement is an optional method for dispute resolution and, therefore, no one with authority under the Act would have capacity to bind Mr. Alston to arbitration. Appellants attempt to distinguish this case from *Coleman* because, in this case, an arbitration provision is in the admission agreement rather than a separate document. (Br. of App. pp. 6-7). This is not the holding of *Coleman* and elevates form over substance. The *Coleman* decision does not hold that an arbitration agreement in an admission agreement falls within "health care" under the Act. Rather, *Coleman* turned on the substance of the arbitration agreement, specifically its lack of relation to health care or payment, and the fact that it was optional.

> Assent to this contract [the admission agreement] was a condition for Decedent's admission to Facility. On the other hand, the ***AA was not required for Decedent's admission, contained no provision for medical, nursing, or health care services to be provided for Decedent, and did not require any financial commitment to pay for such services***. The scope of Sister's authority to consent to decisions concerning Decedent's health care extended to the admission agreement, which was the basis

> upon which Facility agreed to provide health care and Sister agreed to pay for it. The separate ***arbitration agreement concerned neither health care nor payment***, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future. Under the Act, Sister did not have the capacity to bind Decedent to this voluntary arbitration agreement.

Coleman, 407 S.C. at 353-54, 755 S.E.2d at 454 (internal quotation marks omitted). The arbitration provision in this case contains no provision for medical, nursing, or health care services provided to Mr. Alston, and does not require any financial commitment to pay for such services. It is optional and, therefore, assent to it was not required for Mr. Alston's admission or access to health care. Further, the provision is severable. (Exh. A to Def. Memo. in Supp. p. 33 (stating severability provision in admission agreement)). Because the arbitration provision concerned neither health care nor payment, the Act does not confer authority on Ms. Alston-Wood or any other person to bind Mr. Alston to it.

Finally, Appellants represent that Ms. Alston-Wood "represented that she was 'authorized to bind the Resident to all terms in this [Admission] Agreement.'" (Br. of App. pp. 2, 4) (citing Memo. in Supp., Ex. A p. 31) (addition in Br. of App.). This is factually incorrect and legally irrelevant as she cannot confer authority on herself. The admission agreement actually says "The Facility and Resident acknowledge . . . the surrogate or proxy is authorized to bind the Resident to all terms in this agreement." (Exh. A to Pl's Memo. in Supp. p. 31). As determined by Appellants' own physicians, Mr. Alston, the "Resident", did not have the capacity to comprehend his rights or make health care decisions. (Exh. C. to Pl's Memo. in Supp.). Therefore, a boilerplate statement written by Appellants in the admission agreement of his acknowledgement establishes nothing.

The Court should affirm the lower court's holding that the Act does not confer statutory authority to Mrs. Alston-Wood to bind Mr. Alston to arbitration.

C. Mrs. Alston-Wood Did Not have Authority Under the Bill of Rights for Residents of Long-Term Care Facilities

The lower court correctly held the Bill of Rights did not confer statutory authority on Mrs. Alston-Wood to bind Mr. Alston to arbitration. (Order p. 4). The Bill of Rights does not provide statutory authority to bind anyone to a legal document and, even if it did, Mrs. Alston-Wood would not have authority from it.

The purpose of the Bill of Rights is not to provide for statutory authority to bind a person to any legal document, including an arbitration provision. Rather, its purpose is "to preserve the dignity and personal integrity of residents of long-term care facilities through the recognition and declaration of rights safeguarding against encroachments upon each resident's needs for self-determination." S.C. Code Ann. § 44-81-20. Chapter 81 contains seven sections, §§ 44-81-10 to -70. They include, a short title, legislative findings, definitions, the rights of residents, discrimination provision, grievance procedures, and an anti-retaliation provision. The Bill of Rights requires that a "resident or the 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." § 44-81-40 (A). The rights include things such as available services and charges, refund policy, choice of physician, participation in treatment, transfer or discharge guidelines, right to keep personal belongings, access to family members, participation in social and religious activities, and the right to be treated with respect and dignity. § 44-81-40(B)-(P); *see also* W. Andrew Arnold & Brian E. Arnold, *Helping Society's Most Vulnerable: Nursing Home Litigation*, 14 S. Carolina Lawyer 28, 30 (March 2003). (quoting S.C. Code Ann. § 44-81-40 (2001)) ("Essentially, this statute provides that 'each resident must be treated with respect and dignity . . . ' and specifically protects, among other things, a resident's right to choose a personal physician, to be free from physical and chemical

restraints and to privacy.").[3] The Bill of Rights has nothing to do with granting authority to a person to contract on behalf of a resident.

Appellants rely solely on the definition of a resident's representative for their argument. (Br. of App. pp. 7-8). "'Representative' means a resident's legal guardian, committee, or next of kin or other person acting as agent or a resident who does not have a legally appointed guardian." § 44-81-30(2). This definition does not confer authority on Mrs. Alston-Wood, or anyone else, to agree to arbitration on a resident's behalf. The Bill of Rights states only the resident or the resident's representative must be informed of the rights under the Chapter and of the available services and charges, must give notice to the facility of an intent to relocate, and that a representative may manage the resident's personal finances. § 44-81-40(A), (B), (E), & (F). Significantly, the Bill of Rights refers to "the resident's legal guardian" as one with the right to participate in health care treatment and to "a resident's legal representative" as one who may contract with an outside person to provide sitter services to the resident. § 44-81-40(C), (P). There is nothing in § 44-81-40 or the entire Bill of Rights Chapter that evinces an intent to confer statutory authority on a person to legally bind a resident to arbitration.

Alternatively, even if the Court did find the Bill of Rights conveys authority on a person to bind someone to arbitration, it would confer such authority on Mrs. Alston and not Mrs. Alston-Wood. Under the definition of "Representative", there is no legal guardian or committee. § 44-81-30(3). Therefore, the "next of kin" would be Mr. Alston's representative. *Id.* His wife is his next of kin, not his daughter. Next of kin is "[t]he person or persons most closely related to a decedent by blood or affinity. . . . An intestate's heirs – that is, the person or persons entitled to inherit personal property from a decedent who has not left a will." *Black's Law Dictionary* 1070

[3] Respondent found no South Carolina Appellate Court opinions that cite to § 44-81-10, *et seq.*

(8th ed. 2004). In South Carolina, a surviving spouse takes the entire intestate estate if there are no surviving issue and one-half of the estate if there are surviving issue. S.C. Code Ann. § 62-2-102. Further, a surviving spouse has first priority to serve as personal representative of the estate of a deceased person, after someone listed in the will. S.C. Code Ann. § 62-3-203(a)(2). Therefore, South Carolina law supports the lower court's finding that Mr. Alston's spouse, not his daughter, was his next of kin.

II. THE LOWER COURT CORRECTLY HELD RESPONDENT IS NOT EQUITABLY ESTOPPED FROM CHALLENGING ARBITRATION

The lower court correctly found Respondent is not equitably estopped from challenging the validity of the arbitration provision. (Order pp. 6-9).

Appellants assert the elements of equitable estoppel as traditionally applied by South Carolina appellate courts are not applicable because they "do not rely upon that form of equitable estoppel" but instead "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." (Br. of App. p. 9 n.6). To the extent Appellants are attempting to argue traditional equitable estoppel elements do not apply when a benefit-type argument is made, they are incorrect because our appellate courts cite to and apply the elements in assisted living facility cases such as this when the facility argues the resident received a benefit. *See Thompson*, 416 S.C. at 58, 60, 784 S.E.2d at 687-89 ("Appellants argue Mother benefited from the AA because she was admitted to Unihealth, received medical care, and became capable of enforcing the AA. . . . Under South Carolina law, the elements of equitable estoppel as to the party to be estopped are [listing the elements]."); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 813 S.E.2d 292, 300[4] (Ct. App. 2018) (discussing the *Thompson* analysis of the elements of equitable estoppel). Therefore,

[4] The South Carolina Reporter citation is not yet available.

this law applies to the present case, and it can no longer be disputed that Appellants do not meet the elements because they failed to argue otherwise. Respondent addresses the other arguments raised by Appellants.

"[T]he equitable estoppel doctrine in an arbitration setting allows a party to be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Hodge*, 813 S.E.2d at 299 (internal quotation marks omitted). "Restated, when a signatory seeks to enforce an arbitration agreement against a nonsignatory, the doctrine prevents the nonsignatory from averring he or she is not bound to the arbitration agreement when he or she receives a direct benefit from a contract that contains an arbitration clause." *Id.* The equitable estoppel theory argued by Appellants does not apply to this case because Respondent does not seek to enforce the admission agreement and did not receive a benefit from it.

Appellants argue the admission agreement is the basis upon which they admitted Mr. Alston and provided care to him, such that the parties would have no relationship absent the agreement. (Br. of App. pp. 9-11). Based on that, Appellants argue Respondent's claims depend on duties from the admission agreement and, as such, Respondent cannot disclaim the arbitration provision that in the admission agreement. (Br. of App. p. 11). This is factually and legally incorrect. Respondent does not rely on duties stated in the admission agreement for the claims asserted in the Complaint. Respondent does not assert a breach of the admission agreement. *See Hodge*, 813 S.E.2d at 302 (holding "even if the Admission Agreement and Arbitration Agreement merged, because Respondents are not suing for a breach of the Admission Agreement, they are not

attempting to enforce that agreement."). Rather, the Complaint relies on common law and regulatory and statutory duties. *See, e.g.*, Cmplt. ¶¶ 32-35.

Appellants do not articulate any benefit Mr. Alston received. They merely state "Conway Manor agreed to provide Mr. Alston with care and treatment, and Mr. Alston agreed to pay for the care and treatment." (Br. of App. p. 11). If that were sufficient for equitable estoppel, then every assisted living facility resident would be estopped from challenging an arbitration provision simply because an admission agreement existed. That is not the law because our Courts have refused to apply an equitable estoppel defense in cases where an admission agreement existed. *See, e.g.*, *Hodge*, 813 S.E.2d at 302; *Thompson*, 416 S.C. at 62, 784 S.E.2d at 690. That the arbitration provision is in the admission agreement in this case does not mean that Respondent received a benefit from it. The arbitration provision is the last provision in the admission agreement and specifically states it is optional. This shows the arbitration provision is separate from the admission agreement. *See Thompson*, 416 S.C. at 60, 784 S.E.2d at 688 ("The two agreements are independent of one another, as reflected in the language of the A[rbitration] A[greement] indicating its execution is not a condition for being admitted to the nursing home."). Thus, any benefit from the admission agreement is wholly separate from the arbitration provision. Finally, a person who entered a facility and agreed to pay for treatment does not necessarily receive a benefit. As this court noted in *Hodge*, "Because the Facility allegedly caused [the decedent]'s injuries that later led to her death, we find it difficult to find she benefited even from being admitted." 813 S.E.2d at 302.

The Court should affirm the lower court's finding that Respondent is not equitably estopped from challenging arbitration.

III. THE LOWER COURT CORRECTLY HELD MR. ALSTON IS NOT A THIRD-PARTY BENEFICIARY

The lower court correctly held Mr. Alston was not a third-party beneficiary to an arbitration agreement because the agreement "was never valid." (Order p. 6). "[T]here can be no third-party beneficiary unless a valid contract exists." *Thompson v. Pruitt Corp.*, 416 S.C. 43, 57, 784 S.E.2d 679, 687 (Ct. App. 2016) ("Here, Son was not authorized to execute the AA on Mother's behalf. Therefore, she could not be the third-party beneficiary of the alleged AA between herself and Appellants.").[5] Therefore, if the Court finds Mrs. Alston-Wood did not have authority to execute the agreements on Mr. Alston's behalf, it also disposes of the third-party beneficiary issue.

Regardless, the issue is meritless. As stated above, Respondent does not seek to enforce the admission agreement. *See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 813 S.E.2d 292, 302 (Ct. App. 2018) (holding "even if the Admission Agreement and Arbitration Agreement merged, because Respondents are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement."). Therefore, the third-party beneficiary argument fails. "'[A] third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement.'" *Thompson*, 416 S.C. at 57, 784 S.E.2d at 687 (quoting *Dickerson v. Longoria*, 995 A.2d 721, 742 (Md. 2010)). In *Thompson*, this Court held because the personal representative, "is not attempting to enforce the AA on behalf of Mother's estate[but] Rather, she has asserted tort claims against Appellants arising out of the patient-provider relationship created by the separate Admission Agreement", the "estate cannot be bound by the AA." 416 S.C. at 57, 784 S.E.2d at 687. The same result is warranted in this case.

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[5] This refutes Appellants' argument that "[e]ven if Mrs. Alston-Wood had not had statutory and regulatory authority to enter the Admission Agreement . . . Respondent still would be bound to the arbitration provision because Mr. Alston was a third-party beneficiary." (Br. of App. p. 11).

Appellants rely on the unpublished District Court order *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 WL 4089435 (D.S.C. Sept. 13, 2011), for their third-party beneficiary argument. (Br. of App. p. 12). Citation to the case violates the South Carolina Appellate Court Rules, and it should not be considered.[6] Rule 268(d)(2), SCACR ("[U]npublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."). Regardless, the case does not support a finding that Mr. Alston is bound as a third-party beneficiary. In *Wiggins*, the District Court noted the admission agreement "refer[red] to benefits and responsibilities of the resident, the facility, and the fiduciary party." 2011 WL 4089435, *18. Here, the admission agreement does not refer to any benefits of the resident but, instead, almost exclusively refers to payment and refund in different scenarios, treatment by outside providers, and indemnification or limitation of the facility's liability. (Exh. A to Def. Memo. in Supp. Mot. pp. 25-35). Further, while care was ***a*** purpose of the admission agreement, it was not the essential purpose as there are far more terms discussing payment to Appellants than any care they are supposed to provide to Mr. Alston. Therefore, *Wiggins* does not support a third-party beneficiary finding in this case, and the Court should affirm the lower court on this issue.

IV. THE LOWER COURT CORRECTLY HELD THE FEDERAL ARBITRATION ACT DOES NOT MANDATE ENFORCEMENT OF THE ARBITRATION PROVISION IN THIS CASE

The lower court correctly held the FAA does not mandate arbitration in this case because Mrs. Alston-Wood did not have authority to execute an agreement and the dispute is not within the scope of the arbitration provision. (Order p. 9). The evidence and law support these findings.

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[6] Further, it is noteworthy that South Carolina appellate courts have addressed third-party beneficiary arguments in the context of arbitration since *Wiggins* was filed in 2011, and no state appellate court cites to it. *See, e.g., Thompson*, 416 S.C. at 56-58, 784 S.E.2d at 686-87.

First, as explained above in Argument section I., Mrs. Alston-Wood did not have authority to execute an agreement on behalf of Mr. Wood. Therefore, there is no valid arbitration provision to enforce under the FAA. Second, even if a valid, enforceable arbitration provision existed, the claims do not fall within its scope. "[A]rbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). The "Optional Arbitration Clause" 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 anyway arising from or relating to this Agreement governing the Resident's stay a[t] the Facility, shall be resolved by binding arbitration.

(Exh. A to Def. Memo. in Supp. p. 35). "[E]ven the most broadly-worded arbitration agreements still have limits founded in general principles of contract law." *Aiken v. World Fin. Corp.*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007). "[C]ourts generally hold that broadly-worded arbitration agreements apply to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained:" *Id.* at 149, 644 S.E.2d at 708 (internal quotation marks omitted) (finding no significant relationship existed between a loan agreement and claims based on defendant's employees' use of plaintiff's personal information to embezzle money). In this case, there is no significant relationship between Respondent's claims and the admission agreement. Respondent's claims arise out of tortious conduct leading to severe suffering and death. (Cmplt.). The parties could not have intended, at the time they executed the admission agreement, to agree to arbitrate a claim related to such conduct because it was not foreseeable that Appellants would mistreat Mr. Alston. *See id.* at 151, 644 S.E.2d at 709 (stating our courts "will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings").

Appellants cite to no law for the argument that the claims fall within the scope of the arbitration provision but state only that Respondent's causes of action "stem from the care and treatment received by Mr. Alston under the Admission Agreement." (Br. of App. p. 14). This is an insufficient basis on which to order arbitration. *See Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 554, 666 S.E.2d 294, 297 (Ct. App. 2008) (affirming the denial of a motion to compel arbitration as to a negligence claim based on the impermissible withdrawal of money from plaintiff's retirement account because "although these claims are factually related to the performance of the contract, each action is legally distinct from the contractual relationship between the parties, and therefore, was not within the contemplation of the parties' agreement to arbitrate). That an admission agreement was executed for Mr. Alston to enter the facility does not make every claim between the parties subject to arbitration.

Appellants' argument is largely a verbatim repeat of its argument in support of the motion to compel. (Memo. in Supp. pp. 12-15). Appellants' argument as to interstate commerce is not preserved. There is no ruling by the lower court as to whether interstate commerce exists in this case, and Appellants failed to file a Rule 59(e), SCRCP, motion asking for a ruling. *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) ("Post-trial motions . . . are used to preserve those that have been raised to the trial court but not yet ruled upon by it."). Therefore, the Court should not address the issue. Regardless, a ruling is not necessary in this case because, even if it did exist, there is not a valid arbitration provision and the dispute is not within the scope of the provision. The Court should affirm the lower court's holding that the FAA does not mandate arbitration in this case.

V. THE LOWER COURT CORRECTLY HELD THE ADMISSION AGREEMENT AND FACILITY BINDING ARBITRATION AGREEMENT DID NOT MERGE

Appellants state as a secondary position that Respondent is compelled to arbitrate based on the Facility Binding Arbitration Agreement ("the Arbitration Agreement") executed "at the same time as the Admission Agreement." (Br. of App. p. 16). There are independent reasons the Court should refuse to address this issue. First, it is waived. Appellants specifically stated to the lower court at the hearing that "In our case before your Honor, it's a case ***where there is no argument about a merger***; it is one agreement." (Tr. p. 12 lns. 20-22). Second, the argument is legally incorrect. In *Coleman*, the Supreme Court held an arbitration agreement and admission agreement executed at the same time did not merge because the admission agreement contained a clause entitled "Entirety of Agreement" that recognized the separateness of the two agreements. 407 S.C. at 355, 755 S.E.2d at 455. Further, the Court held, "the A[rbitration] A[greement] could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate." *Id.* In *Thompson v. Pruitt Corp.*, 416 S.C. 43, 60, 784 S.E.2d 679, 688 (Ct. App. 2016), this Court found "language of the A[rbitration] A[greement] indicating its execution is not a condition for being admitted to the nursing home" as reflective of the fact that "[t]he two agreements are independent of one another." This case warrants the same conclusion as *Coleman* and *Thompson.*

The admission agreement contains an entirety clause that states: "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, ..." (Exh. A. to Def. Memo. in Supp. p. 34). The admission agreement states "Each party to this agreement shall have three (3) business days from execution of this agreement to cancel the agreement . . . ." *Id.* at p. 33). However, the Arbitration Agreement states it "may be rescinded by written notice to the

Facility by the Resident within thirty (30) days of signature." (Exh. B. to Not. of Mot. p. 37). Finally, the Arbitration Agreement states "the execution of this Arbitration Agreement is not a precondition to the furnishing of services to the Resident by the Facility." (Exh. B. to Not. of Mot. p. 37). Therefore, for the same reasons the agreements in *Coleman* and *Thompson* did not merge, the admission agreement and Arbitration Agreement do not merge in this case.

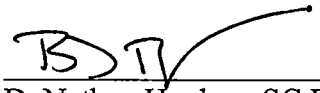
Even if the Court found the agreements merged, arbitration is still unenforceable for the reasons stated above, namely that Mrs. Alston-Wood did not have authority to bind Mr. Alston to arbitration in any agreement, Respondent is not equitably estopped from challenging arbitration, Mr. Alston is not a third-party beneficiary of any agreement, and the claims are not within the scope of the arbitration provision.

Finally, Appellants never explain why they rely on the Arbitration Agreement as a last resort. It is likely because there is no justification for the necessity of two arbitration provisions that have different terms and because Appellants believe the arguments for enforceability of the arbitration provision in the admission agreement could apply to the Arbitration Agreement only if it merged with the admission agreement. However, all of the lower court's reasons for refusing to compel arbitration under the arbitration provision apply equally to the Arbitration Agreement. Appellants make no argument to the contrary. Further, Appellants should not be permitted to simply choose which arbitration provision they want based on which one may be enforceable.

CONCLUSION

For the reasons stated herein, the Court should affirm the lower court's decision to deny Appellants' motion to compel arbitration, and remand the case to proceed as pled in the Court of Common Pleas.

Respectfully submitted this 31st day of July, 2018.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Larry B. Hyman, Jr., Circuit Court Judge

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.

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Initial Brief of Respondent* has been served upon the following counsel of record by mailing one copy by United States Mail, addressed as shown below this 31st day of July 2018.

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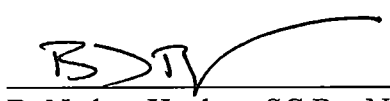

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July 31, 2018

Via US Mail
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Orveletta Alston as Personal Representative of the Estate of Willie Earl Alston, Jr. v. Conway Manor, LLC, Raymond Tiller, and John and Jane Does1-10
Appellate Case No. 2018-000188

Dear Ms. Kitchings:

I hope you are doing well. Please find enclosed for filing in the above case, the following:

1. One (1) original and one (1) copy of the Initial Brief of Respondent, Orveletta Alston as Personal Representative of the Estate of Willie Earl Alston, Sr.;

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.

If you have any questions or concerns, please do not hesitate to contact me. Otherwise, please file the originals of the Initial Brief of Respondent, Proof of Service, Designation of Matter, and Proof of Service, and return to me the clocked copies of the same via the enclosed self-addressed, stamped envelope.

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

With kind regards,

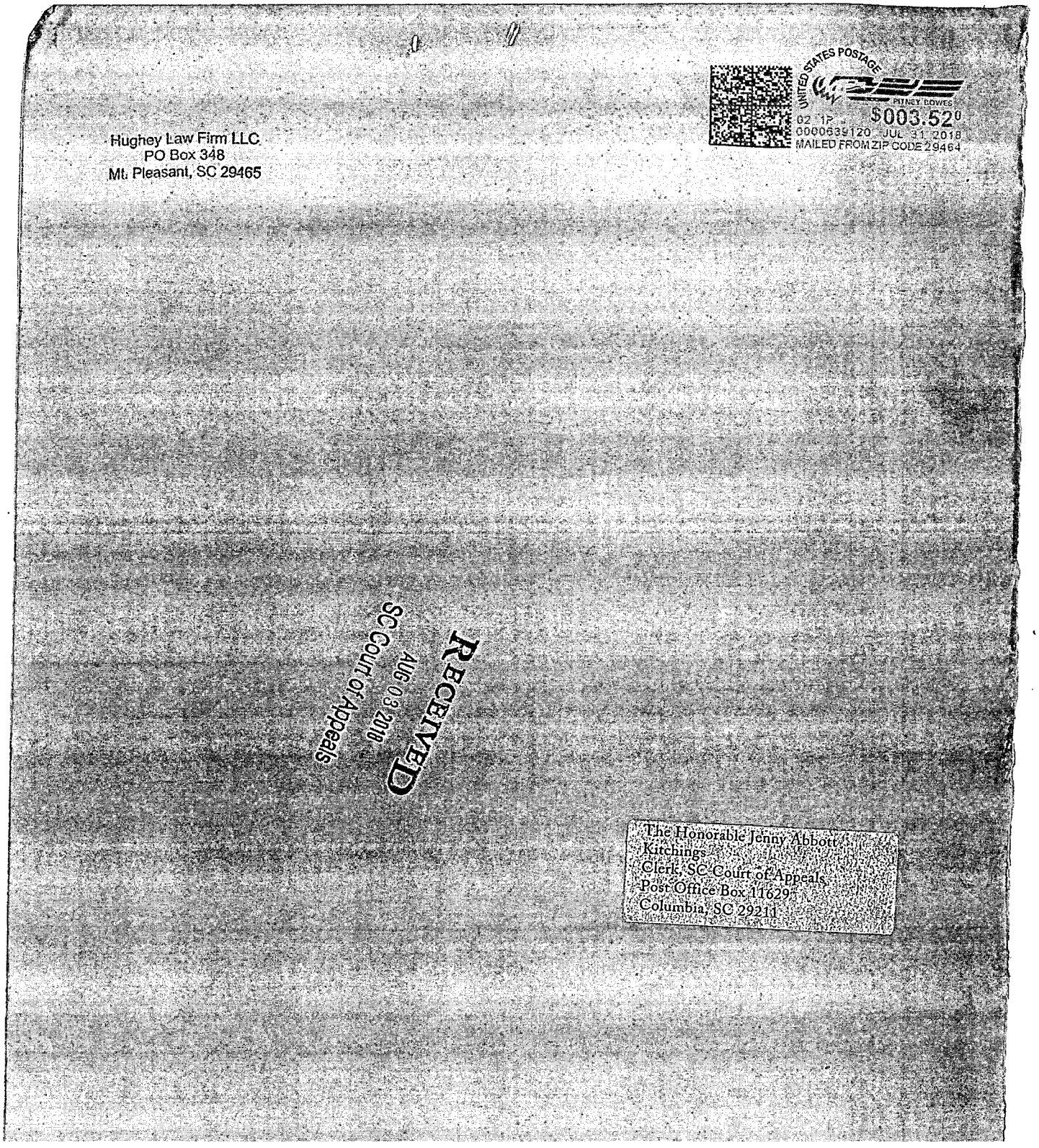
Yours truly,

BHB

Bradley H. Banyas

BHB
Enclosures

CC: W. McElhaney White, Esq. (via Electronic Mail)
Joshua T. Thompson, Esq. (via Electronic Mail)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