THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

Case No. 2017-CP-07-02636
Appellate Case No. 2018-001092

Joseph Holmes, as Personal Representative of the Estate of David Holmes, ...Respondent,

v.

Bayview Manor, LLC, d/b/a Bayview Manor, Epic Group, LP, and Epic General, LLC, ... Appellants.

FINAL BRIEF OF APPELLANTS BAYVIEW MANOR, LLC, D/B/A BAYVIEW MANOR, EPIC GROUP, LP, AND EPIC GENERAL, LLC

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II. Whether the trial court must be overturned because federal regulations regarding Medicare and Medicaid do not govern the enforceability of the waiver of jury trial provisions.

III. Whether the trial court must be overturned because the waiver of jury trial provision was supported by consideration.

STATEMENT OF THE CASE

On December 15, 2017, Joseph Holmes as Personal Representative of the Estate of David Holmes ("Respondent"), filed a Summons and Complaint against Bayview Manor, LLC, d/b/a Bayview Manor ("Bayview"), Epic Group, LP, and Epic General, LLC (collectively, "Appellants"). [R. p. 17 – 49.] Respondent alleged Appellants provided care to David Holmes ("Mr. Holmes") which fell below the standard of care in 2014 – 2015. Appellants timely answered on January 12, 2018, denying liability. [R. p. 50 – 69.]

On March 27, 2018, Appellants filed a Notice of and Motion for Nonjury Trial ("Motion"). [R. p. 70 – 93.] The Motion was based on the terms and provisions of the waiver of jury trial clauses found in the Admission Agreements signed at the time of Mr. Holmes' admission to Bayview on December 2, 2014 ("December Admission Agreement"), and on February 17, 2015 ("February Admission Agreement") (the December Admission Agreement and February Admission Agreement will be referred to collectively as the "Admission Agreements"). [R. p. 72 – 82; R. p. 83 – 93.]

Appellants prepared and filed a detailed memorandum of law addressing the Motion ("Memo in Support"). [R. p. 94 – 182.] On April 25, 2018, The Honorable Perry M. Buckner, III (the "trial court") heard the Motion. [R. p. 198 – 223.] By order dated and filed May 15, 2018, the

trial court denied the Motion ("Order"). [R. p. 2 – 8.] Appellants then filed a Notice of and Motion to Alter or Amend on May 23, 2018 ("Motion to Alter or Amend"). [R. p. 183 – 197.] By order dated June 7, 2018, and filed June 8, 2018, the trial court denied the Motion to Alter or Amend ("Order on Motion to Alter or Amend"). [R. p. 9 – 16.]

STATEMENT OF THE FACTS

Mr. Holmes suffered a choking incident on or about October 13, 2014. He suffered an anoxic brain injury and remained in a vegetative state. He was admitted to Mt. Pleasant Hospital where he remained until December 2, 2014. [R. p. 94.]

On December 2, 2014, the day of Mr. Holmes' admission to Bayview, Mr. Holmes, through his sister and court-appointed Guardian, Dorothy Olenja ("Dorothy"), entered into the December Admission Agreement which set forth the rights and obligations of the parties. [R. p. 72 – 82.] It contained a waiver of jury trial provision. [R. p. 80.] Mr. Holmes was discharged from Bayview on December 23, 2014 and returned to Bayview on February 17, 2015. [R. p. 94.] At the time of his readmission, Mr. Holmes, through his sister and responsible party, Margaret Holmes ("Margaret"), entered into the February Admission Agreement, which again contained a waiver of jury trial provision. [R. p. 91.] Rebecca Jensen, the Admissions Director of Bayview, executed the Admission Agreements on behalf of Bayview. [R. p. 93.]

The waiver of jury trial provisions in the Admission Agreements were identical, and they read as follows:

> **Waiver of Jury Trial: (Please read carefully)**
> Resident hereby knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any litigation, including any counterclaim which Resident may assert, arising from or relating to this Agreement or any other document connected with this Agreement, or arising out of or relating to any of the said documents or any relationship between the Facility and Resident, including the Resident's admission itself, or any other course of conduct, course of dealing statements (whether verbal or written) or actions of the Facility or Resident.

> Resident represents and warrants that the waiver contained in this Paragraph has been freely and voluntarily made after reviewing the same, or having had an opportunity to review the same, with counsel of Resident's choice.

[R. p. 80; R. p. 91.]

STANDARD OF REVIEW

"Whether a party is entitled to a jury trial is a question of law." Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). The appellate court reviews questions of law "with no particular deference to the circuit court's findings." Id. at 328, 755 S.E.2d at 441.

ARGUMENT

I. The trial court must be overturned and the waivers of jury trial enforced because the Admissions Agreements containing the waiver were duly-executed and binding on Respondent.

a. The jury trial waivers contained within the Admission Agreements are valid and enforceable.

Rule 39, SCRCP, provides in part that when a trial by jury is demanded as provided in Rule 38, SCRCP the trial of all issues so demanded shall be by jury unless the court upon motion finds that a right of trial by jury of some or all of those issues does not exist. Rule 39(a), SCRCP.

In the case at bar, the right of trial by jury does not exist. The waiver of jury trial is enforceable. In The Beach Company v. Twillman, LTD., 351 S.C. 56, 566 S.E.2d 863 (Ct.App. 2002), the Court of Appeals held that a party may waive the right to a jury trial by contract, and that while such a waiver must be strictly construed, the terms in a contract must be construed using their plain, ordinary and popular meaning. Id. at 866.

In that case, the waiver of jury trial was contained in section 27.16 of a lease entitled "Waiver of Counterclaim", and it stated:

> Tenant waives any and all right to trial by jury or to interpose any counterclaim in any summary proceedings for eviction or nonpayment of Rent. Any and all claims or 'counterclaims' that may be asserted by Tenant shall only be made the subject of a separate action. In such separate action, it is agreed that trial by jury shall be waived by both parties. Id. at 864.

The waiver of jury trial found in the Admission Agreements is clearer than the one upheld in The Beach Company. Furthermore, rather than being included in a section entitled "Waiver of Counterclaim", the waiver in the case at bar was included in a section entitled "**Waiver of Jury Trial: (Please read carefully)**" (emphasis in original). [R. p. 80; R. p. 91.]

Respondent filed the Affidavit of Robert Escarza, MD with his Notice of Intent to Sue. Dr. Escarza opined "that appropriate skin care protocols were not adhered to during at least the first two weeks after admission to Bayview". Dr. Escarsa also wrote Mr. Holmes "was discharged back to Bayview on 2-17-15. Documentation from this point forward reflects ongoing and more diligent skin care." [R. p. 161.] In his affidavit, Respondent's expert expressed concern about the care and treatment provided to Mr. Holmes during his first admission to Bayview (in December 2014) rather than his second admission (in February 2015). [R. p. 160 – 162.]

As noted above, the December Admission Agreement was signed by Dorothy. Dorothy had been appointed as Temporary Guardian for Mr. Holmes on October 27, 2014, only a week before Mr. Holmes' admission to Bayview. Under the court's order, Mr. Holmes was adjudged to be an incapacitated person, and Dorothy was appointed as temporary guardian with the right to care and custody of Mr. Holmes with all the authority of a permanent guardian as set out it the Probate Code. [R. p. 163 – 165.]

Under S.C. Code Ann. §62-5-310, a temporary guardian is entitled to the care and custody of the ward with the same authority of a permanent guardian. Under S.C. Code Ann. §62-5-312, a guardian of an incapacitated person has the same powers, rights and duties respecting his ward

that a parent has respecting his unemancipated minor child. This includes, but is not limited to, the giving of any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service. Id. Thus, Dorothy had the statutory power to execute the December Admission Agreement and bind Mr. Holmes to the waiver of jury trial provision.

Dorothy was asked about the December Admission Agreement and waiver of jury trial provision in her deposition. She admitted she initialed each page of the December Admission Agreement. [R. p. 175, l. 2 – 11.] She admitted she read as much of it as possible but skimmed through some of it. [R. p. 172, l. 14 – 15.] When asked if she had agreed to a non-jury trial, she answered "[w]ell, my signature is here. That's not forged." [R. p. 174, l. 23.] Thus, Dorothy had the power to, and did in fact, waive the right to a jury trial.

Margaret waived the right to a jury trial in the February Admission Agreement.[1] Margaret was asked about this agreement in her deposition, and she started by confirming that she had initialed each page. [R. p. 90, l. 4 – 8.] She said she skimmed through it, but she admitted she was not rushed. [R. p. 91, l. 6 – 24.] In fact, she admitted that although she may have skimmed it, she had the opportunity to read it. [R. p. 91, l. 25 – p. 92, l. 4.] Here again, Margaret, as Mr. Holmes' sister and responsible party, had the right to execute the February Admission Agreement and bind Mr. Holmes to all the terms thereof.

b. Respondent is equitably estopped from asserting claims founded in duties arising out of the Admission Agreements while simultaneously attempting to disclaim the waiver of jury trial provisions contained within the Admission Agreements.

[1] As noted above, the Respondent's complaint stems from David's initial admission to Bayview in December 2014; however, out of an abundance of caution, the February Admission Agreement will be addressed as well.

The trial court misapprehended the case law concerning equitable estoppel. The court found the waiver of jury trial provisions did not benefit Mr. Holmes, and because it conferred no benefit upon him, the Respondent should not be estopped from challenging those provisions. [R. p. 14.]

The Admission Agreements served as the foundation for Mr. Holmes' admission to Bayview and the duties and obligations which Mr. Holmes and Bayview had to one another. Bayview agreed to provide Mr. Holmes with care and treatment, and Mr. Holmes agreed to pay for the care and treatment. Without the Admission Agreements, there would have been no relationship between the parties.

All the Respondent's claims are dependent on the duties which arise from the terms of the Admission Agreements. Respondent cannot disclaim the waiver of jury trial clauses which are a part of the Admission Agreements, while at the same time assert claims arising under other terms of the Admission Agreements, and Respondent should be equitably estopped from doing so. There is ample case law on equitable estoppel in the context of arbitration provisions, and while the following cases address the enforceability of arbitration clauses, the reasoning applies equally to wavier of jury trial provisions.

The doctrine of equitable estoppel "exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision." Southern Ill. Beverage, Inc. v. Hansen Beverage Co., 2007 WL 3046273 at *11 (S.D. Ill. 2007). The Fourth Circuit has held that "no party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein." United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001); see also Int'l Paper Co. v. Schwabedissen Maschinen &

Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act." (internal quotation marks omitted)). It would be manifestly inequitable to permit a party to claim the other has failed to perform on its contractual obligations, while at the same time allowing that party to avoid the arbitration provisions of the contract upon which the party bases its claims, when such claims are in the scope of the arbitration provisions. Hughes Masonry Co. v. Greater Clark County School Bldg. Corp., 659 F.2d 836, 838-39 (7th Cir. 1981). In other words, plaintiff cannot "have it both ways" by relying upon certain terms of the Admission Agreement when it works to his advantage and repudiating others when it works to his disadvantage. Id.

In 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 as well. Deborah Wiggins executed an admissions contract for the admission of her father, Earl Hall, into the Magnolia Manor nursing home. After a dispute arose, Magnolia Manor moved to compel arbitration of the dispute. Wiggins countered by arguing the admissions contract was unenforceable because there was nothing in the record to indicate she had authority to act as agent for her father, to legally bind her father, or to waive her father's right to a jury trial. One of Magnolia Manor's arguments in response was that Wiggins, as personal representative of her father's estate, was estopped from denying the contract formation. Id. at *5.

The court noted it was undisputed that the contract was signed by an immediate family member of Hall for the purpose of obtaining residential care for him at Magnolia Manor. After the contract was executed, Hall became a resident and received the benefits provided for under the admissions contract. The court then held that when Magnolia Manor performed in reliance on the

terms of the admissions contract, and Hall received the benefits under the admissions contract, it would be inequitable for Hall's estate to avoid the arbitration provision within the admissions contract. The court ruled that Hall's estate was equitably estopped from disclaiming the enforceability of the admissions contract and the arbitration provision contained therein. Id. at *6.

Respondent, in the instant case, has brought claims arising from services rendered to Mr. Holmes under the Admission Agreements between the parties. In accordance with the foregoing law, Respondent cannot assert claims against Bayview arising under the Admission Agreements while repudiating the waiver of jury trial clause. Plaintiff should be estopped from doing so.[2]

c. Mr. Holmes was the intended and direct beneficiary of the Admission Agreements containing the waiver of jury trial provisions.

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[2] It should be noted that both South Carolina's Supreme Court and Court of Appeals addressed equitable estoppel in Coleman v. Marnier Health Care, Inc. et al., 407 S.C. 346, 755 S.E.2d 450 (2014), and Thompson v. Pruitt Corporation, 416 S.C. 43, 784 S.E.2d 679 (Ct.App.2016). In neither case did the courts enforce the arbitration provisions under the doctrine of equitable estoppel; however, there was one important distinction which distinguished these cases from Wiggins and the case at bar. In both Coleman and Thompson, the courts noted the arbitration provisions were in Arbitration Agreements separate and apart from the Admission Agreements, and that there was no merger of the two agreements. As a result, the court in Coleman did not reach the actual merits of the equitable estoppel argument. The court in Thompson, on the other hand, provided a little more discussion on the topic. In discussing cases which have applied equitable estoppel, the 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. Thompson, 784 S.E.2d at 688. Here, in the case at bar, there were contractual benefits directed to Mr. Holmes in terms of the care and services he received under the Admission Agreements which also contained the waiver of jury trial clauses.

Also, more recently, the South Carolina Court of Appeals addressed the equitable estoppel argument in Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, et al., 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018). Again, like the facts of Coleman and Thompson, the admission agreement and arbitration agreement were separate agreements which the court found did not merge. The court in Hodge then stated that even if the agreements were merged, because the family was not suing for breach of the admission agreement, they were not attempting to enforce the admission agreement. This last point was mere dictum and is not binding authority. Hodge, 422 S.C. at 563, 813 S.E.2d at 302.

Respondent is bound to the waiver of jury trial provisions because Mr. Holmes was a third-party beneficiary of the Admission Agreements. It is clear from the plain language of the Admission Agreements that Mr. Holmes was the intended beneficiary and that the purpose of the Admission Agreements was to ensure Bayview would provide the services laid out therein. Mr. Holmes did, in fact, receive those services.

Cases addressing third-party beneficiaries in the arbitration context are instructive on waiver of jury trial provisions as well. See Trinity Mission Health & Rehabilitation of Clinton v. Estate of Scott, 19 So.3d 735 (Miss. Ct. App. 2008.) (holding that a non-signatory, deceased mother, was an intended third-party beneficiary of a nursing home admission agreement that included an arbitration provision; and the arbitration provisions were enforceable against her daughter, who signed the admission agreement, since it was evident that the admissions agreement clearly was intended to provide benefits to her mother as a resident of the facility; accordingly the court held that mother was a third-party beneficiary of the contract; therefore, plaintiff was bound to arbitrate any claims within the scope of the arbitration provision).

Appellants' position is supported by the 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.

It is clear the Admission Agreements were for Mr. Holmes' benefit and that he directly benefited from their execution. It follows that Respondent is bound to the waiver of jury trial provisions as a result of Mr. Holmes' status as a third-party beneficiary under the Admission Agreements.

d. Dorothy and Margaret possessed authority to bind Mr. Holmes to the Admission Agreements under the South Carolina Adult Health Care Consent Act.

Dorothy and Margaret had authority to bind Mr. Holmes to the waiver of jury trial provisions pursuant to the South Carolina's Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10, et seq. ("AHCCA").

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. David was unable to make health care decisions on his own behalf as evidenced by his medical records. As noted by his physician immediately prior to his initial admission to Bayview, he was in a vegetative state. [R. p. 105.] In fact, from the time of his initial hospitalization until he died several months later, he never regained consciousness. [R. p. 169, l. 24 – p. 170, l. 9.]

Dorothy, both as Guardian and as an adult sibling, and Margaret, as an adult sibling, were entitled to consent to health care on behalf of David pursuant to the AHCCA.[3] S.C. Code Ann. § 44-66-30(A)(1) and (7). This included placing him at Bayview and executing all paperwork on

[3] Mr. Holmes had four siblings at the time of his admission to Bayview – Joseph Holmes, Alexander Holmes, Dorothy and Margaret. He was never married and had no children. His parents were deceased. [R. p. 167, l. 23 – 25; p. 168, l. 8 – 19; R. p. 177, l. 24 – p. 178, l. 10.]

Mr. Holmes' behalf associated with his placement at Bayview. Accordingly, the Admission Agreements, including the waiver of jury trial provisions, are binding on Respondent.

The South Carolina Supreme Court's reasoning in Coleman v. Mariner Health Care, et al., 407 S.C. 346, 755 S.E.2d 450 (2014) supports Appellants' position in this case. The Coleman Court considered whether a sister of a nursing home resident could bind the resident to an arbitration agreement at the time of admission. The sister signed several documents relating to the admission of her sister, Mary Brinson, to a nursing home in Florence, South Carolina. Ms. Brinson was unable to consent within the meaning of the AHCCA. Included within these documents signed by the sister was an arbitration agreement that was separate from the admission agreement.

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

The Court found that the sister's authority to consent to decisions concerning the resident's health care extended to all terms contained within the admission and financial agreement which was the basis upon which the nursing home agreed to provide health care, and under which the sister agreed to pay the nursing home. Id. at 353-54, 755 S.E.2d at 454. Because the arbitration

agreement was a separate document from the admission and financial agreement, did not contain any provisions regarding medical, nursing, or health care services, and did not require any financial commitment to pay for such services, the Court reasoned that the sister did not have authority pursuant to the AHCCA to bind the resident to arbitration agreement.

Unlike Coleman, the waiver of jury trial provisions which Appellants seek to enforce are contained within the Admission Agreements and not in a separate agreement. The Admission Agreements, pursuant to which Mr. Holmes was admitted to Bayview, contained the terms under which Bayview would provide long term care health services to Mr. Holmes and how those services would be paid for. For instance, it was agreed that Bayview would provide care and treatment according to practice, policy and physician orders; a physician would be chosen to provide care to Mr. Holmes in the facility; and Mr. Holmes 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. [R. p. 72, 74 – 76; R. p. 83, 85 – 87.]

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, those services and the waiver of jury trial provisions are contained within the Admission Agreements signed by Dorothy and Margaret in the case at bar. Therefore, applying the reasoning set forth in Coleman, the AHCCA empowered Dorothy and Margaret to sign the Admission Agreements on behalf of Mr. Holmes and bind him to all of the provisions of those contracts, including the waiver of jury trial provisions.

II. The trial court must be overturned because federal regulations regarding Medicare and Medicaid do not govern the enforceability of the waiver of jury trial provisions.

The trial court erred in finding that if the waiver of jury trial provisions were pre-conditions

to admission, then this requirement violated federal law. The trial court held that 42 U.S.C. § 1396r(c)(5)(A)(iii) prohibits a facility like Bayview from soliciting or accepting "any other consideration" other than Medicaid payments as a condition to admission for patients in Mr. Holmes' position. The trial court found that by requiring Mr. Holmes' family to waive his right to a jury trial as a condition of admission to Bayview, Appellants were requiring and accepting consideration in addition to Medicaid payments in violation of said statute. The trial court then ruled the waiver of jury trial provision would be unenforceable due to its illegality. [R. p. 6 – 7.]

Respectfully, the trial court has misinterpreted 42 U.S.C. § 1396r(c)(5)(A)(iii). This statute does not identify a waiver of jury trial provision as additional consideration. Furthermore, Respondent did not cite any case law supporting this notion to the trial court.

Other courts have rejected the trial court's interpretation of this statute. In Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 989 (Ala. 2004), the plaintiff argued that requiring nursing home admittees whose fees are paid by Medicare or Medicaid to relinquish their right to a jury trial was a form of additional consideration that violated 42 U.S.C. §1396r(c)(5)(A)(iii). The court rejected the argument, finding "an arbitration agreement sets a forum for future disputes," and requiring a nursing home admittee to sign one is not tantamount to "charging an additional fee or other consideration." Id. at 989. The court pointed out that the plaintiff's reasoning could arguably dispose of almost any term in the admission contract. Id. See also Sanford v. Castleton Health Care Center, LLC, 813 N.E.2d 411, 419 (Ind.App.2004) (finding that "other consideration" did not encompass an arbitration agreement); Owens v. National Health Corp., 263 S.W.3d. 876 (Tenn. 2007) (court rejected plaintiff's argument that waiver of jury trial

through arbitration provision was "other consideration").[4] While these cases dealt with arbitration clauses, the underlying issue, waiver of jury trial, was the same.

III. The trial court must be overturned because the waiver of jury trial provision was supported by consideration.

The trial court ruled that if the waiver of jury trial provision was not a precondition to admission, then it failed for lack of consideration. [R. p. 7.] This was error. It is well-settled law in our state that a valid contract requires an offer, acceptance, and valid consideration. Benya v. Gamble, 282 S.C. 624, 627, 321 S.E.2d 57, 60 (Ct.App.1984). In the case at bar, there was clearly an offer, acceptance and consideration for the Admission Agreements. The Admission Agreements bound Bayview to provide care to Mr. Holmes; they bound Mr. Holmes to pay for the care; and they contained many other rights and obligations of the parties. All of these served as consideration for the contractual relationship. Respondent did not cite to any caselaw, nor are Appellants aware of any caselaw, which requires separate consideration for a waiver of jury trial provision. [R. p. 195.]

CONCLUSION

Respondent is bound to a nonjury trial in the case at bar. The Admission Agreements, including the waiver of jury trial provisions, are valid and enforceable. For these reasons, this

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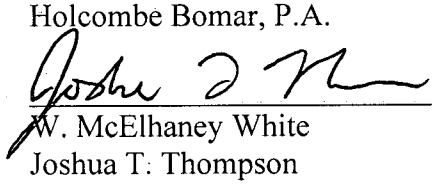
[4] Appellants addressed this argument in their proposed Order Granting Motion for Nonjury Trial ("Proposed Order"). [R. p. 195.] Appellants received Respondent's Response in Opposition to Defendant's Motion to Transfer to Non-Jury Trial on April 24, 2018, one day before the Motion was heard. Appellant's counsel raised a concern with the trial court that he had not been able to address all of Respondent's arguments, and he asked the court to allow the filing of a supplemental memorandum addressing those issues. In response, the trial court instructed Appellants to submit a draft order raising all arguments in reply to Respondent's memorandum. In accordance with the trial court's instruction, Appellants submitted the Proposed Order to the trial court on May 1, 2018. [R. p. 187 – 197.] Appellants also incorporated, and attached, the Proposed Order in and to Appellants' Motion to Alter or Amend. [R. p. 184.] Finally, on May 24, 2018, the trial court's law clerk sent an email to counsel asking for proposed orders in regard to the Motion to Alter or Amend and noting that the record was now closed. [R. p. 671 – 672.]

Court should reverse the trial court's order denying Appellants' Motion and Appellants' Motion to Alter or Amend, and the matter should be remanded to the lower court for a nonjury trial.

Respectfully submitted this 27th day of December, 2018.

Holcombe Bomar, P.A.



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Rule 211(b) Certification

The undersigned attorneys for the Appellants certify that this Final Brief of Appellants complies with Rule 211(b), SCACR.

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