THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE CASE

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

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

Compel Arbitration; in the Alternative Motion for Nonjury Trial; and Motion for Protective Order ("Motion") [Motion to Compel Arbitration.] The Motion was based on the terms and provisions found in the Admission Agreement ("Admission Agreement") and the Resident and Facility Binding Arbitration Agreement ("Arbitration Agreement"). [Memo. in Support of Motion to Compel Arbitration, Ex. A and B.]

On June 7, 2019, Appellants filed a memorandum of law in support of their Motion. [Memo. in Support of Motion to Compel Arbitration.] On June 11, 2019, The Honorable Edgar W. Dickson (the "Trial Court") heard the Motion. [Transcript.] By Form 4 Order dated and filed July 26, 2019, the Trial Court denied the Motion. [Order dated July 26, 2019.] On August 5, 2019, Appellants filed a Notice of Motion and Motion to Alter or Amend. [Motion to Alter or Amend.] By Form 4 Order dated and filed August 20, 2019, the Trial Court denied the Motion to Alter or Amend. [Order dated August 20, 2019.] On September 9, 2019, Appellants filed their Notice of Appeal. [Notice of Appeal.]

STATEMENT OF THE FACTS

On October 3, 2012, Mr. Boles executed a General Durable Power of Attorney ("Power of Attorney") appointing his sister Mrs. Hackworth as his attorney-in-fact. [Power of Attorney.] Mr. Boles' Power of Attorney was recorded in the Beaufort County Probate Court on October 10, 2012 and specifically gave Mrs. Hackworth the power to "establish where [Mr. Boles] shall reside, including the exact physical location, and the city, county, and state of residence and, if necessary, to make all necessary arrangements for [Mr. Boles] at any hospital, convalescent institution nursing home or similar establishment… ." [Power of Attorney, p. 6, Section D.1.]

On November 2, 2015, after suffering a stroke in October 2015, Mr. Boles was admitted to Bayview Manor, a skilled nursing home facility. As a part of the admissions process, Mrs.

Hackworth and Mr. Boles' brother Clifford Byars ("Mr. Byars") each initialed and signed the Admission Agreement. [Memo. in Support of Motion to Compel Arbitration, Ex. A.] Mrs. Hackworth initialed and signed the Arbitration Agreement.

The Admission Agreement contained an arbitration clause which required the arbitration of any action, dispute, claim or controversy of any kind. [Memo. in Support of Motion to Compel Arbitration, 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 original).

[Memo. in Support of Motion to Compel Arbitration, Ex. A., final page.] No X was marked to void the Arbitration Clause.

The Arbitration Agreement states that "any legal dispute, controversy, demand or claim . . . shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the Federal Arbitration Act." [Memo. in Support of Motion to Compel Arbitration, Ex. B, p. 1, paragraph 1.]

Lucy Caruso, Admissions Director of Bayview Manor at the time, executed the Admission Agreement and Arbitration Agreement on behalf of Bayview Manor. [Memo. in Support of Motion to Compel Arbitration, Ex. A, B, and D.]

STANDARD OF REVIEW

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (internal citations omitted). "Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, [the appellate] court will not overrule those findings." Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012). Because federal and state policy favor arbitrating disputes, all doubts regarding the scope of an arbitration clause must be resolved in favor of arbitration. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004).

ARGUMENT

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

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

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

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

[Power of Attorney, pages 1, 2, 4-7.]

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

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

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

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

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

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

Pursuant to Section 44-66-20(8), Bayview Manor appropriately determined Mr. Boles was unable to make health care decisions on his own behalf. At the time of his admission to Bayview Manor, Bayview Manor was aware that Mr. Boles had, *inter alia*, a history of stroke, left side hemiparesis, dementia, cognitive/memory deficits, impaired speech, and severe confusion. [Memo. in Support of Motion to Compel Arbitration, Ex. C and D.] Respondent has not disputed in any filing or at oral argument before the Trial Court that Mr. Boles was unable to make health care decisions on his own behalf at the time of his admission to Bayview Manor.

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

provision, is binding on Respondent.

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

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

The Court found that the sister's authority to consent to decisions concerning the resident's health care extended to all terms contained within the admission and financial agreement which was the basis upon which the nursing home agreed to provide health care, and under which the sister agreed to pay the nursing home. Id. at 353-54, 755 S.E.2d at 454. Because the arbitration agreement *was a separate document from the admission and financial agreement*, did not contain

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

Unlike Coleman, the arbitration provision which Appellants seek to enforce is contained within the Admission Agreement and is not a separate agreement. The Admission Agreement, pursuant to which Mr. Boles was admitted to Bayview Manor, contained the terms under which Bayview Manor would provide long term care health services to Mr. Boles and how those services would be paid for. For instance, it was agreed that Bayview Manor would provide care and treatment according to practice, policy and physician orders (p. 15); a physician would be chosen to provide care to Mr. Boles in the facility (p. 15); and Mr. Boles would be responsible to ensure payment was made to the facility for his care under such clauses as Basic Charges, Supplemental Charges, Medical Supplies, and Pharmacy Services (p. 18-19). [Memo. in Support of Motion to Compel Arbitration, Ex. A, p. 15,18-19].

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

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

The Admission Agreement serves as the foundation upon which Bayview Manor agreed to

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

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

In THI of South Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. 2011), the United States District Court of South Carolina addressed this issue directly. In that case, a daughter executed an admissions contract containing an arbitration clause for the admission of her

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

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

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

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

other terms of the Admission Agreement, and Respondent should be equitably estopped from doing so.

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

Even if Mrs. Hackworth and/or Mr. Byars theoretically lacked statutory and/or regulatory authority to enter into the Admission Agreement and Respondent were not equitably estopped from contesting the validity of the arbitration provision within the Admission Agreement, Respondent still would be bound to the arbitration provision because Mr. Boles was a third-party beneficiary of the Admission Agreement.

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

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

remained binding on Hall's Estate. Id.[2]

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

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

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

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

9 U.S.C. § 2.

The arbitration provision in the Admission Agreement provides that arbitration shall be governed by the provisions of the South Carolina Arbitration Code, and in the event that it is deemed not to apply, the arbitration shall be governed by the FAA. [Memo. in Support of Motion

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

to Compel Arbitration, Ex. A, p. 25.] Section 15-48-10(b)(4) of the South Carolina Code provides that the South Carolina Arbitration Code shall not apply to any claim arising out of personal injury based on contract or tort. Thus, the South Carolina Arbitration Code does not apply. Instead, the FAA is controlling in the instant case.

The FAA expresses a strong national policy in favor of arbitration and "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). The FAA enforces arbitration agreements as written to prevent a party from avoiding their contractual obligations to arbitrate. See Stokes v. Metropolitan Life Ins. Co., 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985). Additionally, the FAA's purpose is to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and place them on the same footing as other contracts." Volt Info. Serv., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 474 (1989) (internal citation omitted).

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

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

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

> Any action, dispute, claim or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims or violations of Resident's Rights)

> now existing or hereafter arising between the parties, in anyway arising from or relating to this [Admission] Agreement governing the Resident's stay at the Facility, shall be resolved by binding arbitration.

[Memo. in Support of Motion to Compel Arbitration, Ex. A., final page.]

Respondent's claims include professional negligence, ordinary negligence, negligent misrepresentation, wrongful death and survivorship, all which allegedly stem from the care and treatment received by Mr. Boles under the Admission Agreement. [Complaint.] All of these causes of action are included within the scope of the arbitration provision quoted above. Thus, there can be no dispute from the plain language of the arbitration provision that all the allegations contained in Respondent's Complaint fall under the types of disputes to be arbitrated under the arbitration provision.

b. Interstate Commerce is Satisfied.

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

The interstate commerce requirement under the FAA is met in the present case on multiple grounds. As noted in Bayview Manor Administrator Christy Drinkard's Affidavit, at the time of Mr. Boles' residency, (1) Bayview Manor received payments from Medicare, Medicaid, and private insurers from other states; (2) the majority of food served at Bayview Manor came from

Charlotte, North Carolina; and (3) Bayview Manor obtained lab and radiology services, oxygen rental and supplies, medical forms, specialty beds and mattresses, laundry supplies and other items from out-of-state. [Memo. in Support of Motion to Compel Arbitration, Ex. C.]

In Dean v. Heritage Healthcare of Ridgeway, LLC, et al., 408 S.C. 371, 759 S.E.2d 727 (2014), the South Carolina Supreme Court found that a nursing home residency agreement implicated interstate commerce by requiring the facility to provide the resident with food and medical supplies which were instruments of interstate commerce. Id. at 381-82, 759 S.E.2d at 732-733. The Admission Agreement at issue required Bayview Manor to provide Mr. Boles room and board, medical supplies, and many other goods and services, all of which were instruments of interstate commerce. [Memo. in Support of Motion to Compel Arbitration, Ex. A.]

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

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

Appellants' primary position is that the Trial Court erred in ruling that the arbitration provision contained within the Admission Agreement was not binding for the reasons presented in Arguments I – V above. Out of an abundance of caution, Appellants also argue that Respondent is compelled to arbitrate her action against Appellants based upon Mrs. Hackworth's execution of the Arbitration Agreement at or near the same time as the Admission Agreement. [Memo. in Support of Motion to Compel Arbitration, Ex. B.]

Unlike Coleman, the Admission Agreement and Arbitration Agreement at issue in this matter merged. "The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together. The theory is that the instruments are effectively one instrument or contract." Klutts

Resort Realty, Inc. v. Down'round Development Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). Given merger of the Admission Agreement and the Arbitration Agreement, the Arbitration Agreement is enforceable and mandates arbitration based on the grounds set forth in Arguments I – V above.

CONCLUSION

Respondent is bound to arbitrate her claims against Appellants. The Admission Agreement executed by an attorney-in-fact/sister and brother are valid and are enforceable under basic contract principles and the Adult Health Care Consent Act; Respondent is equitably estopped from disclaiming the arbitration provision; Mr. Boles was the intended and direct beneficiary of the Admission Agreement containing the arbitration provision; the claims asserted by Respondent are within the scope of the arbitration clauses, and the Federal Arbitration Act mandates that the claims be arbitrated; and the Admission Agreement and the Arbitration Agreement merged.

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

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December 2, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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v.

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PROOF OF SERVICE

The undersigned hereby certifies that on the 2nd day of December 2019, he has served counsel for Respondent with a copy of **APPELLANTS' INITIAL BRIEF** in this matter by mailing copies of the same by United States mail, postage prepaid, to the following address:

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December 2, 2019

VIA HAND DELIVERY
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1220 Senate Street
Columbia, SC 29201

Re: Viola M. Hackworth, as Personal Representative of the Estate of Eugene Boles a/k/a Eugene N. Boles, deceased v. Bayview Manor, LLC d/b/a Bayview Manor, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations (C.A. No. 2019-CP-07-00433)
Appellate Case No. 2019-001536
Our File No. 15378

Dear Ms. Kitchings:

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

(a) One (1) original and one (1) copy of Appellants' Initial Brief;
(b) One (1) original and one (1) copy of the Proof of Service of (a);
(c) One (1) original and one (1) copy of Appellants' Designation of Matter to be Included in the Record on Appeal; and
(d) One (1) original and one (1) copy of the Proof of Service of (c).

Please do not hesitate to contact me if you have any questions or concerns. Otherwise, please file the originals of the Appellants' Initial Brief, Proof of Service, Designation of Matter, and 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,

A. Walker Barnes

cc: C. Caleb Connor, Esq. (*Via First Class Mail*)
Kenneth L. Connor, Esq. (*Via First Class Mail*)
A. Keith McAlister, Jr., Esq. (*Via First Class Mail*)
Anne K. Moore, Esq. (*Via First Class Mail*)

Holcombe Bomar, P.A.

P.O. Box 1897
Spartanburg, SC 29304

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