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. 2019-001536

Lower Court Case No. 2019-CP-07-00433

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.

INITIAL BRIEF OF RESPONDENT

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I. WHETHER THE CIRCUIT COURT CORRECTLY HELD THAT APPELLANTS FAILED TO SET FORTH CREDIBLE EVIDENCE TO ESTABLISH THE EXISTENCE OF A VALID AND ENFORCEABLE ARBITRATION AGREEMENT?

STATEMENT OF THE CASE

This is an appeal from an order denying a motion to dismiss and compel arbitration filed by Appellants Bayview Manor, LLC d/b/a Bayview Manor, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons; John Does, and Richard Roe Corporations (collectively "Appellants"). The case involves an admission agreement ("Admission Agreement") and arbitration agreement ("Arbitration Agreement") purportedly signed by Clifford Byars and Viola M. Hackworth, after their brother, Eugene Boles ("Mr. Boles"), entered Bayview Manor, a skilled nursing facility, located at 11 Todd Drive in Beaufort, South Carolina (the "Facility"). During his year-long residency at the Facility, Mr. Boles suffered multiple injuries, including but not limited to: numerous falls; contractures of his lower extremities; multiple pressure ulcers including Stage IV wounds on his left and right buttocks and ulcerations of his toe and heels; painful irrigation and debridement of his left buttock wound; sepsis; disfigurement; malnutrition; dehydration; and other injuries that ultimately resulted in his wrongful death.

On March 1, 2019, Viola M. Hackworth, as Personal Representative of the Estate of Mr. Boles ("Respondent"), commenced her wrongful death and survival action asserting claims of professional and ordinary negligence, negligence *per se*, and negligence misrepresentation. (Cmplt.) On April 8, 2019, Appellants filed their Notice of Motion and Motion to Stay Action and Compel Arbitration; in the Alternative Motion for Nonjury Trial; and Motion for Protective Order ("Motion"). (Mot.). As exhibits in support of their Motion, Appellants submitted for the Circuit Court's review the Facility's Admission Agreement and Arbitration Agreement. (Mot., Exhs. A and B.) Appellants also included affidavits of Facility representatives, Christy Drinkard ("Ms.

Drinkard"), current Administrator, and Lucy Caruso ("Ms. Caruso"), former Admission and Marketing Director. (Mot., Exhs. C and D.) As exhibits of these affidavits, Appellants also submitted Respondent's General Durable Power of Attorney. *Id.*

On March 11, 2019, Respondent emailed Appellants to request discovery regarding concerns of enforceability of the arbitration provisions in the Admission and Arbitration Agreements. (Resp. p. 1, n 1.) Appellants declined. On April 30, 2019, Respondent filed her motion to conduct limited discovery. (Mot. to Conduct Ltd. Discovery.) On June 6, 2019, Respondent filed her Response in Opposition to Appellants' Motion. (Resp.)

On June 11, 2019, the Honorable Edgar W. Dickson held a hearing on the Motion. On July 26, 2019, the Circuit Court issued a Form 4 Order Denying Appellants' Motion. (Order.) On August 5, 2019, Appellants filed a motion to alter or amend. (Mot. to Alter.) On August 7, 2019, Respondent filed her Response in Opposition to Appellants' Motion to Alter or Amend. (Resp. to Mot. to Alter.) On August 20, 2019, Judge Dickson issued a Form 4 Order denying Appellants' motion to alter. (Form 4 Order.) On September 9, 2019, Appellants filed their Notice of Appeal. (Not.)

FACTS

Respondent is the surviving sister of the decedent, Mr. Boles. (Cmplt. p. 1; Resp. p. 2). Mr. Boles was admitted to the Facility on November 2, 2015, for skilled nursing and rehabilitative care after suffering a stroke. (Cmplt. pp. 2, 8; *See also* Cmplt., Exh. C p. 2, Aff. of Mary Ann Hewston MPM, BSN, RN, NHA.) In addition to his stroke, Mr. Boles also suffered cognitive deficits due to dementia, including short and long-term memory deficits, confusion, disorientation, and impaired decision-making, and he had trouble making his needs known as his speech was mumbled and slurred and often non-verbal. *Id.*

According to Appellants, the Facility's Admissions and Marketing Director, Ms. Caruso, "**met**" with Respondent and her brother, Clifford Byars ("Mr. Byars"), and "**personally presented**" admissions paperwork on **November 2 and 3, 2015**. (Mot., Exh. D; Aff. of L. Caruso ¶¶ 7-8, 12 (Apr. 1, 2019) (emphasis added).) Ms. Caruso also swore that Respondent and Mr. Byars were provided an admissions packet, including an "Admissions Agreement" and a "separate Arbitration Agreement," and she described and explained the arbitration and jury waiver provisions. *Id.* at ¶¶ 8-9; Tr. p. 15:10-24. Although Ms. Caruso "knew that Mrs. Hackworth was the designated power of attorney for Mr. Boles," she apparently had Mr. Byars sign and initial the documents, despite his known lack of authority. *Id.* at ¶¶ 8, 10. Ms. Caruso further swore that Respondent "signed the Admissions Agreement" but "advised she wanted more time to think about the Arbitration Agreement" and returned "the following day, on November 3, 2015," to sign "the Arbitration Agreement." *Id.* at ¶ 12.

In light of Appellants' detailed sworn testimony, including vivid descriptions of supposed interactions with Respondent on November 2 and 3, 2015, Respondent filed a counter-affidavit with corroborating documentation, which illustrates "[n]one of [those details] can be true." (*See* Resp., Exh. 1; Aff. of V. Hackworth ¶¶ 4, 8 (May 31, 2019); Tr. p. 14:16-19.) Contrary to Appellants' assertions, Respondent testified she "**was not present during [her] brother Eugene Boles' admission on November 2, 2015, nor did [she] return to the facility to sign an arbitration agreement on November 3, 2015.**" *Id.* at ¶ 5 (emphasis added). Rather, due to childcare concerns and work obligations, Respondent did not travel from her home in Florida to South Carolina **until November 6, 2015**. *Id.* at ¶ 6. To reinforce her sworn testimony, Respondent offered her work schedule as well as bank statements from that time period. (Resp., Exh. 1, Atts.

A and B.) Moreover, her brother, Mr. Byars, was not with her at this time, despite contrary claims by Ms. Caruso. *Id.* at ¶ 7.

Appellants moved to compel arbitration based upon two (2) separate agreements, the Admission Agreement and Arbitration Agreement, which contain conflicting arbitration provisions. (Mot. p. 1.) The Admission Agreement is an eleven (11) page document found in the admissions packet and its pages are numbered fifteen (15) to twenty-five (25). (Mot., Exh. A.) The parties to the agreement are "Eugene Boles ('Resident')" and "Bayview Manor ('Facility')." *Id.* at p. 1. Ms. Caruso apparently signed[1] on behalf of the Facility on November 2, 2015. *Id.* at p. 11. While no "Responsible Party" is identified or defined, the Admission Agreement was purportedly signed by Respondent and Mr. Byars on November 2, 2015. *Id.* No other persons witnessed the agreement's execution, despite available signature lines. *Id.*

The Admission Agreement attempts to preclude the Facility's liability for "injuries of any kind unless caused by the willful act or negligence of the Facility or the Facility's employees." *Id.* at p. 8. It requires any "notice, request, consent, waiver, or other communication" be provided to Mr. Boles at the Facility, despite his incapacity. *Id.* The agreement further provides a three (3) business day withdrawal period. *Id.* at p. 9.

Pursuant to the Admission Agreement, "the Facility shall be entitled to receive reasonable attorney's fees and costs" incurred in "any legal action or other proceeding by the Facility to enforce or interpret any provision of this Agreement or to enforce any remedy for [its] breach," including "any appellate proceeding." *Id.* at p. 9. It also allows the Facility to recover attorney's fees and costs "for any legal action or proceeding brought by the Resident and/or responsible party

[1] A closer review and comparison of Ms. Caruso's signature on multiple documents within the admissions packet indicates it was either pre-printed or otherwise stamped on the documents. It also appears a different pen was used for purposes of entry of the date.

upon a finding" that the Facility "committed no wrongdoing," including fees incurred at the appellate level. *Id.*

The Admission Agreement also includes separate jury waiver and arbitration clauses. *Id.* at pp. 9, 11. The Waiver of Jury Trial provision states in part:

> Resident hereby knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any litigation . . . arising out of or relating to any of the said documents or any relationship between the Facility and Resident, including the Resident's admission itself, or any other course of conduct . . . or actions of the Facility or Resident.

Id. at p. 9. This provision further provides "the waiver . . . has been freely given and voluntarily made after reviewing the same, or having had an opportunity to review the same, with counsel of Resident's choice." *Id.* The Admission Agreement then provides an "Optional Arbitration Clause" which states:

> Any action, dispute, claim or controversy of any kind (tort, contract, equitable or statutory, including but not limited to claims of violations of Resident's Rights) now existing or hereafter arising between the parties, in any way arising from or relating to this Agreement governing the Resident's stay at the Facility, shall be resolved by binding arbitration. Such binding arbitration shall be governed by the provisions of the South Carolina Arbitration Code.
>
> * * *
>
> **OPTIONAL: If the parties do not agree to this Arbitration Clause, please mark with an X to void this clause only. I have X this clause ____ initial.**

Id. at p. 11 (emphasis in original).

Further, the Admission Agreement's "Entire Agreement" clause states that "it sets forth the entire understanding of the parties . . . and supersedes all prior Agreements, understanding, and discussions relative to such subject matter." *Id.* at p. 10. It further provides that "**[n]othing in this Agreement shall be construed to give any person or entity other than the parties hereto any**

rights to remedies." *Id.* (emphasis added). The agreement also authorizes the Facility to "modify, change or amend this Agreement" at any time in its sole discretion. *Id.* at p. 11. Finally, the Admission Agreement includes another pre-printed provision that claims the Resident and/or Responsible Party "has read or has been read and understands and agrees to all terms and conditions." *Id.* at p. 11.

The separate Arbitration Agreement is a two (2) page document found in admissions packet but is not numbered. (Mot., Exh. B.) It fails to identify the parties to the agreement and leaves placeholders for the "Facility" and the "Resident" or "Resident's Authorized Representative" incomplete. *Id.* at p. 1. The Arbitration Agreement provides that "any legal dispute, controversy, demand or claim . . . that arises out of or relates to that certain Resident Admission Agreement . . . executed by the Resident and the Facility, or any service or healthcare provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration . . . in accordance with the Federal Arbitration Act. . . ." *Id.* at p. 1. It further provides the scope of the agreement shall include "any claim for payment, nonpayment or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Resident Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care. . . ." *Id.*

The Arbitration Agreement also states that it "shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident." *Id.* The Arbitration Agreement claims the Resident "understands" she has the right to

seek legal counsel, "the execution of this Arbitration Agreement is not a precondition to furnishing the services to the Resident by the Facility," and the agreement "may be rescinded by written notice given . . . within thirty (30) days of signature." *Id.* at p. 2. Furthermore, the Arbitration Agreement provides the "PARTIES UNDERSTAND AND AGREE . . . THEY ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY." *Id.* According to Appellants, Respondent purportedly signed the Arbitration Agreement as Resident/Representative on November 3, 2015. *Id.* at p. 2. Again, Ms. Caruso appears to have signed for the Facility; however, again, it is unclear whether her signature was pre-printed or stamped upon the document. *Id.* A different pen was clearly used to enter the dates. *Id.* There are no other signatories to the Arbitration Agreement. *Id.*

While a resident under the care of the Appellants between November, 2015, and December, 2016, Mr. Boles was transferred to Beaufort Memorial Hospital on multiple occasions due to his development of significant pressure ulcerations and infections. (Cmplt., Exh. C pp. 2-7.) He also experienced numerous falls, substantial weight loss, altered mental status, and other issues. *Id.* On October 6, 2016, in emergency preparation for Hurricane Matthew, Mr. Boles was temporarily transferred and hospitalized at McLeod Regional Medical Center ("McLeod") in Florence, South Carolina, where medical staff identified a large, open, infected, Stage IV left sacral/buttock pressure ulceration with yellow, purulent drainage. *Id.* at p. 7. McLeod medical staff also found a plugged feeding tube, and his white blood cell count and other laboratory values were elevated. *Id.* Following the storm, Mr. Boles was returned to Bayview Manor where his condition continued to deteriorate. *Id.*

During his thirteen (13) month residency, Mr. Boles suffered numerous injuries, including, but not limited to: (a) numerous falls; (b) contractures of his lower extremities; (c) multiple pressure ulcers including Stage IV wounds on his left and right buttocks and ulcerations of his toe and heels; (d) painful irrigation and debridement of his left buttock wound; (e) sepsis; (f) disfigurement; (g) malnutrition; (h) dehydration; and (i) urinary tract infections, amongst others. (Cmplt. ¶ 27; *See also* Cmplt., Exh. C, pp. 7-19.) On December 14, 2016, Mr. Boles was found unresponsive by Bayview Manor staff. (*Id.* at ¶ 56; Cmplt., Exh. C, p. 7.) Resuscitation efforts were attempted until emergency medical services (EMS) arrived and transported Mr. Boles to Beaufort Memorial Hospital. *Id.* He passed away a short time later due to vascular collapse, sepsis and osteomyelitis. *Id.* Litigation then ensued and this appeal followed.

STANDARD FOR 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.

ARGUMENT

This case arises out of Appellants' negligent care of Mr. Boles that resulted in his death. His sister and personal representative, Respondent, initiated this action in Circuit Court seeking survival and wrongful death damages for Mr. Boles' injuries and death. Appellants seek to enforce arbitration of those claims based on an Admission Agreement and/or Arbitration Agreement purportedly executed by Respondent after Mr. Boles' admission to the Facility. As briefed to the Circuit Court with counter-affidavit, argued at the hearing with additional, supporting documentation, and as explained below, the arbitration provisions of the Admission Agreement

and Arbitration Agreement are invalid and unenforceable because no credible evidence was made part of the record to confirm the existence of a valid arbitration agreement.[2]

While there is a presumption in favor of arbitration agreements, including those contracts governed by the Federal Arbitration Act (FAA), this presumption only applies where a valid arbitration agreement exists. *EEOC v. Waffle House*, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014). If the existence of a valid agreement or clause is disputed, the "presumption disappears." *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir. 2002); *Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.,* 157 F.3d 775, 779 (10th Cir.1998) ("[W]hen the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away."). Appellants then bear the burden of establishing the existence of a valid contract, *Hinson-Barr, Inc. v. Pinckard*, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1987), and to prove that waiver of Respondent's fundamental right to a jury trial was knowing, voluntary, and intentional. *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Colo. 1982).

"Congress did not intend for the FAA to force parties who [have] not agreed to arbitrate into a non-judicial forum." *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001); 9 U.S.C. § 4. "The FAA thereby places arbitration agreements on an equal footing with other contracts," which "may be invalidated by generally applicable contract defenses." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67-68, 130 S. Ct. 2772, 2776 (2010). Under the FAA,

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[2] Respondent also preserved the right to argue enforceability of the Admission Agreement and Arbitration Agreement due to applicable contract law defects or defenses, including unconscionability, no meeting of the minds, lack of consideration and mutuality, and lack of merger. (*See* Tr. pp. 11-21; *See generally* Resp. p. 3, n. 2; Resp. to Mot. to Alter pp. 4-5.) In addition, Respondent preserved the right to argue other statutory limitations, including an inability to bind wrongful death beneficiaries and lack of authority. *Id.*

contract formation remains "a matter of judicial determination," and the trial court must "consider general [state-law] contract defenses to ensure a meeting of the minds to arbitrate existed, and that such an agreement was not the result of fraud, duress, [or] unconscionability." *York v. Dodgeland*, 406 S.C. 67, 78, 749 S.E.2d 1139, 145 (2013); *citing Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001); *See also Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 388, 759 S.E.2d 727, 736 n. 13 (2014) (The court "must engage in a full inquiry . . . prior to any attempt to enforce the [a]greement," including "whether there was a meeting of the minds between the parties."). When faced with a motion to compel arbitration that is opposed based on enforceability of the contract, the opposing party is given "the benefit of all reasonable doubts and inferences that may arise." *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980).

Further, "[a]n unappealed ruling is the law of the case and requires affirmance." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).[3] This Court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. Appellants also "cannot raise issues on appeal that were not raised at the Circuit Court as such arguments are deemed abandoned and waived." *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (internal citations omitted); *See also United States v. McCall*, 235 F.3d 1211, 1216 (10th Cir. 2000). Similarly, "[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court." *Id.*; *citing Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct.App.1993).

[3] While Appellants' Motion requested an alternative remedy of a non-jury trial, Appellants fail to argue the applicability of any jury waiver provision in their brief. They also abandoned this issue at the hearing. As such, Appellants have waived appeal on this issue.

I. THE CIRCUIT COURT CORRECTLY DENIED APPELLANTS' MOTION BECAUSE NO CREDIBLE EVIDENCE WAS OFFERED TO SUPPORT THE EXISTENCE OF A VALID AND ENFORCEABLE ARBITRATION AGREEMENT.

Appellants bear the burden of establishing the existence of a valid arbitration agreement through submission of credible evidence. *Hinson-Barr*, 292 S.C. at 268. Credible evidence is "[e]vidence that is **worthy of belief,**" and it may come in the form of affidavit, testimony, documents, or other tangible objects. *Black's Law Dictionary* (11th ed. 2019) (emphasis added).

Appellants' Motion, brief in support, and oral argument lacked credible, foundational evidence necessary to establish the existence of a valid contract. Therefore, the Circuit Court correctly denied Appellants' Motion.

A. Appellants concede sworn affidavits regarding the entry of the purported Admission Agreement and Arbitration Agreement were not credible.

An affidavit is a "voluntary declaration of facts written down and **sworn to by a declarant** before an officer authorized to administer oaths." *Collins v. Doe*, 343 S.C. 119, 124, 539 S.E.2d 62, 64 (Ct. App. 2000), *rev'd on other grounds*, 352 S.C. 462, 574 S.E.2d 739 (2002) (emphasis added); *quoting Black's Law Dictionary* (11th ed. 2019). To be legally sufficient, an affidavit must unequivocally and affirmatively show "the affiant's competence to testify to the facts stated and that such facts are personally known to the affiant." *State ex rel. Simmons v. Moore*, 774 S.W.2d 711, 715 (Tex. App. 1989).[4] Ultimately, determination of the affidavit's credibility is "left to the discretion of the court." *Caggiano v. Ross*, 130 A.D.2d 538, 539, 515 N.Y.S.2d 274 (1987).

In South Carolina, a motion may be supported by affidavit so long as the affidavit accompanies the motion at the time of filing. Rule 6(d), SCRCP. Affidavits "**shall be made on**

[4] In fact, courts have warned against affidavits generated from interviews conducted by an attorney with an interest in the litigation because "interviews at which the affidavits [are] taken [are] not conducive to frank disclosures." *N. L. R. B. v. Lifetime Door Co.*, 390 F.2d 272, 275 (4th Cir. 1968).

personal knowledge, shall set forth such facts as would be admissible in evidence, and **shall show affirmatively that the affiant is competent to testify** to the matters stated therein." Rule 56(e), SCRCP (emphasis added).[5] Affidavits are sworn under penalty of perjury. S.C. Code Ann. § 16-9-10(A)(1). Where a pleading or affidavit is submitted to the court that is "false," sanctions may be imposed, including the striking of the pleading, denial of the requested relief, or dismissal. *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 19, 633 S.E.2d 722, 729 (2006); *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996); Rule 11, SCRCP.

To compel this matter to arbitration, Appellants relied upon and presented to the Circuit Court sworn testimony of their former Admission's Director, Ms. Caruso, which was categorically false. (Mot., Exh. D.) In her affidavit, Ms. Caruso swore in very specific detail about her interaction and events with Respondent on **November 2 and 3, 2015**:

- "**On November 2, 2015, I met with Mr. Boles' sister** and Power of Attorney, Viola Boles Hackworth . . . and Mr. Boles' brother, Clifford Byars. . . .";
- "**I personally presented** . . . the admissions documents[,]" "**I described** . . . **the terms** of the agreement[,]" and "**I explained the waiver of jury trial and arbitration provisions**. . . .";
- "Mrs. Hackworth was given as much time as she desired to read the Admission Agreement and Arbitration Agreement. . . .";
- ". . . she wanted more time to think about the Arbitration Agreement. **I recall** that **Mrs. Hackworth came to my office in the later part of the day on November 2, 2015** and, **the following day, on November 3, 2015**, Mrs. Hackworth returned to Bayview . . . and **signed the Arbitration Agreement.**"; and
- ". . . Mrs. Hackworth listened carefully to what I told her, and there was nothing about her demeanor, questions, or behavior that suggested in any way that she did not understand what she was signing."

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[5] Although not a motion for summary judgment, Respondent contends the same general affidavit requirements apply.

Id. at ¶¶ 7-8, 10-13 (emphasis added).[6] After reviewing Appellants' Motion and their false affidavits, Respondent submitted a counter-affidavit with corroborating documentation, which illustrated Ms. Caruso's statements were "false" and "[could not] be relied upon." (Hackworth Aff. ¶ 8; Tr. pp. 12:20-16:7.)

Respondent was not present at Bayview Manor during the admission of Mr. Boles on November 2, 2015 nor was she present the following day on November 3, 2015. Id. at ¶ 5. Rather, she arrived in Beaufort on the evening of November 6, 2015, after leaving Florida and traveling through Georgia and South Carolina with her sister. *Id.* at ¶¶ 6-7. Respondent's testimony was also corroborated by documentation, including her work schedule and bank statements. (Resp., Exh. 1 ¶ 6, Atts. A and B.)

At the hearing for Appellants' Motion, counsel for Appellants acknowledged inaccuracies in the sworn testimony of Ms. Caruso:

> [F]or purposes of today, Your Honor, we would contend that **it does not matter. We will accept plaintiff's contention that it was not, in fact, signed on those dates** and Plaintiffs have asserted she would have been at the facility on November 6.

(Tr. pp. 4:22-5:2 (emphasis added).) After oral argument of Respondent's counsel, Appellants' counsel reiterated their concession to Respondent's affidavit:

> As far as the "falsified dates", as I said in the beginning of my argument, **we are for purposes of today accepting the Plaintiff's argument. . . .**

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[6] Though Christy Drinkard was not serving as Bayview Manor's Administrator during the time period in question, Appellants relied upon her affidavit in support of their Motion as well. Ms. Drinkard's affidavit also falsely states that Respondent entered an arbitration clause on the day of Mr. Boles' admission of November 2, 2015. (Aff. of C. Drinkard ¶ 10.)

(Tr. p. 23:1-3 (emphasis added).) Although no supplemental affidavit was submitted, Appellants further conceded: "**Why the dates say November 2nd and 3rd on the two Agreements, I can't explain. . . .**" *Id.* at 23:25-24:2 (emphasis added).

South Carolina's Constitution guarantees that the right to a trial by jury "**shall be preserved inviolate.**" S.C. Const. art. I, § 14 (emphasis added.)[7] For the Circuit Court to compel arbitration and waive such a fundamental right, Appellants bear the burden of establishing the existence of a valid contract. *Hinson-Barr*, 292 S.C. at 268. To do so, Appellants must submit credible evidence for the Circuit Court's consideration. Here, Appellants admittedly submitted false affidavits of Facility personnel that were "directly contradicted" by Respondent's testimony and corroborating evidence. *Russell*, 370 S.C. at 19. Moreover, as explained in more detail below, Appellants submitted purported contractual documents that were either back-dated or falsified. (Tr. pp. 15:10-24, 20:23-21:2.) However, rather than withdraw their Motion because it lacked good faith support, Appellants stated the fabrication of testimonial and documentary evidence "does not matter," and insisted that the Circuit Court should compel arbitration anyway. (Tr. pp. 4:22-5:2.) Appellants offered no credible evidence for which the Circuit Court could rely to find the existence of a valid contract; thus, the Circuit Court was precluded from compelling arbitration and waiving Mr. Boles and Respondent's right to a jury trial.

B. In willfully producing perjured testimony and concealing relevant information, Appellants committed a fraud on the court.

By swearing false affidavits to procure a jury waiver, Appellants have willfully produced perjured testimony in an attempt to subvert justice. Appellants also concealed relevant

[7] In fact, Appellants acknowledged South Carolina afforded this right during the hearing. (Tr. p. 8:8-12.)

documentation in an unconscionable plan to improperly influence the Circuit Court's decision regarding arbitration.

The instant action closely parallels the facts and analysis in *Eppes v. Snowden*, 656 F.Supp. 1267 (E.D. Ky. 1986). In that case, a Federal court learned that a defendant "manufactured and produced" perjured testimony as well as documents that had been "backdated" in an effort to sway the court's decision-making. *Eppes*, 656 F.Supp. at 1269, 1279. Relying on the United States Supreme Court decision in *Hazel-Atlas Glass Co.* and its progeny, the *Eppes* court found the defendant committed "fraud on the court":

> [T]ampering with the administration of justice . . . is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

Eppes, 656 F.Supp. at 1277; *citing Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46 (1944). In its analysis, the court explained that misconduct such as "presentation of false testimony, fabrication and nondisclosure of relevant information" tampers "with the judicial machinery and subverts the integrity of the court itself." *Id.* Utilizing its inherent power to protect the integrity of the proceedings as a result of defendant's misconduct, the *Eppes* court struck and dismissed the defendant's pleadings and granted the plaintiff sanctions, including an award of costs, expenses and attorney's fees incurred in defending the entire action. *Id.* at 1279, 1281.

Here, Appellants concede they manufactured affidavits, not based upon the affiant's "personal knowledge" but, rather, speculatively based upon "dates that [she]" saw in the agreements. (Tr. pp. 23:11-24:2.) Appellants also cannot explain the dates "on the two Agreements," which were presumably back-dated. *Id.* Further, Appellants' own admission records illustrate that they concealed relevant information from the Circuit Court as Respondent presented Appellants' notation that instructed the parties to "**disregard the [Admission] contract**"

– which forms the primary basis of their Motion. (Tr. pp. 15:10-16:7; Resp. to Mot. to Alter p. 3.) Though this notation was conspicuously attached to the Admission Agreement, Appellants failed to disclose this "relevant information" as part of their exhibit; thus, further attempting to mislead the Circuit Court. (Tr. p. 15:16-22; *See also* Mot., Exh. A.)

Accordingly, Appellants' misconduct – in introducing perjured testimony, back-dating or falsifying contracts, and withholding relevant information – constituted a "fraud on the court." Appellants interfere with the "administration of justice" and attack the very "institutions set up to protect and safeguard" individuals such as Mr. Boles and Respondent, who are in desperate need of necessary healthcare. Moreover, if left unchecked, Appellants' misconduct would eviscerate South Carolina's Constitution, including one of our most sacred individual guarantees – the right of trial by jury. In accordance with this Court's "any evidence" standard, Appellants' Motion was correctly denied by the Circuit Court pursuant to Rule 11, SCRCP, and its inherent power.[8]

CONCLUSION

The Circuit Court correctly denied Appellants' Motion because Appellants failed to establish the existence of a valid arbitration agreement. Appellants' Motion was not supported by credible evidence. For the reasons set forth herein, and any others appearing in the Record on Appeal, Respondent requests this Court affirm the decision of the Circuit Court and remit the case to the Circuit Court.

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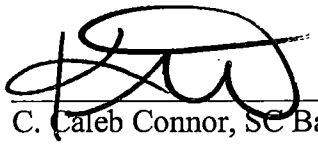
[8] On other sustaining grounds, the arbitration provisions of the Admission Agreement and Arbitration Agreement are unenforceable due to applicable contract law defects or defenses, including unconscionability, no meeting of the minds, lack of consideration and mutuality, and lack of merger. (*See* Tr. pp. 11-21; *See generally* Resp. p. 3, n. 2; *See also* Resp. to Mot. to Alter pp. 4-5.) In addition, the arbitration provisions cannot be enforced due to other statutory limitations, including an inability to bind wrongful death beneficiaries and lack of authority.

This the 3rd day of February, 2020.

Respectfully submitted,



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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. 2019-001536

Lower Court Case No. 2019-CP-07-00433

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.

PROOF OF SERVICE

I certify that this the 3rd day of February, 2020, I have caused to be served a copy of the Initial Brief of Respondent and Respondent's Designation of Matter to be Included in the Record on Appeal upon Appellants Bayview Manor, LLC d/b/a Bayview Manor, Epic Mgt, LLC, Epic Group, Limited Partnership, Teddie Simmons, John Does, and Richard Roe Corporations, causing a copy of same to be deposited in the United States mail, postage prepaid, addressed as follows:

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February 3, 2020

Via U.S. Mail

Clerk of Court Jenny Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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*
Court of Appeals Appellate Case No. 2019-001536

Dear Ms. Kitchings:

Please find enclosed one original and one copy of the Initial Brief of Respondent and the Respondent's Designation of Matter to be Included in the Record on Appeal. Please file the originals and return the copie to our office in the self-addressed stamped envelope provided.

If you have any questions or concerns, please do not hesitate to contact me.

Kind Regards,

CONNOR & CONNOR, LLC

A. Keith McAlister, Jr.

cc: A. Walker Barnes

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