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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2021-000766
Civil Action No. 2020-CP-23-04832

Debra Lynn B. Peele, as Personal Representative of the Estate of Iola Aileen Bagwell, ...Respondent,

v.

Greenville Retirement Properties, LLC d/b/a Pendleton Manor Assisted Living, Reatha Connelly, Regency Hospice of Georgia, LLC, d/b/a Regency Southerncare, Defendants,

Of whom Greenville Retirement Properties, LLC d/b/a Pendleton Manor Assisted Living and Reatha Connelly are the ..... Appellants.

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Appellant Debra Lynn B. Peele ("Peele"), as Personal Representative of the Estate of Iola Aileen Bagwell ("Bagwell") initiated this action with the filing of her Summons and Complaint in the Court of Common Pleas for Greenville County on or about October 20, 2020. (R. pp. 8-17) In her Complaint, Peele asserts causes of action sounding in negligence, gross negligence, wrongful death, and breach of contract stemming from Bagwell's tenure at Pendleton Manor Assisted Living, an assisted living facility located in Greenville County, South Carolina. (*Id.*) Appellants Greenville Retirement Properties, LLC, and Reatha Connelly ("Appellants") moved to stay this action and to compel arbitration via motion filed on or about April 6, 2021. Following oral argument on May 19, 2021, the trial court denied the motion to stay and to compel arbitration via Order filed June 21, 2021. (R. pp. 2-7) This appeal followed.

FACTS

Peele's claims against Appellants stem from the care and services rendered to Bagwell while she was a resident at Pendleton Manor, an assisted living facility in Greenville, South Carolina. Bagwell was admitted to Pendleton Manor on May 17, 2018, at which time she and Cynthia Bagwell, who held valid financial and health care power of attorneys that allowed her to act on Bagwell's behalf, executed an arbitration agreement. (R. p. 9, ¶ 11; R. p. 39; R. pp. 49-55) This Arbitration Agreement was an appendix to a contemporaneously executed lease agreement that set forth the terms of Bagwell's admission to the facility. (R. pp. 30-48) At the same time, Cynthia Bagwell also signed an agreement acknowledging that, pursuant to a contract between the pharmacy and the facility, all of Bagwell's medications must be purchased from Sr. Care Pharmacy in Charlotte, North Carolina. (R. p. 145)

During Bagwell's residency at Pendleton Manor, she sustained a fracture in the neck of the left humerus that Peele contends occurred in the course of care provided by Appellants pursuant to the Lease Agreement. (R. p. 11, ¶¶ 21-22) Later during her stay, Bagwell developed another fracture that Peele contends was the result of a fall or drop, also occurring in the course of Bagwell's stay at Pendleton Manor. (R. p. 11, ¶¶ 25-26) Following the second fracture, a physician prescribed morphine to treat Bagwell's pain. (R. p. 11, ¶ 28) About a week later, Bagwell died, and the coroner attributed her death to morphine intoxication. (R. pp. 11-12, ¶¶ 31-33)

Peele asserts negligence, gross negligence, wrongful death, and breach of contract claims against Appellants as a result of the care and treatment Bagwell received at Pendleton Manor. The crux of each claim rests on actions Peele asserts were taken or should have been taken in the course of services provided pursuant to the Lease Agreement. The plain language of the

Arbitration Agreement executed by Bagwell and her legal representative mandates that all claims arising out of or relating to the treatment or services provided by Pendleton Manor must be resolved by arbitration and that the Federal Arbitration Act governs. (R. p. 39) As such, Appellants ask this Court to reverse the order of the trial court, stay the present action, and order the parties to arbitration.

STANDARD OF REVIEW

An order granting or denying a motion to compel arbitration is subject to *de novo* review on appeal; however, the factual findings by the circuit court will not be reversed if such findings are reasonably supported by the evidence. *Masters v. KOL, Inc.*, 431 S.C. 28, 34, 846 S.E.2d 893, 896 (Ct. App. 2020) (internal citations omitted).

Absent agreement by the parties to the contrary, the question of arbitrability of a claim is an issue for the court. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Defendants' motion to compel arbitration relies on the application of the Federal Arbitration Act ("FAA"). The FAA provides as follows:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. § 2. Generally, a party seeking to compel arbitration under the FAA must establish the following four elements:

> (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and (4) the failure of, neglect or refusal of the [other party] to arbitrate the dispute.

Whiteside v. Teltech Corp., 940 F.2d 99, 102 (4th Cir. 1991); *McCutcheon v. THI*, 2011 U.S. Dist. Lexis 144288 (D.S.C. 2011). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 23-24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

ARGUMENTS

This Court should reverse the order of the trial court denying Appellant's motion to stay the present litigation and compel Peele to submit her claims to arbitration because the Arbitration Agreement is valid, enforceable under the FAA, and encompasses all of her claims. The agreement signed by Bagwell's duly appointed representative applies to "[a]ny dispute arising out of the diagnosis, treatment, or care of the resident[.]" (R. p. 39) In accordance with the terms of the Lease Agreement, including the attached Arbitration Agreement, due to the nexus of the underlying activities to interstate commerce, and in recognition that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," Peele's claims belong in an arbitration forum.

I. THE LEASE AGREEMENT EVIDENCES A TRANSACTION INVOLVING INTERSTATE COMMERCE.

Peele does not appear to contest the nexus between the services Bagwell received and interstate commerce; nor could she. Similarly, the trial court did not consider or address the issue. Nevertheless, it is important to highlight the legal underpinnings of the FAA and their implications in this case.

Consistent with the FAA and the trend towards more liberal enforcement of arbitration agreements, South Carolina courts have consistently enforced arbitration agreements pursuant to the FAA, even where those agreements did not conform to the rigid requirements of the SCUAA. *See, e.g.*, *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977); *Soil Remediation Co. v. Nu-Way Envtl. Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996); *Munoz v. Greentree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001).

Since the Supreme Court of the United States announced the expansive interpretation of the scope and reach of the FAA in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the South Carolina Supreme Court has recognized that:

> [b]eginning in the mid-1980's, the United States Supreme Court, interpreting the FAA, essentially "federalized" the law of arbitration by expanding the reach of the FAA to the full breadth of the Commerce Clause. The federal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements. The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements.

Zabinski, 346 S.C. at 591-92, 553 S.E.2d at 115.

Following these principles, an arbitration provision is valid and enforceable pursuant to the FAA if the provision is contained in "a contract evidencing a transaction involving commerce," and Peele cannot legitimately contend otherwise. 9 U.S.C.A. § 2; *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273 (1995). In *Dobson*, the Court clarified the correct interpretation of the phrase "evidencing a transaction" and specifically rejected any argument that the phrase requires a contract to evidence "on its face" a transaction involving interstate commerce. Thus, the *Dobson* court determined that the question is not whether the contract itself evidences a transaction involving interstate commerce but whether the transaction underlying the contract does. *Id.*, 513 U.S. at 273. *See also Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 123, 747 S.E.2d 461, 465 n.5 (2013) (overruling *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) "to the extent it determined the FAA did not apply because the contract on its face failed to demonstrate that the parties contemplated an interstate transaction").

The *Dobson* Court also defined the appropriate scope of the FAA by broadly interpreting the phrase "involving commerce" as the equivalent of "affecting commerce," thereby reaching the fullest contours of Congress' Commerce Clause powers. *Dobson*, 513 U.S. at 277. The

South Carolina Supreme Court has cited *Dobson* for this very proposition and elaborated as follows: "Under the reach of the Commerce Clause, 'Congress has authority to regulate (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce . . . and (3) those activities having a substantial relation to interstate commerce.'" *Cape Romain Contrs., Inc.*, 405 S.C. at 125, 747 S.E.2d at 464 (quoting *United States v. Gould*, 568 F.3d 459, 470 (4th Cir. 2009)). Furthermore, "Congress'[s] Commerce Clause power 'may be exercised in individual cases without showing any effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" *Citizens Bank v. Alababco, Inc.*, 539 U.S. 52, 56-57 (2003) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)).

The South Carolina Supreme Court has held that nursing home residence contracts implicate interstate commerce and the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (explicitly overruling *Timms* in its entirety). Citing to other federal and state court decisions reaching the same conclusion, the Court stated, "Generally, these holdings center on a common theme: nursing home residency contracts usually entail providing residents with meals and medical supplies that are inevitably shipped across state lines from out-of-state vendors." *Id.* at 381, 759 S.E.2d at 732. The services need not be in direct dispute for the relationship to evidence a transaction involving interstate commerce. *Id.* at 381-82, 759 S.E.2d at 732-33. Rather, reviewing courts must "'focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce was involved.'" *Id.* (quoting *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012).

In the present matter, the Lease Agreement and services associated with that agreement evidence a transaction involving interstate commerce. Pendleton Manor is an assisted living facility located in Greenville, South Carolina. (R. p. 32) As part of the residential care rendered pursuant to the Lease Agreement, Bagwell received three meals per day. (R. pp. 30-48; R. p. 141) Moreover, medical supplies were available, and if utilized, were billed to Bagwell separately. (R. p. 38) These are the precise services recognized by *Dean* as involving interstate commerce. *Dean*, 408 S.C. at 381-82, 759 S.E.2d at 732-33.

As further evidence of Pendleton Manor's impact on interstate commerce, the Medication Agreement signed by Bagwell's representative required all medications to be purchased from an out-of-state pharmacy located in Charlotte, North Carolina. (R. p. 145) These medications were then given to Bagwell in the course of the federally regulated medical and residential care provided by Pendleton Manor pursuant to the Lease Agreement. *See Dean*, 401 S.C. at 381 n.7, 759 S.E.2d at 732 n.7 (citing *Miller v. Cotter*, 448 Mass. 671, 863 N.E.2d 537, 544 (Mass. 2007) (holding health care in general is an activity subject to federal control under the Commerce Clause and thus involves interstate commerce). There can be no doubt the residential care Bagwell received as a result of the Lease Agreement implicated interstate commerce, and Plaintiff cannot make a valid argument otherwise.

In light of the foregoing, the Arbitration Agreement executed in conjunction with the Lease Agreement is valid, irrevocable, and enforceable pursuant to the FAA because the transaction underlying the Lease Agreement is one that inherently involves interstate commerce.

II. THE PURPORTED DESIGNATION OF THE NATIONAL ARBITRATION FORUM AS THE ARBITRAL FORUM IS NOT A MATERIAL TERM OF THE ARBITRATION AGREEMENT.

The order below erroneously concludes that arbitration before the National Arbitration Forum ("NAF"), a forum in which consumer disputes can no longer be heard, is a material term of the Arbitration Agreement, and without it, the contract cannot be enforced. (R. pp. 4-5) (relying on *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009)). The trial court's reliance on *Grant*, however, is misplaced given that the parties agreed to a severability clause, a factor that was not considered by the *Grant* Court. Arbitration agreements, like all other contracts, are subject to the general rules of contract interpretation. *Dean*, 401 S.C. at 382, 759 S.E.2d at 733. Further, "[a] motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." *Grant*, 383 S.C. at 130, 678 S.E.2d at 438. Therefore, when an arbitration clause identifies a forum for arbitration in which disputes arising under the contract can no longer be resolved, courts must determine whether the forum selected is an integral part of the agreement or a mere ancillary matter such that the intent of the parties can be carried out in its absence. *Id.* at 384, 759 S.E.2d at 734.

In *Dean*, the South Carolina Supreme Court adopted an "in accordance with" and "administered by" method for determining whether the parties intended for their designation of a specific forum to be a material term of their agreement to arbitrate. *Id.* Absent evidence to the contrary, when an arbitration provision specifies the arbitration is to be conducted "in accordance with" the procedural rules of a designated forum, the term is not material because any forum could presumably utilize those procedures. *Id.* at 382-84, 759 S.E.2d at 733-34. Typically, though, when a provision mandates the arbitration be "administered by" a specific forum, the

term is material to the agreement because, absent other evidence to the contrary, the parties agreed the dispute would be resolved only in that forum, and their contractual intent cannot be carried out if that forum is unavailable. *Id.*

The arbitration agreement at issue in *Dean* was a separate agreement signed by the plaintiff on behalf of her mother when entering into a nursing home residency agreement. *Id.* at 376, 759 S.E.2d at 730. The plaintiff voluntarily entered into the agreement, as signing it was not a condition of the patient's admission. *Id.* at 376-77, 759 S.E.2d at 730. When deciding whether the arbitration agreement's forum selection clause required the arbitration to be "administered by" the forum, thus integral to the contractual intent of the parties, versus "in accordance with" the forum's procedures, thus not an integral part of the agreement, the Supreme Court considered more than the limited language used to identify the arbitral forum. *Id.* at 383-87, 756 S.E.2d at 733-35. It considered the absence of evidence that the forum itself was of particular importance to the parties and the vital role the inclusion of a severance clause played when ascertaining and carrying out the intent of the parties. *Id.* at 387, 759 S.E.2d at 735. The *Dean* Court ultimately held the forum designated in the agreement was not a material term due, in part, to the significance of the severance clause permitting the removal of any portion of the agreement found to be unenforceable, stating, "The severance provision indicates that the intention was not to make the AAA integral, but rather only to have a dispute resolution process through arbitration." *Id.* (internal quotation and citations omitted).

Like the plaintiff in *Dean*, Cynthia Bagwell signed a separate arbitration agreement at the time of Bagwell's admission to Pendleton Manor. This Arbitration Agreement was not a condition of admission and directly above the signature lines notified Bagwell and her legal representative that "the resident cannot be discharged for refusing this agreement." (R. p. 39)

As further evidence of the voluntariness with which the parties entered into the Arbitration Agreement, the contract allows for termination "by written notice delivered to the facility within 14 days of signature." *Id.* Neither Bagwell nor her legal representative attempted to terminate the agreement.

This voluntary agreement plainly expresses the contractual intent of the parties to resolve any disputes arising as a result of Bagwell's admission to Pendleton Manor via arbitration and not the court system. The Arbitration Agreement includes a general overview of the arbitration process and explains that "[a]rbitration is a cost effective and time saving method of resolving disputes without involving the courts." (R. p. 39) The Arbitration Agreement goes on to state clearly:

> In arbitration proceedings, the disputes are heard and decided by a private individual called an arbitrator. Nether [Pendleton Manor] nor [Bagwell] is waiving their right to sue or obtain statutory and/or contractual remedies by agreement to arbitrate disputes within the scope of this Arbitration Agreement. However, the dispute will not be heard or decided by a judge or jury, **as both [Pendleton Manor] and [Bagwell] desire and expressly agree that any dispute between them be resolved outside of the court system.**

Id. (emphasis added)

Per the agreement, all disputes are to "be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect." (R. p. 39) Importantly, the agreement contains a severance clause shortly thereafter explaining that "[i]n the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion will not be effective and the remainder of the agreement will remain effective." *Id.* The parties agreed the agreement is "governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16." *Id.*

The plain language of the Arbitration Agreement indicates Appellants and Bagwell, through her legal representative, entered into the contract with the express intent that "any dispute between them be resolved outside of the court system" through arbitration governed by the Federal Arbitration Act. This is evidenced by the great lengths taken to explain the purpose of arbitration and ensure voluntary entrance into the agreement. Moreover, the Arbitration Agreement includes a severance clause, which the South Carolina Supreme Court has found to be "other evidence" that the designation of an arbitral forum was not an integral term of an agreement to arbitrate. *See Dean*, 401 S.C. at 387, 759 S.E.2d at 735. When considering the "be resolved by" language of the clause purporting to designate the NAF as the arbitrable forum in the context of the Arbitration Agreement as a whole, this designation is ancillary to the plain intent of the parties and instead attempts to provide a mechanism through which their manifest desire to engage in arbitration can be accomplished. The agreement does not include, nor does any exist, evidence that the parties included the NAF and its Code of Procedure due to a special connection between that forum and disputes arising at of the diagnosis, treatment, or care of Bagwell under the Lease Agreement. The designation simply was not an essential and material term of the Arbitration Agreement.

Per the consent order entered July 17, 2009, the NAF no longer arbitrates consumer claims. However, the unavailability of the NAF to arbitrate this dispute does not invalidate the agreement because the severance clause permits the court to strike this designation and interpret the agreement in its absence. The intent of the parties – to resolve any disputes arising under the Lease Agreement through arbitration government by the FAA – can be carried out in the absence of the NAF designation. Accordingly, Appellants asks this Court to reverse on this issue, to

sever the purported forum selection provision, and to enforce the remaining terms mandating arbitration under the FAA.

In light of the foregoing, the Arbitration Agreement is valid and should be enforced by this Court. Once this Court upholds the validity of the Arbitration Agreement, the parties and the trial court can determine the forum for arbitration and designate an arbitrator in accordance with the gap filler provisions of the FAA. *See* 9 U.S.C.A. § 5 (if an arbitration agreement does not designate a method of naming or appointing an arbitrator, then "the court shall designate and appoint an arbitrator . . . who shall act under said agreement with the same force or effect as if he . . . had been specifically named therein").

III. CYNTHIA BAGWELL HAD LEGAL AUTHORITY TO EXECUTE THE ARBITRATION AGREEMENT ON THE PATIENT'S BEHALF.

Despite the trial court's passing reference to "serious factual questions regarding the patient's capacity to sign the Durable Power of Attorney that enabled the designated person to sign the arbitration agreement. . . ," none of those supposed facts appear in the record. Nonetheless, Peele cannot legitimately dispute that Cynthia Bagwell executed the Lease Agreement pursuant to a valid health care power of attorney authorizing her to admit the patient to any health care facility deemed appropriate and executed the Arbitration Agreement pursuant to a valid durable power of attorney authorizing her to enter into all legal, financial, and business transactions the patient would have had the ability to enter into herself had she been competent. Accordingly, Cynthia Bagwell had legal ability to bind Bagwell to arbitration per the terms of the Arbitration Agreement.

Courts apply general contract law when interpreting the validity and scope of a power of attorney. *Stott v. White Oak Manor, Inc.*, 426 S.C. 586, 577, 828 S.E.2d 82, 87 (Ct. App. 2019). "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* (quoting *Watson v. Underwood*, 407 S.C. 443, 455, 756 S.E. 2d 155, 161 (Ct. App. 2014)). Therefore, when determining whether a power of attorney gives the attorney-in-fact authority to enter into a pre-dispute arbitration agreement on the principal's behalf, courts look to the specific language of the appointment. *Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69, 856 S.E.2d 550 (2021)[1]. A power of attorney giving the attorney-in-fact the ability "'to transact, handle, and dispose of all matters" affecting the principal and "'generally to do and perform . . . all that [the principal] might do if present,'" is sufficiently broad to authorize the execution of a pre-dispute arbitration agreement. *Id.* (quoting *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S.Ct. 1421, 1429 (2017)).

The plain language of the broad durable power of attorney freely given to Cynthia Bagwell by the patient broadly delegates the following authority,

> I, Aileen Bagwell, . . . do appoint Cindy Bagwell . . . as my attorney-in-fact the maximum power under law to perform any act on my behalf that I could do personally, including but not limited to, all acts relating to any and all of my financial transactions and/or business affairs including all banking and financial institution transactions, all real estate or personal property transactions, all insurance or annuit transactions, all claims and litigation, and any and all business transactions.

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[1] In her memorandum in opposition to Respondents' motion, Peele mis-relies on *Arredondo* to support her erroneous assertion that the grantor of a power of attorney must specify that she consents to submit claims to arbitration. Not so. Rather, as the Court noted, the document at issue in that case "could have been drafted to give Arredondo the broad power to sign all documents Whaley could sign himself or otherwise do anything Whaley could do himself, but it was not so drafted." *Id.*, 433 S.C. at 80, 856 S.E.2d at 556. Here, the instruments Bagwell executed, well before her admission to Pendleton Manor, vested her attorney-in-fact with "broad authority" to manage her affairs, including the execution of an agreement to submit her claims to arbitration.

(R. pp. 49-51) The health care power of attorney executed by Bagwell contained similarly broad language that authorized Cynthia Bagwell to admit her to any health care facility or institution. (R. pp. 52-55)

Relying on *Arredondo*, Peele theorizes the broad language authorizing Cynthia Bagwell to assert claims and institute litigation on her behalf did not include the ability to execute a pre-dispute arbitration agreement. Plaintiff's argument is wholly without merit. While the South Carolina Supreme Court found the power of attorney at issue in *Arredondo* was not sufficiently broad to delegate the authority to enter into a pre-dispute arbitration agreement on behalf of the principal, the Supreme Court noted the outcome would have been different had the agreement given the attorney-in-fact the broad power to enter into all agreements or other transactions that the principal could have entered had he been competent. *Arredondo*, 2021 S.C. LEXIS 21, at * 14. The durable power of attorney executed by Bagwell does just that; it broadly authorizes Cynthia Bagwell, as Bagwell's attorney-in-fact, to enter into any transaction Bagwell could have entered into had she been competent. As such, the unlimited durable power of attorney executed by Bagwell authorized Cynthia Bagwell to enter into the Arbitration Agreement, and Peele is now bound by the terms of that valid and legally authorized contract.

IV. THE LEASE AGREEMENT'S ARBITRATION PROVISION ENCOMPASSES THE CLAIMS ASSERTED BY PEELE.

The policy of the United States and of South Carolina is to favor arbitration of disputes. *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. "[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Id.*, at 597, 553 S.E.2d at 119 (citing *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993)).

Moreover, "[a] clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly." *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). As explained by the South Carolina Supreme Court in *Landers*,

> Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. Thus, the scope of the clause does not limit arbitration to the literal interpretation or performance of the contract, **but embraces every dispute between the parties having a significant relationship to the contract.**

402 S.C. at 109-10, 739 S.E.2d at 214 (internal citations omitted) (emphasis added). Stated differently, an agreement to arbitrate will be enforced unless a party, in signing the agreement to arbitrate, could not possibly have been agreeing to arbitrate claims arising from wholly unexpected tortious conduct. *Aiken v. World Fin. Corp.*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 110; *see also Landers*, 402 S.C. at 109, 739 S.E.2d at 214 ("The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.") (internal citations omitted).

The Arbitration Agreement at issue covers all of the claims asserted in Peele's Complaint. The parties to the Lease Agreement understood and agreed,

> [A]ny dispute between [Bagwell] and [Pendleton Manor], including any services rendered prior to the date this agreement was signed and any dispute arising out of the diagnosis, treatment, or care of the resident, including the scope of this arbitration clause and the arbitrability of any claim or dispute, against whomever made . . . will be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect. . . .
>
> This agreement binds all parties whose claims may arise out of or relate to treatment or service provided by the facility including any spouse or heirs of the resident. . . .

> **The resident understands that the result of this arbitration agreement is that claims, including malpractice claims he/she may have against the facility and its employees and agents, cannot be brought as a lawsuit in court before a judge or jury, and agrees that all such claims will be resolved as described in this section.**

(R. p. 39) (emphasis in the original) Peele's Complaint alleges Appellants were negligent and grossly negligent when providing care to Bagwell during her stay at Pendleton Manor, resulting in two fractures, the administration of morphine for pain, and death as a result of morphine intoxication. (R. pp. 9-13, ¶¶ 11- 42; pp. 15-16, ¶¶ 52-57) Peele further alleges Pendleton Manor breached its contract with Bagwell by failing to provide a safe environment, trained caregivers to assist with activities of daily living, trained medication technicians to manage medicine, sufficient staff to care for the resident mix, twenty-four-hour services by trained medical technicians and caregivers, and appropriate measures to prevent falls. (R. pp. 16-17, ¶¶ 58-65) The broad language of the Arbitration Agreement plainly encompasses all Peele's claims against Appellants, as they all relate to the treatment and services Bagwell received while a resident at Pendleton Manor.

Lest any doubt as to the enforceability of the agreement to arbitrate remain, the Supreme Court of the United States has made it clear that "[a] rule selectively finding arbitration contracts invalid because improperly formed fares no better under the [Federal Arbitration] Act than a rule selectively refusing to enforce those agreements once properly made." *Kindred Nursing Centers*, 137 S. Ct. at 1428 (invalidating Kentucky rule barring one granted a general power of attorney from entering into an agreement to arbitrate on behalf of the grantor). When there is any dispute as to the enforceability of an arbitration clause, courts are to err on the side of enforcement. Here, Cindy Bagwell had authority and voluntarily agreed, on behalf of Bagwell and her heirs,

including Peele, to binding arbitration of ***any*** dispute arising out of Bagwell's stay at Pendleton Manor. The broad agreement to arbitrate covers all Peele's claims against these Appellants. Accordingly, this Court should reverse the trial court and enforce the terms of the Arbitration Agreement instead.

CONCLUSION

Peele's clams are subject to the valid arbitration agreement executed by both Bagwell and Cynthia Bagwell, as Bagwell's legal representative, and are governed by the FAA. As a result, the Court should reverse, stay the present matter, and compel Peele to arbitrate her claims in accordance with the agreement.

Respectfully submitted,

March 17, 2022 By: _____

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Mar 17 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2021-000766
Civil Action No. 2020-CP-23-04832

Debra Lynn B. Peele, as Personal Representative of the Estate of Iola Aileen Bagwell, ...Respondent,

v.

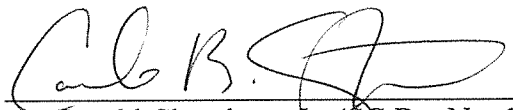
Greenville Retirement Properties, LLC d/b/a Pendleton Manor Assisted Living, Reatha Connelly, Regency Hospice of Georgia, LLC, d/b/a Regency Southerncare, Defendants,

Of whom Greenville Retirement Properties, LLC d/b/a Pendleton Manor Assisted Living and Reatha Connelly are the ..... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Appellants complies with Rule 211(b), SCACR.

(Signature page to follow.)

March 17, 2022 By: 

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