THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court Of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2013-000509
Lower Court Case No. 2012-CP-20-128

Darlene Dean as Personal Representative of the Estate of Louise Porter

Respondent,

v.

Heritage Healthcare of Ridegway, LLC, Uni-Health Post Acute Care – Tanglewood, LLC, and UHS Pruitt Corporation,

Appellants.

INITIAL BRIEF OF APPELLANTS

Joshua S. Whitley (SC Bar No. 77824)
Todd W. Smyth (SC Bar No. 5380)
Smyth Whitley, LLC
234 Seven Farms Drive
BB&T Plaza, Suite 215
Charleston, SC 29492
(843) 606-5635

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

I. **Did the trial court err in refusing to enforce the Arbitration Agreement in accordance with its plain terms?**

   A. **The trial court erred in concluding that the Arbitration Agreement's reference to the AAA Rules rendered the parties' agreement unenforceable.**

STATEMENT OF THE CASE

This appeal involves the denial of a motion to compel arbitration of a nursing home dispute in accordance with the terms of a pre-dispute arbitration agreement. (Arbitration Agreement). On March 23, 2012, Plaintiff/Respondent Darlene Dean, as the Personal Representative for the Estate of Louise Porter, (hereinafter "Plaintiff" or "Respondent") commenced wrongful death and survival actions alleging nursing home negligence. (Compl.). Plaintiff sued Heritage Healthcare of Ridgeway, LLC, ("Ridgeway"), Uni-Health Post Acute Care – Tanglewood, LLC ("Tanglewood") and UHS-Pruitt Corporation ("UHS - Pruitt") (collectively referred to herein as "Appellants" or "Defendants" or "UniHealth"). UniHealth accepted service of Plaintiff's Summons and Complaint on April 26, 2012.

The Appellants timely filed a Motion to Dismiss, or in the Alternative to Compel Arbitration and Stay Litigation on May 25, 2012. (Defendants' Motion to Dismiss, or in the Alternative to Compel Arbitration and Stay Litigation.) Following a hearing on Defendants' Motion to Dismiss, or in the Alternative to Compel Arbitration and Stay Litigation held on November 15, 2012, the Court entered an order denying Defendants' Motion to Compel Arbitration. (November 19, 2012 Order.) Defendants received a copy of this Order on November 20, 2012. On November 28, 2012, Defendants timely filed a Motion to Reconsider. (Defendant's Motion to Reconsider, November 27, 2012). The Appellee filed a memorandum in opposition to Defendants' Motion to Reconsider on December 5, 2012. (Plaintiff's Reply to Defendants' Motion to Reconsider Order Denying Motion to Compel Arbitation). The

Defendants received a Form 4 Order dismissing its Motion to Reconsider on February 21, 2013[1]. (February 18, 2013 Order.) On March 7, 2013, Defendants filed a Notice of Appeal. (Notice of Appeal.)

FACTS

The Resident sought admission on or about January 2, 2007, to Tanglewood, a skilled nursing facility located in Ridgeway, South Carolina. The Plaintiff has filed suit alleging that UniHealth failed to prevent the Resident from falling, which resulted in the Resident suffering a hip fracture, subsequent surgery, and eventual death. (*See* Compl., at ¶ 6). The Plaintiff has filed causes of action for negligence, survival, and wrongful death. *Id.*

As part of the admission process, the Plaintiff expressly agreed to an Arbitration Agreement, which sets forth its scope, in pertinent part as to personal injury, as follows:

> any and all controversies, claims, disputes, disagreements, or demands of any kind . . . arising out of or relating to the Resident's Admission Agreement with the Facility . . . or any service or care provided to the Resident by the Facility shall be settled exclusively by binding arbitration. This means that the parties are waiving their right to a trial before a jury or a judge.

(Arbitration Agreement). Despite the clear terms of the Arbitration Agreement, the Plaintiff filed her civil Complaint alleging that the Defendant's facility and employees failed to

---

[1] The Court dismissed the Defendant's Motion to Reconsider stating "Motion for Reconsideration not heard on the grounds that Plaintiff failed to serve a copy of the same within 10 days as required under SCRCP 59(g)." Defendants timely filed the motion to reconsider but did not serve the Court with a copy within 10 days. The Defendant did provide the Court the motion in advance of the hearing and there was no prejudice to any party. Indeed, the Plaintiff Respondent waives any objection for failure to comply with Rule 59(g) both at the trial court and on appeal. (Letter to Circuit Court, January 2, 2013). As failure to comply with Rule 59(g) does not deprive our courts of subject matter jurisdiction and does not affect the tolling provision regarding the filing of an appeal, both Parties seek a determination on appeal of the Court's Order of Defendants' motion to dismiss and compel arbitration. See Gallagher v. Evert, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (S.C. Ct. App. 2002) (holding there is "no error in the circuit court's decision to decide the motion despite Gallagher's failure to comply with Rule 59(g), SCRCP"); see also Jones v. State, 382 S.C. 589, 594, 677 S.E.2d 20, 22 (2009) (Supreme Court granting prosecutor's writ of certiorari and reversing trial court even though State Prosecutor failed to comply with Rule 59(g)); Coon v. Coon, 356 S.C. 342, 346, 588 S.E.2d 624, 626 (S.C. Ct. App. 2003) (holding that failure to comply with Rule 59(g) did not bar an appeal).

meet the applicable standard of care for the Resident and caused the Resident to suffer personal injury and death. (*See* Compl.) The claims set forth in the lawsuit fall squarely within the scope of the Arbitration Agreement – i.e., they are claims for personal injury "relating . . . [to] any service or care provided to the Resident by the Facility." (Arbitration Agreement).

Further, the Arbitration agreement provides that

> The Resident and the Facility acknowledge and agree that the Resident's Arbitration Agreement effects a transaction involving interstate commerce, therefore the enforcement of this Arbitration Agreement shall be governed by federal law, specifically, the Federal Arbitration Act, notwithstanding any contrary provision of the Admission Agreement or state law.

Id. at 2.

Finally, the Plaintiff agreed to this Arbitration Agreement, as is evidenced by her signature. *Id.* Notwithstanding this Agreement to arbitrate any claim arising out of the care of the resident, the Plaintiff now seeks to circumvent or breach the Agreement and proceed with litigation. (*See generally*, Compl.). Based on this agreement to arbitrate, the Defendants filed their motion to dismiss and compel arbitration, which was denied by the Circuit Court (Order denying motion to compel arbitration). It is from the denial of this motion that the Defendants appeal.

STANDARD OF REVIEW

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). This determination is subject to de novo review. See Gissel v. Hart, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). A circuit court's factual findings will not be reversed on

appeal if any evidence reasonably supports the findings. See Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).[2]

ARGUMENTS

I. The trial court erred in refusing to enforce the Arbitration Agreement in accordance with its plain terms.

"[T]here is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." Herron v. Century BMW, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010). In enacting the FAA, Congress established a strong federal policy in support of arbitration agreements, "requiring that [courts] 'rigorously enforce agreements to arbitrate.'" Shearson/Amer. Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987) (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

This strong federal policy in favor of arbitration reflects Congress's and the Supreme Court's belief that arbitration is fair and beneficial. The United States Supreme Court decisions reflect a determination that "there are real benefits to the enforcement of arbitration provisions." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122-123 (2001). "The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . . ." Allied-Bruce, 513 U.S. at 280 (quoting H. R. Rep.

[2] There is obviously some conflict between these two standards of review as "[d]e novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." Lewis v. Lewis, 392 S.C. 381, 390, 709 S.E.2d 650, 654–55 (2011). In any event, the issue on review here is legal in nature and does not touch on a question of fact.

[3] In Grant, the arbitration agreement required "arbitration *administered by* the National Health Lawyers Association (the

No. 97-542, p. 13 (1982)). Recently, the Supreme Court has specifically held that this federal policy in favor of arbitration includes claims involving nursing care. See Marmet Healthcare Center v. Brown, 132 S.Ct. 1201 (2012).

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." Zabinski, 346 S.C. at 597, 553 S.E.2d at 118. "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." Id. at 597, 553 S.E.2d at 118–19 (emphasis added).

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving commerce. 9 U.S.C. § 2 (2006). Section 4 of the FAA provides, in pertinent part, as follows:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration* in accordance with the terms of the agreement.

9 U.S.C. § 4 (2006) (emphasis added). "By its terms, the act leaves no place for the exercise of discretion by a [] court, but instead mandates that [] courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).

A. The trial court erred in concluding that the Arbitration Agreement's reference to the AAA Rules rendered the parties' agreement unenforceable.

The trial court's Order held that "the agreement at issue was prepared by Tanglewood and calls for any claims between the resident and Tanglewood to be handled under the rules of the American Arbitration Association (AAA)." (Nov. 19, 2011 Order at 2.) The following language in the Arbitration Agreement controls:

> Proceeding. Any arbitration proceeding that takes place under this Arbitration Agreement shall follow the rules of the American Arbitration Association ("AAA") and any resulting decision shall be enforceable by a court of competent jurisdiction. The arbitration proceedings shall be conducted where the Facility is located or as close to the Facility as practical. The arbitration proceeding shall be conducted before one neutral arbitrator selected in accordance with the rules of the AAA.

(Arbitration Agreement at 1). The trial court erroneously concluded that the AAA was "unavailable" based on a mistaken assumption that "[t]he forum selected by the Defendant will not hear this type of dispute." (Nov. 19, 2012 Order at 3 (citing Grant v. Magnolia Manor-Greenwood, Inc., et al, 383 S.C. 125, 678 S.E.2d 435 (2009)).

This conclusion was erroneous because: (1) the Arbitration Agreement does not require administration by the AAA; (2) the AAA will arbitrate these claims and is, therefore, available; and (3) in any event, administration by the AAA was not integral to the Arbitration Agreement, and a substitute arbitrator can be appointed.

1. The Arbitration Agreement does not require administration by the AAA.

By its express terms, the Arbitration Agreement requires only that the parties "follow the rules of the [AAA]," not that arbitration be administered by the AAA. This distinction is critical. Had the agreement at issue required the AAA to *administer* the arbitration, the rule enunciated in

Grant may have controlled.[3] However, the Arbitration Agreement here does not require administration by the AAA, but only requires that its rules be followed in conducting the arbitration. Additionally, the Arbitration Agreement only calls for a "neutral arbitrator selected in accordance with the rules of the AAA" and not an arbitrator associated with or employed by the AAA. (Arbitration Agreement, p. 1 ¶ 2.) Accordingly, this case is not controlled by Grant and the trial court erred in so ruling.

Numerous courts have correctly recognized the distinction between an arbitration agreement requiring use of the AAA Rules and one requiring administration by the AAA. The North Carolina Court of Appeals has held that the AAA's policy of refusing to accept healthcare arbitration based on pre-dispute arbitration agreements did not mandate the invalidation of an arbitration agreement containing provisions identical to the one at issue in the instant case. Westmoreland v. High Point Healthcare, Inc., 721 S.E.2d 712 (N.C. Ct. App. 2012).[4] In that case, the court held that the arbitration agreement, which merely required that the AAA rules be used, "did not provide that an AAA arbitrator must be used to conduct the arbitration" and "did not render the performance of the Arbitration Agreement impossible." *Id.* at 719. Instead, "[i]t simply meant that the arbitration could not be conducted under the auspices of the AAA." *Id.* at 719-20. In a later case where the arbitration agreement "specifically require[d] the use of 'arbitrators selected from the [AAA],'" the court held that the "language indicate[d] the parties' intention to arbitrate under the auspices of the AAA, unlike the procedure contemplated in

[3] In Grant, the arbitration agreement required "arbitration *administered by* the National Health Lawyers Association (the 'NHLA')." Grant, 383 S.C. at 128, 678 S.E.2d at 436-37 (emphasis added).

[4] The arbitration agreement at issue in Westmoreland is attached to the court's opinion and is, in all relevant respects, identical to the Arbitration Agreement. See Westmoreland, 721 S.E.2d at 724-25.

Westmoreland." Crossman v. Life Care Centers of America, Inc., 2013 N.C. App. Lexis 68 (N.C. Ct. App. Jan. 15, 2013). This distinction between provisions that merely require use of particular rules and those that require administration by a particular arbitral forum is reflective of the approach taken in courts across the country.[5]

The arbitration agreement in this case does not require the arbitrator to be a member of the AAA. The only requirement is that the arbitrator is "neutral" and selected in accordance with the rules of the AAA. Any doubts concerning the scope of arbitrable issues should be resolved in

[5] Mathews v. Life Care Centers of America, Inc., 177 P.3d 867, 872 (Ariz. Ct. App. 2008) (arbitration agreement requiring "a board of three arbitrators, selected from the American Arbitration Association [AAA]" could be enforced because the term simply provided the manner of selecting the arbitrator and did not require a particular forum); Blue Cross Blue Shield of Alabama v. Rigas, 923 So. 2d 1077, 1092 (Ala. 2005) (arbitration agreement that provided for the arbitration to be conducted according to the AAA rules and procedure could be enforced because "the statement of the AAA provides only that the AAA will not administer a dispute such as this one; it does not provide that [the] claims are not arbitrable"); Covenant Health & Rehabilitation of Picayune, LP v. Moulds, 14 So. 3d 695, 708-09 (Miss. 2009) (recognizing the distinction in cases between arbitration agreements requiring AAA administration and arbitration agreements requiring the use of AAA rules); Fellerman v. American Retirement Corp., 2010 U.S. Dist. Lexis 43177 at *14 (E.D. Va. May 3, 2010) (addressing Rule R-2 of the AAA Rules and concluding that authorization to administer arbitration by using AAA rules "does not rise to the level of contractual assent to have the matter *exclusively* before that forum" and that courts tend to enforce arbitration agreements whose terms specify that the parties be bound only by the rules of the AAA); Nail v. Consolidated Resources Health Care Fund I, 229 P.3d 885, 889 (Wash. Ct. App. 2010) (holding that "AAA did not, and could not invalidate all pre-dispute arbitration agreements regarding individual health care claims unsupported by an additional post-dispute arbitration agreement" and that in specifying the method of choosing arbitrators, the agreement did not require exclusive AAA administration); Oesterle v. Atria Mgmt. Co., LLC, 2009 U.S. Dist. Lexis 60057 at *26 (D. Kan. July 14, 2009) ("Guided by the Supreme Court, this Court finds that the appropriate way to construe the arbitration provision is to read it as simply requiring arbitration in accordance with AAA rules and not AAA policy. Thus, the AAA provision covers the rules to abide by when conducting the arbitration, while AAA policy on the types of arbitrable claims is simply just that-AAA's policy."); Deeds v. Blueshield of Idaho, 141 P.3d 1079, 1080-81 (Idaho 2006) (even if the AAA would not designate an AAA arbitrator to administer the dispute in light of the Policy Statement, "no reason" why the arbitration could not proceed in accordance with the AAA Rules using a different arbitrator); Trinity Mission v. Scott, 19 So. 3d 735 ("While it would appear that the AAA would not administer the arbitration of this claim since there is only a pre-dispute agreement to arbitrate, it does not mean that arbitration is precluded. Arbitration pursuant to the AAA's rules and procedures would still be possible."); Meskill v. GGNSC Stillwater Greeley, LLC, 862 F. Supp. 2d 966, 973 (D. Minn. 2012) (arbitration agreement requiring arbitration "in accordance with the [NAF] Code of Procedure" did not mandate that the NAF conduct the arbitration, even where NAF rules provided that arbitrations using its rules and procedures could only be administered by the NAF and noting that "if the parties had contemplated the NAF would be their exclusive arbital forum, they could have easily said so – there would be no need for them to do so obliquely by specifying that the arbitration must be conducted by the NAF's rules").

favor of arbitration. See Towles v. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (1999) (citations omitted). Unlike the agreement at issue in Grant, the arbitration agreement here does not mandate that the AAA administer the arbitration. Rather, it merely requires the use of the AAA Rules and a neutral arbitrator. Thus, the arbitration agreement is not impacted by the AAA Policy Statement, which only involves the *administration* of arbitrations, and which courts across the country have correctly distinguished from the mere use of the AAA Rules.

2. The AAA is not "unavailable."[6]

Even if the Arbitration Agreement had required administration by the AAA, as Plaintiff argues, the Policy Statement[7] does not render the AAA "unavailable." The AAA Policy Statement at issue stated in relevant part:

> As a result of a review of its caseload in the health care area, the American Arbitration Association has announced that it will no longer accept the administration of cases involving individual patients without a post-dispute agreement to arbitrate. In order to provide sufficient notice to provide for an orderly transition, this change will become effective on January 1, 2003.[8]

---

[6] The AAA rules cited by the trial court do not require administration by the AAA. Rule R-2 does not make AAA the exclusive administering body of the arbitration, as it simply states that AAA could administer the arbitration if the parties chose. Likewise, Rules R-3, R-49, and R-51 would only apply in arbitrations where AAA is administering the arbitration. Furthermore, the copyrighting prohibition certainly does not mean that the AAA rules can only be used in such limited proscriptions as the AAA administration of an arbitration.

[7] It is important to note that the AAA Policy Statement effective January 1, 2003 is not a "rule" under the AAA. Other cases, including Grant, 383 S.C. 125, 678 S.E.2d 435, have addressed a similar issue involving the National Health Lawyers' Association (NHLA), who issued a *rule* change requiring a post-injury agreement to arbitrate before accepting arbitration. Those cases are distinguishable, in part, because of the difference in the AAA's Policy Statement, which does not render arbitration agreements invalid, and the NHLA's rule change, which would invalidate pre-injury arbitrations following those rules under that change.

[8] (American Arbitration Association, Healthcare Policy Statement (eff. Jan. 1, 2003), available at http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_011014&RevisionSelectionMethod=LatestReleased; see *also* Nov. 9, 2011 Order.)

By its plain language, the AAA Policy Statement simply requires a post-injury agreement to arbitrate; it does not completely close the doors of the AAA to the types of claims asserted in Plaintiff's Complaints. If, as Plaintiff has argued and the trial court held, the use of AAA's Rules requires administration by the AAA, then the Plaintiff can have the result demanded by her proposed interpretation of the Arbitration Agreement simply by filing her demand for arbitration with the AAA. The plain language of the AAA Healthcare Policy Statement indicates that the AAA has not refused access to its forum for all healthcare disputes in general or to Plaintiff's dispute in particular. Instead, the Policy Statement is based solely on AAA's "review of its caseload in the healthcare area."[9]

Although the Arbitration Agreement does not require administration by the AAA, the Defendants are willing to perform whatever formalities may be required by the AAA to have this dispute resolved in the arbitral forum that Plaintiff claims is demanded by the Arbitration Agreement. Moreover, the Plaintiff's argument that the AAA will not administer the Arbitration is plainly incorrect based on an exhibit provided to the trial court by the Plaintiff. *See* (Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss and Compel Arbitration, Exhibit D); *see also* (Hearing Tr. at 2). There, the implication from the correspondence from the AAA was that they would indeed accept any and all arbitrations that were compelled by a court of law. Accordingly, that they will accept the arbitration if the Defendants' motion to compel arbitration is granted absolutely means that Plaintiff's argument that a material term fails cannot be true on its face. In response, the Circuit Court below simply stated that it was not going to compel

[9] (*See* American Arbitration Association, Healthcare Policy Statement.)

arbitration in a wrongful death case. (*see* Hearing Tr. at 6 (holding "95 percent of the time I send it to arbitration but I'm not going to send this one, but I'm not doing it on interstate commerce, I think you've got a good argument on that . . . And the reason being wrongful death actions are not something that's arbitrated, one, two, [AAA] doesn't take them")). That the Circuit Court would not send a wrongful death action to arbitration is contrary to Supreme Court precedent. See Marmet, 132 S.Ct. at 1203-04 (reversing the West Virginia high court that held the state of West Virginia's public policy prohibited wrongful death claims from being submitted to arbitration and held "[the FAA's] text includes no exception for personal-injury or wrongful-death claims. It requires courts to enforce the bargain of the parties to arbitrate") (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985)). Accordingly, the Circuit Court must be reversed and this case should be dismissed and arbitration compelled.

3. Administration by the AAA was not integral to the Arbitration Agreement, and a substitute arbitrator can be appointed.

Once a valid and enforceable arbitration agreement is found to exist, Section 4 of the FAA mandates that the matter be submitted to arbitration. Congress contemplated the possibility that a designated arbitrator might not be available.[10] Therefore, it enacted Section 5 of the FAA, which provides that "if for any other reason there shall be a lapse in the naming of an arbitrator . . . then upon application of either party to the controversy the Court shall designate and appoint

[10] As discussed previously, the Arbitration Agreement here does not require AAA to administer the arbitration and only requires a neutral arbitrator. And, even if it did require AAA administration, it is within the Plaintiff's power to submit her claims to the AAA for its administration of the arbitration. Accordingly, the agreement can be performed according to its terms and without the appointment of a substitute arbitrator.

an arbitrator . . . who shall act under the same force and effect as if he . . . had been specifically named therein." 9 U.S.C. § 5.[11]

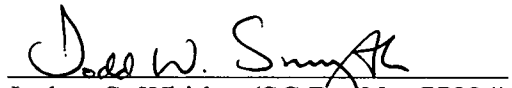
The trial court relied on Grant to determine that the forum was unavailable here. *See* Hearing Tr. p. 7, but the trial court's Order overlooks the significant difference between this case and Grant. In Grant, the arbitration agreement *mandated* administration by the National Health Lawyers Association (NHLA). There is no such strong pronouncement in the Arbitration Agreement here regarding the *administration* of the arbitration. As the Grant court emphasized, the parties there specified an *exclusive* arbitral forum. See Grant, 678 S.E.2d at 438-439 ("There is a dispute in the case law as to whether Section 5 [of the FAA] applies in cases where, as here, the parties have specified an exclusive arbitral forum...." and "[w]e see great merit in the Second Circuit's view that Section 5 does not apply in cases where a specifically designated arbitrator becomes unavailable" and "...in our view, the specific designation of the AHLA as arbitrator is an integral term of this arbitration agreement."). Unlike Grant, the Arbitration Agreement here only requires that the parties use the AAA Rules and a "neutral arbitrator." It does not require AAA administration. Accordingly, the administration by the AAA was not integral to the Arbitration Agreement and, therefore, the Agreement does not fail.

[11] See also Reddam v. KPMG, LLC, 457 F.3d 1054 (9th Cir. 2006) (arbitration agreement enforceable though named arbitrator will not administer arbitration); Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217 (11th Cir. 2000) (compelling arbitration though designated arbitral forum no longer existed); Trade & Transport, Inc. v. Natural Petroleum Charters, Inc., 931 F.2d 191, 194 (2nd Cir. 1991); McGuire, Cornwell & Blakely v. Gilder, 771 F. Supp. 319, 320 (D. Colo. 1991) (arbitration agreement enforceable though arbitral forum unwilling to arbitrate claims); Zechman v. Merrill Lynch, 742 F. Supp. 1359, 1365 (N.D. Ill. 1990); Astra Footwear Indus. v. Harwyn Int'l, Inc., 442 F. Supp. 907, 910 (S.D.N.Y. 1978) *aff'd* 578 F.2d 1366 (2d Cir. 1978).

Conclusion

For the reasons set forth herein, the Court of Appeals should reverse the trial court's decision and remand the matter to the trial court for the entry of an order compelling arbitration.

Respectfully submitted,



Joshua S. Whitley (SC Bar No. 77824)
Todd W. Smyth (SC Bar No. 5380)
Smyth Whitley, LLC
234 Seven Farms Drive
BB&T Plaza, Suite 215
Charleston, SC 29492
(843) 606-5635 (w)
(843) 654-4095 (f)

Attorneys for Appellants

July 3, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court Of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2013-000509
Lower Court Case No. 2012-CP-20-128

Darlene Dean as Personal Representative of the Estate of Louise Porter — Respondent,

v.

Heritage Healthcare of Ridegway, LLC, Uni-Health Post Acute Care – Tanglewood, LLC, and UHS Pruitt Corporation,

Appellants.

PROOF OF SERVICE

I certify that I am a legal assistant at Smyth Whitley, LLC and on July 3, 2013, I placed a copy of Appellants' Initial Brief by depositing a copy of it in the United States Mail, postage prepaid, addressed to Respondent's attorneys of record, John D. Kassel and Theile B, McVey, Post Office Box 1476, Columbia, South Carolina 29202.

Mallory L. Guibault

SMYTH WHITLEY, LLC
ATTORNEYS AT LAW

July 3, 2013

VIA UNITED STATES MAIL

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: *Darlene Dean as Personal Representative of the Estate of Louise Porter v. Heritage Healthcare of Ridgeway, LLC, Uni-Health Post Acute Care-Tanglewood, LLC and UHS Pruitt Corporation*
Appellate Case No. 2013-000509
SW File No. 10015.0013

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service related to the above-referenced matter. Please file the original and return a filed copy to me in the enclosed envelope.

By copy of this letter, I am hereby serving counsel of record with a copy of the same.

Thank you for your time and attention to this matter. Please do not hesitate to contact our office should you have any questions or concerns.

Sincerely,

Todd W. Smyth
TWS/mlg
Enclosures

cc: John D. Kassel, Esquire
Theile B. McVey, Esquire

Joshua S. Whitley
234 Seven Farms Drive, BB&T Plaza, Suite 215, Charleston, SC 29492
main 843-606-5633•*direct* 843-606-5628•*fx.* 843-654-4095•jwhitley@smythwhitley.com
www.smythwhitley.com