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.

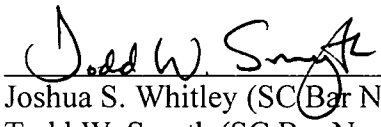
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellants propose the following be included in the Record on Appeal:

1. Arbitration Agreement;
2. Complaint;
3. November 19, 2012 Order of Judge Kinard;
4. Defendants' Motion to Reconsider Order Denying Motion to Compel Arbitration;
5. Plaintiff's Reply to Defendants' Motion to Reconsider Order Denying Arbitration;
6. February 18, 2013 Order of Judge Kinard;
7. Notice of Appeal;
8. American Arbitration Association Healthcare Policy Statement;
9. Plaintiff's Memorandum in Opposition of Defendants' Motion to Compel Arbitration;
10. November 15, 2012 Hearing Transcript on Defendants' Motion to Compel Arbitration;
11. Correspondence to Judge Kinard from Joshua Whitley dated January 2, 2013.

I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,



Joshua S. Whitley (SC Bar No. 77824)
Todd W. Smyth (SC Bar No. 5380)
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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' Designation of Matter to Be Included in the Record of Appeal 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

1

RESIDENT AND FACILITY

ARBITRATION AGREEMENT

PLEASE READ CAREFULLY

It is hereby understood and agreed by PHPC (the "Facility") and Louise Potter (the "Resident" or the "Resident's Authorized Representative", together referred to as the "Resident") that, regardless of any other agreement or understanding between the Facility and the Resident, any and all controversies, claims, disputes, disagreements or demands of any kind (referred to as a "Claim" or "Claims") arising out of or relating to the Resident's Admission Agreement with the Facility (the "Admission Agreement") 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.

1. Claims. For purposes of this **Arbitration Agreement**, a Claim shall include, without being limited to, a 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 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 or safety whether sounding in tort or in contract.

This Arbitration Agreement shall in no way, however, limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility, the long-term care ombudsman, or any appropriate government agency. This Arbitration Agreement does not affect the Facility's duties with respect to the provision of care and treatment.

2. 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** proceeding 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. The parties agree to bear their own attorneys' fees and costs associated with the **arbitration** proceeding.

All claims related to the same incident, transaction, or related course of care or services, must be **arbitrated** in one **arbitration** proceeding. Any Claim that arose before the date that a notice of **arbitration** is given to the Facility or received by the resident must be presented in the **arbitration** proceeding for which notice is given or it shall be considered waived and forever barred.

3. Awards. The Resident and the Facility agree that any damages awarded as a result of arbitration under this **Arbitration Agreement** shall be determined in accordance with state or federal law that is applicable to a comparable civil action, including any prerequisites to, credit against, or limitations on, such damages. The prevailing party in the **arbitration** proceeding or in any legal proceedings connected to the **arbitration** proceeding or this **Arbitration Agreement** shall be entitled to recover any reasonable attorneys' fees and costs that are actually incurred as a result.

Initials _____

4. Binding Effect. The parties intend that this Arbitration Agreement shall benefit and be binding upon the parties, their successors and assigns, including the agents, employees of the Facility, and anyone whose Claim is derived through or on behalf of the Resident, including, without being limited to, any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.

5. Applicable Law. 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. Furthermore, the provisions of this **Arbitration Agreement** remain in effect after the Resident's Admission Agreement has been terminated.

6. Severability. If any term or phrase of this **Arbitration Agreement** is held to be invalid or unenforceable by reason of law, this Agreement will be deemed amended to conform with such law and will otherwise remain in full force and effect, as it is the parties' intent to ensure that the dispute is resolved solely via arbitration.

7. Right of Revocation. The Resident has the right to revoke the **Arbitration Agreement** within thirty (30) days of the signature of the Agreement. Such revocation must be made in writing and submitted to the appropriate, designated Company representative.

8. Right To Consultation. **The Resident understands that the Resident has the right to consult an attorney or his or her choice about this Arbitration Agreement and to receive and explanation or clarification from the Facility's admissions coordinator. The Resident is not required to sign this Arbitration Agreement in order to be admitted to or to remain in the Facility.**

BY SIGNING THIS AGREEMENT, THE RESIDENT ACKNOWLEDGES THAT THE RESIDENT HAS HAD THE OPPORTUNITY TO READ THIS AGREEMENT OR IT HAS BEEN READ TO THE RESIDENT AND THE RESIDENT UNDERSTANDS ITS CONTENTS.

Resident's Signature Date	Facility's Authorized Agent Date
Louise Potter	Frances Mellor SSA
Printed Name of Resident	Printed Name of Facility's Authorized Agent
X Darlene P. Dean X 01-02-07	
Resident's Authorized Representative Date	
X Darlene P Dean	
Printed Name of Resident's Authorized Representative	

Vers.01192004
Effective Feb. 1, 2004

Initials _____

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FAIRFIELD	)	FOR THE SIXTH JUDICIAL CIRCUIT
Darlene Dean as Personal Representative of the Estate of Louise Porter,	)	C/A No.: 2012-CP-20-128
Plaintiff,	)	
vs.	)	**SUMMONS**
Heritage Healthcare of Ridgeway, LLC, Uni-Health Post Acute Care-Tanglewood, LLC, UHS Pruitt Corporation	)	
Defendants.	)	

2012 MAR 23 A 11:21
FAIRFIELD COUNTY
CLERK OF COURT
BY: [illegible]

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

KASSEL McVEY ATTORNEYS AT LAW

By: _____

John D. Kassel (SC Bar No.: 03286)
jkassel@kassellaw.com
Theile B. McVey (SC Bar No.: 16682)
tmcvey@kassellaw.com
1330 Laurel Street
Post Office Box 1476
Columbia, South Carolina 29202
803-256-4242
803-256-1952 (Fax)

March 15, 2012

Columbia, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FAIRFIELD	)	FOR THE SIXTH JUDICIAL CIRCUIT
Darlene Dean as Personal Representative of the Estate of Louise Porter,	)	C/A No.: 2012-CP-20-_____
Plaintiff,	)	**COMPLAINT (Jury Trial Requested)**
vs.	)	
Heritage Healthcare of Ridgeway, LLC, Uni-Health Post Acute Care-Tanglewood, LLC, UHS Pruitt Corporation	)	
Defendants.	)	

Plaintiff would respectfully show that:

1. The Plaintiff, Darlene Dean, is a citizen and resident of the State of South Carolina and a resident of the County of Fairfield and has been appointed as Personal Representative of the Estate of Louise Porter, deceased, who died on or about September 30, 2009. Plaintiff brings this action in her capacity as Personal Representative of the Estate of Louise Porter under and by virtue of the authority of S.C. Code Ann. 14-51-10 and 15-5-90 (1976, as amended).

2. Defendants, Heritage healthcare of Ridgeway, LLC, Uni-Health Post Acute Care-Tanglewood, LLC, UHS Pruitt Corporation, (hereinafter referred to as the "Defendants") are, upon information and belief, businesses or corporations organized and existing under the laws of the State of South Carolina or other states. At all times relevant to this action, Defendants owned and operated a nursing home located at 213 Tanglewood Court, Ridgeway, Fairfield County, South Carolina.

3. In January of 2007, Ms. Porter was admitted to Defendants' nursing home facility in Ridgeway, South Carolina. On December 23, 2008, Ms. Porter's Care Plan described her as a continuing fall risk.

4. On July 30, 2009, at 3:30am, a nursing assistant, acting within the course and scope of her employment, attempted to help Ms. Porter to the bathroom. She slipped and fell. At 8:00am on July 30, 2009, Ms. Porter attempted to get up by herself from bed to go to the bathroom. She fell and struck her head. Upon information and belief, there was no bed alarm in place. On July 30, 2009, it was noted that the bed alarm was to be discontinued.

5. Following the fall, Ms. Porter was noted to have large deep bruises. On August 6, 2009, the physician ordered a CT Scan of Ms. Porter's head following the head trauma from the falls.

6. On August 8, 2009, Ms. Porter suffered her third fall. As a result of that fall, Ms. Porter suffered a left hip fracture. Ms. Porter underwent two left hip surgeries at Palmetto Health Richland. The first surgery was performed by Dr. Maginnis. The second surgery on September 1, 2009, was performed by Dr. David E. Koon, Jr. As a result of her fracture and due to complications following surgery, Ms. Porter died on September 30, 2009.

FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS
(WRONGFUL DEATH/NEGLIGENCE)

7. Defendants were negligent, grossly negligent, willful and wanton, in the following particulars:

a. In failing to adequately evaluate Ms. Porter to determine her fall risk;

b. In failing to put in place protective and preventative measures to prevent falls due to her history of falls;

c. In failing to have a bed alarm in place;

d. In discontinuing the bed alarm;

e. In failing to adequately monitor Ms. Porter to prevent the falls;

f. In failing to adequately assess Ms. Porter after the falls;

g. In failing to evaluate and treat Ms. Porter due to her history of falls;

h. In failing to develop an adequate care plan;

i. In failing to adhere to the standards of practice within the standard of care for nursing homes in general;

j. In failing to adequately train agents and employees in fall prevention or the proper transfer of residents who are at risk for falls;

k. In failing to properly supervise Defendants' employees;

l. In failing to develop proper policies and procedures necessary for the safe transfer of patients;

m. In allowing the Plaintiff's decedent to fall during transfers on multiple occasions; and,

n. In such other acts of negligence and/or gross negligence as may be revealed through the discovery in this case.

8. As a direct and proximate result of the above stated negligence, gross negligence, carelessness and recklessness of Defendants, Ms. Porter suffered injury to her body, incurred medical and hospital expenses, endured severe and disabling pain, and died from these injuries.

FOR A FIRST CAUSE OF ACTION
(SURVIVAL)

9. As a direct and proximate result of Defendants' negligent and grossly negligent actions, Defendants caused fatal injuries to Plaintiff's decedent, Louise Porter, as more fully described above. Prior to her death, as a result of her injuries, Louise Porter was forced to endure

severe conscious pain and suffering, as well as loss of enjoyment of life, mental anguish and emotional distress, impairment of health and hospital and medical bills.

FOR A SECOND CAUSE OF ACTION
(Wrongful Death)

10. As a result of the above described acts of Defendants, Plaintiff and the other statutory beneficiaries have suffered, and will in the future suffer:

a. Grief;
b. Shock;
c. Sorrow;
d. Wounded feelings;
e. Loss of companionship;
f. Loss of the deceased's counsel on family matter;
g. Emotional distress;
h. Pecuniary loss in funeral expenses and medical and hospital bills;
i. Loss of the deceased's financial support.

WHEREFORE, Plaintiff prays for judgment in this matter in a sum sufficient to adequately compensate the estate and the statutory beneficiaries for damages, for punitive damages, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

KASSEL McVEY ATTORNEYS AT LAW

By: _____

John D. Kassel (SC Bar No.: 03286)
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Theile B. McVey (SC Bar No.: 16682)
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803-256-4242
803-256-1952

March 15, 2012

Columbia, South Carolina.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF FAIRFIELD)	
)	
Darlene Dean as Personal Representative of) the Estate of Louise Porter,)	C/A No.: 2012-CP-20-128
)	**AFFIDAVIT OF BETH STROTHER**
Plaintiff,)	**BSN, RN, CFN**
)	
vs.)	
)	
)	
Heritage Healthcare of Ridgeway, LLC, Uni-) Health Post Acute Care-Tanglewood, LLC,) UHS Pruitt Corporation)	
Defendants.	

2012 APR 16 A 9:30
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

Beth R. Strother, BSN, RN, CFN being duly sworn deposes and says:

1. I am a registered nurse, licensed by the State of North Carolina. I am also a certified forensic nurse. I received a BSN from Barton College in 1994. Since 2005, I have been employed by Rex Healthcare in Raleigh, North Carolina as a staff nurse on the sub-acute skilled rehabilitation unit and long-term care. As part of my duties, I manage all aspects of geriatric patients and long-term care patients and deliver direct patient care.

2. I have actual professional knowledge and experience in the area of patient care, specifically the prevention of falls, at rehabilitation facilities and long-term care facilities as a result of my having been regularly engaged in the active practice in these areas for the last 17 years. As part of my current practice, I regularly manage all clinical aspects of patient's care in long-term care facilities.

Additionally, I have provided training and supervision to licensed and certified staff in long-term care facilities. As part of my current practice, I regularly evaluate and care for patients who have been deemed to be a fall risk in long-term care facilities.

3. Through my professional standing as set forth above, I am familiar with the applicable standard of care for nursing professionals in a long-term care facility, regarding the evaluation and treatment of patients in a facility who have been deemed to be a fall risk.

4. This affidavit is made pursuant to section 15-36-100 of the 1976 South Carolina Code of Laws, which requires that this affidavit specify at least one negligent act or omission claimed to exist, and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit. As other information is provided to me, I reserve the right to review and, if necessary, change or further explain any opinions rendered.

5. The evidence made available to me for my review, prior to making this affidavit, includes:

a. Medical records of Louise Porter from Heritage Healthcare-Ridgeway dated December 5, 2009 through September 30, 2009.

b. Medical records of Louise Porter from Palmetto Richland Memorial Hospital dated August 9 through 14, 2009; and, August 29 through September 3, 2009.

6. In January of 2007, Ms. Porter was admitted to Heritage Healthcare. On December 23, 2008, Ms. Porter's Care Plan described her as a continuing fall risk. On July 30, 2009, at 3:30am, a CNA attempted to help Ms. Porter to the bathroom. She slipped and fell in vomit. At 8:00am on July 30, 2009, Ms. Porter

attempted to get up by herself from bed to go to the bathroom. She fell and struck her head. There is no note that a bed alarm was in place or that it notified the nurses of Ms. Porter's attempts to get out of bed. On July 30, 2009, it is noted that the bed alarm was to be discontinued. Following the fall, she was noted to have large deep bruises. On August 6, 2009, the physician ordered a CAT scan of Ms. Porter's head following her head trauma from the falls. On August 8, 2009, Ms. Porter suffered her third fall. As a result of that fall, she suffered a left hip fracture. Ms. Porter underwent two left hip surgeries at Palmetto Health Richland. The first surgery was performed by Dr. Maginnis. The second surgery on September 1, 2009 was performed by Dr. David E. Koon, Jr.

7. Based on my education, experience and training, it is my opinion to a reasonable degree of medical certainty that employees acting within the course and scope of their employment at the Defendants' facility were negligent in the following acts or omissions in regard to the falls suffered by Ms. Porter:

a. In failing to adequately evaluate Ms. Porter to determine her fall risk;

b. In failing to put in place protective measures to prevent falls due to her history of falls;

c. In failing to have a bed alarm in place;

d. In discontinuing the bed alarm;

e. In failing to adequately monitor Ms. Porter to prevent the falls;

f. In failing to adequately assess Ms. Porter after the falls;

g. In failing to evaluate and treat Ms. Porter due to her history of falls;

h. n failing to put in place protective measures to prevent her falls; and,

In failing to develop an adequate care plan.

Based on my education, experience and training, it is my opinion to a reasonable degree of medical certainty that the employees of Defendants violated the applicable standard of care in the way described above and such violation was a proximate cause of the injuries suffered by Ms. Porter.

FURTHER AFFIANT SAYETH NAUGHT.

Beth Strother, BSN, RN, CFN

Sworn to before me this

21st Day of March, ~~2011~~ 2012

NOTARY PUBLIC FOR NORTH CAROLINA
My Commission Expires:

BETHANY M. BEALE NOTARY PUBLIC DURHAM COUNTY, N.C.

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COPY

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF FAIRFIELD)	FOR THE SIXTH JUDICIAL CIRCUIT
Darlene Dean as Personal Representative of the Estate of Louise Porter,)	C/A No.: 2012-CP-20-128
Plaintiff,)	**ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION**
vs.)	
Heritage Healthcare of Ridgeway, LLC, Uni-Health Post Acute Care-Tanglewood, LLC, UHS Pruitt Corporation)	
Defendants.)	

This matter comes before the Court on the Defendants' Motion to Compel Arbitration. For the reasons set forth below, the motion is denied.

The policy of this state is to favor arbitration of disputes. *Toler's Cove Homeowners Ass'n Inc.*, 355 S.C. 605, 612, 586 S.E.2d 581 (2003). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). 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., Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009). However, not all arbitration clauses are enforceable. Arbitration is a matter of contract and South Carolina courts must determine the enforceability of an arbitration agreement based on principals of contract law. *Munoz v. GreenTree Fin.Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001) The parties to an

arbitration agreement are at liberty to choose the terms under which they will arbitrate. *Dowling v. Home Buyers Warranty Corp., II*, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993). In order to have a valid and enforceable contract, there must be a meeting of the minds as to all essential and material terms of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).

The Arbitration Agreement between Ms. Dean, on behalf of Louise Porter, and Tanglewood is not enforceable. There is no dispute 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).

Since January 1, 2003, the AAA has not accepted cases for arbitration involving individual patients in a healthcare facility unless there was a post-dispute agreement to arbitrate. The subject Arbitration Agreement was signed at the time Ms. Porter was admitted to Tanglewood. Therefore, the Arbitration Agreement was signed "pre-injury." By its own language, the Arbitration Agreement is not enforceable as the AAA will not hear the matter and the agreement is silent as to the method by which the arbitration shall be conducted absent the AAA rules.

Our Supreme Court recently addressed this very issue in *Grant v. Magnolia Manor-Greenwood, Inc., et al*, 383 S.C. 125, 678 S.E.2d 435 (2009). The Court held that the selection of an arbitration forum is an "integral part of the agreement." There, the chosen forum, the National Health Lawyers Association, took the same position as the AAA in that it would not administer arbitration of a health care personal injury claim unless the arbitration agreement was entered into after the event giving rise to the claim. *Id.* Because Tanglewood chose the AAA's rules as the guiding principle for arbitration, it is an integral part of the agreement. The *Grant*

court held that the chosen means by which an arbitrator will be selected and the "rules that govern the arbitration" are not "logistical" nor "ancillary." *Id.* The Defendant Tanglewood knew or should have known that the AAA did not recognize these types of arbitration agreements when it entered into it in 2007. It should not look to the Court now to correct its mistake.

Defendants suggest the arbitration provision does not mandate administration of any arbitration by the AAA, only that the AAA rules must be followed. This is a distinction without a difference. The rules and the organization cannot be separated. The AAA rules require the AAA to establish a list of national arbitrators and for the AAA to select arbitrators from that list. Under the rules, payment is made directly to the AAA and not to the arbitrators. Thus, the rules cannot be plucked from the AAA and grafted onto some other entity in order to administer an arbitration. Moreover, the AAA has copyrighted its rules and prohibits unauthorized use. Therefore, neither the AAA nor its rules are available to the parties in this matter to arbitrate this dispute. The arbitration agreement fails in its purpose.

Our Court's policy of favoring arbitration does not override the basic requirements of contracts in South Carolina. The forum selected by the Defendant will not hear this type of dispute. Our Supreme Court has determined that the forum selection is an integral part of the agreement and cannot be remedied. Therefore, the Defendants' Motion to Compel Arbitration is denied.

J. Ernest Kinard, Jr. Judge

Camden, South Carolina
November 19, 2012

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STATE OF SOUTH CAROLINA 2012 NOV 30 A 10:47 COUNTY OF FAIRFIELD FAIRFIELD COUNTY CLERK OF COURT BETTY JO BECKHAM Darlene Dean as Personal Representative of the Estate of Louise Porter, Plaintiff, vs. Heritage Healthcare of Ridgeway, LLC, Uni-Health Post Acute Care-Tanglewood, LLC and UHS Pruitt Corporation, Defendants.	IN THE COURT OF COMMON PLEAS C.A. No.: 2011-CP-20-128 **DEFENDANTS HERITAGE HEALTHCARE OF RIDGEWAY, LLC, UNI-HEALTH POST ACUTE CARE-TANGLEWOOD, LLC AND UHS PRUITT CORPORATION'S MOTION TO RECONSIDER ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION**

PLEASE TAKE NOTICE the Defendants Heritage Healthcare of Ridgeway, LLC, Uni-Health Post Acute Care-Tanglewood, LLC and UHS Pruitt Corporation. (hereinafter referred to as "Defendants"), by and through the undersigned counsel, hereby move before this Honorable Court, pursuant to the South Carolina Rules of Civil Procedure and Rule 59(e), and submit this Motion to Reconsider the Order Denying Defendants' Motion to Dismiss and Compel Arbitration for the following reasons:

This Court held pursuant to *Grant v. Magnolia Manor-Greenwood, Inc., et al,* 383 S.C. 125, 678 S.E.2d 435 (2009), that the Arbitration Agreement here failed for lack of an arbitral forum, which is an integral part (material term) of the agreement that cannot be remedied. Respectfully, this holding is incorrect pursuant to the dictates of *Grant.*

In *Grant,* there was an arbitration clause within an admissions agreement to a long-term care facility that was signed by the plaintiff resident. *Id.* at 127. The *Grant* arbitration clause stated, *inter alia,* that any dispute "shall be resolved by binding arbitration administered by the National Health Lawyers Association (the "NHLA")." *Id.* at 128 (emphasis added). Subsequently, the NHLA changed its rules to only administer arbitration claims pursuant to

agreements entered into after any alleged injury occurred. *Id.* Thus, at the time of the arbitration in *Grant*, the forum selected to "administer" the arbitration would not do so because the agreement had been entered into upon admission and not post-injury. *Id.* The Supreme Court of South Carolina held that the selection of a specific forum was an integral part (material term) of the agreement and because that forum was no longer available, the arbitration agreement was unenforceable. *Id.* at 132.

Respectfully, and based on a plain reading of *Grant,* the Court's Order here is incorrect in at least two respects. First, the arbitration agreement here does not require the AAA to administer the arbitration but rather only borrows the AAA's rules. *See* Exhibit A, Arbitration Agreement at Paragraph 2, (noting "[a]ny 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.") There is clearly a difference between the *Grant* clause and the one before this Court where in *Grant* you require a forum to administer the arbitration and, here, the parties simply use an association's rules when administering the arbitration.

Secondly, and more importantly, even if this Court were to refuse its holding that the use of the AAA's rules and administering an arbitration is a "distinction without a difference;" nevertheless, here, the AAA is not an unavailable forum like in *Grant.* That is, pursuant to Plaintiff's own exhibit, although AAA only directly accepts nursing home negligence arbitrations based on a post-injury agreement, it clearly will accept any arbitration that is compelled by a Court, which is the exact nature of this matter. *See Plaintiff's* Exhibit D to Memorandum in Opposition to Defendants' Motion to Compel Arbitration, letter from AAA dated January 7, 2009, (stating "[i]n any circumstance we would comply with a court order

directing that a matter be arbitrated through the AAA.") Accordingly, as a matter of law, it is incorrect to hold that the forum here is unavailable, as it was in *Grant*. Therefore, because the forum here cannot be said to be "unavailable," a material term is not omitted and the Agreement must be enforced. *Id.* at 129 (noting "at the outset that it is the policy of this state to favor the arbitration of disputes") (internal citation and quotation marks omitted).

Respectfully and for these reasons, the Court's Order should be reconsidered and the motion to dismiss and compel arbitration should be granted.

This Motion may be supplemented by affidavits, memoranda, or other supporting documentation.

Respectfully submitted,

Todd W. Smyth, Esquire
Joshua S. Whitley, Esquire
SMYTH WHITLEY, LLC
234 Seven Farms Drive
BB&T Plaza, Suite 215
Charleston, South Carolina 29492

ATTORNEYS FOR DEFENDANTS

November 27, 2012
Charleston, South Carolina

2012 NOV 30 A 10:47

FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD)	C.A. No.: 2011-CP-20-128
Darlene Dean as Personal Representative of the Estate of Louise Porter,	**CERTIFICATE OF SERVICE**
Plaintiff,	
vs.	
Heritage Healthcare of Ridgeway, LLC, Uni-Health Post Acute Care-Tanglewood, LLC and UHS Pruitt Corporation,	
Defendants.	

I, the undersigned employee of Smyth Whitley, LLC, do hereby certify that I have caused the attached document to be served by mailing a copy thereof, by first class mail, postage prepaid, to all counsel of record at the addresses shown below.

Mallory Gilbault, Paralegal

Date Mailed: November 28, 2012

Document Mailed: **DEFENDANTS HERITAGE HEALTHCARE OF RIDGEWAY, LLC, UNI-HEALTH POST ACUTE CARE-TANGLEWOOD, LLC AND UHS PRUITT CORPORATION'S MOTION TO RECONSIDER ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION**

Mailed To: John D. Kassel, Esq.
Theile B. McVey, Esq.
KASSEL MCVEY
Post Office Box 1476
Columbia, SC 29202-1476

Attorneys for the Plaintiff

EXHIBIT A

RESIDENT AND FACILITY

ARBITRATION AGREEMENT

PLEASE READ CAREFULLY

It is hereby understood and agreed by RHRC (the "Facility") and Louise Porter (the "Resident" or the "Resident's Authorized Representative", together referred to as the "Resident") that, regardless of any other agreement or understanding between the Facility and the Resident, any and all controversies, claims, disputes, disagreements or demands of any kind (referred to as a "Claim" or "Claims") arising out of or relating to the Resident's Admission Agreement with the Facility (the "Admission Agreement") 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.

1. Claims. For purposes of this Arbitration Agreement, a Claim shall include, without being limited to, a 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 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 or safety whether sounding in tort or in contract.

This Arbitration Agreement shall in no way, however, limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility, the long-term care ombudsman, or any appropriate government agency. This Arbitration Agreement does not affect the Facility's duties with respect to the provision of care and treatment.

2. 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 proceeding 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. The parties agree to bear their own attorneys' fees and costs associated with the arbitration proceeding.

All claims related to the same incident, transaction, or related course of care or services, must be arbitrated in one arbitration proceeding. Any Claim that arose before the date that a notice of arbitration is given to the Facility or received by the resident must be presented in the arbitration proceeding for which notice is given or it shall be considered waived and forever barred.

3. Awards. The Resident and the Facility agree that any damages awarded as a result of arbitration under this Arbitration Agreement shall be determined in accordance with state or federal law that is applicable to a comparable civil action, including any prerequisites to, credit against, or limitations on, such damages. The prevailing party in the arbitration proceeding or in any legal proceedings connected to the arbitration proceeding or this Arbitration Agreement shall be entitled to recover any reasonable attorneys' fees and costs that are actually incurred as a result.

Initials _____

4. Binding Effect. The parties intend that this Arbitration Agreement shall benefit and be binding upon the parties, their successors and assigns, including the agents, employees of the Facility, and anyone whose Claim is derived through or on behalf of the Resident, including, without being limited to, any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.

5. Applicable Law. 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. Furthermore, the provisions of this Arbitration Agreement remain in effect after the Resident's Admission Agreement has been terminated.

6. Severability. If any term or phrase of this Arbitration Agreement is held to be invalid or unenforceable by reason of law, this Agreement will be deemed amended to conform with such law and will otherwise remain in full force and effect, as it is the parties' intent to ensure that the dispute is resolved solely via arbitration.

7. Right of Revocation. The Resident has the right to revoke the Arbitration Agreement within thirty (30) days of the signature of the Agreement. Such revocation must be made in writing and submitted to the appropriate, designated Company representative.

8. Right To Consultation. The Resident understands that the Resident has the right to consult an attorney or his or her choice about this Arbitration Agreement and to receive and explanation or clarification from the Facility's admissions coordinator. The Resident is not required to sign this Arbitration Agreement in order to be admitted to or to remain in the Facility.

BY SIGNING THIS AGREEMENT, THE RESIDENT ACKNOWLEDGES THAT THE RESIDENT HAS HAD THE OPPORTUNITY TO READ THIS AGREEMENT OR IT HAS BEEN READ TO THE RESIDENT AND THE RESIDENT UNDERSTANDS ITS CONTENTS.

Resident's Signature	Date	Facility's Authorized Agent	Date
Louise Potter		Frances Melton SSA	
Printed Name of Resident		Printed Name of Facility's Authorized Agent	
X Darlene P. Dean	X 01-02-07		
Resident's Authorized Representative	Date		
X Darlene P Dean			
Printed Name of Resident's Authorized Representative			

Vers.01192004
Effective Feb. 1, 2004

Initials _____

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD)

Darlene Dean as Personal Representative of the Estate of Louise Porter,) CASE NO. 2012-CP-20-128
☐ Plaintiff)

2012 NOV 30 A 10:47

FAIRFIELD COUNTY CLERK OF COURT BETTY JO BECKHAM

v.) MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Heritage Healthcare of Ridgeway, LLC, Uni-Health Post Acute Care-Tanglewood, LLC and UHS Pruitt Corporation,)
☒ Defendants.)

Plaintiff's Attorney:	Defendant's Attorney:
John D. Kassel, Esq./Theile McVey, Esq. Address: KASSEL MCVEY *Post Office Box 1476* Columbia, SC 29202-1476 phone: fax:	Todd W. Smyth, Esq. Joshua S. Whitley, Esq. Address: 234 Seven Farms Drive, Suite 215 Charleston, SC 29492 phone: 843.606.5635 fax: 843.654.4095 e-mail:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: **Defendants' Motion to Reconsider Order Denying Defendants' Motion to Compel Arbitration**

Estimated Time Needed: 10 min. Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Todd W. Smyth
Signature of Attorney for ☐ Plaintiff / ☒ Defendant

November 28, 2012
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT:
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:
- ☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed: 11/30/12 Collected by: Betty Jo Beckham
☒ MOTION FEE COLLECTED: _____

SCCA/233 (11-03)

☐ CONTESTED – AMOUNT DUE: _____

5

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF FAIRFIELD)	FOR THE SIXTH JUDICIAL CIRCUIT
Darlene Dean as Personal Representative of the Estate of Louise Porter,)	C/A No.: 2012-CP-20-128
Plaintiff,)	
vs.)	**PLAINTIFF'S REPLY TO DEFENDANTS' MOTION TO RECONSIDER ORDER DENYING MOTION TO COMPEL ARBITRATION**
Heritage Healthcare of Ridgeway, LLC, Uni-Health Post Acute Care-Tanglewood, LLC, UHS Pruitt Corporation)	
Defendants.)	

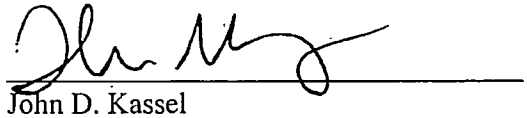
Defendants Heritage Healthcare of Ridgeway, LLC, Uni-Health Post Acute Care-Tanglewood, LLC and UHS Pruitt Corporation have moved before this Court to reconsider its' Order Denying the Motion to Compel Arbitration. The Defendants raise two issues in the Motion to Reconsider. First, that the arbitration at issue in this case did not require the AAA to *administer* the arbitration, only to borrow its rules. Second, that despite the AAA's position that they will not arbitrate a nursing home negligence case without a post injury agreement, this Court can still compel the arbitration by court order and the AAA will then hear the arbitration. Both of these issues were raised at the hearing and were addressed in the Court's Order denying the Motion to Compel Arbitration.

The Defendants argue that the Court incorrectly relied on *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009), by holding that the Arbitration Agreement at issue here failed for lack of an arbitral forum which is a material term of the

agreement. Defendants argue that unlike *Grant* the arbitration provision at issue in this case does not require that the arbitration be administered by AAA but rather only borrows the rules of the AAA. Further, Defendants argue that the AAA will hear the arbitration without a post injury agreement if the Court compels the parties to do so. The Defendants argument is without merit. Defendants suggest the arbitration provision does not mandate administration of any arbitration by the AAA, only that the AAA rules must be followed. This is a distinction without a difference. The rules and the organization cannot be separated. The AAA rules require the AAA to establish a list of national arbitrators and for the AAA to select arbitrators from that list. Under the rules, payment is made directly to the AAA and not to the arbitrators. Thus, the rules cannot be plucked from the AAA and grafted onto some other entity in order to administer an arbitration. Moreover, the AAA has copyrighted its rules and prohibits unauthorized use. Therefore, neither the AAA nor its rules are available to the parties in this matter to arbitrate this dispute. The arbitration agreement fails in its purpose. Therefore, the Court cannot Order the parties to arbitrate with the AAA because a material part of the agreement is invalid.

Respectfully, and for these reasons, the Court should deny the Defendants' Motion to Reconsider.

KASSEL McVEY, Attorneys at Law

By: 

John D. Kassel
Theile B. McVey

1330 Laurel Street
Post Office Box 1476
Columbia, South Carolina 29202

Jkassel@kassellaw.com
Tmcvey@kassellaw.com
803-256-4242

Attorneys for Plaintiff

December 5, 2012

Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF FAIRFIELD	)	**SIXTEENTH JUDICIAL CIRCUIT**
DARLENE DEAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUISE PORTER,	)	**C/A No.: 2012-CP-20-128**
Plaintiff,	)	
v.	)	**CERTIFICATE OF SERVICE**
HERITAGE HEALTHCARE OF RIDGEWAY, LLC; UNIHEALTH POST-ACUTE CARE --TANGELWOOD, LLC; AND, UHS-PRUIT CORPORATION,	)	
Defendants.	)	

I, Elizabeth C. Moultrie, Paralegal, an employee of Kassel McVey Attorneys at Law, attorneys for Plaintiff, do hereby certify that on the 5th day of **DECEMBER 2012,** I caused the attached **MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER ORDER DENYING MOTION TO COMPEL ARBITRATION** to be served upon counsel for Defendants by depositing a true and correct copy of same in the United States Mail, First Class, sufficient postage pre-paid, return address clearly indicated on the envelope, and addressed as follows:

Todd W. Smyth, Esquire
Joshua S. Whitley, Esquire
Smyth Whitley, LLC
234 Seven Farms Drive, Suite 215
Charleston, South Carolina 29492

Elizabeth C. Moultrie

Elizabeth C. Moultrie

December 5, 2012

Columbia, South Carolina.

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Fairfield
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011CP-20-128

Darlene Porter as PR of Estate of Louise Porter

PLAINTIFF(S)

Heritage Healthcare of Ridgeway, LLC et al.

DEFENDANT(S)

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☒ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:

IT IS ORDERED AND ADJUDGED: ☐ See Attached order.

☒ Statement of Judgment by the Court: 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).

FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

2013 FEB 18 A 10:00

Dated at Camden South Carolina, this 15th day of February 2013.

PRESIDING JUDGE

This judgment was entered on the 18th day of Feb, 2013, and a copy mailed first class this 18th day of Feb, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

John D. Kassel
Theile B. McVey
PO Box 1476
Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

Joshua S. Whitley
234 Seven Farms Drive
BB&T Plaza
Suite 215
Charleston, SC 29492

ATTORNEY(S) FOR THE DEFENDANT(S)

Betty Jo Beckham

CLERK OF COURT

SCCA SCRCP Form 4 (Revised 12/07)

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NOTICE OF APPEAL IN A CIVIL CASE

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. 2012-CP-20-128

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

v.

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

NOTICE OF APPEAL

Heritage Healthcare of Ridgeway, LLC, Uni-Health Post Acute Care – Tanglewood, LLC and UHS Pruitt Corporation appeal the Order of the Honorable J. Ernest Kinard, Jr. dated November 19, 2012. Appellant received written notice of entry of this Order on November 21, 2012. The Defendants filed a timely Motion to Reconsider this Order on November 30, 2012, and received a Form 4 Order dismissing its Motion to Reconsider on February 21, 2013.[1] The Orders are attached hereto as Exhibits

---

[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)." See Exhibit B. In actuality, Defendant 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 agreed to waive any objection for failure to comply with Rule 59(g) both at the trial court and on appeal. 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 at Exhibit A. *See 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 See Jones v. State,* 382 S.C. 589, 594, 677 S.E.2d 20, 22 (2009) (Supreme Court granting prosecutor's writ of certiorari and 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).

A and B.

March 6, 2013

Joshua S. Whitley
Todd W. Smyth
Smyth Whitley, LLC
234 Seven Farms Drive
BB&T Plaza, Suite 215
Charleston, SC 29492
(843) 606-5635
Attorneys for Appellants

Other Counsel of Record:

John D. Kassel, Esquire
Theile B. McVey, Esquire
Kassel McVey, Attorneys at Law
Post Office Box 1476
Columbia, SC 29202-1476
(803) 256-4242
Attorneys for Respondent

NOTICE OF APPEAL IN A CIVIL CASE

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. 2012-CP-20-128

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

v.

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

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Darlene Dean as Personal Representative of the Estate of Louise Porter by depositing a copy of it in the United States Mail, postage prepaid, on March 6, 2013, addressed to her attorneys of record, John D. Kassel and Theile B, McVey, Post Office Box 1476, Columbia, South Carolina 29202.

March 6, 2013

Joshua S. Whitley
Todd W. Smyth
Smyth Whitley, LLC
234 Seven Farms Drive
BB&T Plaza, Suite 215
Charleston, SC 29492
(843) 606-5635
Attorneys for Appellants

EXHIBIT A

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF FAIRFIELD)	FOR THE SIXTH JUDICIAL CIRCUIT
Darlene Dean as Personal Representative of the Estate of Louise Porter,)	C/A No.: 2012-CP-20-128
Plaintiff,)	
vs.)	**ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION**
Heritage Healthcare of Ridgeway, LLC, Uni-Health Post Acute Care-Tanglewood, LLC, UHS Pruitt Corporation)	
Defendants.)	

This matter comes before the Court on the Defendants' Motion to Compel Arbitration. For the reasons set forth below, the motion is denied.

The policy of this state is to favor arbitration of disputes. *Toler's Cove Homeowners Ass'n Inc.*, 355 S.C. 605, 612, 586 S.E.2d 581 (2003). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). 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., Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009). However, not all arbitration clauses are enforceable. Arbitration is a matter of contract and South Carolina courts must determine the enforceability of an arbitration agreement based on principals of contract law. *Munoz v. GreenTree Fin.Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001) The parties to an

arbitration agreement are at liberty to choose the terms under which they will arbitrate. *Dowling v. Home Buyers Warranty Corp., II*, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993). In order to have a valid and enforceable contract, there must be a meeting of the minds as to all essential and material terms of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).

The Arbitration Agreement between Ms. Dean, on behalf of Louise Porter, and Tanglewood is not enforceable. There is no dispute 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).

Since January 1, 2003, the AAA has not accepted cases for arbitration involving individual patients in a healthcare facility unless there was a post-dispute agreement to arbitrate. The subject Arbitration Agreement was signed at the time Ms. Porter was admitted to Tanglewood. Therefore, the Arbitration Agreement was signed "pre-injury." By its own language, the Arbitration Agreement is not enforceable as the AAA will not hear the matter and the agreement is silent as to the method by which the arbitration shall be conducted absent the AAA rules.

Our Supreme Court recently addressed this very issue in *Grant v. Magnolia Manor-Greenwood, Inc., et al*, 383 S.C. 125, 678 S.E.2d 435 (2009). The Court held that the selection of an arbitration forum is an "integral part of the agreement." There, the chosen forum, the National Health Lawyers Association, took the same position as the AAA in that it would not administer arbitration of a health care personal injury claim unless the arbitration agreement was entered into after the event giving rise to the claim. *Id.* Because Tanglewood chose the AAA's rules as the guiding principle for arbitration, it is an integral part of the agreement. The *Grant*

court held that the chosen means by which an arbitrator will be selected and the "rules that govern the arbitration" are not "logistical" nor "ancillary." *Id.* The Defendant Tanglewood knew or should have known that the AAA did not recognize these types of arbitration agreements when it entered into it in 2007. It should not look to the Court now to correct its mistake.

Defendants suggest the arbitration provision does not mandate administration of any arbitration by the AAA, only that the AAA rules must be followed. This is a distinction without a difference. The rules and the organization cannot be separated. The AAA rules require the AAA to establish a list of national arbitrators and for the AAA to select arbitrators from that list. Under the rules, payment is made directly to the AAA and not to the arbitrators. Thus, the rules cannot be plucked from the AAA and grafted onto some other entity in order to administer an arbitration. Moreover, the AAA has copyrighted its rules and prohibits unauthorized use. Therefore, neither the AAA nor its rules are available to the parties in this matter to arbitrate this dispute. The arbitration agreement fails in its purpose.

Our Court's policy of favoring arbitration does not override the basic requirements of contracts in South Carolina. The forum selected by the Defendant will not hear this type of dispute. Our Supreme Court has determined that the forum selection is an integral part of the agreement and cannot be remedied. Therefore, the Defendants' Motion to Compel Arbitration is denied.

J. Ernest Kinard, Jr. Judge

Camden, South Carolina
November 19, 2012

EXHIBIT B

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Fairfield
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011CP-20-128

Darlene Porter as PR of Estate of Louise Porter

PLAINTIFF(S)

Heritage Healthcare of Ridgeway, LLC et al.

DEFENDANT(S)

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☒ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:

IT IS ORDERED AND ADJUDGED: ☐ See Attached order.

☒ Statement of Judgment by the Court: 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).

FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM
2013 FEB 18 A 10:00

Dated at Camden South Carolina, this 15th day of February 2013.

PRESIDING JUDGE

This judgment was entered on the 18th day of Feb, 2013, and a copy mailed first class this 18th day of Feb, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

John D. Kassel
Theile B. McVey
PO Box 1476
Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

Joshua S. Whitley
234 Seven Farms Drive
BB&T Plaza
Suite 215
Charleston, SC 29492

ATTORNEY(S) FOR THE DEFENDANT(S)

Betty Jo Beckham

CLERK OF COURT

SCCA SCRCP Form 4 (Revised 12/07)

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Healthcare Policy Statement

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.

AAA, the world's largest provider of alternative dispute resolution services, has also determined that there will be no change in the administration of cases in the health care area where businesses, providers, health care companies, or other entities are involved on both sides of the dispute.

Distinguishing a patient undergoing health care treatment from other situations involving an individual, AAA has determined that they will continue to administer pre-dispute agreements to arbitrate in all areas outside of the health care field, as long as there are appropriate due process safeguards as defined by the courts.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FAIRFIELD	)	FOR THE SIXTH JUDICIAL CIRCUIT
Darlene Dean as Personal Representative of the Estate of Louise Porter,	)	C/A No.: 2012-CP-20-128
Plaintiff,	)	
vs.	)	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION**
Heritage Healthcare of Ridgeway, LLC, Uni-Health Post Acute Care-Tanglewood, LLC, UHS Pruitt Corporation	)	
Defendants.	)	

Ms. Dean, acting as Personal Representative of her mother, Louise Porter's Estate, brought wrongful death and survival claims against Heritage Healthcare and other Defendants. These claims are the basis for Defendants' Motion to Compel Arbitration. For the reasons set forth below, Defendants' Motion should be denied.[1]

DISCUSSION

The policy of this state is to favor arbitration of disputes. *Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Inc.*, 355 S.C. 605, 612, 586 D.E.2d 581 (2003). However, not all arbitration clauses are enforceable. Arbitration is a matter of contract and South Carolina courts must determine the enforeceability of an arbitration agreement based on principles of contract law. *Munoz v. Green*

[1] This Court has previously denied a motion to compel arbitration against the same Defendant involving the same arbitration agreement. The case was *Carol Brunson as PR of the Estate of Curtis Parsons v. Uni-Health, et al.*, CA NO: 2010-CP-20-474 & 475. The *Brunson* arbitration agreement is attached as Exhibit A, the Dean arbitration agreement is attached as Exhibit B. The Order denying defendant's motion to compel arbitration is attached as Exhibit C.

Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). In order to have a valid and enforceable contract, there must be a meeting of the minds as to all essential and material terms of the contract. *Player v. Chandler*, 299 SC 101, 105, 382 S.E.2d 891(1989).

A. FORUM SELECTED BY DEFENDANT HERITAGE HEALTHCARE IS NOT AVAILABLE

The Arbitration Agreement between Ms. Dean, on behalf of Louise Porter, and Heritage HealthCare is not enforceable. There is no dispute that the agreement at issue was prepared by the Facility and calls for any claims between the resident and the facility to be handled under the rules of the American Arbitration Association (AAA). The Arbitration Agreement provides:

> 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 proceeding 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. The parties agree to bear their own attorneys' fees and costs associated with the arbitration proceeding.

Since January 1, 2003, the AAA has not accepted cases for arbitration involving individual patients in a healthcare facility unless there was a post-dispute agreement to arbitrate.(See, letter from AAA dated January 7, 2009, attached as Exhibit D.) The Arbitration Agreement at issue here was signed by Ms. Dean, the decedent's daughter, on January 2, 2007, at the time Ms. Porter was admitted to Heritage. Therefore, the Arbitration Agreement was signed "pre-injury." By its own language, the Arbitration Agreement is not enforceable, as the AAA will not hear the matter and the agreement is silent as to the method by which the arbitration shall be conducted, absent the AAA rules.

Our Supreme Court has recently addressed this exact issue. In *Grant v. Magnolia Manor-Greenwood, Inc., et al*, 383 S.C. 125, 678 S.E.2d 435 (2009), the Court held that the selection of an arbitration forum is an "integral part of the agreement." In that case, the chosen forum, the National Health Lawyers Association, took the same position as the AAA in that it would not administer arbitration of a health care personal injury claim unless the arbitration agreement was entered into after the event giving rise to the claim. *Id.* Because Heritage chose the AAA's rules as the guiding principle for arbitration, it is an integral part of the agreement. The chosen forum also negates the ability to look to the Federal Arbitration Agreement ("FAA") for another means of arbitration. The *Grant* Court held the chosen means by which an arbitrator will be selected and the "rules that govern the arbitration" are not "logistical" nor "ancillary." *Id.* The Defendants knew or should have known that the AAA did not recognize these types of arbitration agreements when it entered into it in 2007. It should not look to the Court now to correct its mistake. Accordingly, the arbitration agreement must fail.

Despite Defendants' contention, there is no distinction between a chosen "forum" and an agreement that the parties will use the AAA "rules." In essence, the two are inseparable. Rule R-2 of the Commercial Arbitration Rules and Administrative Procedures of the AAA provides as follows:

> When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authorities and duties of the AAA are prescribed in the agreement of the parties and in these rules and may be carried out through each of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its officers.

Rule R-3 makes reference to the National Roster of Arbitrators. This Rule provides:

> The AAA shall establish and maintain a national roster of commercial arbitrators (National Roster) and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

Rule 4-49 addresses administrative fees and provides that, "As a Not-For-Profit Organization, the AAA shall prescribe an initial filing fee and a case service fee to compensate it for the costs of providing administrative services."

Sub-paragraph C of Rule 51 address the neutral Arbiter's Compensation and provides that, "Any arrangement for the compensation of a neutral arbiter shall be paid through the AAA and not directly between the parties and the arbitrator."

The American Arbitration Association Rules conclude by revealing that:

> These rules are the copyrighted property of the American Arbitration Association (AAA) and are intended to be used in conjunction with the AAA's administrative services. Unauthorized use or modification of these rules may violate copyright laws and other applicable laws.

Therefore, there is no discernible difference between the AAA as a "forum" or simply using the AAA's rules. Thus, an integral component of the parties' agreement has failed. As *Grant* dictates, when the forum fails, the agreement fails and the parties cannot look to the FAA for a replacement forum.

B. THE FAA IS NOT INVOLVED AS THERE IS NO INTERSTATE COMMERCE IN THE AGREEMENT

The agreement of the parties is not a transaction involving interstate commerce. This issue was addressed by the South Carolina Supreme Court in the case of *Tims v. Green*, 310 S.C. 469, 427 S.E.2d 642 (1993). The *Tims* case involved an action by a nursing home resident seeking damages

for injuries sustained while she was left unattended under a hair dryer at the defendant's facility. The arbitration agreement between Tims and the Defendant required submission of any dispute to binding arbitration. The Defendant argued that interstate commerce was involved in the contract as the defendant was a division of a national corporation; it hired employees from out of state; it marketed its services out of state; purchased the majority of its goods and equipment from out of state; and contemplated payments from Medicare and Medicaid. The lower court disagreed with the Defendants' position finding the contract did not involve interstate commerce. This was affirmed on appeal by the Supreme Court. The Court in *Tims* states, "[A]lthough these factors could evidence the center's involvement in interstate commerce, we find that their relationship to the agreement between the center and the respondent is insufficient to form the basis of a contract between the parties." *Id.*

Interstate commerce is a necessary basis for the application of the FAA. Because interstate commerce was absent in the contract between Tims and the Defendant, the Supreme Court refused to require arbitration because *Tim's* cause of action was not subject to the Arbitration Act of South Carolina and the FAA was not applicable.

In this case, there is no evidence of interstate commerce in the arbitration agreement between the parties. The contract was entered into between Ms. Dean, a South Carolina resident, and Ridgeway Health & Rehab and Heritage Healthcare of Ridgeway, LLC, a South Carolina LLC (Uni-Health Tanglewood). The agreement is void as to any issues of interstate commerce between the parties to the agreement. Further, there has been no evidence of any interstate commerce between the parties to the arbitration agreement. Here, the Defendant attempts to create interstate commerce by filing an affidavit from Hazel Brown, the administrator for Uni-Health, Tanglewood. She states

in her affidavit that, (1) Uni-Health employs staff persons from other states, mostly from North Carolina; (2) Uni-Health participates in and receives reimbursements under the Medicare and Medicaid programs; (3) accepts insurance payments from out-of-state insurance companies; (4) contracts with out of state companies; (5) orders supplies from out of state companies; and, (6) that Ms. Porter received Medicare benefits. These same factors were analyzed under *Tims*. The Supreme Court of South Carolina found that even with all of the above, this arbitration agreement, almost identical to the one at issue here, did not affect interstate commerce.

The Defendant's contention that interstate commerce is stipulated between the parties to the agreement is unavailing. Just as parties cannot "stipulate" to subject matter jurisdiction, parties cannot "stipulate" to interstate commerce that would invoke the FAA. "Like the construction of a contract, it is improper subject for stipulation and any attempted stipulation is not binding on a court." *Morris v. Beacham*, 262 S.E.2d 921 (1980). It is not enough to say it, it must be evidenced in the contract itself. *Tims, supra.*

C. THERE IS NO MEETING OF THE MINDS

In order to have a contract, there must be a meeting of the minds as to essential parts of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). Here, there is no meeting of the minds as to what the parties were entering into. Frances Maddox is the Tanglewood social worker who was responsible for Ms. Porter's admission. She is responsible for explaining the admission documents to residents or their representatives. In a previous case before this Honorable Court, *Carol Brunson, as Personal Representative of the Estate of Curtis Parsons v. Uni-Health Post Acute Care-Tangelwood, et al.*, Civil Action number 2010-CP-20-474 &475, Ms. Maddox testified that she did not know what the American Arbitration Association is (Deposition of Maddox,

p.32, lines 5-9; Maddox deposition attached as Exhibit E); she does not know what rules apply to the subject arbitration agreement (p. 32, lines 11-24); she did not know that the AAA would not hear post-injury disputes involving healthcare (p. 33, lines 12-18); she does not know where to find the rules for the American Arbitration Association (p. 34, lines 12-15); she does not know how much it costs to file a claim in arbitration (p.34, lines 17-19); she does not know the qualifications of the arbitrators or their required profession (p. 34, line 20 - pg 35, line 12); and she does not know how long it takes for an arbitration to be heard (pg 48, line 25). The very person Tanglewood selected to explain the Arbitration Agreement to residents and their representatives does not know what those very documents mean. She candidly admits that there is no meeting of the minds and that the arbitration agreement must fail.

Ms. Dean's affidavit is attached hereto as Exhibit F. Ms. Dean confirms in her affidavit the testimony of Ms. Maddox, the Defendant's employee responsible for explaining the arbitration agreement, that she was not told nor does she know anything about the AAA, the rules, etc. Therefore, there was no meeting of the minds, which this Court also found in the *Brunson* Order, attached as Exhibit C.

D. THE DEFENDANTS HAVE WAIVED ARBITRATION

Assuming that the arbitration agreement was valid, or that the FAA applied, Defendants have waived their right to arbitrate these claims. Parties can waive their right to enforce an arbitration agreement. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999). There are three factors generally considered to determine if a party has waived its right to enforce an arbitration clause: (1) the time between commencement of the action and moving for arbitration; (2) whether the party seeking to compel arbitration engaged in discovery before moving for arbitration;

and, (3) prejudice to the non-moving party which must be more than mere inconvenience. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S. C 122, 647 S.E.2d 249 (Ct. App. 2007).

In this case, the Notice of Intent, as well as the initial discovery and Plaintiff's expert affidavit, were filed and served in December of 2011. Counsel for Defendant then requested additional discovery on January 30, 2012, including all of the medical records of Ms. Porter. There was no mention of an arbitration provision. Counsel for Plaintiff sent all of Ms. Porter's medical records on February 2, 2012. Following that exchange, the parties engaged in a pre-suit mediation with mediator, Bob Erwin. During that mediation, the Defendants never mentioned there was an arbitration agreement. It was not until the day the Defendant's Answer was due, on Friday, May 25, 2012, at 7:09pm, that counsel for Plaintiff received an email with Defendants' Motion to Dismiss and to Compel Arbitration. To date, counsel for Defendants have refused to answer any discovery served with the Complaint. While the Defendants got the benefit of all of Plaintiff's responses to discovery, they have refused to answer any of Plaintiff's discovery requests.

Defendants waited too long to move for arbitration. A nursing home negligence action cannot be commenced until the Plaintiff has filed and served a Notice of Intent. Thus, it is that action that is the appropriate starting place for determining when the party seeking arbitration could have moved to compel arbitration. In fact, South Carolina Code 15-79-120 specifically addresses this issue, and states that parties can agree to arbitrate prior to filing a medical malpractice action. The Defendants waited nearly six months before moving for arbitration and engaged in discovery and mediation. Plaintiff has been prejudiced by the Defendant's conduct.

E. MS. DEAN LACKED STANDING TO ENTER INTO AN ARBITRATION AGREEMENT

The Arbitration Agreement also fails for lack of standing. On the date of Ms. Porter's admission, Ms. Porter was competent to sign the admission agreement and the arbitration provision. (See, Affidavit of Darlene Dean, attached as Exhibit F). She could read and write and was able to make informed decisions. Ms. Porter had no legal guardian nor did she have a power of attorney. In fact, in 2008, a year after her admission to the Defendant's facility, Ms. Porter was found to be competent to execute a mortgage on her property. (See, First Citizen's mortgage attached as Exhibit G.) In order for a person to be bound by a contract, the person signing must have standing to enter into the contract. In this case, there has been no evidence that Ms. Dean had the authority to bind Louise Porter to the Arbitration Agreement. Therefore the standing element has not been met.

Likewise, there is no evidence that Ms. Dean had the apparent authority to enter into an arbitration agreement. Whether an agency relationship exists is a question of fact to be determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal. *American Fed. Bank. FSB v. Number One Main Joint Venture*, 321 S.C. 169, 467 S.E.2d (1996); *Hinson v. Roof*, 128 S.C. 470, 122 S.E.488 (1924). Defendants have not produced any evidence that Ms. Porter knew Ms. Dean had signed an arbitration agreement on her behalf, much less any evidence that she authorized or acquiesced to this act. In fact, while the Defendants provided two affidavits attached to their motion, neither one addresses this issue.

Under the doctrine of apparent authority, the principal is bound by the acts of an agent when the principal places the agent in such a position that, "persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe that the agent has certain

authority and they in turn deal with the agent based on that assumption". *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292 (1996). In this case, there is no evidence in the record that any employee of the Defendants were led to believe that Ms. Dean was Ms. Porter's agent. Clearly, it is the duty of an entity dealing with an agent to use due care to ascertain the full extent of the agent's authority. *Fraser v. Palmetto Homes of Florence*, 323 S.C. 240, 473 S.E.2d 865 (Ct. App. 1996). There is no evidence in this case that any employee did anything to determine if Ms. Dean had the authority to bind Ms. Porter. Therefore, Defendants could not have relied on any representations of Ms. Porter, the purported principal, in entering into the Arbitration Agreement.

CONCLUSION

Our Court's policy of favoring arbitration does not override the basic requirements of contracts in South Carolina. Ms. Dean did not have the legal or apparent authority to enter into an arbitration agreement on behalf of Louise Porter. Even if she did have the authority, there was no meeting of the minds as to material terms of the contract. Furthermore, the forum selected by the Defendant will not hear this type of dispute. Our Supreme Court has determined that the forum selection is an integral part of the agreement and cannot be remedied by following the FAA, which does not apply to this intrastate agreement. Moreover, the Defendants have waited too long to move for an arbitration and have substantially prejudiced the Plaintiff in the process such that any arbitration that it could have sought to compel is waived. Therefore, Defendants motion to Compel Arbitration should be denied.

[Signature appears on the following page.]

KASSEL McVEY ATTORNEYS AT LAW

By: _____

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Attorneys for Plaintiff

November 14, 2012

Columbia, South Carolina

RESIDENT AND FACILITY

ARBITRATION AGREEMENT

PLEASE READ CAREFULLY

It is hereby understood and agreed by PHRC (the "Facility") and Curtis Person (the "Resident" or the "Resident's Authorized Representative", together referred to as the "Resident") that, regardless of any other agreement or understanding between the Facility and the Resident, any and all controversies, claims, disputes, disagreements or demands of any kind (referred to as a "Claim" or "Claims") arising out of or relating to the Resident's Admission Agreement with the Facility (the "Admission Agreement") 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.

1. Claims. For purposes of this Arbitration Agreement, a Claim shall include, without being limited to, a 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 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 or safety whether sounding in tort or in contract.

This Arbitration Agreement shall in no way, however, limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility, the long-term care ombudsman, or any appropriate government agency. This Arbitration Agreement does not affect the Facility's duties with respect to the provision of care and treatment.

2. 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 proceeding 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. The parties agree to bear their own attorneys' fees and costs associated with the arbitration proceeding.

All claims related to the same incident, transaction, or related course of care or services, must be arbitrated in one arbitration proceeding. Any Claim that arose before the date that a notice of arbitration is given to the Facility or received by the resident must be presented in the arbitration proceeding for which notice is given or it shall be considered waived and forever barred.

3. Awards. The Resident and the Facility agree that any damages awarded as a result of arbitration under this Arbitration Agreement shall be determined in accordance with state or federal law that is applicable to a comparable civil action, including any prerequisites to, credit against, or limitations on, such damages. The prevailing party in the arbitration proceeding or in any legal proceedings connected to the arbitration proceeding or this Arbitration Agreement shall be entitled to recover any reasonable attorneys' fees and costs that are actually incurred as a result.

PLAINTIFF'S EXHIBIT A

4. Binding Effect. The parties intend that this Arbitration Agreement shall benefit and be binding upon the parties, their successors and assigns, including the agents, employees of the Facility, and anyone whose Claim is derived through or on behalf of the Resident, including, without being limited to, any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.

5. Applicable Law. 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. Furthermore, the provisions of this Arbitration Agreement remain in effect after the Resident's Admission Agreement has been terminated.

6. Severability. If any term or phrase of this Arbitration Agreement is held to be invalid or unenforceable by reason of law, this Agreement will be deemed amended to conform with such law and will otherwise remain in full force and effect, as it is the parties' intent to ensure that the dispute is resolved solely via arbitration.

7. Right of Revocation. The Resident has the right to revoke the Arbitration Agreement within thirty (30) days of the signature of the Agreement. Such revocation must be made in writing and submitted to the appropriate, designated Company representative.

8. Right To Consultation. The Resident understands that the Resident has the right to consult an attorney or his or her choice about this Arbitration Agreement and to receive and explanation or clarification from the Facility's admissions coordinator. The Resident is not required to sign this Arbitration Agreement in order to be admitted to or to remain in the Facility.

BY SIGNING THIS AGREEMENT, THE RESIDENT ACKNOWLEDGES THAT THE RESIDENT HAS HAD THE OPPORTUNITY TO READ THIS AGREEMENT OR IT HAS BEEN READ TO THE RESIDENT AND THE RESIDENT UNDERSTANDS ITS CONTENTS.

Resident's Signature Date

Printed Name of Resident

Resident's Authorized Representative Date June 25, 2007.

CAROL F. BRUNSON
Printed Name of Resident's Authorized Representative

Facility's Authorized Agent Date 6.25.07

Printed Name of Facility's Authorized Agent

Vers.01192004
Effective Feb. 1, 2004

RESIDENT AND FACILITY

ARBITRATION AGREEMENT

PLEASE READ CAREFULLY

It is hereby understood and agreed by PHPC (the "Facility") and [illegible] (the "Resident" or the "Resident's Authorized Representative", together referred to as the "Resident") that, regardless of any other agreement or understanding between the Facility and the Resident, any and all controversies, claims, disputes, disagreements or demands of any kind (referred to as a "Claim" or "Claims") arising out of or relating to the Resident's Admission Agreement with the Facility (the "Admission Agreement") 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.

1. Claims. For purposes of this Arbitration Agreement, a Claim shall include, without being limited to, a 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 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 or safety whether sounding in tort or in contract.

This Arbitration Agreement shall in no way, however, limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility, the long-term care ombudsman, or any appropriate government agency. This Arbitration Agreement does not affect the Facility's duties with respect to the provision of care and treatment.

2. 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 proceeding 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. The parties agree to bear their own attorneys' fees and costs associated with the arbitration proceeding.

All claims related to the same incident, transaction, or related course of care or services, must be arbitrated in one arbitration proceeding. Any Claim that arose before the date that a notice of arbitration is given to the Facility or received by the resident must be presented in the arbitration proceeding for which notice is given or it shall be considered waived and forever barred.

3. Awards. The Resident and the Facility agree that any damages awarded as a result of arbitration under this Arbitration Agreement shall be determined in accordance with state or federal law that is applicable to a comparable civil action, including any prerequisites to, credit against, or limitations on, such damages. The prevailing party in the arbitration proceeding or in any legal proceedings connected to the arbitration proceeding or this Arbitration Agreement shall be entitled to recover any reasonable attorneys' fees and costs that are actually incurred as a result.

Initials _____

PLAINTIFF'S EXHIBIT B

4. Binding Effect. The parties intend that this Arbitration Agreement shall benefit and be binding upon the parties, their successors and assigns, including the agents, employees of the Facility, and anyone whose Claim is derived through or on behalf of the Resident, including, without being limited to, any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.

5. Applicable Law. 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. Furthermore, the provisions of this Arbitration Agreement remain in effect after the Resident's Admission Agreement has been terminated.

6. Severability. If any term or phrase of this Arbitration Agreement is held to be invalid or unenforceable by reason of law, this Agreement will be deemed amended to conform with such law and will otherwise remain in full force and effect, as it is the parties' intent to ensure that the dispute is resolved solely via arbitration.

7. Right of Revocation. The Resident has the right to revoke the Arbitration Agreement within thirty (30) days of the signature of the Agreement. Such revocation must be made in writing and submitted to the appropriate, designated Company representative.

8. Right To Consultation. The Resident understands that the Resident has the right to consult an attorney or his or her choice about this Arbitration Agreement and to receive and explanation or clarification from the Facility's admissions coordinator. The Resident is not required to sign this Arbitration Agreement in order to be admitted to or to remain in the Facility.

BY SIGNING THIS AGREEMENT, THE RESIDENT ACKNOWLEDGES THAT THE RESIDENT HAS HAD THE OPPORTUNITY TO READ THIS AGREEMENT OR IT HAS BEEN READ TO THE RESIDENT AND THE RESIDENT UNDERSTANDS ITS CONTENTS.

Resident's Signature Date

Louise Porter
Printed Name of Resident

X Darlene P. Dean 1-2-07
Resident's Authorized Representative Date

X Darlene P Dean
Printed Name of Resident's Authorized Representative

SSA 1-2-07
Facility's Authorized Agent Date

Frances Mydlow SSA
Printed Name of Facility's Authorized Agent

Vers.01192004
Effective Feb. 1, 2004

Initials _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF FAIRFIELD)
)
)
Carol Brunson, As Personal)
Representative of the Estate of Curtis)
Parsons,)
)
Plaintiff,)
)
vs.)
)
Uni-Health Post Acute Care--)
Tanglewood, LLC, D/B/A Uni-Health)
Post-Acute Care-Tanglewood, F/K/N)
Heritage of Ridgeway, and United)
Clinical Services, Inc., United Rehab,)
Inc., and UHS-Pruitt Corporation,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
CASE NO: 2010-CP-20-474 & 475

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION

This matter comes before the Court on the Defendant's Motion to Compel Arbitration. For the reasons set forth below, the motion is denied.

The policy of this state is to favor arbitration of disputes. Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581 (2003). However, not all arbitration clauses are enforceable. Arbitration is a matter of contract and South Carolina courts must determine the enforceability of an arbitration agreement based on principles of contract law. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). In order to have a valid and enforceable contract, there must be a meeting of the minds as to all essential and material terms of the contract. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).

A. Forum Selected by Defendant Tanglewood is Not Available.

The Arbitration Agreement between Ms. Brunson, on behalf of Curtis Parsons, and Tanglewood is not enforceable. There is no dispute 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).

Since January 1, 2003, the AAA has not accepted cases for arbitration involving individual patients in a healthcare facility unless there was a post-dispute agreement to arbitrate. The subject Arbitration Agreement was signed at the time Mr. Parsons was admitted to Tanglewood. Therefore, the Arbitration Agreement was signed "pre-injury." By its own language, the Arbitration Agreement is not enforceable as the AAA will not hear the matter and the agreement is silent as to the method by which the arbitration shall be conducted absent the AAA rules.

Our Supreme Court has recently addressed this very issue. In Grant v. Magnolia Manor—Greenwood, Inc. et al, 383 S.C. 125, 678 S.E.2d 435 (2009), the Court held that the selection of an arbitration forum is an "integral part of the agreement." There, the chosen forum, the National Health Lawyers Association, took the same position as the AAA in that it would not administer arbitration of a health care personal injury claim unless the arbitration agreement was entered into after the event giving rise to the claim. Id. Because Tanglewood chose the AAA's rules as the guiding principle for arbitration, it is an integral part of the agreement. The chosen forum also negates the ability to look to the Federal Arbitration Agreement ("FAA") for another means of arbitration. The Grant court held that the chosen means by which an arbitrator will be selected and the "rules that govern the arbitration" are not "logistical" nor "ancillary." Id. The Defendant Tanglewood knew or should have known that the AAA did not recognize these types of

arbitration agreements when it entered into it in 2007. It should not look to the Court now to correct its mistake. Accordingly, the arbitration agreement must fail.

B. The FAA is not Involved as There is no Interstate Commerce in the Agreement.

The agreement of the parties is not a transaction involving interstate commerce. This issue was addressed by the South Carolina Supreme Court in the case of Tims v. Green, which involved an action by a nursing home resident seeking damages for injuries sustained while she was left unattended under a hair dryer at defendant's facility. 310 S.C. 469, 427, S.E. 2d 642 (1993). The arbitration agreement between Tims and the defendant required submission of any dispute to binding arbitration. The defendant argued that interstate commerce was involved in the contract as the defendant was a division of a national corporation; it hired employees from out of state; it marketed its services out of state; purchased the majority of its goods and equipment from out of state; and contemplated payments from Medicare and Medicaid. The lower court disagreed with the defendant's position, finding the contract did not involve interstate commerce, rendering the FAA moot. The Court found that although the factors could evidence the center's involvement in interstate commerce, their relationship to the agreement between the center and the respondent was insufficient to form the basis of a contract between the parties.

Interstate commerce is a necessary basis for the application of the FAA. Because interstate commerce was absent in the contract between Tims and the defendant, the Supreme Court refused to require arbitration because Tims' cause of action was not subject to the Arbitration Act of South Carolina and the Federal Arbitration Act was inapplicable.

In this case, there is no evidence of interstate commerce in the arbitration agreement between the parties. The contract was entered into between Ms. Parsons, a South Carolina resident, and Uni-Health Post Acute Care-Tanglewood, LLC, a South Carolina LLC. The agreement is void

as to any issues of interstate commerce between the parties to the agreement. Furthermore, there has been no evidence of any interstate commerce between the parties to the arbitration agreement.

The Defendants' contention that interstate commerce is stipulated between the parties to the agreement is unavailing. Just as parties cannot "stipulate" to subject matter jurisdiction, parties cannot "stipulate" to interstate commerce that would invoke the FAA. It is not enough to say it must be evidenced in the contract itself. Tims.

The fact that Georgia corporations are also defendants is immaterial and not a basis for finding that the arbitration agreement involves interstate commerce. The agreement itself, the focus of this inquiry, does not mention any out of state entity. The agreement specifically limits arbitration to disputes involving the resident and the "facility." The "facility" is Uni-Health Post Acute Care-Tanglewood, LLC. Tanglewood's own employee did not know the arbitration agreement involved out-of-state entities. In addition, the responsive pleadings of the out of state corporations deny that they are responsible for the care provided at the Tanglewood facility. Accordingly, the FAA does not apply.

C. There is no Meeting of the Minds.

The Court is also concerned about the lack of understanding between the parties in the case as to what exactly was being agreed upon. In order to have a contract, there must be a meeting of the minds as to essential parts of the contract. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). Here, there is no meeting of the minds as to what the parties were entering into and the arbitration agreement must fail.

D. The Defendants have Waived Arbitration.

Assuming that the arbitration agreement was valid or that the FAA applied, the Defendants have waived their right to arbitrate these claims. Parties can waive their right to enforce an

arbitration agreement. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (Ct.App. 1999). There are three factors generally considered to determine if a party has waived its right to enforce an arbitration clause: (1) the time between commencement of the action and moving for arbitration; (2) whether the party seeking to compel arbitration engaged in discovery before moving for arbitration; and (3) prejudice to the non-moving party which must be more than mere inconvenience. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007).

The Defendants waited too long to move for arbitration and the prejudice to the Plaintiff is more than mere inconvenience. The parties have conducted extensive discovery. The Defendants can point to no reasonable basis for waiting this long to move for arbitration. The only logical explanation for moving at this stage to compel arbitration is to cause an unnecessary delay and unfair prejudice to Plaintiff. Accordingly, Defendants have waived their right to arbitrate these claims, even if the Arbitration Agreement was valid.

E. Ms. Brunson Lacked Standing to Enter into Arbitration Agreement.

The Arbitration Agreement also fails for lack of standing. On the date of Mr. Parsons' admission, the nursing home staff performed an evaluation and found Mr. Parsons to be mentally competent, able to read and write, and able to make informed decisions. The nursing home staff also verified that Mr. Parsons had no legal guardian. Ms. Brunson told Tanglewood's admissions representative that she did not understand the admissions paperwork and to talk directly to Mr. Parsons about it. The Tanglewood staff told Ms. Brunson to sign the Arbitration Agreement despite knowing that she did not have a Power of Attorney or any other legal basis to enter into this agreement and did not understand the paperwork.

In order for a person to be bound by a contract, the person signing must have standing to enter into the contract. In this case, there has been no evidence that Ms. Brunson had the authority to bind Mr. Parsons to the Arbitration Agreement. Therefore, the standing element has not been met.

Likewise, there is no evidence that Ms. Brunson had the apparent authority to enter into the Arbitration Agreement. Whether an agency relationship exists is a question of fact to be determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal. American Fed. Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439 (1996); Hinson v. Roof, 128 S.C. 470, 122 S.E. 488 (1924). The Defendants have not produced any evidence that Mr. Parsons knew Ms. Brunson had signed an Arbitration Agreement on his behalf; much less any evidence that he authorized or acquiesced to this act. Accordingly, the Court finds Mrs. Brunson did not have the authority to sign the Arbitration Agreement for Mr. Parsons.

F. Plaintiff is not Estopped from Seeking a Jury Trial.

Defendants are unable to establish the elements of equitable estoppel. In order to estopp Ms. Brunson, Defendants must establish:

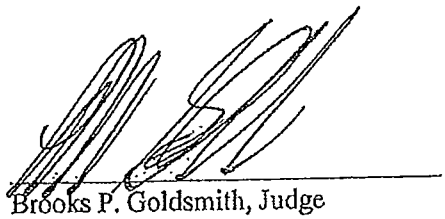
> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey an impression that facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that the conduct shall be acted upon by other party; and (3) knowledge, actual or constructive, of the real facts.

Langdale v. Carpets, 395 S.C. 194, 717 S.E.2d 80 (Ct. App. 2011). Defendants must also show as to themselves "a (1) lack of knowledge and of means of knowledge of truth as to facts in question, (2) reliance upon conduct of party estopped, and (3) prejudicial change in position." Id.

Ms. Brunson did not make a false misrepresentation or conceal material facts. The only evidence presented is that Ms. Brunson told Mrs. Maddox she did not understand the Admissions Agreement and Arbitration Agreement and asked Mrs. Maddox to review the agreements with Curtis Parsons. As such, Ms. Brunson could not have intended that Defendants act upon a false representation or had knowledge of contrary facts. Further, as she told Mrs. Maddox the truth, Defendants cannot claim a "lack of knowledge" or that they relied upon Ms. Brunson's conduct. Mrs. Maddox testified Mr. Parsons would still have been admitted to the facility and that his care and costs would have been the same even if Ms. Brunson had not signed the arbitration agreement. Therefore, Defendants cannot claim a prejudicial change of position.

CONCLUSION

Our Court's policy of favoring arbitration does not override the basic requirements of contracts in South Carolina. Ms. Brunson did not have the legal or apparent authority to enter into an arbitration agreement on behalf of Curtis Parsons. Even if she did have the authority, there was no meeting of the minds as to material terms of the contract. Tanglewood's agent admitted she did not know numerous material contract terms. Furthermore, the forum selected by the Defendant will not hear this type of dispute. Our Supreme Court has determined that the forum selection is an integral part of the agreement and cannot be remedied by following the FAA which does not apply to this intrastate agreement. Moreover, the Defendants have waited too long to move for arbitration and have substantially prejudiced the Plaintiff in the process such that any arbitration that it could have sought to compel is waived. Therefore, Defendants' Motion to Compel Arbitration should be denied.



Brooks P. Goldsmith, Judge

Lancaster

~~Fairfield~~, South Carolina
March 20, 2012

American Arbitration Association
Dispute Resolution Services Worldwide

Southeast Case Management Center

2200 Century Parkway, Suite 300, Atlanta, GA 30345
telephone: 404-325-0101 facsimile: 404-325-8034
internet: http://www.adr.org/

January 7, 2009

VIA EMAIL

Jason E. Bring
Arnall Golden Gregory, LLP
171 17th Street, N.W.
Suite 2100
Atlanta, GA 30363-1031

William A. Dean
Ford, Dean & Mallard, PA
Two Datran Center, PH1C
9130 S. Dadeland Blvd.
Miami, FL 33156

Re: 30 434 E 00978 08
Heritage Healthcare of Augusta, LLC ("Claimant")
and
Thomas Pride ("Respondent")

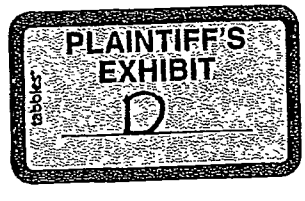
Gentlemen:

This will acknowledge receipt of a letter dated December 5, 2008, from Jason Bring, a letter dated December 15, 2008, from William Dean, and a letter dated December 18, 2008, from Jason Bring. We note that copies have been exchanged between counsel.

In response to Mr. Dean's December 15, 2008 letter, the American Arbitration Association ("AAA") will administer nursing home disputes in any state. For such cases in which the dispute does not involve the provision of medical services to a patient, we will accept the filing pursuant to a pre-dispute arbitration agreement. Per the AAA's policy on healthcare disputes, for those disputes that do involve the provision of medical services to a patient, we require a post-dispute agreement to arbitrate prior to accepting the case. In any circumstance we would comply with a court order directing that a matter be arbitrated through the AAA. For additional information on the AAA's healthcare policy, please visit the "Healthcare" section of our web site, www.adr.org.

Inasmuch as the current claim filed with the AAA does not involve the provision of medical services, we will proceed with this case as filed.

We note that in Mr. Bring's December 5, 2008 letter, he objects to the application of the Supplementary Procedures for Consumer-Related Disputes ("Consumer Procedures"). In the absence of an agreement by the parties regarding their applicability, this matter will proceed pursuant to the Consumer Procedures. As a threshold issue, the parties may raise the applicability of the Consumer Procedures to the arbitrator for a final determination.



In accordance with the Consumer Procedures, we are in the process of appointing an arbitrator and will advise you of the arbitrator's appointment shortly.

Sincerely,

Angeline S. Mason
Case Manager
866 205 4335
MasonA@adr.org

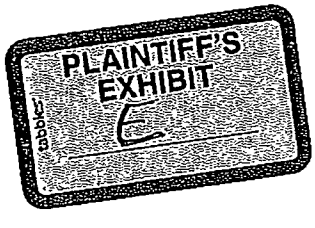
Supervisor Information: Allyson C. Connor, 404 320 5102, ConnorA@adr.org

Healthcare Policy Statement

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.

AAA, the world's largest provider of alternative dispute resolution services, has also determined that there will be no change in the administration of cases in the health care area where businesses, providers, health care companies, or other entities are involved on both sides of the dispute.

Distinguishing a patient undergoing health care treatment from other situations involving an individual, AAA has determined that they will continue to administer pre-dispute agreements to arbitrate in all areas outside of the health care field, as long as there are appropriate due process safeguards as defined by the courts.



STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF FAIRFIELD

CAROL BRUNSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CURTIS PARSONS,

Plaintiff,

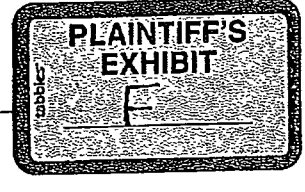
vs.

CASE NO. 2010-CP-20-474
2010-CP-20-475

UNI-HEALTH POST ACUTE CARE - TANGLEWOOD, LLC, D/B/A UNI-HEALTH POST-ACUTE CARE - TANGLEWOOD, F/K/N HERITAGE OF RIDGEWAY, AND UNITED CLINICAL SERVICES, INC., UNITED REHAB, INC., AND UHS-PRUITT CORPORATION,

Defendants.

DEPOSITION OF:	FRANCES MADDOX
DATE:	March 1, 2012
TIME:	9:59 a.m.
LOCATION:	Law Offices of Coleman & Tolan 120 West Washington Street Winnsboro, South Carolina
TAKEN BY:	Counsel for the Plaintiff
REPORTED BY:	ANGELA D. ZUVER, Court Reporter



answer them in that way. Sometimes people would just read their own paperwork and sign it. I did not read each paperwork to them. That is not required.

Q. Do you know what the Triple A is, the American Arbitration Association?

MR. ARNOLD: Object to the form.

THE WITNESS: Not offhand. I do not, no.

BY MR. HOLMES:

Q. Do you know what rules they have in place for -- or what rules governed the arbitration agreement that we've marked as Exhibit 2?

MR. ARNOLD: Object to the form.

BY MR. HOLMES:

Q. You still have to answer the question. I'm sorry.

A. Okay. Would you repeat the question, please?

Q. What rules govern the arbitration agreement that is marked as Exhibit 2?

A. Can I look at it?

Q. Well, do you know?

A. No, I don't know what rules. I just remember in the past that there is a 30-day time

frame that you could have someone review it if you didn't agree with the arbitration agreement. I do know that that's there.

Q. And do you know what rules the American Arbitration Association has in place for handling arbitrations and disputes regarding medical malpractice or nursing home neglect?

MR. ARNOLD: Object to the form.

THE WITNESS: No, I do not know what rules those are.

BY MR. HOLMES:

Q. Do you know whether or not the American Arbitration Association will hear disputes between a resident and a nursing home regarding an arbitration agreement which was signed prior to the injury to the patient or resident?

MR. ARNOLD: Object to the form.

THE WITNESS: I do not know.

BY MR. HOLMES:

Q. Do you know how you would file an arbitration claim?

MR. ARNOLD: Object to the form.

THE WITNESS: No, I do not know how you would file that.

BY MR. HOLMES:

Q. Do you know where it would be filed?

A. No, I do not.

Q. So you wouldn't be able to tell someone as you're having to execute this agreement where to file a claim or how a claim would be filed?

MR. ARNOLD: Object to the form.

THE WITNESS: No. But if anyone would ask that question I would try to find that answer for them. I've never had anybody ask me that.

BY MR. HOLMES:

Q. Where would you go to get the American Arbitration Association rules?

MR. ARNOLD: Object to the form.

THE WITNESS: I do not know.

BY MR. HOLMES:

Q. Do you know how much it costs to file a claim in arbitration?

A. No.

Q. Do you know what the qualifications are for arbitrators that could hear a dispute?

MR. ARNOLD: Object to the form.

THE WITNESS: No, I do not know what the qualification are, but I would -- in my opinion, it would be someone who would not be

A. No. No one had told me anything about the rules. It's pretty self-explanatory according to this arbitration -- according to this Exhibit 2.

Q. You say it's self-explanatory. Where are the rules contained in Exhibit 2?

A. It just tells you about the awards of any damages, awards, the binding effect. I mean, you just read it and how to -- and your right to revoke the agreement within 30 days if you don't agree with it.

Q. And the rules that it says you will follow for the actual arbitration procedure itself, where are those contained?

A. I do not see those in here.

Q. So you're unable to determine what rules or process would be followed in order to arbitrate a dispute between a resident and Tanglewood based on Exhibit 2?

MR. ARNOLD: Object to the form.

THE WITNESS: That's correct.

BY MR. HOLMES:

Q. Do you know how long it would take from the filing of an arbitration to the time that you would actually be heard on the merits of it?

A. No, I do not.

1418

B 48

2008 MAY -5 P 12:52

FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

7439220 6

[Space Above This Line For Recording Data]

MORTGAGE

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated 05/01/2008, together with all Riders to this document.

(B) "Borrower" is JAMES W. P. REAR AND LOUISE P. PORTER JOINTLY. Borrower is the mortgagor under this Security Instrument. Lender is a

(C) "Lender" is CONSUMER RESOURCE BANK N.A. MIDLANDS REGION, organized and existing under the laws of CORPORATION. Lender's address is , POST OFFICE BOX 8, RIDGEWAY, SC 29130. Lender is the mortgagee under this Security Instrument.

(D) "Note" means the promissory note signed by Borrower and dated 05/01/2008. The Note states that Borrower owes Lender FIFTY THOUSAND AND NO/100 Dollars (U.S. $ 50,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than 05/05/2013.

(E) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(F) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(G) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- ☐ Adjustable Rate Rider
- ☐ Balloon Rider
- ☐ 1-4 Family Rider
- ☐ Condominium Rider
- ☐ Planned Unit Development Rider
- ☐ Biweekly Payment Rider
- ☐ Second Home Rider
- ☐ Other(s) [specify]

(H) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(I) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(J) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(K) "Escrow Items" means those items that are described in Section 3.

(L) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(M) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(N) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(P) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender and Lender's successors and assigns the following described property located in the COUNTY [Type of Recording Jurisdiction] of FAIRFIELD [Name of Recording Jurisdiction]:

SEE ATTACHED EXHIBIT "A"

The Within Mortgage was recorded this 5 day of May, 2008 in RECORD BOOK 906 PAGE 48

Betty Jo Beckham
Clerk of Court of Common Pleas & General Sessions
Fairfield County, S. C.

B 48

Form 3041 1/01

SOUTH CAROLINA—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT
Bankers Systems, Inc., St. Cloud, MN Form 3940-5SC 8/31/2000
(page 1 of 7 pages)

CXSAO

which currently has the address of 432 OAK STREET .... [Street]

[illegible] .... [City], South Carolina [illegible] .... [Zip Code] ("Property Address"):

TO HAVE AND TO HOLD this property unto Lender and Lender's successors and assigns, forever, together with all the improvements now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as

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EXHIBIT "A"

All that certain piece, parcel or tract of land lying, being and situated on the western side of Oak Street, in Fairfield County, in the State aforesaid, designated as Lot No. 1501 in Block 1500 on a plat made by Southern Mapping & Engineering Co, recorded in the office of the Clerk of Court for Fairfield County in Book "4" of Plats, at pages 65, 67 and 71, fronting on said street one hundred (100') feet and extending westwardly therefrom between parallel lines 127.32 feet; bounded on the north by an alley 12 feet in width; on the east by lot No. 1500, now or formerly of Stephen Greene Baptist Church, and lot No. 1511, now or formerly of Baxter Boone; on the south by said street; and west by lot No. 1502, now or formerly of Johnny W. Groomes; said lot is also known as 430 and 430-A Oak Street.

This being the same property conveyed to Darlene P. Dean by deed of Louise C. Porter and Doris Carnell, reserving, however, a Life Estate unto themselves for and during the terms of their natural lives, recorded February 22, 2005 in the office of the Clerk of Court for Fairfield County in Record Book "699" at page 292. Thereafter, the said Doris Mary Carnell died on or about January 10, 2006.

TMS: 145-01-03-010 (f/k/a 151-11-10-008) and
145-01-03-011 (f/k/a 151-11-10-013)

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defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false,

misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has--if any--with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to Section 22 of this Security Instrument; (b) such other period as Applicable Law might specify for

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the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

23. Release. Upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Homestead Waiver. Borrower waives all rights of homestead exemption in the Property to the extent allowed by Applicable Law.

25. Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within 30 days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. TO THE EXTENT PERMITTED BY LAW, THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY. This waiver shall not apply so long as the Property is used as a dwelling place as defined in § 12-37-250 of the South Carolina Code of Laws.

26. Future Advances. The lien of this Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument up to 150% of the original principal amount of the Note plus interest thereon, attorneys' fees and court costs.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:

[signature] .... [signature] .... (Seal)
DARLENE R. DEAN -Borrower

[signature] .... [signature] .... (Seal)
LOUISE C. PORTER -Borrower

——— [Space Below This Line For Acknowledgment] ———

STATE OF SOUTH CAROLINA, ... County ss:

Before me personally appeared .... Hubert C. Humphries .... and made oath that .... he/she/they .... saw the within named Borrower sign, seal, and as .... his/her/their .... act and deed, deliver the within written Mortgage; and that .... he .... with .... John E. James, III .... witnessed the execution thereof.

Sworn before me this 5th .... day of MAY, 2008 ....

[signature] .... (Seal) [signature] ....
Notary Public for South Carolina

My commission expires: 2-8-10

2008 MAY -5 P 12:52
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

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To: Mr. Joshua S. Whitley
Attorney at Law
Columbia, SC 29492

From: Michael C. Watkins, Court Reporter
5116 Cressingham Drive
Indian Land, SC 29707

Darlene Dean as Personal Rep. of Louise Porter vs. Heritage Healthcare of Ridgeway, LLC. November 15, 2012 hearing, 8 pages @ $3.25 = $26.00, plus $5.15 postage, for a total of $31.60.

Payment is due upon receipt.

Michael C. Watkins
Court Reporter

June 2, 2013

Mr. Joshua S. Whitley
BB&T Plaza, Suite 215
Charelston, SC 29492

Dear Mr. Whitley:

I received inquiry from the Clerk of Court of Appeals via my supervisor, Ms. Desiree Allen, concerning a transcript in the appeal of Darlene Dean, as Personal Rep. of the Estate of Louise Porter vs. Heritage Healthcare of Ridgeway, LLC. I understand there was a transcript request letter dated March 7, 2013 mailed to me, I either did not receive the letter or just misplaced it. Enclosed please find the transcript, and I apologize for the mix-up.

Sincerely,

Michael Watkins
Court Reporter

CC: Court Administration
Clerk of Court of Appeals

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF FAIRFIELD

2012-CP-20-00128

Darlene Dean, as Personal Rep. of the Estate of Louise Porter

vs.

Heritage Healthcare of Ridgeway, LLC, et als.

Winnsboro, South Carolina

November 15, 2012

Before the Honorable Ernest Kinard

APPEARANCES

For the Plaintiffs: John D. Kassel

For the Defendants: Joshua S. Whitley

Reported by: Michael C. Watkins

Official Court Reporter

THE COURT: Somebody has a motion?

MR. WHITLEY: Yes, sir. We have a motion to compel and a motion to stay discovery, a motion to compel arbitration, he has a motion to compel discovery which I think will be determined based on your decision on the motion to compel arbitration.

THE COURT: All right.

MR. WHITLEY: We're ready to proceed if you are, Your Honor.

THE COURT: I'm ready.

MR. WHITLEY: Your Honor, we've filed a motion to compel. We have an arbitration agreement signed by the daughter and the personal representative of the estate of Darlene Dean. The plaintiffs have made several arguments why our motion to compel arbitration should fail. The first is they say the material term is missing under the Grant decision of the Supreme Court because the arbitral forum is unavailable, further on Exhibit D that's not true. First, the agreement doesn't say that you must use the Triple A -- the Triple A is the forum -- the agreement doesn't say you must use them, it just says you need to use their rules. Secondly Triple A per their own exhibit, Exhibit D of their memorandum, they'll accept arbitration such as these if this court orders arbitration. So it's not true to say that the material term is missing because the arbitral forum is

missing. They next say there's no interstate commerce. We had made this motion and the agreement is made pursuant to the Federal Arbitration Act. As this Court is well aware our courts, the Fourth Circuit and the Supreme Court, greatly favors arbitration agreements made pursuant to the Federal Arbitration Rule. They've cited a case from I believe Judge Goldsmith where he decides against -- that there's no interstate commerce, however there's an opinion out of the Court of Appeals this summer reversing the trial court that denied a motion to compel arbitration and it gives us great guidance on how to determine if interstate commerce is involved which it clearly is here. The Court of Appeals says you look to the agreement, you look to the complaint and you look to the surrounding facts, all three demonstrate interstate commerce. And I can expound on that if Your Honor deems it worthy. But first the agreement itself says the parties understand interstate commerce is involved in nursing facilities. The complaint the plaintiff's have filed against an out of state corporation which demonstrates interstate commerce. And third we filed an affidavit of the administrator demonstrates all of the interstate commerce activities that are involved in the nursing care of the plaintiff's mother. Finally they said we have waived -- in an interesting argument -- they say we have waived the right to compel arbitration, and they cite

one case which I'll look for the name of it, but they cite one case which is a Judge Henry Floyd when he was a Circuit Judge case where Judge Floyd found you've waived your right to compel arbitration if you've waited 2.5 years in litigating the case and suddenly moved forward. We filed our motion to dismiss and compel arbitration in lieu of filing an answer, we haven't waived any right. The first opportunity we could move to compel and to dismiss the plaintiff's case was within the 30 days and we did just that. So that case that says if you procedurally move for 2.5 years litigating the case it's too late, you've waived your right to compel arbitration is just not applicable in this case when we filed it within 30 days of their filing their complaint. So as Your Honor knows because this agreement is made pursuant to the Federal Arbitration Act we believe it's highly enforceable, courts have in a progeny of cases that show that the arbitrations made pursuant to that act are greatly favored by the courts and we would ask you to dismiss their lawsuit and compel arbitration.

THE COURT: All right.

MR. KASSEL: Please the Court, Your Honor? John Kassel representing Ms. Dean who is a personal representative. This is a nursing home case, Your Honor. Ms. Porter, who was a resident at Heritage Healthcare of Ridgeway, South Carolina, entered into that facility in 2007.

THE COURT: Well, you filed a brief and as you recall I'm faster than the average reader.

MR. KASSEL: Okay. So you have the brief?

THE COURT: I don't have it with me out here but I received it yesterday and I read it. You made one point that he didn't touch on it seems like, it had something to do with time limits about arbitration entered before or after something occurs.

MR. KASSEL: Right, Your Honor. That goes to the argument about that the forum has failed. We have essentially two main arguments why you shouldn't compel arbitration. One is there is no interstate commerce so the FAA doesn't apply and he doesn't comply with the South Carolina Act so there is no arbitration, and I would like to address that too. But the forum fails, and if the forum fails then there's no arbitration agreement and that has to do with what Your Honor just asked about.

THE COURT: I'm just showing you I can read.

MR. KASSEL: What's interesting to me is that this lady went in in 2007 and he they asked her family to sign this arbitration agreement in 2007. Some four years before that in 2003 the Triple A said you know what, we're not going to arbitrate anymore these cases of personal injury or wrongful death where you have a pre-dispute arbitration loss that somebody signed. If you want to sign one of those things

after somebody gets hurt or dies we'll do that but we're making a special effort not to do that anymore out of certain notions of fairness, that was in 2003. My friends at Heritage Healthcare of Ridgeway never changed their contract, never changed their position and they presented this arbitration provision that could not be fulfilled by the Triple A, and they chose the Triple A and now they want the Court to undo it when they should have created something different but they didn't.

THE COURT: 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. I'll let you argue, fair is fair, I'm just telling you how it looks. And the reason being wrongful death actions are not something that's arbitrated one, two, Triple A doesn't take them. I recognize you say they will take them if I order them to take it but that's not "we're going to do it," that's the cut to the bottom line, but I'll listen to you.

MR. WHITLEY: Judge, I think that's perfectly reasonable and if I can offer one thing. The Grant decision is the one that states if the forum is unavailable the arbitration agreement fails. And if you read the clause in Grant it said that -- I think it was the NHLA shall administer the arbitration. Because they were unable to

administer the arbitration it failed. Here our agreement does not state that Triple A should administer, it says find a close arbitrator --

THE COURT: By the rules and regulations that Triple A does, I recognize that. I'm still going to rely on Mr. Kassel with his great experience to draft an order that is sustainable on appeal, right?

MR. KASSEL: Yes. I will do that, Your Honor.

THE COURT: Plus all he wants is a little money, whether it comes in arbitration or at trial he doesn't care, mediate it.

MR. KASSEL: And the order is based on Your Honor's ruling forum failing.

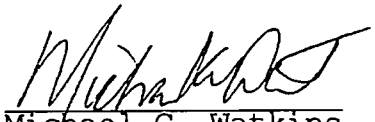
THE COURT: That's right.

(End of the hearing.)

I, the undersigned, Michael C. Watkins, Official Court Reporter for the Sixth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Fairfield County, South Carolina, on the 15th day of November, 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 2, 2013



Michael C. Watkins
Court Reporter

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SMYTH WHITLEY, LLC
ATTORNEYS AT LAW

VIA EMAIL & U.S. MAIL

The Honorable J. Ernest Kinard, Jr.
1121 Broad Street- County Courthouse
P. O. Drawer 1707
Camden, SC 29021-1707

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*
CA No. 2012-CP-20-128
SW File No. 10015.0013

Dear Judge Kinard:

I am in receipt of your law clerk's correspondence related to the Defendant's motion to reconsider in the above-referenced matter. I thank you for your kindness and your clerk's kindness in the communications related to our failure to file our motion with your chambers pursuant to Rule 59(g). We appreciate the Court bringing this to our attention and apologize for any inconvenience.

As you are aware, we did timely file the Motion to Reconsider pursuant to Rules 5 and 59(e) and, thus, satisfied the 10-day filing requirement. However, we frankly admit we did not serve the Court within the 10 days prescribed by Rule 59(g) and apologize for that oversight. However, in researching cases involving the application of Rule 59(g), we believe the Court can and should nevertheless consider our motion to reconsider on its merits and, in any event, must act on it one way or the other. *See Jones v. State*, 382 S.C. 589, 594 (S.C. 2009) (Supreme Court deciding appeal and reversing trial court even though State Prosecutor failed to comply with Rule 59(g)); *see also Coon v. Coon*, 356 S.C. 342 (S.C. Ct. App. 2003) (holding that failure to comply with Rule 59(g) did not bar an appeal).

Indeed, the Court of Appeals has held that Rule 59(g) is not jurisdictional and does not deprive the Circuit Court of subject matter jurisdiction to decide motions to reconsider. *See Gallagher v. Evert*, 353 S.C. 59, 63 (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"). Thus, as this Court expressed its concern that it is without the power to decide our motion to reconsider due to our failure to comply with Rule 59(g), the Court of Appeals has addressed this exact issue and has affirmed your power to hear our motion to reconsider. *Id.* Furthermore, because the Court of Appeals has found

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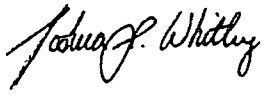
Rule 59(g) to not be a jurisdictional rule, we respectfully as this Court to forgive our mistake and to decide the motion on the merits, as no party has been prejudiced in any way by this oversight and the hearing is eight (8) days away.

I have spoken to Plaintiff's Counsel Theile McVey, and she does not object to this Court deciding our Motion to Reconsider on the merits. We are both willing for you Honor to decide Defendant's Motion based on the briefs but, of course, are more than willing to appear for a hearing if you desire us to do so. We will await your direction of whether next week's scheduled hearing is still going forward.

Again, I apologize for any inconvenience and assure you it will not happen again. If I can answer any further concerns, I would be happy to do so, and I appreciate your consideration in this matter.

With warm regards, I am,

Very truly yours,



Joshua S. Whitley

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