

PM 9/22/11
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED

Carmen Tevis Mullen, Circuit Court Judge

SEP 22 2011

SC Court of Appeals

Case No. 2011-CP-07-1610

Elizabeth O'Meara....., Respondent,

v.

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC....., Appellants,

and

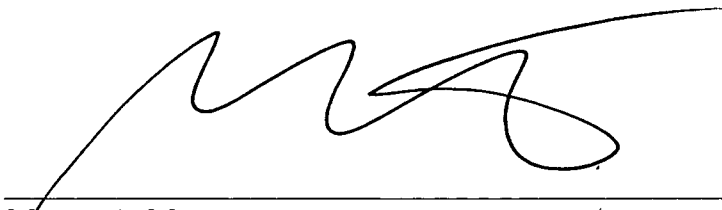
Sonia S. King....., Defendant.

NOTICE OF APPEAL

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC appeals the Order of the Honorable Carmen Tevis Mullen, dated August 8, 2011, denying the Motion to Dismiss and Compel Arbitration filed by Brookdale Senior Living, Inc. and Southern Assisted Living, LLC. A copy of the Order is attached to this Notice of Appeal. Appellants received written notice of entry of this Order on August 23, 2011.

Appellants also filed a Motion to Reconsider on September 2, 2011, which the lower court denied on September 20, 2011. A copy of the Order denying the Motion to

Reconsider is also attached to this Notice of Appeal. Appellants received written notice of that Order on September 22, 2011.



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Manton M. Grier, Jr.
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Attorneys for Appellants
Brookdale Senior Living, Inc. and Southern Assisted
Living, LLC

September 22, 2011

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No. 2011-CP-07-1610

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SEP 22 2011

SC Court of Appeals

Elizabeth O'Meara,.....Respondent,

v.

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC,.....Appellants

and

Sonia S. King,.....Defendant.

PROOF OF SERVICE

The undersigned certifies that a copy of the **Notice Of Appeal** has been served upon counsel of record by depositing a copy of the same, first-class postage prepaid in the United States Mail, on the 22nd day of September, 2011, to the address shown below.

Kelly M. Jolley, Esquire
McNAIR LAW FIRM, P.A.
Shelter Cove Executive Park
23-B Shelter Cove Lane, Suite 400 (29928)
Post Office Drawer 3
Hilton Head Island, South Carolina 29938


NEXSEN PRUET, LLC

NEXSEN | PRUET

Manton M. Grier, Jr.
Special Counsel
Admitted in SC

September 22, 2011

VIA HAND DELIVERY

The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street (29201)
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
SEP 22 2011
SC Court of Appeals

**Re: Elizabeth O'Meara v. Brookdale Senior Living, Inc., Southern Assisted Living, LLC and Sonia S. King
Case No. 2011-CP-07-1610**

Dear Ms. Gee:

Enclosed for filing with the Court is an original and four copies of the **Notice Of Appeal** and **Proof Of Service** in the above-referenced matter along with my firm's check in the amount of \$100.00 for the filing fee. Please return a clocked-in copy to me via our courier.

By copy of this letter and as evidenced by the attached Proof Of Service, we are serving counsel of record with a copy of the above Notice Of Appeal.

Thank you for your assistance in this matter

Very truly yours,


Manton M. Grier, Jr.

MMG/hjr

Enclosure

cc w/encl.: The Honorable Jerri Ann Roseneau
Kelly M. Jolley, Esquire

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Nexsen Pruet, LLC
Attorneys and Counselors at Law

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2011-CP-07-1610

ELIZABETH O'MEARA,
Plaintiff,

v.

BROOKDALE SENIOR LIVING, INC.,
SOUTHERN ASSISTED LIVING, LLC, and
SONIA S. KING,
Defendants.

(Jury Trial Requested)

ORDER DENYING DEFENDANTS,
BROOKDALE SENIOR LIVING, INC.
AND SOUTHERN ASSISTED LIVING,
LLC'S MOTION TO DISMISS AND
COMPEL ARBITRATION

AUG 19 PM 4:06
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter is before me on Defendants Brookdale Senior Living, Inc. and Southern Assisted Living, LLC's (collectively the "Defendants") Motion to Dismiss and Compel Arbitration on the claims asserted by Plaintiff Elizabeth O'Meara ("Plaintiff" or "Mrs. O'Meara"). A hearing was held on June 14, 2009 at 11 a.m. in which I heard oral arguments from Defendants' counsel, Manton R. Grier, Jr., and Plaintiffs' counsel, Kelly M. Jolley.

The basis for Defendants' Motion is arbitration language found in the arbitration provision contained in the Residency Agreement between Elizabeth O'Meara and Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head ("Carolina House"), signed by Mrs. O'Meara's daughter Julie Stanton on September 30, 2008. Mrs. O'Meara opposed this motion and filed an opposing memorandum with exhibits, and Defendants filed a memorandum in support of the motion. Plaintiff opposed enforcement of the arbitration clause found in the Residency Agreement on four grounds: (1) it is not binding pursuant to the South Carolina Arbitration Act, S.C. Code Section 15-48-10(b), (2) the Federal Arbitration Act (hereinafter "FAA") does not apply to this action because the Residency Agreement does not involve

interstate commerce, (3) the arbitration and limitation of liability clauses contained in the Residency Agreement are unconscionable, and (4) no one with the authority to bind Elizabeth O'Meara to arbitration executed the Residency Agreement on her behalf and discovery would be required to demonstrate any such authority. The Court is persuaded by Plaintiff's arguments opposing the Motion to Compel Arbitration and accordingly denies Defendants' Motion to Dismiss and Compel Arbitration.

During the hearing on this Motion, the parties conceded that arbitration cannot be compelled under the South Carolina Arbitration Act in this matter because Mrs. O'Meara's claims all arise out of her alleged personal injury. S.C. Code Ann. Section 15-48-10. Defendants contend that the FAA preempts the South Carolina state statute. However, I find that the Residency Agreement between Elizabeth O'Meara and Carolina House does not involve interstate commerce. Therefore, this case is not subject to the FAA. The South Carolina Supreme Court in *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) held that the FAA was inapplicable to a similar contract for patient and residency services. The Court explained that the analysis must focus on the contract between the parties, and whether that contract involves interstate commerce. The Residency Agreement here is a contract for basic services – accommodations, meals, utilities, housekeeping, laundry and recreation. The provision of these contractual services to Mrs. O'Meara at the Carolina House facility in Hilton Head does not involve interstate commerce. Moreover, the Affidavit of Timothy J. Caesar attached to Defendants' Motion does not contain any facts from which one could conclude that any of the basic services included in the contract between Mrs. O'Meara and Carolina House involve interstate commerce.

Defendants argued that *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531 (2001) and *Allied Bruce Terminal Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) changed the analysis previously supported in *Timms*. However, these cases clarify that a transaction occurring via a

contract must in fact involve interstate commerce to enforce an arbitration provision in the contract. Neither case alters our Supreme Court's holding in *Timms* that arbitration cannot be compelled pursuant to the FAA when the underlying transaction does not involve interstate commerce. The Residency Agreement does not involve interstate commerce and Defendants' Motion to Dismiss and Compel Arbitration must be denied.


Even if the Residency Agreement did involve interstate commerce so as to bring it under the purview of the FAA, I find that the arbitration and limitation of liability clauses in the Residency Agreement are unconscionable and should be struck in their entirety from the contract. Among other provisions, the arbitration and limitation of liability clauses in the Residency Agreement significantly restrict discovery, limit compensatory damages, and prohibit punitive damages. Both the "Arbitration Provision" (V.A.) and the "Limitation of Liability Provision" (V.B.) are included in Section V. of the Residency Agreement. Subsection V.A(13) incorporates by reference the Limitation of Liability Provision into the Arbitration Provision. Taken together, these provisions restrict discovery, including a limitation on depositions to only those of experts, and limits liability for any "claims by, or on behalf of, a Resident ... arising out of the care or treatment received by the Resident...." For example, all "[n]et economic damages" awarded must be "offset by any collateral source payments such as payments made by medical insurance." Additionally, the provisions limit noneconomic damages, including pain and suffering, to "a maximum of \$350,000.00", prohibit payment of "[i]nterest and/or late fees on unpaid assisted living charges", and preclude any award for punitive damages. Generally, "courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 28, 644 S.E.2d 663, 670 (2007). I find that the limitations on damages and discovery unilaterally

imposed upon Mrs. O'Meara in the Residency Agreement are substantively unconscionable and violate public policy. Accordingly, even if the FAA were applied to the Residency Agreement, Section V of the Residency Agreement ("Arbitration and Limitation of Liability Provision") is unconscionable and unenforceable in its entirety. *See, e.g. Simpson*, 373 S.C. at 33-37, 644 S.E.2d at 673-674.

Finally, there is a question whether Mrs. O'Meara's acquiescence to the arbitration agreement in the Residency Agreement is valid. Mrs. O'Meara argued that she did not execute the Residency Agreement, that Julia Stanton, Mrs. O'Meara daughter, executed the Residency Agreement as Mrs. O'Meara's Attorney-in-Fact for health care matters, and that Julia Stanton is not Mrs. O'Meara's attorney-in-fact under Mrs. O'Meara's durable power of attorney and does not have the authority to bind Mrs. O'Meara to arbitration. Mrs. O'Meara presented a instrument designating Thomas Stanton as Mrs. O'Meara's attorney-in-fact. The proper forum for determining whether an arbitration clause is enforceable in South Carolina is the trial court rather than arbitration. *See, Simpson*, 373 S.C. at 23, 644 S.E.2d at 667-668 ("[T]he trial court should determine the threshold validity of the arbitration agreement."); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The question of the arbitrability of a claim is an issue for judicial determination, unless the apties provide otherwise."); *Hous. Auth of the City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003) ("The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties.") To the extent that the parties contest whether Julia Stanton had the authority to bind Mrs. O'Meara to arbitration, the parties must engage in discovery regarding the matter, precluding dismissal of this case at this time.

IT IS NOW THEREFORE ORDERED, this action shall proceed on the jury docket for the Fourteenth Judicial Circuit, Beaufort County, South Carolina. The Defendants shall have fifteen (15) days from the date of this Order to file responsive pleadings.

AND IT IS SO ORDERED.

By: 
Carmen T. Mullen
Circuit Court Judge
Fourteenth Judicial Circuit

July 20, 2011

Beaufort, South Carolina

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-070-11610

Elizabeth O'Meara vs. Brookdale Senior Living Inc, et al

PLAINTIFF(S)

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 12(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
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other
 NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

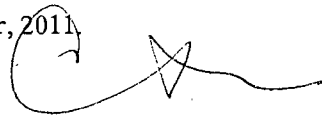
2011 SEP 20 AM 10:04
JERRI ANN ROSENEAU
CLERK OF COURT
BEAUFORT COUNTY, S.C.

IT IS ORDERED AND ADJUDGED:

- See attached order. (Formal order to follow)
- Statement of Judgment by the Court:

Defendant Brookdale Senior Living's Motion to Reconsider Order, is respectfully denied without a hearing.

Dated at Beaufort, South Carolina, this 20 day of September, 2011.



PRESIDING JUDGE - Carmen T. Mullen

This judgment was entered on the 20 day of September 2011, and a copy mailed first class this 20 day of September, 2011 to attorneys of record or to parties (when appearing pro se) as follows:

Kelly McPherson Jolley McNair Law Firm, PA
PO Drawer 3 Hilton Head Island, SC 29938

Manton M Grier, Jr. Nexsen Pruet, LLC
PO Drawer 2426 Columbia, SC 29202

ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

Jamie Thompson

Jerri Ann Roseneau - Clerk of Court



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
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FAX: (803) 734-1839
www.sccourts.org

September 27, 2011

Marcus A. Manos, Esquire
Manton M. Grier, Jr., Esquire
Nexsen Pruet, LLC
P.O. Drawer 2426
Columbia, SC 29202

Re: O'Meara, Elizabeth v. Brookdale Senior
2011199666

Dear Counsel:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/mpm

cc: Kelly McPherson Jolley, Esquire

The Supreme Court of South Carolina

RE: Interim Guidance Regarding Personal Data Identifiers and
Other Sensitive Information in Appellate Court Filings

ORDER

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions,¹ documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts.

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court:²

1. Social Security Numbers. If a social security number must be included, only the last four digits of that number should be used.
2. Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted, and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.
3. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.
4. Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall

be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile.)

A party seeking to seal material beyond those personal identifiers listed above, must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, supra, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED.

s/Jean H. Toal _____ C.J.

s/James E. Moore _____ J.

s/John H. Waller, Jr. _____ J.

s/E.C. Burnett, III _____ J.

s/Costa M. Pleicones _____ J.

Columbia, South Carolina

August 13, 2007



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29211
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September 27, 2011

Marcus A. Manos, Esquire
Manton M. Grier, Jr., Esquire
Nexsen Pruet, LLC
P.O. Drawer 2426
Columbia, SC 29202

Re: O'Meara, Elizabeth v. Brookdale Senior
Tracking # **2011199666** - Court case # **2011-CP-07-1610**

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

Upon review, it has come to the Court's attention that the caption should read as shown below:

Elizabeth O'Meara,	v.	Respondent,
Brookdale Senior Living, Inc., Southern Assisted Living, LLC, and Sonia S. King,		Defendants,
Of whom, Brookdale Senior Living, Inc. and Southern Assisted Living, LLC, are the,		Appellants.

Any future filings by any party to this appeal must feature the above caption.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: Edgar A. Brown Building, 1205 Pendleton Street, Columbia, SC 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:

- 1) any final judgment from the circuit court which includes a sentence of death;
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;
- 5) any final judgment from the circuit court pertaining to elections and election procedure;
- 6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;
- 7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

Very truly yours,

V. Claire Allen, Deputy

Tanya A. Gee

CLERK

TAG/mpm

cc: Kelly McPherson Jolley, Esquire
The Honorable Jerri Roseneau

Manton M. Grier, Jr.
Special Counsel
Admitted in SC

September 27, 2011

Deborah E. Everett
Post Office Box 4461
Beaufort, South Carolina 29903

**Re: Elizabeth O'Meara v. Brookdale Senior Living, Inc., Southern
Assisted Living, LLC and Sonia S. King / Case No. 2011-CP-07-1610**

Dear Ms. Everett:

I am writing to order a copy of the hearing transcript in the above-referenced matter which was heard before Judge Carmen T. Mullen on June 23, 2011 in Beaufort County. Please forward an invoice for the transcript to me and I will promptly return payment.

Charleston

Charlotte

Columbia

Greensboro

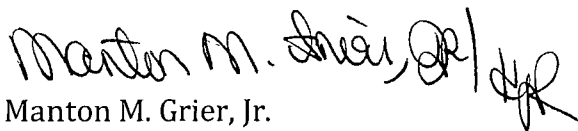
Greenville

Hilton Head

Myrtle Beach

Raleigh

Very truly yours,



Manton M. Grier, Jr.

MMG/hjr

cc: The Honorable Tanya Gee
The Honorable Jerri Ann Roseneau
Kelly M. Jolley, Esquire

RECEIVED
SEP 28 2011
SC Court of Appeals



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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February 21, 2012

Marcus A. Manos, Esquire
Manton M. Grier, Jr., Esquire
Nexsen Pruet, LLC
P.O. Drawer 2426
Columbia, SC 29202

Re: O'Meara, Elizabeth v. Brookdale Senior
2011199666

Dear Counsel:

Our records indicate that the transcript in the above matter should have been delivered by November 28, 2011. As of today's date, we have received no information indicating that the court reporter has been granted an extension, nor have we received your initial brief.

If you have not yet received the transcript, you must contact the Office of Court Administration per Rule 207 of the South Carolina Appellate Court Rules. The address for Court Administration is as follows:

South Carolina Office of Court Administration
1015 Sumter Street, Suite 201
Columbia, SC 29201

Be sure to copy the Court and opposing counsel with all correspondence concerning the transcript.

Please advise the Court of the status of the transcript within ten (10) days of the date of this letter, or your appeal may be dismissed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ma

cc: Kelly McPherson Jolley, Esquire