THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court Of Common Pleas
Diane S. Goodstein, Circuit Court Judge

Case No. 2011-CP-38-1513
South Carolina Court of Appeals No. 2013-000689

BERTHA TYLER, as Guardian of
HENRIETTA MAYES, Respondent,

v.

UNIHEALTH POST-ACUTE CARE - ORANGEBURG,
LLC, and CATHERINE PAVLICK, Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in concluding that the Motion to Compel Arbitration was not governed by the Federal Arbitration Act where the parties acknowledged interstate commerce in their arbitration agreement and the Plaintiff alleged in her Complaint that out-of-state companies were responsible for the level of care provided?

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A. The FAA requires courts to "direct[] the parties to proceed to arbitration in accordance with the terms of the agreement."

B. The existence of a written agreement to arbitrate is not in dispute.

C. Plaintiff's claims are covered by the broad scope of the Arbitration Agreement and must be enforced.

D. The trial court erred in refusing to enforce the Arbitration Agreement "in accordance with the terms of the agreement."

STATEMENT OF THE CASE

This appeal involves the denial of a motion to compel arbitration of claims in accordance with the terms of a written arbitration agreement.

On December 14, 2011, Plaintiff/Respondent Bertha Tyler ("Plaintiff") commenced a lawsuit alleging negligence and negligent hiring, supervision and retention of an employee, at a nursing home in Orangeburg, South Carolina. (Complaint.) Plaintiff sued the operator of the nursing home, Unihealth Post-Acute Care – Orangeburg, LLC ("UPAC-Orangeburg"), and the nursing home's administrator, Crystal Pavlick[1] (collectively referred to herein as "Defendants"). Plaintiff did not sue the employee whose alleged conduct is at issue and did not assert that Defendants were vicariously liable for the alleged acts of the employee. (*Id.*)

Defendants timely served answers to the Complaint on February 6, 2012. (Answers to Complaint.) In their Answers, Defendants asserted as a defense that Plaintiff's claims were barred pursuant to the terms of an arbitration agreement covering Plaintiff's claims. (Answers ¶¶ 28-29.)[2] On March 14, 2012, Defendants moved for an order compelling arbitration. (Defendants' Motion to Compel Arbitration.) Plaintiff filed a response to Defendants' Motion on September 5, 2012, one day prior to a hearing held on September 6, 2012. (Plaintiff's Response to Defendants' Motion to Compel Arbitration; Transcript of Sept. 6, 2012 Hearing.) Following the hearing, the parties submitted to the court additional evidence, letters, and proposed orders regarding their

[1] Appellants note that Crystal Pavlick is improperly identified as "Catherine Pavlick" in the caption of Plaintiff's Complaint.

[2] The Answers of the Defendants were filed concurrently and are identical in all respects material to this appeal. These have been collectively cited as "Answers," for the sake of brevity.

respective positions. (Defendant UPAC-Orangeburg's Notice of Filing of Articles of Organization; Defendants' October 5, 2012 Letter; Plaintiff's October 18, 2012 Letter; Defendants' October 25, 2012 Letter; Plaintiff's Proposed Order; Defendants' Proposed Order.) On February 12, 2013, the trial court entered an order denying Defendants' Motion to Compel Arbitration. (Feb. 12, 2013 Order.) Defendants received a copy of the Order on February 27, 2013. On March 28, 2013, Defendants filed a Notice of Appeal. (Notice of Appeal.)

FACTS

Defendant UPAC-Orangeburg operates a skilled nursing facility known as Unihealth Post-Acute Care – Orangeburg located in Orangeburg, South Carolina ("Orangeburg nursing facility"). Henrietta Mayes has been a resident of the Orangeburg nursing facility since May 7, 2010 and remains a resident.

Ms. Mayes was admitted to the Orangeburg nursing facility by her sister, Bertha Tyler. In connection with Ms. Mayes's admission to the Orangeburg nursing facility, Ms. Tyler contracted with UPAC-Orangeburg on behalf of Ms. Mayes. Among the contracts that Ms. Tyler entered into on behalf of Ms. Mayes in connection with her admission was a voluntary Arbitration Agreement ("Arbitration Agreement"). Based on the contracts executed by Ms. Tyler on behalf of Ms. Mayes, UPAC-Orangeburg admitted Ms. Mayes to the Orangeburg nursing facility.

The Arbitration Agreement is titled "State of South Carolina ARBITRATION AGREEMENT" and provides in conspicuous type on the first page:

> **THE PATIENT/RESIDENT AND THE HEALTHCARE CENTER UNDERSTAND AND ACKNOWLEDGE THAT THIS AGREEMENT IS A VOLUNTARY AGREEMENT TO SUBMIT FOR RESOLUTION BY ARBITRATION ANY DISPUTES THAT MAY ARISE IN THE FUTURE BETWEEN THE PARTIES.**

(Arbitration Agreement, p. 1, Section I (emphasis in original).) The agreement further advises:

> **EACH OF THE PARTIES IS WAIVING THE RIGHT TO TRIAL BY JURY, AND INSTEAD, ANY DISPUTES BETWEEN THE PARTIES SHALL BE RESOLVED THROUGH BINDING ARBITRATION.**

(*Id.*, p. 1, Section I. (emphasis in original).) The Arbitration Agreement further advises of the "right to seek legal counsel concerning this Agreement;" that "[t]he signing of this

Agreement is not a precondition to admission, expedited admission, or the furnishing of services to the Patient/Resident by the Healthcare Center;" and that the Patient/Resident may revoke the Arbitration Agreement within 30 days following execution. (*Id.*, p. 5, Section IV.) Immediately above the signatures, the Arbitration Agreement again conspicuously advises:

> **THIS AGREEMENT GOVERNS IMPORTANT LEGAL RIGHTS. PLEASE READ THE AGREEMENT IN ITS ENTIRETY BEFORE SIGNING. THE PARTIES UNDERSTAND AND ACKNOWLEDGE THAT, AS TO ALL DISPUTES THAT ARE GOVERNED BY THIS AGREEMENT, EACH OF THE PARTIES IS WAIVING THE RIGHT TO TRIAL BY JURY, AND INSTEAD DISPUTES BETWEEN THE PARTIES SHALL BE RESOLVED THROUGH ARBITRATION.**

(*Id.* at 5.) Ms. Tyler initialed each page of the Arbitration Agreement and signed the final page of the agreement as the "Patient/Resident Representative." (*Id.*)

The parties agreed that UPAC-Orangeburg's "business activities substantially affect, relate to, and involve interstate commerce," and that, therefore, the Arbitration "Agreement shall be governed by and enforced under federal law, specifically, the Federal Arbitration Act. . . ." (*Id.*, p. 4, Section III.A.)

With respect to the scope of the Arbitration Agreement, the parties agreed that "[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement . . . or the Patient/Resident's stay at, or the care or services provided by, [UPAC-Orangeburg], or any acts or omissions in connection with such care or services . . . shall be submitted for arbitration." (Arbitration Agreement, p. 1, Section I.A.1.) The Arbitration Agreement further provides that such claims are arbitrable regardless of whether they are "for statutory, compensatory or punitive damages, and whether sounding in breach of contract, tort, or

breach of statutory or regulatory duties (including, without limitation . . . , any claim based on negligence [and] any claim based on any other departure from accepted standards of health care or safety . . .), irrespective of the basis for the duty or legal theories upon which the claim is asserted. . . ." (*Id.*)

Despite the clear terms of the Arbitration Agreement, Plaintiff filed a civil Complaint alleging that the Defendants were liable for injuries that Ms. Mayes allegedly sustained while she was a resident of the Orangeburg nursing facility. (Complaint.) Plaintiff alleges that Ms. Mayes was the victim of a sexual assault by an employee of UPAC-Orangeburg. (*See id.*) Plaintiff alleges that UPAC-Orangeburg was negligent, including in the hiring, supervision, and retention of the employee who allegedly assaulted Ms. Mayes. (*See id.*) Plaintiff did not sue the employee whose conduct is at issue and has not alleged that Defendants are vicariously liable for the employee's actions. (*See id.*)

The Defendants filed Answers denying the material allegations of the Complaint and specifically noted that UPAC-Orangeburg "conducted a criminal background check of Mr. Williams on February 2, 2010 [pre-hire], in accordance with applicable state and federal law, and the criminal check returned no criminal record." (Answers ¶¶ 9-11.) The Defendants further asserted that Plaintiff's claims are barred by the Arbitration Agreement. (*Id.* ¶¶ 28-29.) Defendants then moved to compel arbitration of the claims asserted in the Complaint. (Defendants' Memorandum in Support of Motion to Compel Arbitration.) The court denied Defendants' motion, concluding that the parties' transaction did not involve interstate commerce and that the Plaintiff's allegations "would

fall into the outrageous conduct exception" to arbitration. (Feb. 12, 2013 Order at 6.) It is from the denial of this motion that the Defendants appeal.

STANDARD OF REVIEW

"The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. The determination of whether a claim is subject to arbitration is subject to de novo review. However, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *Landers v. Federal Deposit Insurance Corp.*, 739 S.E. 2d 209, 213 (S.C. 2013) (citations and quotation marks omitted).

ARGUMENTS

I. The trial court erred in concluding that the Motion to Compel Arbitration was not governed by the Federal Arbitration Act because the transaction involves interstate commerce.

The FAA provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA applies in federal or state court to any arbitration agreement that "in fact" involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).[3]

The South Carolina Court of Appeals has succinctly stated:

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[3] *Munoz* expressly overruled *Mathews v. Fluor Corp.*, 312 S.C. 404, 440 S.E.2d 880 (1994), to the extent that the *Mathews* court considered "whether the parties contemplated interstate commerce as a factor in determining if the FAA applied." *Munoz*, at n. 3.

> The words 'involving commerce' have been interpreted by the United States Supreme Court as being the functional equivalent of 'affecting commerce'-words signaling 'an intent to exercise Congress' commerce power to the full.' *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) . . . 'Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce-that is, within the flow of interstate commerce.' *Citizens Bank* [*v. Alafabco, Inc.*], 539 U.S. [52,] [] 56, 123 S.Ct. [2037,] [] 2040 [(2003)].

Thornton v. Trident Medical Center, LLC, 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2004). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001).

A. The FAA governs because the parties specifically acknowledged interstate commerce and agreed that the FAA would apply.

In the Arbitration Agreement, the parties specifically acknowledged that their transaction involved interstate commerce and would be governed by the FAA because UPAC-Orangeburg's "business activities substantially affect, relate to, and involve interstate commerce." (Arbitration Agreement, p. 4, Section III.A.) South Carolina courts have held that such agreement alone is sufficient to invoke the FAA.[4] Courts outside of

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[4] *See, e.g., Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) ("The parties' arbitration agreement provides that the arbitration shall be administered pursuant to the FAA."); *Munoz*, 343 S.C. at 539, 542 S.E.2d at 363-364 ("Here, the arbitration agreement which applies to 'this contract and the relationships which result from this contract,' provides it shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms."); *McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 U.S. Dist. Lexis 144288 at *13 (D.S.C. Dec. 15, 2011) ("The Arbitration Agreement here clearly states that 'the services and reimbursement thereof effects a transaction that involves interstate commerce.' [cit.] Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate commerce."); *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 U.S. Dist. Lexis 103638 at *4, n.3 (D.S.C. Sept. 13, 2011) ("The parties here do not dispute that the FAA applies.").

South Carolina agree that the parties' acknowledgment that the arbitration agreement involves interstate commerce and will be governed by the FAA is dispositive of the issue.[5] Accordingly, the parties are entitled to rely on their stipulation that their transaction involves interstate commerce and that the Arbitration Agreement is governed by the FAA, and the trial court erred in holding that this matter did not involve interstate commerce.[6]

B. The FAA governs because the transaction between the parties involves interstate commerce.

In addition to the parties' express acknowledgment in the agreement that their transaction involved interstate commerce, the affidavit of the nursing home's administrator, the surrounding facts, and the allegations in the Complaint all evidence interstate commerce. Brenda Parris, an administrator at UPAC-Orangeburg, provided specific examples of how interstate commerce is involved in the operation of the nursing home facility. (Affidavit of Brenda Parris ("Parris Aff."), Defendants' Motion to Compel Arbitration, Exhibit B.) For example, UPAC-Orangeburg uses materials and supplies which come from out-of-state in the day-to-day operation of the facility; the fees for services rendered are paid for through federal reimbursement funds and by out-of-state

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[5] *See, e.g., Bales v. Arbor Manor*, 2008 U.S. Dist. Lexis 99215 (D. Neb. July 3, 2008) (involving stipulation in admission agreement that interstate activity was involved); *Thomas v. Cook*, 350 S.W.3d 382 (Tex. App. 2011) (holding that when the parties expressly invoke the FAA in the arbitration agreement, the FAA governs and the parties are not required to establish that the transaction at issue affects interstate commerce); *In re Choice Homes, Inc.*, 174 S.W.3d 408 (Tex. App. 2005) (same); *In re Ledet*, 2004 Tex. App. Lexis 11474 (Tex. App. Dec. 22, 2004) (holding that when parties agree to arbitrate under the FAA, no independent showing of interstate commerce is necessary).

[6] The trial court's conclusion that "parties cannot 'stipulate' to interstate commerce that would invoke the FAA," (Feb. 12, 2013 Order at 5) is not supported by any cited authority and is contrary to the numerous cases inside and outside of South Carolina applying the FAA based on the parties' stipulation (either in the arbitration agreement or before the trial court). *See* cases cited *supra*, notes 3 and 4.

insurance companies; and some residents come to the facility from outside the State of South Carolina. (Parris Aff. ¶¶ 4-6, 8; *see also* Arbitration Agreement, p. 4, Section III.A.) Moreover, a portion of Ms. Mayes's care at the Orangeburg nursing facility was paid by Medicaid, a state and federal government system of health insurance for those requiring financial assistance. (Parris Aff. ¶ 7.)

UPAC-Orangeburg is a citizen of Georgia because one of its members is a Georgia citizen. (UPAC-Orangeburg Articles of Organization; UPAC-Orangeburg Operating Agreement, p. 31.)[7] *See General Technology Applications, Inc. v. Exro Ltda*, 388 F. 3d 114, 120 (4th Cir. 2004) (an LLC is assigned the citizenship of each state in which its members are citizens). Therefore, the Complaint, on its face, avers a relationship involving interstate commerce under the provisions of the FAA. *See Pickering v. Urbantus, LLC*, 827 F. Supp. 2d 1010 (S.D. Iowa 2011) (noting that the FAA is applicable to nursing facilities that are operated by entities from other states). Moreover, Plaintiff alleges that Defendants' actions in this case are governed by federal law. (Complaint ¶ 14(f) (alleging that Defendants were negligent in allegedly violating "***federal*** regulation requiring actions to protect the safety and health of residents, so as to constitute negligence per se") (emphasis added).) Accordingly, Plaintiff's own Complaint demonstrates that the transaction between the parties involved interstate commerce.

[7] The trial court found that "[t]he Defendants have provided no evidence as to the identity and citizenship of the individual members of the LLC." (Feb. 12, 2013 Order at 3, n. 1.) However, Defendants provided the trial court with UPAC-Orangeburg's Articles of Organization and Operating Agreement, along with an explanation of the citizenship of UPAC-Orangeburg. (Defendant UPAC-Orangeburg's Notice of Filing of Articles of Organization; Defendants' October 5, 2012 Letter; Defendants' October 25, 2012 Letter.)

C. *Timms v. Greene* does not apply.

In reaching its conclusion that interstate commerce was not implicated and thus the FAA was inapplicable, the trial court based its decision on *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993). (Feb. 12, 2013 Order at 3-5.) In *Timms*, the parties had not agreed that their transaction involved interstate commerce or that their arbitration agreement would be governed by the FAA. *Timms* is distinguishable on that basis alone. Moreover, *Timms* relied on a narrow interpretation of "involving commerce" that has since been rejected by the United States Supreme Court. *Allied-Bruce*, 513 U.S. 265. South Carolina consistently has followed *Allied-Bruce*. *See, e.g.*, *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 454-55, 730 S.E.2d 312, 315-16 (2012); *see also Citizens Bank*, 539 U.S. 52 (holding no elaborate explanation needed to show an impact on interstate commerce upon consideration of the 'general practice' those transactions represent). The trial court erred in ignoring the evidence of interstate commerce (including the parties' acknowledgement) and in relying on *Timms* and failing to rely on the more recent cases following *Allied-Bruce*. *See Thornton*, 357 S.C. 91 (recognizing that appropriate standard is now the much broader "affecting commerce").

II. The trial court erred in determining that claims encompassed in the broad scope of the Arbitration Agreement were not arbitrable based on an "outrageous conduct exception" instead of "directing the parties to proceed to arbitration in accordance with the terms of the agreement" as required by the FAA.

A. The FAA requires courts to "direct[] the parties to proceed to arbitration in accordance with the terms of the agreement."

"Once it is determined that the FAA applies to a dispute, federal substantive law regarding arbitrability controls." *Landers*, 739 S.E.2d at 213 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d

444 (1985) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA]."). "There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010). In enacting the FAA, Congress established a strong federal policy in support of arbitration agreements, "requiring that [courts] 'rigorously enforce agreements to arbitrate.'" *Shearson/Amer. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Recent decisions of the United States Supreme Court have emphatically reiterated that this strong federal policy in favor of arbitration does not bend to state public policy concerns regarding which claims are appropriate (or inappropriate) for arbitration or how arbitration should be conducted. *Marmet Healthcare Center, Inc. v. Brown*, 132 S.Ct. 1201, 1203-04 (2012) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. That rule resolves these cases. West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.") (citations and quotation marks omitted); *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1753 (2011) ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated

reasons."); *see also American Express Co. v. Italian Colors Restaurant*, 570 U.S. ___, No. 12-133 (June 20, 2013) (Kagan, J. dissenting) ("When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives. If the state rule does so—as the Court found in *AT&T Mobility*—the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law.").

Section 2 of the FAA declares that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The United States Supreme Court has noted:

> The statute's text includes no exception for personal-injury or wrongful-death claims. It "requires courts to enforce the bargain of the parties to arbitrate." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). It "reflects an emphatic federal policy in favor of arbitral dispute resolution." *KPMG LLP v. Cocchi*, 565 U.S.__, __, 132 S.Ct. 23, 25, 181 L.Ed.2d 323 (2011) (*per curiam*) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); internal quotation marks omitted).

Marmet, 132 S. Ct. at 1203. The Court has further instructed that "courts must place arbitration agreements on an equal footing with other contracts ... and enforce them according to their terms." *Concepcion*, 131 S. Ct. at 1745-46 (citations omitted).

The "savings clause" in Section 2 permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of *any* contract," 9.U.S.C. § 2 (emphasis added), "but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (citations omitted); *see also Concepcion*, 131 S. Ct. at 1753 (Thomas, J. dissenting) ("If § 2 means anything, it is that courts cannot refuse

to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to 'any contract.'").

"The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Concepcion*, 131 S. Ct. at 1748 (citations and punctuation omitted). Section 4 of the FAA provides:

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

9 U.S.C. § 4 (emphasis added). "By its terms, the act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Section 4 "requires courts to compel arbitration '***in accordance with the terms of the agreement***' upon the motion of either party to the agreement (assuming that the 'making of the arbitration agreement or the failure . . . to perform the same' is not at issue)." *Concepcion*, 131 S. Ct. at 1748 (emphasis added). "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *Id.* at 1752.

B. The existence of a written agreement to arbitrate is not in dispute.

The court did not find that the making of the arbitration agreement was at issue. (Feb. 12, 2013 Order.) In this case, it is undisputed that Ms. Tyler signed the Arbitration Agreement, a five-page, standalone agreement clearly titled "State of South Carolina ARBITRATION AGREEMENT." (Arbitration Agreement.) The Arbitration Agreement states:

> **THE PATIENT/RESIDENT AND THE HEALTHCARE CENTER UNDERSTAND AND ACKNOWLEDGE THAT THIS**

> **AGREEMENT IS A VOLUNTARY AGREEMENT TO SUBMIT FOR RESOLUTION BY ARBITRATION ANY DISPUTES THAT MAY ARISE IN THE FUTURE BETWEEN THE PARTIES. THE PARTIES FURTHER UNDERSTAND AND ACKNOWLEDGE THAT, AS TO ALL DISPUTES THAT ARE GOVERNED BY THIS AGREEMENT, EACH OF THE PARTIES IS WAIVING THE RIGHT TO TRIAL BY JURY, AND INSTEAD, ANY DISPUTES BETWEEN THE PARTIES SHALL BE RESOLVED THROUGH BINDING ARBITRATION.**

(Arbitration Agreement, p. 1 (emphasis in original).) The execution of the Arbitration Agreement was knowing and voluntary. In fact, the Arbitration Agreement advises of the right to contact an attorney to obtain further explanation regarding the Arbitration Agreement.

The Patient/Resident understands that:

> A. The Patient/Resident has the right to seek legal counsel concerning this Agreement;
>
> B. The signing of this Agreement is not a precondition to admission, expedited admission, or the furnishing of services to the Patient/Resident by the Healthcare Center; and
>
> C. This Agreement may be revoked by written notice to the Healthcare Center from the Patient/Resident within thirty (30) days of signature....

(Arbitration Agreement, p. 5.) Ms. Tyler also represented that she had the opportunity to read the Arbitration Agreement and understood its contents. Immediately above the signature line and in all upper case type, the Arbitration Agreement states as follows:

> **THIS AGREEMENT GOVERNS IMPORTANT LEGAL RIGHTS. PLEASE READ THE AGREEMENT IN ITS ENTIRETY BEFORE SIGNING. THE PARTIES UNDERSTAND AND ACKNOWLEDGE THAT, AS TO ALL DISPUTES THAT ARE GOVERNED BY THIS AGREEMENT, EACH OF THE PARTIES IS WAIVING THE RIGHT TO TRIAL BY JURY, AND INSTEAD DISPUTES BETWEEN THE PARTIES SHALL BE RESOLVED THROUGH ARBITRATION.**

(Arbitration Agreement, p. 5 (emphasis in original).)

The existence of a written agreement to arbitrate is not in dispute, and the only issue for resolution is whether Plaintiff's allegations fall within the scope of the Arbitration Agreement.

C. Plaintiff's claims are covered by the broad scope of the Arbitration Agreement and must be arbitrated.

1. Under the FAA and South Carolina law, the scope of an arbitration clause must be construed broadly.

Questions of arbitrability are addressed by the courts with "a healthy regard for the federal policy of favoring arbitration." *Towles v. United Healthcare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (1999) (citation omitted). "It is the policy of [South Carolina] and federal law to favor arbitration and any doubts concerning the scope of the arbitrable issues should be resolved in favor of arbitration." *Landers v. Federal Deposit Insurance Corp.*, 739 S.E. 2d 209, 213 (S.C. 2013) (citations omitted). "The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Levin v. Alms and Assocs.*, 634 F.3d 260, 266 (4th Cir. 2011) (citation omitted). "Such a presumption is strengthened when the arbitration clause is broadly written." *Landers*, 739 S.E.2d at 213 (citations omitted). "Therefore, unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, arbitration must generally be ordered." *Id.* (citations and punctuation omitted).

In other words, "the court should find that a party's claims fall within the scope of the arbitration clause, unless the court finds the arbitration clause ***cannot possibly*** be interpreted to cover the claims at issue." *Montgomery v. Applied Bank*, 848 F. Supp. 2d 609 (S.D.W.V. 2012) (citing *Winston-Salem Mailers Union 133, CWA v. Media Gen. Operations, Inc.*, 55 Fed. Appx. 128, 133 (4th Cir. 2003) (citing *AT&T Technologies, Inc.*

v. Communications Workers of America, 475 U.S. 643, 649-50, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986))) (emphasis added).

With respect to broad arbitration clauses the Supreme Court has recently stated:

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

Landers, 739 S.E.2d at 214 (citations omitted) (emphasis added).

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Zabinksi*, 346 S.C. at 597 (citing to *S.C. Public Service Authority v. Great W. Coal*, 312 S.C. 559 (1993)).

The South Carolina Supreme Court recently applied these principles in *Landers*. In that case, a former bank executive (Landers) argued that his claims of slander, intentional infliction of emotional distress, illegal proxy solicitation and wrongful termination were not subject to the arbitration clause contained in his employment agreement. *Landers*, 739 S.E.2d at 211-12. The arbitration clause provided that "'*any controversy or claim arising out of or relating to this contract, or the breach thereof*, shall be settled by binding arbitration ....' (emphasis added)." *Id.* at 211. In his complaint, "Landers asserted five causes of action: (i) breach of contract/constructive termination; (ii) slander/slander per se; (iii) intentional infliction of emotional distress; (iv) illegal proxy solicitation pursuant to S.C. Code Ann. § 33-7-220(i) (Supp. 2011); and (v) wrongful expulsion as a director." *Id.* at 212 (fn. omitted). The defendant moved to

compel arbitration. The trial court denied the motion as to all claims except the breach of contract claim, finding that "there was not a significant relationship between the claims and the Agreement" and "[a]lternatively [that] the allegations underlying the claims were unforeseeable at the time the parties entered into the Agreement." *Id.* at 212-13.

On appeal, the Supreme Court noted that "under the expansive reach of the FAA, a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause." *Id.* at 214. Observing the requirement to interpret the scope of the arbitration agreement broadly, the Supreme Court reversed, finding "that all of [Landers'] causes of action bear a significant relationship to the Agreement." *Id.* at 217.[8] Having found that Landers' claims were encompassed by the arbitration agreement, the Court "reject[ed] the trial court's alternative ruling that the claims are not subject to arbitration because they were not foreseeable." *Id.*

2. The scope of the Arbitration Agreement is broad and covers Plaintiff's claims.

The court did not determine that the language used in the Arbitration Agreement failed to encompass Plaintiff's claims, but instead found that the Plaintiff's claims "fall

[8] In deciding the case, the Court acknowledged the confusion that could be caused by the use of the phrase "significant relationship" and observed that other courts prefer the phraseology "touch matters," holding that "broad arbitration clauses encompass all claims that 'touch matters' covered by the contract or agreement." *Landers*, 739 S.E.2d at 217. The Court noted that "[t]he phrase 'significant relationship' has arguably evolved to impose an enhanced burden on the party seeking to compel arbitration." *Id.* The Court stated that it employed the term "significant relationship" in its decision "only because it is in keeping with our jurisprudence," but held that "if ever there did appear to be an appreciable conflict between the two phraseologies in the future, given the text of the FAA, the United States Supreme Court's interpretation of such, and the strong policy favoring arbitration, we would necessarily find that the 'touch matters' term hues more closely to Congressional intent concerning the FAA." *Id.* at 218.

outside of the scope of the arbitration agreement" because "[t]he facts at issue . . . could not have been foreseen by the parties" and are "outrageous." (Feb. 12, 2013 Order at 9.) Plaintiff's claims clearly fall within the express terms of the written Arbitration Agreement. The Arbitration Agreement expressly requires the parties to resolve by arbitration "[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement . . . or the Patient/Resident's stay at, or the care or services provided by, [UPAC-Orangeburg], or any acts or omissions in connection with such care or services." (Arbitration Agreement, p. 1, Section I.A.1.) The parties further agreed to arbitrate claims "for statutory, compensatory or *punitive damages*" (*id.* (emphasis added)), reflecting that the Arbitration Agreement is intended to cover even claims involving misconduct that is "willful, wanton, or in reckless disregard of the plaintiff's rights." *Mellen v. Lane*, 659 S.E.2d 236, 377 S.C. 261 (Ct. App. 2008) ("Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights."). Clearly, then, the Arbitration Agreement covers Plaintiff's claims of negligence, including those that could be considered "outrageous."[9] Nothing in the Arbitration Agreement limits its scope to foreseeable claims, and nothing in the Arbitration Agreement excludes claims alleging "outrageous" conduct from its scope.

[9] Notably, Plaintiff has not sued the former employee who allegedly assaulted Ms. Mayes, and the Plaintiff does not allege that Defendants are vicariously liable for his alleged assault. Rather, Plaintiff contends that the Defendants were negligent in the hiring, supervision, and retention of the former employee and in failing to prevent the alleged assault. These claims of negligence—as opposed to the alleged assault itself—are neither "outrageous" nor "unforeseeable."

Plaintiff's claims of negligence arising out of or relating to Ms. Mayes's residency at the Orangeburg nursing facility are clearly covered by the Arbitration Agreement. Plaintiff's claims of alleged negligence in this case all occurred while Ms. Mayes was a resident of the nursing facility, and the duties allegedly owed by the Orangeburg nursing facility to Ms. Mayes all stemmed directly from the relationship established by the Arbitration Agreement. All of Plaintiff's claims are cognizable, if at all, strictly because of the resident/facility relationship between Ms. Mayes and the Orangeburg nursing facility. Accordingly, there is a clear nexus between Plaintiff's claims and the Arbitration Agreement. Moreover, to the extent there is any doubt that the broad arbitration provision covers Plaintiff's claims (which there is not), the claims are still subject to arbitration because it is impossible to "say with positive assurance that the arbitration clause is not susceptible of an interpretation that [Plaintiff's negligence claims] are covered by the clause." *Landers*, 739 S.E. 2d at 215. Indeed, the trial court did not find to the contrary but instead grounded its decision solely on the unforeseeable and outrageous nature of the claims asserted. (Feb. 12, 2013 Order at 9.)

D. The trial court erred in refusing to enforce the Arbitration Agreement "in accordance with the terms of the agreement."

Rather than construe the Arbitration Agreement and enforce it in accordance with its plain terms, the court asked: "Is the dispute between the parties one that is arbitrable or does it fall under the outrageous conduct exception?" (Feb. 12, 2013 Order at 5.) Applying this framework, the court determined that "[u]nder the specific facts of this case, the hiring, supervision and retention of an employee who had an extensive criminal history prior to his employment, and who committed a sexual assault on a vulnerable adult, would fall into the outrageous conduct exception enunciated by our Supreme Court

in *Aiken v. World Finance Corporation of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007)." (Feb. 12, 2013 Order at 6.) In reaching this conclusion, the trial court apparently treated as fact the mere allegations of Plaintiff's Complaint and ignored the specific allegations in Defendants' Answers that UPAC-Orangeburg "conducted a criminal background check of Mr. Williams on February 2, 2010 [pre-hire], in accordance with applicable state and federal law, and the criminal check returned no criminal record." (Answers ¶¶ 9-11.)[10] Based on this "outrageous conduct exception," the court refused to enforce the Arbitration Agreement in accordance with its plain terms. Moreover, the court prejudged the facts of the dispute based solely on the allegations of the Complaint, thereby improperly assuming the fact finding role that was reserved to the arbitrator pursuant to the Arbitration Agreement.

The trial court's approach suffers from a number of infirmities. First, it ignores the obligation to "ensure that private arbitration agreements are enforced ***according to their terms***." *Concepcion*, 131 S. Ct. at 1748 (citations and punctuation omitted) (emphasis added). Second, a determination that certain alleged claims are "unforeseeable" and "outrageous" and therefore inappropriate for arbitration (notwithstanding that they clearly fall within the scope of the arbitration agreement) is the equivalent of a public policy exception to arbitration of certain types of claims forbidden by the FAA. *Marmet Health Care Ctr., Inc.*, 132 S. Ct. 1201 (2012). Third, a determination that "outrageous conduct" exists to exempt the claim from arbitration necessarily relies on an assumption that the allegations in the Complaint are meritorious

[10] To the extent that the court considered the former employee's alleged assault itself as the "outrageous conduct," this was improper because the former employee is not a party to this lawsuit, and Plaintiff does not (and cannot) allege that Defendants are vicariously liable for his alleged assault.

(and that the denials and assertions in the Answers are not), in contravention of the instruction "not to rule on the potential merits of the underlying claims" in determining if a claim is arbitrable. *Landers*, 739 S.E.2d at 213.

1. The trial court erred by applying a public policy exception to the enforcement of the Arbitration Agreement and thereby failing to "ensure that [the Arbitration Agreement was] enforced according to [its] terms" as required by *Concepcion*.

As discussed above, the Plaintiff's claims clearly fall within the broad scope of the Arbitration Agreement. By refusing to enforce the Arbitration Agreement as written, the court violated the mandate of Section 4 of the FAA that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court* ***shall*** *make an order directing the parties to proceed to arbitration* ***in accordance with the terms of the agreement.***" 9 U.S.C. § 4 (emphasis added).

The refusal to enforce the Arbitration Agreement that encompasses the parties' dispute based on a determination that the claims are "unforeseeable" and "outrageous" is the functional equivalent of imposing a public policy exception to the FAA. Application of public policy exceptions to enforcement of arbitration agreements has been flatly rejected by the courts. In *Marmet*, the United States Supreme Court rejected West Virginia's judicially-created public policy rule against the enforcement of arbitration agreements in nursing home admission contracts. *Marmet*, 132 S. Ct. at 1204; *see also Concepcion*, 131 S.Ct. at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). In the most recent South Carolina case to address the issue, the Supreme Court flatly "reject[ed] the trial court's alternative ruling that the claims are not subject to arbitration because they were not foreseeable." *Landers*, 739 S.E.2d at 217.

The trial court determined that its use of an "exception" to the enforcement of the Arbitration Agreement was not contrary to *Marmet* because "[t]he *Aiken* case complies with the Supreme Court's mandate not to create categorical rules prohibiting arbitration." (Feb. 12, 2013 Order at 9.) As discussed below, this case is factually distinguishable from *Aiken*. Pretermitting whether *Aiken* itself would run afoul of *Marmet* on its facts, the trial court's application of *Aiken* in this case runs afoul of *Marmet* because the dispute in this case is within the scope of the Arbitration Agreement, and the court has created an "exception" to avoid enforcing the agreement. *Marmet* held that the FAA prohibits not only a refusal to enforce arbitration agreements generally but also a more narrow refusal to enforce arbitration agreements based on a belief that a particular category of claims – in that case personal injury and wrongful death claims against nursing homes – is not appropriate for arbitration. *Marmet*, 132 S. Ct. 1201. That the trial court relied on an "exception" for a different category of claims – in this case claims that the court determines on an *ad hoc* basis are "unforeseeable" or "outrageous" – does not change the analysis. It still involves a refusal to enforce an arbitration agreement as written based on a belief that the claims at issue are not appropriate for arbitration. It still violates the FAA's mandate to enforce arbitration agreements "in accordance with [their] terms." 9 U.S.C. § 4; *see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. at 218 ("By its terms, the act leaves ***no place for the exercise of discretion*** by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.") (emphasis added).

2. The trial court erred by assuming the merit of Plaintiff's claims in ruling that Defendants engaged in "outrageous conduct."

The court's reliance on "the specific facts of this case," which it describes as "the hiring, supervision and retention of an employee who had an extensive criminal history prior to his employment, and who committed a sexual assault on a vulnerable adult," presupposes the merits of the Plaintiff's allegations. Moreover, it ignores the Defendants' denial of those allegations and their specific assertion that UPAC-Orangeburg "conducted a criminal background check of Mr. Williams on February 2, 2010 [pre-hire], in accordance with applicable state and federal law, and the criminal check returned no criminal record." (Answers ¶¶ 9-11.) The determination that Defendants engaged in "outrageous conduct"[11] necessarily requires a weighing of the merits of the claims and defenses. "However, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *Landers*, 739 S.E.2d at 213. Accordingly, the "outrageous conduct" exception violates this rule by permitting the trial court to decide the potential merits of the underlying claim to determine if "outrageous conduct" has occurred. *See, e.g., UFCW, Local 23 v. Mountaineer Park, Inc.*, 408 Fed. Appx. 709, 712 (4th Cir. Jan. 26, 2011) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether 'arguable' or not, indeed even if it appears to the court to be frivolous, the dispute at issue is to be decided, not by the court asked to order arbitration, but as the parties have agreed,

[11] Notably, Plaintiff has not alleged any intentional torts but relies solely on negligence. Plaintiff has not sued the employee whose conduct is at issue, and Plaintiff has not alleged that Defendants are vicariously liable for his alleged acts.

by the arbitrator. The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.") (citing *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648-650 (1986)) (internal quotations and citations omitted).

3. This case is factually distinguishable from *Aiken*.

The trial court relied heavily on *Aiken* to determine that Plaintiff's claims were unforeseeable when the parties executed the Arbitration Agreement and therefore fell outside the scope of the broad arbitration provision. This case is factually distinguishable from *Aiken*. In *Aiken*, the arbitration agreements were contained within loan agreements. *Aiken*, 373 S.C. at 146-47. Two years after the plaintiff paid off his last loan, several of the bank's employees conspired to use plaintiff's personal information to obtain sham loans and embezzle proceeds for the employees' personal benefit. *Id.* at 147. The order denying the bank's motion to compel was upheld because the claims regarding identity theft were completely unrelated to the loan contracts. *Id.* at 151.

The Arbitration Agreement in this case specifically provides that any and all claims of negligence are subject to arbitration. Unlike the *Aiken* case, the alleged negligence in this case occurred while Ms. Mayes was a resident of the nursing facility, and the duties allegedly owed to her stemmed directly from the parties' continuing relationship. In *Aiken*, the Court noted that, "[it did] not seek to exclude all intentional torts from the scope of arbitration." *Id.* at 152. Instead, "[the Court] only [sought] to distinguish those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties." *Id.* The case upon which the South Carolina Supreme Court relied for this principle,

McMahon v. RMS Electronics, Inc., 618 F. Supp. 189, 191 (S.D.N.Y. 1985), clarified that, "[w]hen a tort claim is based in substantial part on the contractual rights and responsibilities of the two parties, then it must be arbitrated as required by an arbitration clause." *McMahon*, 618 F. Supp. at 191 (citing *Altshul Stern & Co., Inc. v. Mitsui Bussan Kaisha, Ltd.*, 385 F.2d 158, 159 (2d Cir. 1967)). *Aiken* does not have any applicability to the present case where the Plaintiff's claims are closely related to the transaction in which the Arbitration Agreement is contained and clearly fall within the scope of the Arbitration Agreement. This case is more akin to *Landers*. Accordingly, Plaintiff is bound by the Arbitration Agreement because the claims asserted in the Complaint are within the scope of the Arbitration Agreement.

CONCLUSION

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

Respectfully submitted,

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August 7, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court Of Common Pleas
Diane S. Goodstein, Circuit Court Judge

Case No. 2011-CP-38-1513
South Carolina Court of Appeals No. 2013-000689

BERTHA TYLER, as Guardian of
HENRIETTA MAYES, Respondent,

v.

UNIHEALTH POST-ACUTE CARE - ORANGEBURG,
LLC, and CATHERINE PAVLICK, Appellants.

CERTIFICATE OF SERVICE

I do hereby certify that I served all counsel in this action with a copy of the Initial Brief of Appellants by mailing a copy of the same to counsel United States Mail, postage prepaid, at the following address(es):

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DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

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

1. Order Denying Defendants' Motion to Compel Arbitration Dated February 12, 2013
2. Transcript from Hearing on September 6, 2012 (Motion to Compel Arbitration)
3. Complaint
4. Answer of Unihealth Post-Acute Care – Orangeburg, LLC
5. Answer of Crystal Pavlick
6. Defendants' Memorandum in Support of Motion to Compel Arbitration and supporting exhibits
7. Plaintiff's Memorandum in Opposition to Defendants' Motion to Compel Arbitration
8. Defendants' October 5, 2012 Letter to Judge Diane S. Goodstein, Circuit Court Judge and attached exhibits
9. Defendants' October 8, 2012 Notice of Filing
10. Plaintiff's October 18, 2012 Letter to Judge Diane S. Goodstein, Circuit Court Judge and attached exhibits
11. Defendants' October 25, 2012 Letter to Judge Diane S. Goodstein, Circuit Court Judge and attached exhibits
12. Defendants' Proposed Order on Defendants' Motion to Compel Arbitration

13. Plaintiff's Proposed Order on Defendants' Motion to Compel Arbitration
14. Arbitration Agreement
15. Affidavit of Brenda Parris
16. Notice of Appeal

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

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CERTIFICATE OF SERVICE

I do hereby certify that I served all counsel in this action with a copy of the Designation of Matter to be Included in the Record on Appeal by mailing a copy of the same to counsel United States Mail, postage prepaid, at the following address(es):

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