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.

REPLY BRIEF OF APPELLANTS

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

A. The Arbitration Agreement does not require that the AAA administer the arbitration, but only that AAA rules be followed in selecting an arbitrator and in the conducting proceeding.

Curiously, the Respondent insists this Court enforce the strict terms of the Arbitration Agreement and states that such enforcement causes the Agreement to fail. In fact, such enforcement of the *strict* terms of the Agreement requires this Court to enforce the Agreement. The Respondent states that the contract is unambiguous. The Appellants absolutely agree.

Indeed, this Agreement is not deficient in any way. The whole dispute in this case involves one clause and one South Carolina Supreme Court case. The clause at issue states:

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

(Arbitration Agreement at 1) (emphasis added). The singular case at issue is Grant v. Magnolia Manor-Greenwood, Inc., et al, 383 S.C. 125, 678 S.E.2d 435 (2009), which stands for the proposition that where an exclusive arbitral forum is selected in the Agreement to administer the arbitration and that forum will no longer administer the arbitration, a material term of the agreement fails, which causes the entire agreement to fail.[1] Here, the trial court erroneously

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

concluded that the AAA was "unavailable." (Nov. 19, 2012 Order at 3). In point of fact, the Arbitration Agreement does not require administration by the AAA, but rather that AAA rules be followed in (1) selecting a neutral arbitrator; and (2) conducting the proceeding. Although the Respondent boldly states the parties specifically "named an arbitral forum and a set of rules," Respond. Brief, p. 16 (emphasis added), the conjunctive "and" is simply not accurate. The parties only named a set of rules. The distinction is critical and is why the Respondent's argument fails, as the administration of the arbitration by the AAA was not integral to the Arbitration Agreement. Therefore, the Agreement does not fail.

B. **Even if the Court accepts Respondent's argument that the Agreement requires the AAA administer the arbitration, the AAA would be available to accept this dispute and, thus, the Agreement should be enforced.**

The Respondent argued that the AAA has refused to accept cases for arbitration involving individual patients in a healthcare facility unless there was a post-dispute agreement to arbitrate. This statement is simply not accurate based on the Respondent's own evidence submitted in this case. It is true that is one circumstance in which the AAA will accept this type of dispute; however, the AAA will also accept this type of dispute if the Court compels the case be sent to Arbitration. See Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss and Compel Arbitration, Exhibit D, (AAA official stating "In any circumstance we would comply with a court order directing that a matter be arbitrated through the AAA"). That the AAA will still administer this Arbitration means the term absolutely does not fail, even if the Court were to agree with the Respondent's argument that the Rules require administration by the AAA.

Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. See Towles v. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (1999) (citations omitted). Thus, if this Court has any doubts about the distinction outlined above, case law still requires that the doubt be resolved in favor of arbitration.

Furthermore, the Court knew it could compel this arbitration and the AAA was different from the NHLA in the Grant case. See Transcript at 6-7 ("Mr. Whitley: 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 the [AAA] should administer, it says find a close arbitrator – The Court: By the rules and regulations that [AAA] does, I recognize that"). Thus, the Court recognized that the AAA did not have to administer this arbitration.

At bottom, the motivation for the Court was that it did not want to compel arbitration in a wrongful death case. (See Hearing Tr. at 6) (Stating "95 percent of the time I send it to arbitration but I'm not going to send this one, but I'm not doing it on interstate commerce, I think you've got a good argument on that . . . And the reason being wrongful death actions are not something that's arbitrated, one, two, [AAA] doesn't take them")). This is simply contrary to the Supreme Court's recent admonition to the United States Supreme Court of West Virginia. *See* Marmet Health Care Center, Inc., et al., v. Clayton Brown, et al., 565 U.S. ___ (2012) (holding from the outset that "State and federal courts must enforce the Federal Arbitration Act"). In this decision, the Supreme Court held that arbitration agreements for a resident's claim of personal

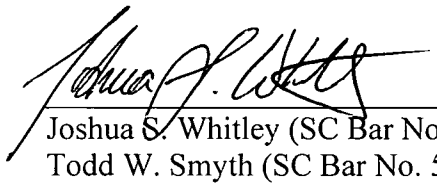
injury are enforceable and wholly preempt a state's public policy to the contrary. Id. at 3-4. The Court held that West Virginia's judicial policy of refusing to enforce arbitration agreements made between residents and the facility where they resided was both "incorrect" and "inconsistent with clear instruction in the precedents of this Court." Id. at 3. In making its ruling that the FAA preempts West Virginia's policy, the Supreme Court added, "[t]he [the FAA's] text includes no exception for personal-injury or wrongful-death claims. It requires courts to enforce the bargain of the parties to arbitrate." Id. (emphasis added) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985)). The Circuit Court's ruling (and the motivation for his ruling) is exactly contrary to the Supreme Court's ruling of last year involving a long-term care facility dispute and whether it should be subject to arbitration. Marmet could not be more compelling or applicable. Accordingly, the Circuit Court must be reversed and this case should be dismissed and arbitration compelled.[2]

Conclusion

For the foregoing reasons, 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.

[2] As argued in the opening brief, At bottom, Section 4 of the Federal Arbitration Act, codified at 9 U.S.C. § 4 requires that this matter be submitted to arbitration. The FAA also contemplates the possibility that a designated arbitrator might not be available. So even if the Court did believe the AAA would be required to administer this arbitration, Section 5 of the FAA allows the court to designate and appoint an arbitrator as if they were named within the Agreement itself. See 9 U.S.C. § 5. Thus, there are no deficiencies in this Agreement.

Respectfully submitted,



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August 16, 2013

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PROOF OF SERVICE

I certify that I am a legal assistant at Smyth Whitley, LLC and on August 16, 2013, I placed a copy of Reply Brief of Appellants 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, Kenneth G. Goode, P.O. Box 1175, Winnsboro, SC 29180 and Gerald Jowers, Jr., 500 Taylor Street, Suite 301, Columbia, SC 29202.

Mallory Guibault
Mallory L. Guibault

SMYTH WHITLEY, LLC
ATTORNEYS AT LAW

August 16, 2013

VIA UNITED STATES MAIL

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

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

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of the Reply Brief of Appellants and Proof of Service related to the above-referenced matter. Please file the original and return a filed copy to me in the enclosed envelope.

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

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

With warm personal regards, I remain,

Very truly yours,

Joshua S. Whitley

JWS/mlg

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