THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No.: 2013-000689
Case No.: 2011-CP-38-1513

Bertha Tyler, as Guardian of Henrietta Mayes, ... Respondent,

v.

Uni-Health Post-Acute Care–Orangeburg,
LLC and Catherine Pavlick, ... Appellants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On December 14, 2011, Bertha Tyler (Plaintiff/Respondent) filed a lawsuit on behalf of her sister Henrietta Mayes alleging that Uni-Health and the Uni-Health administrator, Pavlick (Defendants/Appellants) were negligent in their hiring, supervision and retention of Ralph Williams, a certified nursing assistant at the Uni-Health Orangeburg facility. (Complaint.) Defendants timely answered the Complaint.(Answer.) On March 14, 2012, Defendants moved to compel arbitration. (Motion to Compel Arbitration.) Plaintiff filed a response. (Plaintiff's Response to Motion to Compel Arbitration.) The Court held a hearing on September 6, 2012 (Transcript of September 6, 2012 Hearing.) On February 12, 2013, the Court entered an Order denying the Defendants' motion to compel arbitration. (February 12, 2013 Order.) On March 28, 2013, Defendants filed a Notice of Appeal (Notice of Appeal.)

STATEMENT OF THE FACTS

Henrietta Mayes had a history of severe strokes. Following these strokes, Ms. Mayes was bed bound and unable to communicate. Ralph Williams was hired in January of 2010 as a certified nursing assistant (CNA) at the Uni-Health nursing home facility in Orangeburg, South Carolina. Prior to his employment with Uni-health, Mr. Williams had a criminal history in South Carolina, which included possession of crack cocaine, shoplifting and disorderly conduct. (South Carolina criminal history) Prior to his employment with Uni-Health, Mr. Williams was charged in Missouri with Third Degree Assault and repeated violations of the Adult Abuse Act, and had an indication in his criminal file that he was a suspect in an armed burglary involving the shooting of a victim.(Missouri criminal file.) Despite this criminal history, Mr. Williams was hired to work in the Uni-Health facility with frail and vulnerable adults like Henrietta Mayes.

In May of 2010, Ms. Mayes was admitted to the Uni-Health facility in Orangeburg. (Complaint.) She needed total assistance in all areas of her daily living. She was bed bound and unable to communicate following several severe strokes. (Complaint.) Ms. Tyler signed the admission paperwork which contained an arbitration provision. It is undisputed that Ms. Tyler did not have a power of attorney to sign on her sister's behalf. Further, it is undisputed that at the time of Ms. Mayes' admission Ms. Tyler was neither the guardian or conservator for her sister.

On June 21, 2010, Mr. Williams was working as a CNA at the Uni-Health facility. That evening, a nurse was looking for Mr. Williams. After searching for Williams on the "back hall," the nurse walked into Ms. Mayes room and found Ralph Williams (while still

on the time clock) with his pants down, his body on top of Ms. Mays and her vagina exposed. Rather than calling for help and demanding that he stop sexually abusing Ms. Mayes, the nurse left the room and allowed the sexual assault to continue. Upon information and belief, the police were later called and Mr. Williams was arrested on the nursing home premises. He was charged with Criminal Sexual Conduct 3rd Degree and Assault of a Vulnerable Adult. (Arrest warrant dated 6/22/10.)

STANDARD OF REVIEW

Determinations of arbitrability are subject to *de novo* review. *Stokes v. Metropolitan Life Ins.* Co., 351 S.C. 606, 571 S.E.2d 711 (2002). Unless the parties provide otherwise, the question or arbitrability is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Furthermore, the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them. *Liberty Builders, Inc., v. Horton*, 336 S.C. 658, 664-665, 521 S.E.2d 749, 753 (Ct. App. 1999).

ARGUMENTS

I. The Dispute Between the Parties is Not One That is Arbitrable Because it Falls Under the Outrageous Conduct Exception.

The Arbitration Agreement at issue in this case 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. (Emphasis in original.)

The Defendants argue that since the arbitration agreement at issue here calls for "any dispute" to be resolved through arbitration, that the Plaintiff's claims for negligence, negligent hiring, negligent supervision and negligent retention must also be resolved through binding arbitration. Under 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). Defendants argue that this conduct (the hiring of a criminal who would later sexually assault Ms. Mayes) should have been reasonably expected by the parties. This conduct clearly falls into the outrageous conduct exception.

A. This Case is in Line with the Supreme Court's Opinion in *Aiken v. World Finance Corporation of South Carolina*

The South Carolina Supreme Court enunciated an exception to arbitration agreements. If conduct is unforeseeable to the parties and outrageous in nature, then the dispute is not arbitrable. In *Aiken*, as in the case at bar, the Plaintiff sued a finance company for the acts of its employees. The Plaintiff alleged causes of action for outrage, emotional distress, negligence, negligent hiring and negligent supervision as well as unfair trade practices, arising from the finance company's former employees' misuse of the plaintiff's

personal information and embezzled money. In that case, Aiken obtained a series of consumer loans from World Finance beginning in 1997 and continuing through late 1999. He paid off his last loan in 2000. With each loan, Aiken entered into an arbitration agreement with World Finance. Each arbitration agreement provided that:

> ***ALL DISPUTES***, CONTROVERSIES OR CLAIMS OF ANY KIND AND NATURE BETWEEN LENDER AND BORROWER ARISING OUT OF OR IN CONNECTION WITH THE LOAN AGREEMENT, OR ARISING OUT OF ANY TRANSACTION OR RELATIONSHIP BETWEEN LENDER AND BORROWER OR ARISING OUT OF ANY PRIOR OR FUTURE DEALINGS BETWEEN LENDER AND BORROWER SHALL BE SUBMITTED TO ARBITRATION....."(emphasis added).

Aiken then sued World Finance, the employer of the former embezzling employees. The Court stated:

> Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings....in this case, we find the theft of Aiken's personal information by World Finance employees to be outrageous conduct that Aiken could not possibly have foreseen when he agreed to do business with World Finance. Consequently, in signing the agreement to arbitrate, Aiken could not possibly have been agreeing to provide an alternate forum for settling claims arising from this wholly unexpected tortious conduct. Accordingly, we hold that Aiken's claims for unanticipated and unforeseeable tortious conduct by World Finance's employees are not within the scope of the arbitration agreement with World Finance.

Appellants argue that Ms. Mayes claims still fall into the arbitration agreement because the arbitration at issue here provides that *all disputes* shall be arbitrated. In Aiken, as noted above, the arbitration provision also provided that *all disputes* shall be arbitrated. The Supreme Court held that even the "*all disputes*" language would not save unforseen tortious conduct from being arbitrated. Interestingly, the plaintiff in Aiken alleged the same

causes of action in that case (negligent hiring and negligent supervision) that are alleged in the case before this Court.

However, the Appellants instead argue that this case is more in line with the South Carolina Supreme Court case of *Landers v. Federal Deposit Ins., Corp.*, 402 S.C. 100, 739 S.E.2d 209 (2013). The *Landers* case involved an arbitration clause within an employment contract. In that case, the Plaintiff sued his former employer because the actions of his superior, he alleged, made it difficult to do his job. In that case, the Court held:

> [I]n light of the breadth of the Agreement and the particular manner in which Landers has pled his underlying factual allegations, we find Landers' tort claims significantly relate to the Agreement. The perceived inability to perform one's *job* certainly relates to an *employment* contract.

(Emphasis in original.) That is clearly not the issue here. Even assuming the arbitration agreement is valid, the arbitration agreement here would address with the medical care that Ms. Mayes received at the facility. Mayes/Tyler could not possibly have been agreeing to provide an alternate forum for negligent hiring and supervision that resulted in a sexual assault. This conduct, under any interpretation, was unanticipated and unforeseeable.

B. *Aiken* does not violate the holding in *Marmet Health Care Center, Inc. v. Brown, et al.*

The Appellants further argue that the recent United States Supreme Court case of *Marmet Health Care Center, Inc., v. Brown, et al* 565 U.S. ___ (2012) weakens the holding in *Aiken*. In *Marmet*, the Supreme Court addressed the issue of arbitration in three nursing home neglect cases. In each of those cases, a family member of a patient who had died sued the nursing home in state court alleging that negligence caused injuries or harm resulting in death. The Supreme Court of Appeals of West Virginia held that "as a matter of public

policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence." The US Supreme Court overruled the West Virginia Court with the following language:

> As this Court reaffirmed last Term, "[W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is displaced by the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, ___ (2011) (slip op., at 6-7). 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.

The Defendants argue that the Supreme Court's ruling in *Aiken* runs afoul of the U.S. Supreme Court's prohibition against categorical rules. The South Carolina Supreme Court addressed this very issue in *Aiken*. The Court said:

> In establishing the line for claims subject to arbitration, this Court does not seek to exclude all intentional torts from the scope of arbitration. For instance, the parties in the instant case stipulate that a tort claim which essentially alleges a breach of the underling contract (e.g., breach of fiduciary duty, misappropriation of trade secrets) would be within the contemplation of the parties in agreeing to arbitrate. We only seek 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. *See, McMahon v. RMS Electronics, Inc.*, 618 F.Supp. 189, 191 (S.D.N.Y. 1985).
>
> Our decision today does not ignore the state and federal policies favoring arbitration as a less formal and more efficient means for resolving disputes. *See, Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 386, 498 S.E.2d 898, 902 (Ct. App., 1998). This Court merely seeks, as a matter of public policy, to promote the procurement of arbitration in a commercially reasonable manner. To interpret an arbitration agreement to apply to actions completely outside the expectations of the parties would be inconsistent with this goal.

The *Aiken* case complies with the Supreme Court's mandate not to create categorical rules prohibiting arbitration. The facts at issue in this case could not have been foreseen by the parties. Therefore, like in *Aiken*, the alleged acts here are so outrageous as to fall outside of the scope of the arbitration agreement.

II. The Agreement does not involve interstate commerce, therefore the FAA does not apply.

A. The Arbitration Agreement at Issue Does Not Involve Interstate Commerce.

The Federal Arbitration Act ("FAA") provides that a written provision in any contract involving interstate commerce that requires disputes be resolved by arbitration shall be "valid, irrevocable and enforceable, save upon such grounds as exist at law or in acquity for the revocation of any contract." *See*, 9 U.S.C. section 2 (1988). If interstate commerce is affected, the FAA will preempt state laws that would otherwise render the arbitration agreement unenforceable. *Id.*

As the Supreme Court of the United States recently stated, "We have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'- words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause Power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). The Court added, "[T]o be sure, the power to regulate commerce, though broad indeed, has its limits." *Citizens Bank,* at 58. The United States Supreme Court looked at the particular economic transactions as well as the nature of the legal practice at issue in finding those activities involved commerce or "affected" commerce.

In this case, the arbitration agreement is between Uni-Health PAC Orangeburg, LLC, South Carolina limited liability corporation[1], and Henrietta Mayes and Bertha Tyler, South Carolina residents. Mr. Williams was a South Carolina resident. All of the actions between the parties took place in South Carolina. It appears the hiring was done in South Carolina; the training was done in South Carolina; the supervision was done in South Carolina; the retention was done in South Carolina; and the assault was in South Carolina. In none of the affidavits supplied by Appellants did they argue that any of these transactions between the parties forming the basis of the dispute occurred outside of South Carolina. The arbitration provision and the agreement of the parties is not a transaction involving interstate commerce. Unlike the commercial lending and debt-refinancing transactions in *Citizens Bank*, providing managed care in a nursing facility is not the kind of activity that Congress intended to regulate across state lines. Although Appellants outline various activities that may involve people from outside of South Carolina, and its involvement in the State's Medicaid program, there is simply nothing about the purported agreement in this case that affects interstate commerce. *See, also, Flexon v. PHC-Jasper, Inc.*, ___S.C.___, 731 S.E.2d 1, 4 (Ct. App. 2012). (Noting that under the facts surrounding the agreement, Flexon was a South Carolina resident, and Coastal hired him to provide medical services "at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina...and such other practice

[1] The Circuit Court found that the Defendants did not produce any evidence as to the identity and citizenship of the individual members of the LLC. Defendants, following the hearing, later attempted to produce additional documents that they allege show that one member of the LLC was from Georgia. However, that evidence was untimely and not before the Court. Therefore, the only evidence before this Court is that Uni-Health PAC Orangeburg, LLC is a South Carolina limited liability corporation.

sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time...", the Court held the agreement and the surrounding facts in that case did not implicate interstate commerce.)

This issue was addressed by the South Carolina Supreme Court in a nursing home context in the case of *Timms v. Green*, 310 S.C. 469, 427 S.E.2d 642 (1993). The *Timms* 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 Timms 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 *Timms* 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 Timms and the Defendant, the Supreme Court refused to require arbitration because Timms' 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. Here, the Appellants attempt to create interstate commerce by filing an affidavit from Brenda Parris, the administrator for UPAC-Orangeburg. She states in her affidavit that, (1) the care and services provided by UPAC-Orangeburg to Ms. Mayes would not have been possible were it not for supplies, materials and services provided by entities located outside the state of South Carolina; (2) UPAC-Orangeburg routinely provides nursing services to residents from other states, mostly the Southeast; (3) Uni-Health participates in and receives reimbursements under the Medicare and Medicaid programs; (4) accepts insurance payments from out-of-state insurance companies; and, (5) that Ms. Mayes received Medicaid benefits. These same factors were rejected under *Timms.* There, the Supreme Court of South Carolina found the affidavit failed to demonstrate interstate commerce sufficient to save the arbitration provision, a provision almost identical to the one at issue here.

B. *Timms v. Greene* is still good law

The Appellants contend that *Timms v. Greene* is no longer good law in light of *Citizens Bank.* However, *Timms* remains good law. It has been cited with approval in a number of cases since 2003, the year the Supreme Court of the United States filed *Citizens Bank. See, e.g., McElveen v. Mike Reichenbach Ford Lincoln, Inc.*, C/A No. 4:12-874-RBH-KDW (D.S.C. filed Aug. 12, 2012) (2012 WL 3964973)(citing *Timms* but distinguishing it); *Lucey v. Meyer,* 401 S.C. 122 736 S.E.2d 274 (Ct. App. 2012) (citing to *Timms* in ruling on whether the agreement in that case involved interstate commerce); *New Hope Missionary*

Baptist Church v. Paragon Builders, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008) (citing to *Timms* when making determination of whether agreement involved interstate commerce).

The Appellants' contention that interstate commerce is stipulated between the parties to the agreement is equally unavailing. Although the contract between the parties in this case contained an acknowledgment that Uni-Health was engaged in interstate commerce, the contract or transaction which is sought to be enforced must *itself* involve interstate commerce. *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 533 S.E.2d 110 (2001). 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). Saying something "evidences a transaction involving commerce" does not make it so. Assuming the validity of the Agreement, the Court must still analyze whether the agreement itself involves interstate commerce despite any labels the parties may give it.

III. Ms. Tyler Lacked Authority to Enter into an Arbitration Agreement[2].

A. Ms. Tyler Lacked both Actual and Apparent Authority to Enter into an Arbitration Agreement.

The Arbitration Agreement also fails for lack of standing. Ms. Tyler did not have actual authority to bind Ms. Mayes to the arbitration agreement. She did not have a power

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[2] SCAR Rule 220(c) Affirmance on Any Ground Appearing in Record provides: "the appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the record." Although the Trial Court did not address the authority or unconscionability issue in her Order, both issues were raised by the Respondent and the briefs appear in the record.

of attorney nor was she the guardian or conservator for Ms. Mayes. Not only did Ms. Tyler not have actual authority, there is no evidence that Ms. Tyler 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. Mayes knew Ms. Tyler 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. Tyler was Ms. Mayes' 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).

B. The AHCCA Does Not Give Appellant Authority to Sign the Arbitration Agreement.

The Defendants may argue that44 S.C. Code Ann. §66 (1976), the Adult Health Care Consent Act, gave Ms. Tyler the authority to sign the arbitration agreement on behalf of Ms. Mayes. The AHCCA is found in Sections 44-66-10, et seq., of the South Carolina Code. Section 44-66-30 governs "Persons who may make health care decisions for patient who is unable to consent; order of priority; exceptions," and provides:

> (A) Where a patient is unable to consent, decisions *concerning his health care* may be made by the following persons in the following order of priority:
>
> ***
>
> (6) an adult sibling, grandparent, or adult grandchild of the patient;

S.C. Code Ann. 44-66-30(A)(6) (2002) (emphasis added).

There is no question that Ms. Mayes was unable to consent and was incompetent. There is also no question that Ms. Tyler is Ms. Mayes' "adult sibling." However, the issue is whether signing a document that waives Mayes' right to access the court, including a right to a jury trial, falls within the ambit of "decisions *concerning* [her] health care." (Emphasis added.) As used in the AHCCA:

> (1) "Health care" means a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. It also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled, or sick persons; and *the placement in or removal from a facility that provides these forms of care.*

S.C. Code Ann. 44-66-20(1)(2002) (emphasis added).

While the AHCCA granted Ms. Tyler the authority to make "healthcare decisions" for Ms. Mayes, consent for medical treatment for someone who is unable to give her own

consent is not the same as binding an incompetent person to an arbitration agreement without the authority to do so. Entering a contract to waive the right to a jury trial is not a decision that involves healthcare, including whether to place a person in a facility or remove the person from the facility. The Act simply does not contemplate authorizing a person to bind an incapacitated person to an agreement that waives the incapacitated person's rights to due process under the law.

The Supreme Court of Kentucy recently addressed this issue. In *Ping v. Beverly* 2010-SC-000558-DG (2012), the Supreme Court of Kentucky refused to compel arbitration in a nursing home case. In that case, Ms. Ping's Mother, Ms. Duncan was admitted to the Beverly nursing home. Prior to her admission, Ms. Duncan had given her daughter a power of attorney. After reviewing the power of attorney, the Court found that the power of attorney did not give Ms. Ping actual authority to sign the arbitration agreement on behalf of her mother. The nursing home then argued that the power of attorney may not have given Ms. Ping actual authority, but it was reasonable for the nursing home to assume she had apparent authority to bind her mother. The Supreme Court of Kentucky held:

> Beverly maintains that the document containing Mrs. Duncan's power of attorney, which Ms. Ping showed to the admissions director, was couched in such broad and general terms that a reasonable third person would have believed that it authorized Ms. Ping to enter the Arbitration Agreement on her mother's behalf. As explained above, however, the power of attorney is reasonably understood as granting Ms. Ping authority to make only health care and property or finance-related decisions. Beverly could not, therefore, reasonably rely on the power of attorney as "apparently" granting more authority than on its face it does.....Beverly also contends that Ms. Ping held herself out as authorized to "sign the documents," and thus it could rely on her apparent authority to enter the Arbitration Agreement. This contention fails for at least a couple of reasons. First, it appears that Ms. Ping believed she was signing her mother's admission documents, which is how the

> admissions director presented them to her. Her willingness to sign, therefore, was not necessarily an assertion that she believed herself to have authority to execute an arbitration agreement collateral to the admission. More importantly, as noted above, apparent authority arises not from the purported agent's manifestations of authority, but rather from manifestations by the principal. The principal, here Mrs. Duncan, was incapacitated at the time of her admission and so could not have done anything to lead Beverly to believe that her daughter had more authority that the power of attorney said she had.

The Kentucky Court went on to hold "where the arbitration agreement is not a condition of admission to the nursing home, but is an optional, collateral agreement, courts have held that the authority to choose arbitration is not within the purview of a health-care agency, since in that circumstance agreeing to arbitrate is not a 'health care' decision." *(Id.* slip at p. 8.) The plain meaning of the AHCCA is that it permits persons enumerated by priority to make *health care* decisions for an incompetent person, that is decisions related to the person's treatment for a physical or mental ailment. That may include making the decision to place or remove the person from a managed care facility. To construe this Act to permit a surrogate to execute an agreement that operates as a waiver of the basic right of access to justice is forcing an expansive construction upon the Act that the legislature simply did not intend.

There is no question that Ms. Mayes lacked the capacity to contract. *See e.g., Gaddy v. Douglas,* 359 S.C. 329, 597 S.E.2d 12 (Ct. App. 2004) (contractual capacity is generally defined as a person's ability to understand in a meaningful way, at the time the contract is executed, the nature, scope and effect of the contract). Thus she could only be bound by any agreement, including the arbitration agreement, if the person executing the agreements had some actual or implied authority to do so. Ms. Tyler had no actual authority to sign *any*

contract, so the arbitration agreement is on the same footing with all other agreements in that regard.

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999). "Accordingly, a party may seek revocation of the contract under 'such grounds as exist at law or in equity,' including fraud, duress, and unconscionability." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). General contract principles of state law apply to arbitration clauses, even those governed by the FAA. *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011).

The AHCCA may have provided implied authority for Ms. Tyler to enter into agreements that permitted Ms. Mayes to obtain health care treatment, including an agreement to admit or discharge Ms. Mayes from the Defendants' facility. However, entering into an agreement to arbitrate all disputes is not the kind of agreement for health care treatment contemplated by the AHCCA. Ms. Tyler had no actual or implied authority to bind Ms. Mayes to the arbitration agreement, which is a ground available under state law to revoke the agreement to arbitrate. The FAA is not offended in this instance.

There is no evidence in this case that any employee of Uni-Health did anything to determine if Ms. Tyler had the express authority to bind Ms. Mayes. Ms. Mayes was incapacitated at the time of her admission. Therefore, Defendants could not have relied on any representations of Ms. Mayes, the purported principal, in entering into the Arbitration Agreement.

IV. The Arbitration Agreement is Procedurally and Substantively Unconscionable

The actual process of admitting a resident to a nursing home does not provide the kind of informative setting necessary for the resident to consider the pros and cons of arbitration. Arbitration agreements should be stand alone documents not buried in the middle of admission contracts.

In South Carolina, unconscionability is defined as the absence of a meaningful choice on the part of one party due to one sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Carolina Care Plan, Inc. v. United HealthCare Servs.*, 361 S.C. 544, 554, 606 S.E.2d 752,757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. *See,* South Carolina Code Ann Section 36-2-302(1)(2003).

In *Simpson v. MSA of Myrtle Beach Inc*, 644 S.E.2d 663 (SC 2007), the South Carolina Supreme Court held that the arbitration agreement was unconscionable and unenforceable because the arbitration agreement pertained to Simpson purchasing an automobile which was Simpson's primary transportation: "Under this approach, we first observe that the contract between Simpson and Addy involved a vehicle intended for use as Simpson's primary transportation, which is critically important in modern day society ... accordingly, we find that when considered as a whole and in context of an adhesion contract

for a vehicle trade in, the circumstances reveal that Simpson had no meaningful choice in agreeing to arbitrate claims with Addy."

In a nursing home contract, as in the one at issue before this court, we are faced with an even more indispensable service-healthcare for which Plaintiff's sister was required to sign an arbitration contract. If the Supreme Court considered a vehicle a critical component of modern day society, then the health care provided to a vulnerable adult at a nursing home facility would clearly be considered critically important. Since nursing home care is of such importance, the totality of the circumstances show that Plaintiffs had no meaningful choice when signing the arbitration agreement.

CONCLUSION

For the reasons stated, the Court should affirm the Circuit Court and remand this matter for trial by jury.

Respectfully submitted,

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September _____, 2013

Columbia, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
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Bertha Tyler, as Guardian of Henrietta Mayes, ... Respondent,

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Uni-Health Post-Acute Care–Orangeburg, LLC and Catherine Pavlick, ... Appellants.

PROOF OF SERVICE

I certify that on 23 September 2013, I served the Respondent's Initial Brief on Uni-Health Post-Acute Care–Orangeburg, LLC and Catherine Pavlick by depositing a true and correct copy of same in the United States Mail, postage prepaid, return address clearly printed on the envelope and addressed to their attorneys Tyler L. Arnold, Esquire and Jason E. Bring, Esquire, 171 17th Street NW, Suite 2100, Atlanta, GA 30363-1031.

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Attorneys for Respondent

September 23, 2013

Columbia, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No.: 2013-000689
Case No.: 2011-CP-38-1513

Bertha Tyler, as Guardian of Henrietta Mayes, ... Respondent,

v.

Uni-Health Post-Acute Care–Orangeburg, LLC and Catherine Pavlick, ... Appellants.

RESPONDENT'S DESIGNATION OF RECORD ON APPEAL

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RESPONDENT'S DESIGNATION OF MATTER
TO BE INCLUDED IN RECORD ON APPEAL

Respondent proposes the following be included in the Record on Appeal:

1. Complaint;

2. Answer;

3. Defendants motion and memo to compel arbitration;

4. Plaintiffs response to motion to compel arbitration;

5. Transcript of sept 6, 2012 hearing;

6. February 12, 2013 Order;

7. Notice of Appeal;

8. South Carolina criminal history;

9. Missouri criminal file;

10. Arrest warrant dated June 22, 2010.

[Signature appears on the following page.]

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that on 23 September 2013, I served the Designation of Matter to be Included in the Record on Appeal on Uni-Health Post-Acute Care–Orangeburg, LLC and Catherine Pavlick by depositing a true and correct copy of same in the United States Mail, postage prepaid, return address clearly printed on the envelope and addressed to their attorneys Tyler L. Arnold, Esquire and Jason E. Bring, Esquire, 171 17th Street NW, Suite 2100, Atlanta, GA 30363-1031.

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