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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.

APPELLANTS' MOTION TO WITHDRAW APPEAL AS MOOT

Pursuant to Appellate Court Rule 260(c), Appellants move to withdraw this appeal on the grounds that it is now moot. In a recent September 23, 2013 Order (the "Reconsideration Order"), the trial court granted the Appellants' Motion for Reconsideration and granted the Appellants' Motion to Compel Arbitration. A copy of the Reconsideration Order is attached as Exhibit A. By entering the Reconsideration Order, the trial court effectively vacated its prior order that is the subject of this appeal, thereby rendering this appeal moot.

By way of further background, on February 12, 2013, the trial court entered an order denying Appellants' Motion to Compel Arbitration (the "Initial Order"), which Appellants received on February 26, 2013. On March 11, 2013, the Appellants moved the trial court for reconsideration, and the trial Judge received her copy on March 27, 2013. Plaintiff / Respondent argued that the Motion for Reconsideration was untimely

under SCRCP 59(g) because the trial Judge did not receive her copy within ten days after the filing of the motion. In light of the Rule 59(g) argument, Appellants filed, out of an abundance of caution, an appeal of the Initial Order. (See Exhibit B, fn. 1, noting that "Appellants' Notice of Appeal is filed in an abundance of caution in order to preserve appellate rights of the Appellants should Judge Goodstein find the Motion for Reconsideration was untimely filed.")

During this appeal, the trial court reconsidered its Initial Order and issued its Reconsideration Order on September 23, 2013, finding among other things that Appellants' Motion for Reconsideration was in fact timely filed. Thus, the Reconsideration Order dispenses with all issues in this appeal, and this appeal should therefore be dismissed. See Hudson v. Hudson, 290 S.C. 215, 216, 349 S.E.2d 341, 342 (1986) (holding that when a timely post-trial motion is pending before the lower court, any notice of appeal will be dismissed without prejudice as premature); see also Elam v. S.C. Dep't of Transp., 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004).

For the reasons set forth herein, the Court of Appeals should dismiss this appeal without prejudice and remand the case to the trial court.

Respectfully submitted,

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September 30, 2013

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	FOR THE FIRST JUDICIAL CIRCUIT
	)	
Bertha Tyler, as Guardian of Henrietta Mayes,	)	C/A No.: 2011-CP-38-1513
	)	
Plaintiff,	)	
	)	**ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION**
v.	)	
	)	
Uni-Health Post-Acute Care – Orangeburg, LLC and Catherine Pavlick,	)	
	)	
Defendants.	)	

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendants Uni-Health Post-Acute Care – Orangeburg, LLC and Catherine Pavlick ("Defendants") seek reconsideration of the Court's decision denying their Motion to Compel Arbitration. The Court has reviewed the papers submitted by the parties and has considered the arguments of counsel presented therein. For the following reasons, the Court GRANTS the Defendants' Motion for Reconsideration.

I. BACKGROUND

The factual background of the present motion, as set forth in this Court's earlier Order Denying Defendant's Motion to Compel Arbitration, is as follows: 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. The Plaintiff has alleged that 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. The Plaintiff further alleged that 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. Despite this criminal history, Plaintiff alleges Mr. Williams was hired to work in the Uni-Health facility with frail and vulnerable adults like Henrietta Mayes. On June 21, 2010, Mr. Williams was working as a CNA at the Uni-Health facility. Plaintiff alleges that Mr. Williams was found sexually assaulting Ms. Mayes. Plaintiff's allegations in this case involve Defendants' negligence and gross negligence in the hiring, supervision, and retention of Ralph Williams.

On February 12, 2013, this Court issued its Order Denying Defendants' Motion to Compel Arbitration. Counsel for Defendants received noticed of the Court's Order on February 26, 2013 pursuant to a copy of Plaintiff's letter to the Orangeburg County Clerk of Court requesting entry of the Order. On March 8, 2013, Defendants served Plaintiff with their Motion for Reconsideration and subsequently filed the Motion with the Orangeburg County Clerk of Court on March 11, 2013. On March 27, 2013, the Court received its copy of the Motion that Defendants mailed.

II. TIMELINESS OF DEFENDANTS' MOTION TO RECONSIDER

As an initial matter, the Court will address Plaintiff's argument that Defendants' Motion is untimely and should not be considered. Rule 59(g), SCRCP, states: "A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion." Plaintiff argues that if Defendants did not serve the Court with a copy of their Motion within 10 days after filing as proscribed by Rule 59(g), then Defendants' Motion is untimely and should not be considered. (Plaintiff's Response to Defendants' Motion to Reconsider fn1). The Court disagrees.

Although the Court did not receive a copy of Defendants' Motion until March 27, 2013, more than 10 days after the filing date of March 11, 2013, the Court finds that it is appropriate to hear the matter, despite Defendants' failure to comply with Rule 59(g). The notes to Rule 59(g) state that the Rule is "intended to help insure that the judge is promptly notified that the motion has been filed," which indicates that the judge has some discretion in determining what constitutes prompt notice. *See Gallagher v. Evert,* 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002) (finding no error in the circuit court's decision to decide a motion for reconsideration despite the movant's failure to comply with Rule 59(g), SCRCP). Here, the Court finds that receiving notice within 16 days of the filing date was sufficiently prompt. Thus, the Court finds it proper to consider Defendants' Motion for Reconsideration.

III. LEGAL STANDARD

Rule 59(e), SCRCP governs motions to alter or amend a judgment. The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to "reconsider matters properly encompassed in a decision on the merits." '*Arnold v. State*, 309 S.C. 157, 171, 420 S.E.2d 834, 842 (1992) (*citing Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200 (1988) (internal citations omitted). The South Carolina Supreme Court explains that a party can file a Rule 59(e) motion "when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). The Court in *Elam* goes on to emphasize how "there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity." *Id.* at 22, 779.

IV. DISCUSSION

Defendants move this Court to reconsider two issues ruled upon in the Order Denying Defendant's Motion to Compel Arbitration. First, Defendants request that the Court reconsider its ruling that the Federal Arbitration Act does not apply because there is not sufficient evidence of the involvement of interstate commerce in this nursing home transaction. Secondly, Defendants ask the Court to conclude that the Plaintiff's claims in this action fall within the scope of the Parties' Arbitration Agreement. Based on the arguments of counsel and based upon the trend in several recent decisions handed down by the United States Supreme Court and the South Carolina Supreme Court, this Court finds that (1) there is sufficient evidence of interstate commerce and (2) Plaintiff's claims fall within the scope of the Parties' Arbitration Agreement.

A. Because the Nursing Home Transaction in This Case Involves Interstate Commerce, the Federal Arbitration Act Applies.

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. § 2 (1988). If interstate commerce is affected, the FAA will preempt state laws that would otherwise render the arbitration agreement unenforceable. *Id.* 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 Tire Fin. Corp.,* 343 S.C. 531 (2001) (*citing Allied-Bruce Terminix Co., Inc. v. Dobson,* 513 U.S. 265 (1995); *Soil Remediation Co. v. Nu-Way Envtl., Inc.,* 323 S.C. 454 (1996)). The South Carolina Court of Appeals has succinctly stated:

> 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); *see also Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52, 56, 123 S.Ct. 2037, 2040, 156 L.Ed.2d 46 (2003) ("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."); *Blanton v. Stathos,* 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct.App.2002) ("The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent."). "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,* 539 U.S. at 56, 123 S.Ct. at 2040 (internal quotation marks and citations omitted).
>
> *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003)

This Court based its decision as to whether the FAA should apply in this case on *Timms v. Greene*, 310 S.C. 469 (1993). In their brief in support of the Motion for Reconsideration, defense counsel aptly points out that *Timms* was decided before the United States Supreme Court issued the *Allied-Bruce* decision which clarified—and consequently broadened—the reach of the FAA in areas of interstate commerce. After reviewing the South Carolina Supreme Court's August 14, 2013 decision in *Cape Romain*, this Court is persuaded that it construed interstate commerce too narrowly when it determined that interstate commerce was absent in the nursing home contract.

In *Cape Romain*, the Supreme Court of South Carolina reversed the Circuit Court's decision denying a motion to compel arbitration. *Cape Romain Contractors, Inc. v. Wando E., LLC*, 2011-197207, 2013 WL 4082353 (S.C. Aug. 14, 2013). The Circuit Court concluded that the parties' transaction did not involve interstate commerce, and thus the FAA did not apply. *Id.* In reversing the Circuit Court's decision, the Supreme Court explained:

> In analyzing the interstate commerce question solely as whether the Contract on its face reflected a "substantial relation to interstate commerce" and in finding the

> FAA was not triggered, the trial court relied upon *Timms v. Greene* and *Mathews v. Fluor Corporation.* This was error, for the proper analysis involves consideration of all three broad categories of activity within the purview of Congress's commerce power—use of the channels of interstate commerce; regulation of persons, things or instrumentalities in interstate commerce; and regulation of activities having a substantial relation to interstate commerce. *United States v. Lopez,* 514 U.S. 549, 558–59, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). While the transaction's effect on interstate commerce was by no means insubstantial, the parties' transaction plainly falls within the purview of Congress's commerce power as it extensively involves both the channels and the instrumentalities of interstate commerce.
> *Id.*

Because the Supreme Court in *Cape Romain* overruled *Timms* when it held that the FAA can apply to an arbitration agreement even if the agreement, on its face, fails to demonstrate that the parties contemplated an interstate transaction, this Court is convinced that it interpreted interstate commerce too narrowly. Therefore, the Court now concludes that the nursing home transaction between the parties does involve interstate commerce.

Here, the Defendants provided sufficient evidence that interstate commerce is involved in this case such that the FAA applies. The parties in the present case acknowledged that their transaction involved interstate commerce. *See* Arbitration Agreement, p. 4, Part III, ¶ A. Additionally, the Defendant showed that Uni-Health Post-Acute Care – Orangeburg, LLC is an out-of-state entity because it is a citizen of Georgia. *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). Furthermore, as evidenced in the Affidavit of Brenda Parris, the operation of the nursing home facility would not be possible were it not for supplies, material and services provided by various entities outside of the state of South Carolina. Finally, the patient, Ms. Mayes, received Medicare payments on her behalf that were paid to the nursing home, and this source of federal funding directly implicates the involvement of interstate

commerce. In sum, this Court is satisfied that the following facts demonstrate that the parties' transaction involve both the channels and instrumentalities of interstate commerce.

B. Plaintiff's Claims Fall within the Scope of the Parties' Arbitration Agreement.

The Court initially concluded that the claims asserted in the Plaintiff's Complaint are not within the reasonable expectations of the Parties because the alleged negligence could not have been foreseen at the time the arbitration clause was signed. Based on recent decisions by the South Carolina Supreme Court and the Court of Appeals, this Court now concludes that the Plaintiff's claims for negligence and negligence in hiring, maintaining, and supervising an employee fall within the scope of the parties' arbitration agreement.

In *Landers v. FDIC*, decided on February 27, 2013, the South Carolina Supreme Court found that the Plaintiff's tort claims for slander and intentional infliction of emotional stress arising from his employment with the defendant were encompassed by an arbitration clause in his employment contract that required arbitration for "any controversy or claim arising out of or relating to this contract, or the breach thereof." *Landers v. FDIC*, 402 S.C. 100, 109-13 739 S.E.2d 209, 214–15 (2013). The Court highlighted how "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." *Id.* at 109, 214, emphasis added (*citing J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001)). Subsequent to the *Landers* decision, the South Carolina Court of Appeals has held in at least two decisions that arbitration should be compelled because the Plaintiff's claims fell within the scope of the parties' arbitration agreement. *See, e.g., Carlson v. S. Carolina State Plastering, LLC*, 404 S.C. 250, 262, 743

S.E.2d 868, 875 (Ct. App. 2013) (citing *Landers* and finding the arbitration clause in the purchase agreement was not intended to apply to claims arising in contract only and encompasses the Plaintiffs' tort claims as well); *York v. Dodgeland of Columbia, Inc.*, 2011-199006, 2013 WL 4734569 (S.C. Ct. App. Sept. 4, 2013) (citing *Landers* and finding that broad language included in an arbitration agreement such as "any claim or dispute ... that arises out of or relates to your credit application, this Contract or any resulting transaction or relationship, including those with third parties" affords the clause an expansive reach.)

Combining these recent cases in South Carolina jurisprudence along with the United States Supreme Court's decision in *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012), this Court finds that the Plaintiff's negligence claims fall within the scope of the arbitration agreement. In *Marmet Health Care Ctr., Inc. v. Brown*, the Supreme Court addressed the issue of arbitration in three nursing home neglect cases. *Id.* 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. *Id.* 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." *Id.* at 1203. The US Supreme Court overruled the West Virginia Court, explaining that the FAA does not include exceptions for personal-injury or wrongful-death claims and "requires courts to enforce the bargain of the parties to arbitrate." *Id.* (*quoting Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217, 105 S.Ct. 1238 (1985)). Furthermore, the FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution." *Id.* (*quoting KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25, (2011) (per curiam) (internal citations omitted).

Here, the parties' Arbitration Agreement contemplates the Plaintiff's negligence claims by covering:

> Any acts or omissions in connection with such care or services, ... , whether arising out of State or Federal law, ... , and whether sounding in ... tort, or breach of statutory or regulatory duties (including, without limitation, ... , any claim based on negligence, any claims for damages resulting from death or injury to any person arising out of care or service rendered by [the Orangeburg nursing facililty] ... , irrespective of the basis for the duty or of the legal theories upon which the claim is asserted, shall be submitted for Arbitration.
>
> Arbitration Agreement, p. 1, Section I., A. 1.

The plain language of the Parties' Arbitration Agreement contemplates and covers all of Plaintiff's claims because such claims arise out of Ms. Mayes's rights as a resident at the Orangeburg nursing facility, and they directly relate to the duties, responsibilities, and obligations allegedly owed to Ms. Mayes by the Defendants as a result of the contractual relationship between her and the Orangeburg facility. Based on the recent *Landers* decision holding that a broad arbitration clause, such as the one cited above in this case, applies to disputes in which a *significant relationship* exists between the asserted claims and the contract in which the arbitration clause is contained, the Court finds that there is a significant relationship between the Plaintiff's negligence claims and the nursing home contract. Thus, the Court finds that the Plaintiff is bound by the Arbitration Agreement as to the claims asserted in the Complaint because they fall within the scope of the Arbitration Agreement.

V. CONCLUSION

For the reasons set forth herein, the Court grants Defendants' Motion to Reconsider and grants the Motion to Compel Arbitration in this case.

AND IT IS SO ORDERED.

The Honorable Diane Schafer Goodstein
First Judicial Circuit

September 23, 2013

EXHIBIT B

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

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

v.

Unihealth Post-Acute Care – Orangeburg, LLC and Crystal Pavlick .....Appellants.

NOTICE OF APPEAL

Unihealth Post-Acute Care – Orangeburg, LLC and Crystal Pavlick appeal the Order Denying the Motion to Compel Arbitration of Honorable Diane S. Goodstein, dated February 12, 2013.[1] Appellants received written notice of entry of this Order on February 26, 2013.

March 27, 2013

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[1] Within 10 days of notice of entry of the Judge Goodstein's Order, Appellants filed a Rule 59 Motion for Reconsideration. However, Respondent contends that the Motion for Reconsideration was not timely filed. Accordingly, Appellants' Notice of Appeal is filed in an abundance of caution in order to preserve appellate rights of the Appellants should Judge Goodstein find the Motion for Consideration was untimely filed.

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CERTIFICATE OF SERVICE

This is to certify that I have served copies of **DEFENDANTS' NOTICE OF APPEAL** upon the person listed below by U.S. Mail, first class postage, on this 27th day of March 2013:

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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 APPELLANTS' MOTION TO WITHDRAW APPEAL AS MOOT by mailing a copy of the same to counsel United States Mail, postage prepaid, at the following address(es):

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