THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

Appellate Case No. 2013-001808

Samuel H. Pruett, as Personal Representative for the Estate of Yvonne Carrie Pruett,.....Respondent,

v.

Brookdale Senior Living, Inc., Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head, and Sonia S. King,.....Defendants,

Of whom Brookdale Senior Living, Inc. and Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head are the .....Appellants.

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3. Did the Circuit Court err in deciding a discovery issue in the arbitration agreement that should have been decided by the arbitrator?

STATEMENT OF THE CASE

Respondent filed the original action alleging Mrs. Yvonne Pruett, a resident of the Appellant's long-term care facility, suffered mistreatment at the hands of the facility staff. As part of her admission to the facility, Mrs. Pruett's husband and Personal Representative, Samuel H. Pruett signed a Residency Agreement and Arbitration Agreement on March 31, 2009. However, Respondent disregarded the Arbitration Agreement (hereinafter referred to as "agreement" or "Agreement") and, instead, filed a lawsuit in the Circuit Court of Beaufort County on April 12, 2011. [1]

Notwithstanding the dispute pertaining to the Arbitration provision of the Residency Agreement, on September 28, 2012, counsel for Respondent proposed and ultimately entered into a voluntary agreement with the Appellant to arbitrate any and all claims she had against the facility during the pendency of the appeal on the original Agreement. The attorneys for the respective parties negotiated the terms and a revised agreement was sent to counsel for the Appellants on October 5, 2012. (See, Letter of K. Jolley of 10/5/12). Counsel for Appellant accepted this proposal on October 8, 2012. (See, E-mail of M. Grier of 10/8/12). Thereafter, the parties, pursuant to their agreement, agreed on the arbitrator, exchanged discovery requests, answered discovery, disclosed experts and otherwise proceeded to prepare the case for the scheduled arbitration. Subsequently, however, the attorneys for Respondent have withdrawn from this agreement because of a discovery dispute that arose in a separate case and continue to refuse to participate in the very arbitration they initiated.

Based on the Respondent's withdrawal from the Arbitration Agreement, Appellants

[1] Appellants filed a Motion to Dismiss And Compel Arbitration based on the Agreement Respondent signed at the time of admission. That motion was denied by Hon. Carmen Mullen. However, Judge Mullen's Order is currently on appeal before the South Carolina Supreme Court.

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC ("Appellants") filed a Motion to Compel Arbitration with the agreed upon arbitrator, retired Circuit Court Judge Hon. Thomas W. Cooper. However, the arbitrator did not believe he had jurisdiction and refused to hear the Motion. Thereafter, the Appellants filed a Motion to Compel Arbitration with the Circuit Court. By Order of the Honorable Marvin H. Dukes, III dated June 17, 2013, the Court denied the Appellants' motion because he did not believe the parties had an agreement. (See, Order Denying Defendants' Motion to Compel Arbitration of 6/17/13, pg. 5). Thereafter, the Appellants, pursuant to Rule 59(e), S.C.R.Civ.P., filed a Motion to Reconsider this ruling, which the Hon. Marvin H. Dukes, III also denied by Order dated August 5, 2013. (See, Order Denying Defendants Motion to Reconsider of 8/5/13). The Appellants filed a Notice of Appeal on August 16, 2013, and now seek reversal of these Orders.

FACTS

This appeal concerns the Respondent's attempt to renege on the very arbitration agreement they proposed, drafted, and acted under for a month and a half. By way of a letter dated September 28, 2012, Respondent proposed that the parties voluntarily arbitrate their dispute and gave Appellant a deadline of noon October 4, 2012 to agree. (See, Letter of K. Jolley 9/28/12). When counsel for the Appellant expressed an interest in arbitration, Respondent's counsel then drafted the terms of the agreement. (See, Letter of K. Jolley on 10/5/12). Respondent's offer contained the following terms:

- Exchange discovery requests – October 20, 2012
- Designate expert witnesses and provide expert CV's – November 15, 2012
- Exchange discovery responses and documents – November 20, 2012
- Depose experts during December, 2012
- Exchange witnesses and exhibit lists – December 30, 2012
- Arbitrate the week of January 21, 2013.

Id.

In the same letter, Respondent further proposed that no depositions be taken or testimony given except experts, and that no objections to exchanged documents being admitted. Id. Finally, Respondent also proposed three potential arbitrators.

On October 8, 2012, after an exchange of emails, Appellants accepted the Respondent's offer to arbitrate, specifically stating "we will agree to those terms," and affixing an electronic signature to the email that accepted the Respondent's terms. (See, Email of M. Grier of October 8, 2012). The parties then asked retired Circuit Court Judge Thomas W. Cooper, Jr. to serve as the arbitrator, and the arbitration was scheduled for January 21-22, 2013. (See, Letter of 10/30/12 of Judge Cooper confirming his role as arbitrator). On October 12, 2012, counsel for the Respondent then sent a letter to counsel for the Appellant again confirming the agreement to arbitrate and that the terms and conditions had been agreed to stating "...we have scheduled arbitration with Thomas Cooper for January 21-22, 2013 at McNair Law Firm's Hilton Head office. *Please confirm you will attend in accordance with our previously agreed to terms and conditions.*" (See, Letter of K. Jolley of 10/12/12) (emphasis added).

It is uncontroverted that the terms offered by Respondent differ from the terms of the original Arbitration Agreement contained in the Appellants' Residency Agreement. (See, 3/31/09 Residency Agreement, at Section V). By way of example, the October 5th terms proposed by Respondent contain no limitation on the amount of damages recoverable at arbitration, whereas the original agreement places a limit of $250,000 on non-economic damages and does not allow for an award of punitive damages. (See, 3/31/09 Agreement at Section V. B (2)(a) and (d), at pg. 14). There are multiple other differences, but, suffice it to say, Appellants gave up several substantive and procedural rights they had under the original agreement as valuable

consideration in accepting the Respondent's terms. See, Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998)("Valuable consideration may consist of "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." see also Armstrong v. Collins, 366 S.C. 204, 222-223, 621 S.E.2d 368, 378 (Ct. App. 2005) ("A benefit to the promisor or a detriment to the promisee may provide sufficient consideration for a contract."). Of note, neither Respondent, nor the lower court in either of its Orders ever questioned the existence of valuable consideration in the agreement.

Per the agreement, both parties then immediately began to act in accordance with the terms of their arbitration agreement and did so without incident over the next month and a half. They served interrogatories and requests to produce on one another on October 22, 2012. In fact, in the cover letter serving its discovery requests, counsel for Respondent specifically stated that the discovery requests were being served "*in accordance with our agreed-upon arbitration schedule.*" (See, Letter of K. Jolley of 10/20/12) (emphasis added). Similarly, Respondent's own discovery requests again referred specifically to the agreed upon arbitration. (See, Respondent's Requests for Production Nos. 3, 5, 7, and 8). Both parties then answered written discovery on November 20, 2012. Again, Respondent specifically admitted in both its transmittal letter and in its discovery responses that it had an arbitration agreement with Appellants. (See, Plaintiff's Answer to Interrogatories Nos. 1, 5, 6, and 7 and Responses to Requests for Production No. 7). Also during this time, the arbitrator reviewed certain case materials, billed the parties for the time he spent working on the matter from October through December 2012, and issued an invoice reflecting the same. (See, Invoice of Thomas W. Cooper).

Concurrently with the arbitration discovery process in the Pruett arbitration, the parties

Appellants ("Scheerle"). The discovery dispute centered on the privilege Appellants asserted over internal investigation documents prepared in anticipation of litigation and Respondent's challenge to the claim of privilege. In Scheerle, the Appellants ultimately produced the requested discovery files on March 1, 2013.[2] However, by way of letter dated November 20, 2012, counsel for Respondent had already indicated they were withdrawing from the arbitration in this case because the documents in Scheerle were not produced in this arbitration. (See, 11/20/12 Letter of K. Jolley). Despite the subsequent production of the documents in question, Respondents have continued to refuse to honor the agreement to arbitrate. Importantly for purposes of this appeal, the letter of November 20, 2012 is the very first time Respondent ever attempted to frame its desire for discovery requests as a "condition precedent" to the arbitration agreement. There is no language in the actual agreement that would suggest that the production of these documents was something that had to occur before Respondent's duty to arbitrate would be triggered.

After Respondent withdrew, Appellant then sought the assistance of the arbitrator in resolving the discovery issue, but the Arbitrator felt he did not have jurisdiction to decide the issue. Thereafter, Appellant sought relief in the Circuit Court in the form of a Motion to Compel Arbitration. (See, Appellants' Motion to Compel Arbitration).

At the hearing on Defendants' Motion to Compel Arbitration, Respondent asserted she had the right to renege on her agreement to arbitrate for two reasons. First, Respondent asserted she did not (initially) receive the internal investigation documents that she had requested in a separate case against the Appellants. Second, Respondent attempted to re-write the agreement to include a "time is of the essence" type clause and argued the agreement was void because the

[2] The Court of Appeals ruled on June 27, 2013 that discovery should now be stayed in the other case because it is on appeal.

include a "time is of the essence" type clause and argued the agreement was void because the arbitration did not occur on the date agreed upon. Respondent again attempted to couch these two points of contention as "condition precedents" despite not making them such in the arbitration agreement she drafted and offered.

Judge Dukes denied the Motion to Compel Arbitration finding there was no agreement to arbitrate and there was no meeting of the minds as to the terms. Interestingly, however, Respondent never argued that there was not an arbitration agreement, rather what she asserted was that the Appellant breached the agreement by not providing certain documents in discovery. However, in his Order, Judge Dukes made this finding *sua sponte*, stating,

> This Court finds the parties had no enforceable agreement to arbitrate. First, the evidence shows that counsel negotiated, *but never came to an actual agreement* to the terms of an arbitration. No agreement was ever memorialized and signed by the parties or counsel. See, Order Denying Defendants' Motion to Compel Arbitration, at pg. 5. (emphasis added).

Judge Dukes continued, "Second, the parties' disagreement as to the terms and the interpretation of their negotiations evidences there was no meeting of the minds and, therefore, no agreement." Id. After Appellants' motion to reconsider this ruling was denied, this appeal followed.

STANDARD OF REVIEW

An appeal from the denial of a motion to compel arbitration is subject to de novo review. Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007); see also Davis v. KB Homes of S.C., Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011) (holding "arbitrability determinations are subject to de novo review"). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings.

See Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).[3]

ARGUMENT

I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT THERE WAS NO AGREEMENT TO ARBITRATE.

An agreement to arbitrate is a contract and the parties are free to determine its terms. See Palmetto Homes, Inc., v. Bradley, 357 S.C. 485, 593 S.E.2d (Ct. App. 2004); see also Simmons v. Lucas & Stubbs Assocs. Ltd., 283 S.C. 326, 332-33, 322 S.E.2d 467, 470 (Ct. App. 1984) (Arbitration is a matter of contract, and the range of issues that can be arbitrated is restricted by the terms of the agreement). Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it. See York v. Dodgeland of Columbia, Inc., ___ S.C. ___, 749 S.E.2d 139 (Ct. App. 2013). "A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." Armstrong v. Collins, 366 S.C. 204, 222-223, 621 S.E.2d 368, 378 (Ct. App. 2005), citing Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). With certain exceptions, a contract need not be in writing to be enforceable. See Armstrong, *supra.*

"When the existence of a contract is disputed or its terms are ambiguous, evidence that a party complied with the terms of the alleged contract or acted in conformity therewith is relevant and admissible on the issues of the contract's existence, the meaning of its terms, and whether the contract was breached." Conner v. City of Forest Acres, 363 S.C. 460, 473, 611 S.E.2d 905, 912(2005) (citing Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 303, 468 S.E.2d 292, 300 (1996) (contract may be based on verbal understanding to which both parties have mutually

3 There is obviously some conflict between these two standards of review as "[d]e novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." Lewis v. Lewis, 392 S.C. 381, 390, 709 S.E.2d 650, 654–55 (2011). In any event, the issue on review here is legal in nature and does not touch on a question of fact.

assented and upon which both are acting)); see also Gaskins v. Blue Cross-Blue Shield of S.C., 271 S.C. 101, 105, 245 S.E.2d 598, 600 (1978) ("agreement" does not necessarily import any direct or express stipulation, nor is it necessary that it should be in writing; if there is verbal understanding to which both parties have assented, and upon which both are acting, it is an agreement); Baylor v. Bath, 189 S.C. 269, 1 S.E.2d 139 (1938) (holding in lawsuit to enforce specific performance of an alleged oral agreement by elderly bachelor to make a will in consideration of care and nursing, it was proper to admit evidence that plaintiffs provided care and nursing for three years until bachelor's death to prove existence of the contract and performance under its terms).

In determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts." Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). The policy of the United States and South Carolina is to favor arbitration of disputes. Zabinski v. Bright Acres Assoc., 346 S.C. 580, 553 S.E.2d 110 (2001). There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. Towles, *supra*, citing O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273 (4th Cir. 1997). A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." Pearson v. Hilton Head Hosp., 400 S.C. 281, 287,733 S.E.2d 597 (Ct. App. 2012) (reversing Judge Dukes who refused to enforce a valid arbitration agreement) (citing Zabinski, 346 S.C. at 597, 553 S.E.2d at 118-19)).

In the instant case, there is no basis for denying the existence of an arbitration agreement when the parties reached a clear agreement that was (a) *offered* by the Respondent, (b) *accepted*

by the Appellants, and (c) supported by *consideration*. See Southern Glass & Plastics Co., Inc. v. Kemper, 399 S.C. 483, 491 732 S.E.2d 205, 209 (Ct. App. 2012) ("[t]he necessary elements of a contract are an offer, acceptance, and valuable consideration"). In fact, Respondent specifically and repeatedly acknowledged the existence of an agreement, and, in several documents subsequent to the ratification of the agreement, relied upon it to propound and respond to discovery. (See, Letters of K. Jolley of 10/12/12, 10/20/12 and Plaintiff's Answers to Interrogatories and Requests for Production). Indeed, had there been no arbitration agreement, the Respondent would have not had any power to propound discovery requests, as the original action was stayed during its appeal. Likewise, both parties conducted themselves in accordance with the terms of this same agreement and this performance further evidences the existence of the agreement. See Gaskins v. Blue Cross-Blue Shield of S.C., 271 S.C. 101, 105, 245 S.E.2d 598, 600 (1978) (holding an "agreement" does not necessarily import any direct or express stipulation, nor is it necessary that it should be in writing; if there is verbal understanding to which both parties have assented, and upon which both are acting, it is an agreement). Here, the agreement is even stronger than a verbal understanding, as it is evidenced in the parties' explicit e-correspondence.

The first offer was made on September 28, 2012, when Respondent gave Appellant a deadline to agree to arbitration. Negotiations of the terms of the agreement ensued. On October 5, 2012, Respondent sent its offer in an email proposing arbitration with limited discovery and proposing the dates for conducting such discovery. (See, Letter of K. Jolley of 10/5/12). On October 8, 2012, Appellants accepted that offer in writing and said "we agree to those terms." See Email of M. Grier of 10/8/12. Truly, the offer and acceptance could not be more clear – i.e., "we agree to those terms." Finally, Appellants in agreeing to Respondent's terms gave up their

rights to proceed under the arbitration agreement in the Residency Agreement, which contained among other things a limit of liability, as valuable consideration. Accordingly, all three contractual elements were satisfied. The Respondent never asserted there was no agreement. Instead, she elected to call off the arbitration in this case based on a discovery dispute. (See, Letter of K. Jolly of 11/20/12).

The Respondent also did not premise her withdrawal on a lack of an agreement or because the parties lacked a meeting of the minds. In fact, when the Respondent withdrew from the scheduled arbitration, her counsel expressly admitted that the parties had an agreement to arbitrate. (See, Letter of K. Jolley of 11/20/12). Thus, by her own admission, Respondent has conceded that an arbitration agreement existed. So there cannot be a question of whether there was an agreement to arbitrate and, therefore, the court below erred as a matter of law.

A. THE AGREEMENT IS NOT RENDERED UNENFORCEABLE SIMPLY BECAUSE IT IS FINALIZED THROUGH EMAIL WITH AN ELECTRONIC SIGNATURE.

The lower Court erred when it concluded that no agreement existed because "[n]o agreement was ever memorialized and signed by the parties or counsel." (See, Order Denying Defendants' Motion to Compel Arbitration, p. 5). The Respondent's offer letter was sent electronically, and the Appellants likewise accepted the offer in the same fashion using an electronic signature affixed to the acceptance. Both the offer and acceptance were valid under South Carolina law, which treats electronic records the same as written records, and electronic signatures the same as written signatures. See, S.C. Code Ann. § 26-6-70 (stating that "(A) A record or signature must not be denied legal effect or enforceability solely because it is in electronic form; (B) A contract must not be denied legal effect or enforceability solely because an electronic record is used in its formation; (C) An electronic record satisfies a law requiring a record to be in writing; [and] (D) An electronic signature satisfies a law requiring a signature).

Thus, clearly the Legislature has deemed a contract via e-mail to be proper, legal, and binding.

B. THE CIRCUIT COURT ERRED WHEN IT RULED THE PARTIES DID NOT HAVE A MEETING OF THE MINDS

In his Order Denying Defendants' Motion to Compel Arbitration, the trial court ruled there was no meeting of the minds [and therefore, no agreement] based on the parties' subsequent "disagreement as to the terms and interpretation of their negotiations." This ruling was in error because the parties did in fact have a meeting of the minds and acted in accordance with the terms of the agreement for more than a month and a half. Moreover, the Respondent's purported reason for reneging on the arbitration agreement had to do with a discovery issue, i.e., the terms of the agreement, not the actual existence of the agreement. South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Byrd v. Livingston, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012) (citing Patricia Grand Hotel, L.L.C. v. MacGuire Enters., Inc., 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007)).

The trial court's decision was controlled by an error of law when it found there was no agreement because there was a subsequent dispute over the enforcement of the terms. As was the case in the Supreme Court's recent decision in York, neither the trial court nor the Respondent cited any authority for the proposition that discovery rules, cost allocations, or arbitration initiation procedures are material terms that an arbitration agreement must explicitly designate. York v. Dodgeland of Columbia, Inc., ___ S.C. ___, 749 S.E.2d 139 (Ct. App. 2013). Rather, these terms are "ancillary logistical" ones not required within an arbitration agreement. Cf. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 131-32, 678 S.E.2d 435, 439 (2009) (distinguishing between "integral terms," which "may substantially affect the substantive outcome," with "ancillary logistical concerns," which do not).

The Respondent drafted the offer and clearly proposed the material terms: namely, arbitration would take place in January 2013, with certain limitations on discovery and evidence. The Appellants accepted these material terms. (See, E-mail of M. Grier of 10/8/12). Both parties clearly understood that each side had agreed to all material terms, because the parties then proceeded to select the Honorable Thomas Cooper as an Arbitrator and serve arbitration discovery. As argued, supra, the Respondent never claimed that the parties lacked a meeting of the minds and, instead, recognized that the parties had reached an "agreement . . . to arbitrat[e.]" (See, Email of K. Jolley on 11/12/12). The Court erred by finding the parties lacked a meeting of the minds, when there was a clear offer of material terms that the Appellants accepted, and the Respondent admitted such an agreement existed. See Byrd, 398 S.C. at 244 (finding "no error with the court's determination that the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds and intended to be bound by the Agreement.")

In denying the Motion to Compel Arbitration, the Court stated "[T]he parties' disagreement as to the terms and the interpretation of their negotiation evidences there was no meeting of the minds and, therefore, no agreement." (See, Order of June 18, 2013, p. 5). However, this ruling is in error and contrary to Byrd and common sense. If every subsequent dispute to a contract followed the court below's logic, then there would never be a meeting of the minds based upon the dispute itself. This outcome would render every contract where there was a subsequent dispute over the terms unenforceable. The Court cannot base its ruling over whether there was a meeting of the minds on the fact that there is now a dispute. See Eastern Air Lines, Inc. v. Air Line Pilots Asso., International, 670 F. Supp. 947, 951 (S.D. Fla. 1987) (holding "[i]t is beyond peradventure that one of the requirements of a binding contract is a manifestation of mutual assent--there must be a 'meeting of the minds.' It is also fundamental, however, that there does

not have to be a subjective meeting of the minds on all issues. 'For a contract to exist there does not have to be, and rarely is, a subjective "meeting of the mind' all along the line") (internal citation and quotation marks omitted); see also Shoney's, Inc. v. Schoenbaum, 894 F.2d 92, 97 (4th Cir. Va. 1990) (noting that while generally a dispute that later arises may seem to suggest a lack of mutual assent, the "judicial obligation [is] nevertheless to interpret disputed terms and thereby to decide the legal controversy . . . which 'may or may not accord with the subjective intentions had by one or the other, or indeed by either of the parties'"). Thus, a dispute on a particular term cannot mean lack of mutual assent based on the subjective understanding of the contract by the Respondent; rather, the court must enforce the contract to arbitrate as objectively agreed upon and upon the easily understood terms proposed in this instance so long as there was a meeting of the minds to contract. Of course, here, there was, as both parties mutually agreed to arbitrate.

C. THERE WAS NO CONDITION PRECEDENT TO THE ARBITRATION AGREEMENT REGARDING DISCOVERY AND RESPONDENT IMPROPERLY RESCINDED THE CONTRACT.

The Respondent improperly rescinded the agreement on the basis of an arbitrary condition precedent that did not exist, was never negotiated by the parties, and was at best vague and ambiguous. A party may not rescind a contract unless the other party commits "a substantial and fundamental breach[.]" Martin v. Carolina Water Services, Inc., 280 S.C. 235, 240, 312 S.E.2d 556, 560 (Ct. App. 1984). "It is a general legal principle that a breach of contract warranting rescission 'must be so substantial and fundamental as to defeat the purpose of the contract.'" Rogers v. Salisbury Brick Corp., 299 S.C. 141, 143, 382 S.E.2d 915, 917 (1989). In this case, the Respondent claimed that the agreement to arbitrate was conditioned on the Appellants producing discovery in another case. However, it was not until the hearing on the

Appellants' Motion to Compel that Respondent ever attempted to categorize the discovery question as a so-called "condition precedent." "The Court is without authority to consider parties' secret intentions and, therefore, words cannot be read into a contract to impart an intent unexpressed when the contract was executed." Davis 394 S.C. at 127. Regardless, their attempt to retroactively couch this as such is misplaced.

Under South Carolina law, "[A] condition precedent to a contract is any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises." Byrd, 398 S.C. at 237 (emphasis added); see also Brewer v. Stokes Kia, Isuzu, Subaru, Inc., 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct. App. 2005) (emphasis added) (quoting Worley v. Yarborough Ford, Inc., 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994) (concluding as a matter of law that no express condition precedent existed, nor should one be implied from the facts)). "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." Id. at 244. (internal quotation marks omitted). A condition precedent entails something that is essential to a right of action, as opposed to a condition subsequent, which is something relied upon to modify or defeat the action. Worley, *supra.*

As was the case in Byrd, a review of the language contained in Respondent's offer of October 5, 2012, demonstrates Respondent's agreement to arbitrate was not at all contingent on the receipt of certain documents via discovery. Nor can any such intention be implied when it could have been expressly stated. See Worley, 317 S.C. at 210, 452 S.E.2d at 625 (holding "[g]enerally, a condition precedent may not be implied when it might have been provided for by the express agreement"). There is no question that here the Respondent, acting through counsel,

could have explicitly stated that she would arbitrate this matter if and only if certain named documents or types of documents were provided. Clearly, that condition was not stated. Moreover, Respondent should not be rewarded by excusing her performance by claiming an ambiguity in the agreement she drafted. See Chassereau, 373 S.C. at 175, 644 S.E.2d at 722. ("A court will continue any doubts and ambiguities in an agreement against the drafter of the agreement"). Indeed, any ambiguity in the contract is resolved against the drafter / offeror and, therefore, the Respondent cannot claim any ambiguity of the discovery term in her favor, as she was the offeror and drafter. See Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 309 (S.C. 2010) (holding "if the language creates an ambiguity, a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement") (citing Duncan v. Little, 384 S.C. 420, 425, 682 S.E.2d 788, 790 (2009)).

If this truly was a condition precedent, then Respondents would have insisted on having the specific documents before ever agreeing to arbitrate the case, appointing an arbitrator, agreeing on an arbitration date, etc. That did not happen. In fact, the opposite is true, both parties agreed to arbitrate the matter first and then acted in complete reliance that arbitration was going to happen right up until Respondent attempted to renege. Both parties agreed to an arbitrator and proceeded with discovery in preparation for arbitration. It was not until afterwards, Respondent took issue with the discovery response and tried to use their withdrawal from arbitration as leverage. If you were to take Respondent's argument to its logical conclusion, then Respondent arguably had the ability to pull out of the Agreement at any point by simply claiming it did not like or agree with any of the Appellants' responses. In essence, Respondent's argument is that she somehow bargained for the ability to keep the Appellants from objecting to any discovery request. That clearly was not the expressed intentions of the parties when they

agreed to submit the matter to arbitration and there is nothing in the language of the agreement that would warrant reaching such a conclusion. Clearly, the Respondent could have artfully drafted a condition precedent regarding specific documents that must be produced in order for her to agree to arbitration. No such condition was drafted; much less agreed to.

To substantiate her claim that this was a condition precedent, Respondent relies on an email sent after the agreement was made wherein she threatened not to arbitrate if the documents are not produced. However, their reliance on this is barred by the parol evidence rule. See Davis, 394 S.C. at 128, 713 S.E.2d at 805 ("The terms of a completely integral agreement cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing. Furthermore, when the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term to this agreement, even when the writing is silent as to the particular term sought.")

In reality, once arbitration was agreed to, the proper place to resolve any disputes over the sufficiency of discovery responses lies with the arbitrator, not a unilateral rescission of the entire agreement. As was the case in the Supreme Court's recent decision in York v. Dodgeland of Columbia, Inc., ___ S.C. ___, 749 S.E.2d 139 (Ct. App. 2013), neither the trial court or the Respondent cited any authority for the proposition that discovery rules, cost allocations, or arbitration initiation procedures are material terms that an arbitration agreement must explicitly designate. Rather, these terms are "ancillary logistical" ones not required within an arbitration agreement. Accordingly, there was no basis for the Respondent to rescind the agreement and,

therefore, the Circuit Court must be reversed, as a matter of law. [4]

D. **THERE WAS NO TIME IS OF THE ESSENCE PROVISION IN THE AGREEMENT; AND NONE CAN BE ASSERTED SUBSEQUENT TO THE MAKING OF THE AGREEMENT.**

As was the case with the asserted "condition precedent" there was also no express provision that time is of the essence in the agreement. Again, Respondent's argument is barred by the parol evidence rule. In South Carolina, "the parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument." Estate of Holden v. Holden, 343 S.C. 267, 275-276 (S.C. 2000) (citing Gilliland v. Elmwood Properties, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990)). Further, "[t]he terms of a completely integral agreement cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing. Furthermore, when the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term to this agreement, even when the writing is silent as to the particular term sought." Davis, 394 S.C. at 128.

Here, Respondent now also contends the arbitration agreement is unenforceable because arbitration did not occur on the date specified in their proposed timeline and argues that there was a "time is of the essence" type clause. Clearly, there was not an explicit clause in the agreement and any oral agreement to that affect would certainly be parol evidence and

[4] Following a judicial determination of the discoverability of the documents at issue in a different case, the Appellants ultimately produced the documents Respondent now claims as the basis for reneging on the agreement. Despite this, the Respondent still continues to refuse to arbitrate this dispute. A discovery dispute in another case which happens to have the same Appellants should have no bearing on whether the parties agree to arbitrate in this case, particularly since producing the discovery was never a condition to the Respondent's arbitration proposal. But even if you assume that producing the discovery was a clear condition before arbitration, the discovery was ultimately produced on March 1, 2013, thereby curing the Respondent's complaints. The Court did not expressly rule on this issue, and the Appellants asked the lower Court to reconsider its ruling and find that the discovery dispute was resolved and cured, thereby paving the way to arbitrate this case. The Court below erred in not ruling accordingly.

disallowed. Moreover, Respondent cannot argue that the Appellants violated any purported time is of the essence provision because it was their withdrawal from the agreement that prevented the arbitration from going forward. Any recission based on such an assertion would be barred by the equitable doctrine of unclean hands. See generally Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698, S.E.2d 244 (Ct. App. 2010); see also Goer v. Jasco Indus., Inc., 395 F. Supp. 308 (D.S.C. 2005) (noting "[i]n all cases, "the lynchpin for equitable estoppel is equity, and the point of applying it to compel arbitration is to prevent a situation that would fly in the face of fairness") (internal citations omitted).

Respondent's own letter on this very subject belies the assertion that there was even such a clause wherein she states in the first paragraph of her letter that "we need to agree on the following guidelines, *understanding that you have requested more time*." (See, Letter of K. Jolley on 10/5/12) (emphasis added). Clearly, the parties knew and contemplated the possibility that the schedule was subject to change and that the possibility existed for some revisions to their proposed "guidelines." Moreover, the scheduling order also lies within the jurisdiction of the arbitrator and once the parties agreed to arbitrate the matter, the arbitrator should resolve any concerns over deadlines and scheduling. Accordingly, the Court should not find any basis to support that a "time is of the essence" clause existed, much less was material and, therefore, Respondent's rescission was prohibited.

II. RESPONDENTS ARE ESTOPPED FROM CHALLENGING THE EXISTENCE OF AN AGREEMENT THEY CONSISTENTLY ACKNOWLEDGE AND PERFORMED UNDER.

"Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." Pearson, 400 S. C. at 296, 733 S.E.2d at 604. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract

precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. Id. "'To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.'" Id. See Goer, 395 F. Supp. 308 (D.S.C. 2005) (noting "[i]n all cases, "the lynchpin for equitable estoppel is equity, and the point of applying it to compel arbitration is to prevent a situation that would fly in the face of fairness") (internal citations omitted).

The parties to this arbitration acted in compliance with the terms of the agreement from October 8, 2012 through November 20, 2012. The Respondent benefitted from various parts of the agreement – namely, propounding discovery requests and having experts identified. (See, Letter of M. Grier to K. Jolley of 11/29/12). `Indeed, the Respondent's correspondence and discovery responses all specifically confirm the existence of the arbitration agreement wherein the Respondent was acting pursuant to the Arbitration Agreement, as opposed to acting under a reservation of rights or otherwise. Respondents cannot now contend there was no agreement. It is nearly nonsensical to suggest that all those acts did not constitute acts pursuant to an agreement to arbitrate.

Further, Appellants detrimentally relied on the Respondent's offer and performed under the contract by exchanging written discovery, naming an Arbitrator, scheduling arbitration, and naming and hiring experts, among other things. The Appellants reliance was reasonable based on the Respondent's offer and actions. The parties also were performing under the contract under a course of dealing and performance that established a contract that the Respondent could not withdraw from on the basis of a discovery dispute in a separate case. The Respondent had no basis to withdraw from the October 8, 2012 arbitration agreement and under doctrines of equity

and fairness, she should be estopped from avoiding her performance under the Agreement. This is especially true when Respondent is the one who prevented the arbitration from occurring.

III. UPON THE FINDING OF A VALID ARBITRATION AGREEMENT, THE ARBITRATOR, AND NOT THE CIRCUIT COURT, HAS JURISDICTION TO DECIDE ANY DISCOVERY DISPUTES.

Although South Carolina law does give jurisdiction to determine the existence of an arbitration agreement with the Circuit Court, for the reasons previously stated, this dispute should not be characterized as a dispute regarding the existence of an agreement to arbitrate but rather as a discovery dispute regarding the production of documents. See MBNA Am. Bank, N.A. v. Christianson, 377 S.C. 210, 215 (Ct. App. 2008) (finding "[i]f there is a challenge to the arbitration, it is for the courts, not the arbitrator, to decide whether the agreement to arbitrate exists and whether the issue in dispute falls within the agreement to arbitrate") but cf. First Options v. Kaplan, 514 U.S. 938, 942 (U.S. 1995) (holding a party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances) (citing 9 U.S.C. § 10 (allowing awards to be set aside if the award is procured by corruption, fraud, or undue means; arbitrator exceeded his powers; etc.)). Of course, a run-of-the mill document production discovery dispute is not an area that would allow an arbitration award to be set aside and, therefore, is clearly within the purview of the arbitrator. The remedy to the discovery dispute, therefore, is to be addressed by the arbitrator. See Hous. Auth. Of Columbia v. Cornerstone Hous., LLC, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003) (citing Hooters of Am. v. Phillips, 39 F. Supp. 2d 582, 609 (D.S.C. 1998) (holding all issues raised before a trial court not relating to whether "a valid arbitration agreement exists between the parties" or whether "the specific dispute falls within the substantive scope of the agreement . . . fall within the ambit of 'procedural arbitrability,' and are within the jurisdiction of the arbitrator")).

In this case, Respondent's sole issue was with the substance of Appellants' discovery

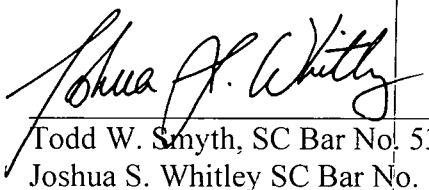
responses, not with the agreement to arbitrate. As the Court of Appeals rightly noted, a party cannot avoid arbitration when it fails to allege an independent challenge to the validity of the arbitration agreement. See Hous. Auth. of Columbia, 356 S.C. at 341, 588 S.E.2d at 624; see also Jackson Mills v. Bt Capital Corp., 312 S.C. 400, 440 S.E.2d 877 (1997) (holding that it is only when a party has valid grounds upon which to challenge the arbitration clause itself that arbitration may be avoided.) Plainly this dispute, which is no longer even a dispute as the documents have been produced, clearly should be decided by the arbitrator after the Court finds the existence of an arbitration agreement. The only issue for the court to decide is whether the parties agreed to arbitrate – which they plainly did – all other disputes should be deferred back to the arbitrator.

Following a judicial determination of the discoverability of the documents at issue in a different case, the Appellants ultimately produced the documents Respondent now claims as the basis for reneging on the agreement. Despite this, the Respondent still continues to refuse to arbitrate this dispute. A discovery dispute in another case which happens to have the same Appellants should have no bearing on whether the parties agree to arbitrate in this case, particularly since producing the discovery was never a condition to the Respondent's arbitration proposal. But even if you assume that producing the discovery was a clear condition before arbitration, the discovery was ultimately produced on March 1, 2013, thereby curing the Respondent's complaints. The Court did not expressly rule on this issue, and the Appellants asked the lower Court to reconsider its ruling and find that the discovery dispute was resolved and cured, thereby paving the way to arbitrate this case. The Court below erred in not ruling accordingly.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the circuit court and compel Pruett to comply with the arbitration agreement.

Respectfully Submitted,



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December 20, 2013
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

Appellate Case No. 2013-001808

Samuel H. Pruett, as Personal Representative for the Estate of Yvonne Carrie Pruett,.....Respondent,

v.

Brookdale Senior Living, Inc., Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head, and Sonia S. King,.....Defendants,

Of whom Brookdale Senior Living, Inc. and Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head are the .....Appellants.

PROOF OF SERVICE

I certify that I am a legal assistant at Smyth Whitley, LLC and on December 20, 2013, I placed a copy of Appellants' Initial Brief in the United States Mail, with first-class postage prepaid, and addressed as follows:

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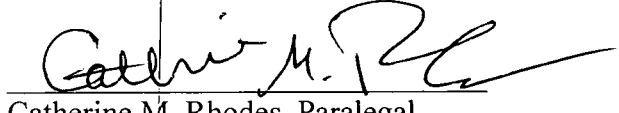

Catherine M. Rhodes, Paralegal

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APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

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

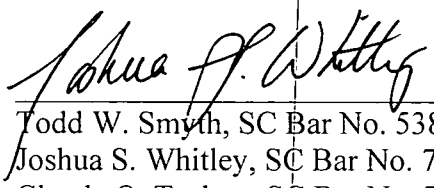
1. March 31, 2009 Residency Agreement of Yvonne Pruett containing Arbitration Agreement.
2. September 28, 2012 Letter of Kelly Jolley to Manton Grier setting deadline to agree to arbitration.
3. October 5, 2012 Letter of K. Jolley to M. Grier setting terms of arbitration.
4. October 8, 2012 Email of M. Grier to K. Jolley accepting terms of arbitration.
5. October 12, 2012 Letter of K. Jolley to M. Grier confirming arbitration agreement, date of arbitration and name of arbiter.
6. October 20, 2012 Letter of K. Jolley to M. Grier serving Discovery Requests of Respondent on Appellant.
7. Respondent's Request for Production Nos. 3, 5, 7, and 8 confirming existence of arbitration agreement.
8. October 22, 2012 Letter of M. Grier to K. Jolley serving Discovery Requests of Appellants on Respondent.

9. October 30, 2012 Letter of Thomas W. Cooper to counsel confirming his role as arbiter and arbitration date.
10. November 12, 2012 Email of K. Jolley to M. Grier confirming existence of arbitration agreement.
11. November 20, 2012 Respondent's Answers to Interrogatories Nos. 1, 5, 6, and 7 (Pgs. 2, 4, and 5) confirming existence of arbitration agreement.
12. November 20, 2012 Respondent's Responses to Request for Production No. 7 (Pg. 3) confirming existence of arbitration agreement.
13. November 20, 2012 Letter of M. Grier to K. Jolley serving Appellant's Discovery Responses.
14. November 20, 2012, Appellants' Answer to Interrogatory No. 5 (Pg. 4) confirming existence of arbitration agreement.
15. November 20, 2012 Appellants Responses to Request for Production No. 3, 5 (Pg. 2).
16. November 20, 2012 Letter of K. Jolley to M. Grier withdrawing from arbitration.
17. November 29, 2012 Letter of M. Grier to K. Jolley identifying Appellants' expert witnesses.
18. January, 2013 Invoice of Thomas W. Cooper.
19. June 11, 2013, Transcript of Hearing on Appellants' Motion to Compel Arbitration.
20. June 18, 2013 Order of Hon. Marvin H. Dukes, III, Denying Appellants' Motion to Compel Arbitration.
21. July 1, 2013 Appellant's Motion to Reconsider and Memorandum in Support, including all exhibits.
22. July 15, 2013 Appellants' Reply to Respondent's Memorandum in Opposition to Motion to Reconsider, including all exhibits.
23. August 5, 2013 Order of Hon. Marvin H. Dukes, III, Denying Appellants' Motion to Reconsider.

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

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,



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PROOF OF SERVICE

I certify that I am a legal assistant at Smyth Whitley, LLC and on December 20, 2013, I placed a copy of Appellants' Designation of Matter to be Included in the Record of Appeal in the United States Mail, with first-class postage prepaid, and addressed as follows:

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Charleston, SC 29402

Catherine M. Rhodes, Paralegal