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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

1. IS THERE EVIDENCE TO SUPPORT THE CIRCUIT COURT'S FINDING THAT THERE WAS NO AGREEMENT TO ARBITRATE BECAUSE NO BINDING AGREEMENT WAS PUT IN WRITING SIGNED BY THE PARTIES AND COUNSEL AND THERE WAS NO MEETING OF THE MINDS?

2. IS THERE EVIDENCE TO SUPPORT THE CIRCUIT COURT'S FINDING THAT THERE WAS NO BINDING AGREEMENT TO ARBITRATE BECAUSE BROOKDALE BREACHED CONDITIONS PRECEDENT TO ARBITRATION?

3. DID BROOKDALE FAIL TO PRESERVE ITS ESTOPPEL ARGUMENT AND IS ESTOPPEL INAPPLICABLE BECAUSE BROOKDALE FAILED TO SATISFY CONDITIONS PRECEDENT TO ARBITRATION?

4. DID BROOKDALE FAIL TO PRESERVE ITS JURISDICTION ARGUMENT AND DID THE CIRCUIT COURT HAVE JURISDICTION WHEN THERE WAS NO BINDING ARBITRATION AGREEMENT?

STATEMENT OF THE CASE

This is an appeal from an Order denying Brookdale Senior Living, Inc., and Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head's (collectively "Brookdale") Motion to Compel Arbitration. On April 13, 2011, Yvonne Carrie Pruett filed an action against Brookdale in the Beaufort County Court of Common Pleas arising from abuse she suffered while a resident in the dementia memory care unit at Appellants' assisted living facility in Bluffton, South Carolina. On September 24, 2012, Samuel H. Pruett, as Personal Representative for the Estate of Yvonne Carrie Pruett, ("Pruett") filed an Amended Complaint after his wife died on May 30, 2012. In early October 2012, counsel for Brookdale and Pruett discussed an arbitration of the case to occur in January 2013, with certain terms and conditions precedent. When Appellants did not timely produce documents and information requested in discovery as agreed to in the conditions to arbitrate, Pruett withdrew from arbitration. On January 22, 2013, Brookdale filed a Motion to Compel Arbitration. On June 11, 2013, Pruett filed a Memorandum in Opposition to Defendants' Motion to Compel Arbitration in the circuit court. The Honorable Marvin H. Dukes, III, held a hearing on Brookdale's motion on June 11, 2013. On June 14, 2013, Judge Dukes signed an Order denying Brookdale's motion. Brookdale filed a Motion to Reconsider on July 1, 2013. Pruett filed a Memorandum in Opposition to Defendants' Motion to Reconsider. On August 5, 2013, Judge Dukes signed an Order denying Brookdale's Motion to Reconsider. Brookdale filed a Notice of Appeal on August 16, 2013.

STATEMENT OF THE FACTS

Mrs. Pruett, who suffered from severe Alzheimer's disease, entered Carolina House of Hilton Head assisted living facility memory care unit on March 31, 2009. (Residency Agreement, pp. 3, 6). Brookdale owned and operated Carolina House of Hilton Head assisted living facility at all operative times. Mrs. Pruett's Estate alleges that she suffered repeated abuse by Brookdale employees throughout her residency at Carolina House. (Am. Cmplt. p. 3). In addition to prior abuse, on December 31, 2010, Mrs. Pruett suffered severe physical and verbal abuse at the hands of Defendant Sonia S. King, Brookdale's employee hired to care for its vulnerable residents. (Tr. p. 22, lines 16-22). On that date, King jerked seventy-nine-year-old Mrs. Pruett out of bed, undressed her, put toothpaste on a washcloth, and then "washed" Mrs. Pruett's vaginal area with the toothpaste. (Am. Cmplt. p. 3). King threatened to "choke her out" for trying to protect herself from the abuse. (Am. Cmplt. p. 3). The same night, King abused two other residents suffering from Alzheimer's disease and dementia, Janet Sue Scheerle and Elizabeth O'Meara. (Resp't Memo. in Opp. to Def. Mot. to Compel Arbitration, p. 1). A co-worker witnessed and tape-recorded the abuse of all three victims. (Am. Cmplt. p. 3). In April and June 2011, Mrs. Pruett, Mrs. Scheerle, and Mrs. O'Meara each filed an action against Brookdale for damages suffered from abuse while a resident at Carolina House. *Id.* All three victims are represented by counsel for Pruett.

In response to the complaints, Brookdale filed motions to dismiss and compel arbitration based on an arbitration provision in the Carolina House Residency Agreements. The Circuit Court, the Honorable Carmen T. Mullen, denied Brookdale's motions to dismiss and compel arbitration under the Residency Agreements, finding the

arbitration provision in the Agreements to be unenforceable and unconscionable. (Aug. 3, 2012 Order, p. 1-4). Brookdale then appealed Judge Mullen's Orders to the Court of Appeals. The Court of Appeals consolidated the cases for appeal. (Consolidated Appellate Case No. 2011-199666). The Supreme Court granted a motion to certify the consolidated case and heard oral argument on September 19, 2013. The Supreme Court has not yet issued an opinion.

This appeal in Mrs. Pruett's case involves the enforceability of a negotiation of arbitration discussed by counsel for Brookdale and counsel for Pruett during the pendency of the consolidated appeal. The instant appeal is not related in any way to the arbitration provision in the Residency Agreement and thus the appeal before the Supreme Court has no effect on the issues in this appeal.

A. Counsel's Discussions Concerning Arbitration

After Mrs. Pruett's death, counsel discussed the possibility of an arbitration of only the Pruett case. Mr. Pruett, who continued to grieve at the death of his wife, was concerned about the delay caused by Brookdale's appeal of Judge Mullen's Order. On October 5, 2012, Pruett's counsel at the time, Kelly M. Jolley, sent a letter to Brookdale's counsel at the time, Manton M. Grier, Jr., regarding a possible arbitration. (Exh. A to Appellants' Mot. to Compel Arbitration, p. 1). The letter outlined a timeframe for discovery, pre-arbitration procedure, and procedural parameters for an arbitration, as well as proposed arbitrators. (Exh. A to Appellants' Mot. to Compel Arbitration, p. 1). The timeframe proposed was for an arbitration to be completed within four months. Discovery responses were due on November 20, 2012, and arbitration was to occur the week of January 21, 2013. (Exh. A to Appellants' Mot. to Compel Arbitration, p. 1).

The last sentence of the October 5, 2012 letter states "Please let me hear from you as soon as possible *to finalize the details*." (Exh. A to Appellants' Mot. to Compel Arbitration, p. 1 (emphasis added)). The letter was not a take-it-or-leave-it offer but rather the start of a negotiation of the timeframes and terms for discussion and determination prior to either side committing to an arbitration. This is evidenced by the exchange of emails between Ms. Jolley and Mr. Grier that followed the October 5, 2012 letter.

On October 5, 2012, Mr. Grier sent a responsive email asking Ms. Jolley what witnesses would be allowed to testify in an arbitration. (Exh. B to Appellants' Mot. to Compel Arbitration, p. 3). On October 8, 2012, Mr. Grier asked if Pruett's counsel would use discovery conducted in Mrs. Scheerle's case in an arbitration of Mrs. Pruett's case. (Exh. B to Appellants' Mot. to Compel Arbitration, p. 2). Pruett's counsel responded in the negative, explaining that discovery would be requested separately in the Pruett case and, if documents requested were not produced in the Pruett case, there would be no arbitration.

> We will be requesting the same documents in Pruett that we did in Scheerle. The question from our side is whether you'll be providing the documents we request. If you do, we won't need the Scheerle documents. *If our discovery requests only get us a string of objections, we won't be arbitrating at all.*
>
> Obviously, we'll know what your 30(b)(6) witness testifies to in Scheerle, we wouldn't use the deposition testimony unless your witness decided to testify inconsistently at the arbitration. For impeachment purposes, that testimony, like any deposition testimony taken in any case, is fair game.

(Exh. B to Appellants' Mot. to Compel Arbitration, p. 1 (emphasis added)). The discovery in Pruett stood alone and was separate from any other case. Brookdale's counsel agreed to the conditions of arbitration, by responding "With the qualification that

you will not be using the 30(b)(6) information except for impeachment purposes, *we will agree to those terms*." (Exh. B to Appellants' Mot. to Compel Arbitration, p. 1 (emphasis added)).

B. Brookdale's Discovery Responses

On the November 20, 2012 due date for discovery responses, Brookdale produced discovery responses to Pruett with numerous objections, in direct contravention of the terms of arbitration. (*See, e.g.*, Brookdale Defs. Resp. to Pl.'s First Set of Req. for Prod., pp. 3-7, 10-15; Brookdale Defs. Ans. to Pl.'s First Set of Int., pp. 4-5, 13). Among other items, Brookdale objected to producing its internal investigation documents related to the abuse suffered by Mrs. Pruett. (Exh. 9 to Resp't Memo. in Opp. to Appellants' Mot. to Compel Arbitration, p. 5). Brookdale's conduct resulted in the impossibility of a fair arbitration occurring on the agreed-upon January 21, 2013 date. Consequently, Pruett could not and would not go forward with an arbitration in her case.

Brookdale then attempted to relate the discovery in the Pruett case to the discovery occurring in the Scheerle case. However, Mrs. Pruett's case and the discussions concerning an arbitration of her case *stood alone* without regard to any other case. Brookdale was told in the Pruett case that Pruett would be requesting the same documents requested in the Scheerle case and, if they were not produced in the Pruett case, there would be no arbitration. (Exh. B to Appellants' Mot. to Compel Arbitration, p. 1). Written requests for production were made in the Pruett case, and the requests included Brookdale's internal investigation documents. (Exh. 9 to Resp't Memo. in Opp. to Appellants' Mot. to Compel Arbitration, p. 5).

Prior to the due date for Brookdale's discovery responses in the Pruett case, Judge Mullen had ordered Brookdale to produce the internal investigation documents in the

Scheerle case.[1] (Exh. 5 to Resp't Memo. in Opp. to Appellants' Mot. to Compel Arbitration, p. 1). Despite Judge Mullen's Order, Brookdale did not produce the internal investigation documents in the Scheerle case. (Exh. 6 to Pls. Memo. in Opp. to Def. Mot. to Compel Arbitration, p. 2). Ultimately, Judge Mullen sanctioned Brookdale, who then on March 1, 2013, produced the documents in the Scheerle case. (Appellants' Memo. in Supp. of Mot. to Compel Arbitration, p. 3). To date, Brookdale has not produced the documents in the Pruett case.

Despite agreeing to produce documents requested in the Pruett case without objection, Brookdale did not produce the internal investigation documents in the Pruett case. Pruett's counsel understood from the negotiations that Brookdale would produce, without objection, the documents requested in Mrs. Pruett's case, and the requests and interrogatories in the Pruett case were not conditioned on what occurred in the Scheerle case. (Exh. B to Appellants' Mot. to Compel Arbitration, p. 1). Therefore, because the documents were not produced by November 20, 2012, in the Pruett case, an arbitration could not go forward on January 21, 2013.

C. Procedural History

Brookdale attempted to force Pruett to arbitrate without the requested and agreed upon discovery responses and on a different timeline. Brookdale asked retired Judge Thomas W. Cooper, Jr., the scheduled arbitrator, to compel arbitration in Mrs. Pruett's case. (Order p. 3; Tr. p. 25, ln. 25, p. 26, lns. 1-2). Judge Cooper declined to do so because he correctly concluded that he did not have jurisdiction and the circuit court, not

[1] The Scheerle case was the only one of the three abuse cases that had proceeded to discovery before Brookdale filed notices of appeal from Judge Mullen's Orders denying Brookdale's motions to dismiss and compel arbitration based on the Residency Agreements. (Order p. 2).

he, should decide Brookdale's motion to compel arbitration.[2] (Order p. 3). In response, Brookdale filed an amended notice of appeal from Judge Mullen's August 3, 2013 Order denying Brookdale's original motion to dismiss and compel arbitration based on the Residency Agreements. (Order p. 3; Tr. p. 26, lns. 3-4). The amended notice of appeal attempted to add to the pending, consolidated appeal an appeal from Judge Cooper's email stating he would not decide Brookdale's motion to compel arbitration. In response, on January 8, 2013, Respondent filed a Motion to Dismiss Appellants' Amended Notice of Appeal and to Strike any Matter in the Record and Appellants' Initial Brief Relating to the Amended Notice of Appeal. On January 26, 2013, The Court of Appeals granted Pruett's motion to dismiss Brookdale's attempt to add an issue to a pending appeal. (Order p. 3). Thereafter, Brookdale filed a motion to compel arbitration in the circuit court, which is the motion at issue in this appeal. In the meantime, counsel for Pruett was required to fully brief Mrs. Pruett's case in the consolidated appeal, further frustrating the purpose of an arbitration in the Pruett case.

STANDARD OF REVIEW

The issue before this Court is whether the negotiations between counsel regarding arbitration in Mrs. Pruett's case rose to the level of a binding contract. "The requirement to arbitrate does not arise spontaneously, but must be contractually agreed to by the parties involved. The existence of such a contract is a question of law." *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000) (internal citations omitted). The issue before this Court on appeal is not subject to *de*

[2] *See Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 126, 713 S.E.2d 799, 804 (Ct. App. 2011) (holding "the determination regarding whether a valid arbitration agreement existed was a 'gateway matter' that the circuit court could properly consider") (vacated in part on other grounds by *Davis v. KB Home of S.C., Inc.*, Op. No. 2014-MO-004 (S.C. Sup. Ct. filed Jan. 29, 2014)).

novo review, as stated in Brookdale's brief. Rather, because the appeal is to determine whether a binding contract was formed, "this court is limited merely to the correction of errors of law and the circuit court's factual findings will not be disturbed unless wholly unsupported by the evidence or controlled by an error of law." *Patricia Grand Hotel, LLC v. MacGuire Enters., Inc.*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007).

ARGUMENTS

The circuit court was correct in holding that there was no binding agreement to arbitrate and there was no meeting of the minds as to the terms of an arbitration. Further, as an additional sustaining ground, the conditions precedent to arbitration were breached by Brookdale. Therefore, there was no enforceable agreement to arbitrate. For these reasons and any other in the record, this Court should affirm the decision of the circuit court. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

I. THE EVIDENCE SUPPORTS THE CIRCUIT COURT'S RULING THAT THE PARTIES DID NOT HAVE A BINDING AGREEMENT TO ARBITRATE IN WRITING SIGNED BY THE PARTIES AND COUNSEL, AND THERE WAS NO MEETING OF THE MINDS

In this action, the "circuit court's factual findings will not be disturbed unless wholly unsupported by the evidence or controlled by an error of law." *Patricia Grand Hotel*, 372 S.C. at 638, 643 S.E.2d at 694. The circuit court found there was no binding agreement to arbitrate. The circuit court's Order states:

> 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. 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.

(Order p. 5). The evidence and law support the circuit court's findings.

A. There was No Writing Signed by the Parties and Counsel Setting Forth the Terms of an Arbitration.

Counsel and the parties never came to a binding agreement to arbitrate. Under Rule 43(k), SCRCP, "No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, *or reduced to writing and signed by the parties and their counsel.*" (emphasis added).[3] Counsel did not reduce any agreement to a writing signed by the parties *and* their counsel. "Rule 43(k) is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006). An agreement affecting the proceedings of an action is not binding unless one of the conditions of Rule 43(k) is met. "In other words, an agreement is non-binding until a condition is satisfied. Until a party is bound, she is entitled to withdraw her assent." *Id.* at 637, 627 S.E.2d at 725.

Brookdale incorrectly argues in its brief that the exchange of emails in this case constitute a binding agreement. (Initial Br. of Appellants at pp. 15-16). Rule 43(k), SCRCP is clear that for an agreement to arbitrate to be binding, where arbitration is otherwise not required, the agreement must be signed by both *the parties and counsel.* The circuit court correctly found there was no agreement reduced to writing signed by the parties and counsel. Neither this condition nor any of the other conditions of Rule 43(k),

[3] The circuit court's ruling was based on the same requirement and principle found in Rule 43(k), SCRCP. (Order, p. 5). This Court may affirm for any reason appearing in the Record on Appeal. Rule 220(c), SCACR. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

SCRCP, were met. Therefore, there was no binding agreement, and Pruett was entitled to withdraw from arbitration.

B. There was No Meeting of the Minds.

There is evidence to support the circuit court's additional finding that the dispute as to the terms of the negotiations demonstrated a lack of a meeting of the minds, that is, whether a discovery ruling by Judge Mullen in the Scheerle case affected conditions to arbitration in the Pruett case. Brookdale apparently thought Judge Mullen's ruling on Plaintiff's motion to compel production of the internal investigation documents in the Scheerle case would control whether Brookdale was required to produce those documents in the Pruett case. (Exh. 6 to Appellants' Memo. in Support of Mot. to Compel Arbitration; 11/12/12 email between M. Grier & K. Jolley, p. 1; Tr. p. 29, lns. 10-15). Pruett, on the other hand, understood and made clear in the October 5 letter and October 5 and 8 email exchange that the Pruett case stood on its own. Arbitration was discussed only in the Pruett case. Brookdale received written discovery requests and interrogatories, and was required to produce requested documents and answers, without objection, in the Pruett case regardless of any ruling in the Scheerle case. Obviously, a primary purpose for including the discovery and timeline conditions precedent in the Pruett arbitration discussions was to avoid discovery disputes and delays occasioned by objections and subsequent motions.

"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 contract." *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). "The 'meeting of minds' required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not

brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989). "Where there has been no agreement to arbitrate, a party cannot be forced into compulsory arbitration." *Hilton Head Resort Four Seasons Ctr. Horizontal Prop. Regime Council of Co-Owners, Inc. v. Resort Inv. Corp.*, 311 S.C. 394, 398, 429 S.E.2d 459, 492 (Ct. App. 1993). "Arbitration is available only when the parties involved contractually agree to arbitrate." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999).

Brookdale's complete responses to discovery requests made in the Pruett case were an essential and material term of arbitration. At the time the terms and conditions of an arbitration were discussed in Pruett, no written or deposition discovery had yet been conducted in the Pruett case. Thus, it was essential in Pruett that discovery responses be complete and timely to allow for preparation and a fair arbitration where the side with the knowledge of the abuse did not withhold information from the victim's husband, Mr. Pruett. It is now clear, however, that Brookdale had a "secret purpose or intention" when negotiating arbitration not to produce the internal investigation documents in Pruett based on what it hoped would be Judge Mullen's ruling in the Scheerle case. *Player*, 299 S.C. at 105, 382 S.E.2d at 894. Brookdale's secret intent not to produce the documents requested in the Pruett case was hidden from Pruett's counsel during negotiations of the terms and conditions of an arbitration. Indeed, Pruett could not have reasonably understood that Brookdale had no intention of providing the documents requested in Pruett since Brookdale agreed during negotiations to provide discovery responses without

objection in the Pruett case. (Exh. B to Appellants' Mot. to Compel Arbitration, p. 1). It is inconceivable that Pruett would willingly arbitrate without the internal investigation documents because to do so would be to arbitrate without necessary, material information that only Brookdale possessed.

At the hearing before the circuit court on Brookdale's motion to compel arbitration in Pruett, and at the conclusion of counsel's arguments, the circuit court stated: "I have enough questions based on a series of e-mails and a letter where I just don't think I'm going to grant the motion to enforce arbitration. Whether this is even an agreement or not I'm unclear on, so I think I'm going to deny it." (Tr. p. 21, lns. 21-25, p. 32, ln. 1). The circuit court correctly found there was no meeting of the minds *at the time* counsel discussed arbitration.

Brookdale attempts to argue that the circuit court incorrectly based its ruling on a "subsequent dispute" between counsel as to the interpretation of the terms of an arbitration. (Initial Br. of Appellants p. 16). This interpretation of the circuit court's Order is not in accord with the language of the Order or the facts presented. The circuit court's finding was based on the fact that, *at the time of the negotiations*, as evidenced in the Record, counsel did not have a meeting of the minds as to the essential and material terms of an arbitration. *Grant*, 383 S.C. at 130, 678 S.E.2d at 438. The facts support the circuit court's finding: Brookdale had the intent at that time to withhold the requested documents in the Pruett case despite its agreement in an email to provide discovery responses in the Pruett case without objection.

The circuit court's ruling that there was no enforceable agreement to arbitrate is further supported by the fact that the Court on appeal cannot now enforce an agreement

without writing a new agreement with new terms. "We are unaware of any legal authority . . . permitting a court to order parties to renegotiate contract terms and enter into a new agreement." *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 410, 656 S.E.2d 775, 781 (Ct. App. 2008) (reversing an order requiring parties to renegotiate and enter into a new agreement). "Courts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or to make new contracts for the parties." *Id.* at 410, 656 S.E.2d at 781; *see also Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003) ("The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plan and unambiguous."). The reasons for and the terms and time for an arbitration in the Pruett case have long since passed. There is no agreement for the Court to enforce.

The circuit court's ruling that counsel did not have an enforceable agreement to arbitrate and there was no meeting of the minds is supported by the law and the evidence in this case and, accordingly, should be affirmed.

II. THERE WAS NO ENFORCEABLE AGREEMENT TO ARBITRATE BECAUSE BROOKDALE FAILED TO SATISFY CONDITIONS PRECEDENT.

Pruett specifically conditioned arbitration on Brookdale providing full and complete responses to discovery requests in her case by a specific date, together with arbitration to occur the week of January 31, 2013. (Resp't Memo. in Opp. to Def. Mot. to Compel Arbitration pp. 2-5). Brookdale agreed to the conditions precedent but thereafter refused to satisfy them. Therefore, Pruett had no obligation to arbitrate, and the circuit

court's denial of Brookdale's motion to compel arbitration should be affirmed based on this additional sustaining ground. (Order pp. 1-4).

"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.'" *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994) (quoting *Ballenger Corp. v. City of Columbia*, 286 S.C. 1, 5, 331 S.E.2d 365, 368 (Ct. App. 1985)). "A condition precedent is any fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance by the promisor can arise." *Ballenger*, 286 S.C. at 5, 331 S.E.2d at 368. "Words and phrases such as 'if,' 'provided that,' 'when,' 'after,' 'as soon as,' and 'subject to' frequently are used to indicate that performance expressly has been made conditional." *Id.* Counsel's negotiations evidence conditions precedent to arbitration.

A. Condition One: Complete Discovery Responses without Objections by November 20, 2012.

First, Brookdale agreed to provide full and complete discovery responses, without objections, by November 20, 2012. During the Pruett negotiations concerning arbitration, Brookdale raised the issue of discovery in another case of abuse, Mrs. Scheerle's case. (Exh. B to Appellants' Mot. to Compel Arbitration, p. 2). Pruett's counsel made clear that discovery in the Scheerle case was separate from discovery in the Pruett case. Pruett's counsel advised that written discovery requests in the Pruett case would be the same as those earlier issued in the Scheerle case and then stated "If our discovery requests only get us a string of objections, we won't be arbitrating at all."

(Exh. B. to Appellants' Mot. to Compel Arbitration, p. 2). Brookdale agreed to the terms. *Id.*

The circuit court correctly found "based on the reference to the requests in Mrs. Scheerle's case, Defendants knew what documents would be requested in any arbitration of Mrs. Pruett's case." (Order p. 3). Appellants do not appeal this factual finding. Therefore, it is the law of the case. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."). Thus, it is uncontested that Brookdale knew and agreed that in the Pruett case, it would receive the same discovery requests and that there would be no arbitration in Pruett if Brookdale failed to produce the requested information in the Pruett case.

Brookdale argues that the condition precedent was that it produce discovery in the Scheerle case. (Initial Br. of Appellants p. 18). This is incorrect and makes no sense because the case at issue was Pruett's case and the internal investigation documents were required to be produced in Pruett. (Brookdale Defs. Resp. to Pl.'s First Set of Req. for Prod., pp. 3, 5-6). The condition precedent was that Brookdale would produce discovery *in Pruett's case* without objection. This was a purpose of discussing arbitration in the Pruett case—Mr. Pruett wished to have fair and timely closure by the week of January 21, 2013. This could not occur if the parties had discovery disputes or waited until events occurred in another case that had dragged on, specifically the Scheerle case. As Pruett's counsel stated in her November 12, 2012 email: "As you no doubt recall and as I explained . . . we were requesting the same documents in Pruett that we had requested in Scheerle and our agreement to arbitrate required that you produce the responsive

documents." (Nov. 12, 2012 Email "RE: Pruett vs. Brookdale Senior Living," p. 1). Pruett wanted fair closure of his wife's case but never at the cost of compromising his right to the truth.

The law does not require Pruett to expressly use the phrase "condition precedent." Pruett's counsel stated "*If* our discovery requests only get us a string of objections, we won't be arbitrating at all." (Exh. B. to Appellants' Mot. to Compel Arbitration, p. 2 (emphasis added)). The "if" language is a direct expression of a condition precedent. *Ballenger*, 286 S.C. at 5, 331 S.E.2d at 368. An arbitration was conditioned upon Brookdale providing full and complete responses to Pruett's discovery requests by November 20, 2012.

At the hearing, Brookdale's counsel acknowledged the arbitration was conditioned upon Brookdale providing discovery responses.

> [I]f you look at the e-mail from [Pruett's counsel] that's dated October 8, what is their condition? This is it in one sentence: If our discovery requests only get us a string of objections, we won't be arbitrating at all. A string of objections. That was it. . . . There were no string of objections. There was an objection to producing one file which we would have happily taken up before the arbiter.

(Tr. p. 23, lns. 10-15, 21-23). Any attempt by Brookdale to distinguish "objections" from a "string of objections" is disingenuous at best. First, numerous objections were made by Brookdale in refusing to produce the internal investigation documents. (*See, e.g.*, Brookdale Defs. Resp. to Pl.'s First Set of Req. for Prod., pp. 3-7, 10-15; Brookdale Defs. Ans. to Pl.'s First Set of Int., pp. 4-5, 13). Brookdale interposed more than four objections; for example: "Brookdale Defendants object to this request because it calls upon Brookdale Defendants to perform legal analysis and seeks attorney work product and trial strategy. Defendants further object to the extent that this request seeks

information prepared in anticipation in litigation, attorney work-product, or other similarly privileged materials." (Brookdale Defs. Resp. to Pl.'s First Set of Req. for Prod., p. 4). This constitutes a string of objections. Second, Brookdale interposed a string of objections to other requests for production. (Brookdale Defs. Resp. to Pl.'s First Set of Req. for Prod., pp. 3-7, 10-15; Brookdale Defs. Ans. to Pl.'s First Set of Int., pp. 4-5, 13).

Brookdale misses the point that the condition precedent as to discovery in Pruett was to avoid delays that would result from Brookdale's refusal to produce documents. Without receiving all documents requested, there could be no arbitration because Pruett would have no meaningful information from Brookdale and Pruett would be denied a fair arbitration. Furthermore, without satisfaction of the conditions, counsel could not satisfy the agreed to timeline for an arbitration.

B. Condition Two: Arbitration to Occur the Week of January 21, 2013.

Brookdale agreed to arbitrate the case the week of January 21, 2013. In the October 5, 2012 letter, Pruett's counsel proposed a tight timeline and pointed out the necessity for compliance with the deadlines. The letter states "We have very little time to prepare for this arbitration." (Exh. A to Appellants' Mot. to Compel Arbitration, p. 1). The timeline was intended in part to resolve Pruett's case prior to the necessity of briefing Pruett's case in the pending consolidated appeal before the Supreme Court based on the arbitration provision in the Residency Agreement. (Resp't Memo. in Opp. to Appellants' Mot. to Compel Arbitration, p. 2). Brookdale's failure to produce discovery responses without objection on the November 20, 2012 deadline, or any time thereafter, made it impossible to arbitrate by the January 21, 2013 date. Brookdale had agreed to the

timeline condition, and compliance was required. (Exh. A to Appellants' Mot. to Compel Arbitration, p. 1).

Brookdale incorrectly argues that strict compliance with the agreed-upon deadlines was not required because the communications between counsel did not contain a time-is-of-the-essence written provision. It cannot be seriously disputed, since the date was in writing and agreed to, that arbitration was to occur the week of January 21, 2013. (Exh. A to Appellants' Mot. to Compel Arbitration, p. 1). The words "time is of the essence" are not necessary when a date for performance is agreed to. A time-is-of-the-essence "provision is not necessary to make time of the essence of the contract, nor any particular form of expression, although that intention must be clearly manifested." 17B C.J.S. *Contracts* § 787. Counsel expressly agreed to and set dates for the occurrence of events and, therefore, performance was required on the agreed-upon dates.

C. Brookdale Did Not and Could Not Cure its Failure to Satisfy the Conditions Precedent.

Brookdale never produced full and complete discovery responses in the Pruett case. Brookdale's assertion that it has cured the failures to satisfy the conditions precedent is not only incorrect, the argument cannot be considered on appeal. As an initial matter, the issue is not proper for the Court's consideration because it is not raised as a separate issue on appeal and includes no citation to authority. *See* Rule 208(b)(1)(B), SCACR, ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.") *and* Rule 208(b)(1)(D), SCACR ("At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority."). Accordingly, this Court should decline to rule on the issue.

Should the Court choose to review the issue, it is an undisputed fact that Brookdale did not cure the conditions precedent. Brookdale has *never* produced the requested discovery responses in the Pruett case *to date*. Although Brookdale produced the internal investigation documents in the Scheerle case in March 2013, that production is irrelevant to the production requirement in the Pruett case. Furthermore, the Scheerle production occurred *long after* the documents were due in the Pruett case, *long after* the time allowed for arbitration in the Pruett case, and *long after* Pruett was forced to file a brief in the consolidated case on appeal at the Supreme Court. "[I]n some instances timely performance is so essential that any delay immediately results in discharge and there is no period of time during which the injured party's duties are merely suspended and the other party can cure his failure." Restatement (Second) of Contracts § 242 cmt. a (1981). Receipt of complete discovery responses at any time after November 20, 2012, would not "cure" Brookdale's failure to satisfy the condition precedent under the timeline set forth between counsel. Brookdale's refusal to produce documents in Pruett led to its breach of the arbitration date of January 21, 2013. An arbitration in Pruett could not occur on the date agreed to because of Brookdale's failure to produce documents, which failure continues to this day in the Pruett case. Brookdale cannot attempt to cure its failures after the time for compliance has expired. The time for compliance has long come and gone.

D. Pruett had No Obligation to Arbitrate.

As discussed above, there was no binding agreement to arbitrate under Rule 43(k), SCRCP, and there was no binding agreement to arbitrate because there was no meeting of the minds. Furthermore, when Brookdale refused to satisfy the conditions

precedent to arbitration, Pruett had no obligation to arbitrate her case. In its brief, Brookdale makes a number of arguments that are unpreserved or are an incorrect characterization of the facts. First, Brookdale mischaracterizes counsel's discussions and conduct in asserting that Pruett was the "drafter" of an arbitration. It is evident in the emails following the October 5, 2012 letter that, in fact, counsel for both sides mutually contributed to and negotiated terms and conditions of an arbitration. (Exhs. A and B to Appellant's Mot. to Compel Arbitration). "At common law, no contract is formed if the acceptance varies the terms of the offer. Instead, an acceptance which adds different or additional terms is treated as a counteroffer, which may be accepted or rejected by the other party." *Weisz Graphics Div. of Fred B. Johnson Co. v. Peck Indus., Inc.*, 304 S.C. 101, 106, 403 S.E.2d 146, 149 (Ct. App. 1991) (internal citation omitted). In the October 5 and October 8 emails between counsel, different or additional terms and conditions were added to the October 5 proposal. Thus, there is no legal or factual basis for construing the terms and conditions against Pruett. Regardless, it was Brookdale who refused to produce documents despite its agreement to the contrary, thus breaching the condition precedent.

Second, Brookdale incorrectly labels Pruett's withdrawal from arbitration as a rescission of a contract. "Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed." *ZAN, LLC v. Ripley Cove, LLC*, 406 S.C. 404, 751 S.E.2d 664, 669 (Ct. App. 2013). Rescission is inapplicable in the first instance because there was no binding agreement to arbitrate. In addition, Pruett did not rescind arbitration but instead withdrew from arbitration and was not obligated to arbitrate due to Brookdale's failure to satisfy the conditions precedent to

arbitration, which failure Pruett did not excuse. *See McGill v. Moore*, 381 S.C. 179, 187, 672 S.E.2d 571, 575 (2009) ("If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises.").

Third, Brookdale asserts the parol evidence rule applies to this Court's decision on appeal. This argument cannot be considered by the Court on appeal because it is not preserved for appellate review, as Brookdale did not raise the issue to the circuit court. *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 406, 714 S.E.2d 904, 916 (Ct. App. 2011) ("An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the circuit court to be preserved." (internal quotation marks omitted)). If the Court were to consider the issue, the parol evidence rules does not apply because there was no binding and enforceable agreement to arbitrate. "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." *McGill*, 381 S.C. at 188, 672 S.E.2d at 576. The parol evidence rule applies only when there is a binding agreement, which in this case does not exist.

Brookdale also incorrectly claims that Pruett relied on the November 12, 2012 email to prove the discovery condition precedent. (Initial Br. of Appellant p. 21). As Brookdale's counsel acknowledged at the hearing before Judge Dukes, the conditions precedent were set forth in the October 5, 2012 letter and emails on October 5, 2012, and October 8, 2012. The Court asked: "Am I correct that the entire substance of the – what's purported to be the arbitration agreement is the letter of October 5 and the e-mail chain that includes correspondence on October 8 and October 5 and that's it, right?" (Tr.

p. 21, lns. 20-25). Brookdale's counsel answered "Yeah. And those are attached to my motion too." (Tr. p. 22, lns. 1-2). The October 5, 2012 letter and emails on October 5, 2012, and October 8, 2012, include the condition precedent of discovery without objection and the date for arbitration to occur the week of January 21, 2013. These writings presented to the circuit court evidence the conditions precedent without resorting to any other documents or discussions. The November 12, 2012 email, also presented to the circuit court, was evidence of the reiteration of the discovery condition precedent. (Exh. 6 to Resp't Memo. in Opp. to Appellants' Mot. to Compel Arbitration, p. 1).

Finally, Brookdale's argument that Pruett's withdrawal from arbitration is barred by the doctrine of unclean hands cannot be considered by the Court because it too is not preserved for appellate review, as it was not raised to the circuit court. *Hollis*, 394 S.C. 383, 406, 714 S.E.2d 904, 916 ("An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the circuit court to be preserved." (internal quotation marks omitted)). Should the Court consider the argument, it does not apply to the facts of this case and is legally inapplicable. This is an action at law to which the equitable defense of unclean hands does not apply. *See Sherlock Holmes Pub, Inc. v. City of Columbia*, 389 S.C. 77, 81, 697 S.E.2d 619, 621 (Ct. App. 2010) ("Generally, an action to construe a contract is one at law."); *Aaron v. Mahl*, 381 S.C. 585, 594, 674 S.E.2d 482, 487 (2009) ("The equitable doctrine of unclean hands, however, has no application to an action at law."). In addition, because Brookdale refused to produce complete discovery responses, a condition precedent, Brookdale's conduct prevented a timely and fair arbitration from occurring.

Brookdale did not satisfy the conditions precedent to arbitration. Pruett withdrew from arbitration because Pruett had no obligation to arbitrate based upon Brookdale's failure to satisfy the agreed upon terms. Therefore, this Court should affirm the circuit court's decision to deny Brookdale's motion to compel arbitration.

III. BROOKDALE'S ESTOPPEL ARGUMENT IS NOT PRESERVED FOR APPEAL AND IS WITHOUT MERIT.

Brookdale argues for the first time on appeal that Pruett was estopped from withdrawing from arbitration. The Court on appeal should decline to address this issue because Brookdale failed to preserve the issue for appellate review. Further, Brookdale's argument is without merit because Pruett does not assert a breach of contract claim seeking to enforce an agreement.

Brookdale cannot raise equitable estoppel for the first time on appeal. "It is axiomatic that an issue cannot be raised for the first time on appeal. Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (internal quotation marks and citation omitted); *see also Hollis*, 394 S.C. at 406, 714 S.E.2d at 916 ("An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the circuit court to be preserved." (internal quotation marks omitted)). Brookdale did not argue estoppel, or even use the word "estoppel," in its Motion to Compel Arbitration, Memorandum in Support of Motion to Compel Arbitration, or Motion to Reconsider and Memorandum in Support. Further, at the hearing on its motion, Brookdale did not argue estoppel. Brookdale's argument of detrimental reliance was asserted for the first time in its Motion to Reconsider. (Appellants' Mot. to Reconsider p. 8). The circuit court ruled

the argument was not proper for its consideration because it had not been raised prior to the motion to reconsider. (Resp't Memo. in Opp. to Appellants' Mot. to Reconsider, p. 2; Order Denying Resp't Mot. to Reconsider, p. 1-2). Brookdale did not appeal that ruling and, therefore, it is the law of the case. *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance."). Thus, Brookdale cannot now raise this issue on appeal because the issue was not raised to and ruled upon below.

If the Court were to consider estoppel, Brookdale cannot and has not proven the elements.

> To establish estoppel, the party claiming estoppel must prove that he or she (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; and (2) relied upon the conduct of the party to be estopped. The party claiming estoppel must also establish that the party to be estopped (1) acted in a way amounting to a false representation or concealment of material facts; (2) intended such conduct be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts.

Kelly v. Logan, Jolley, & Smith, LLP, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009) (internal citation omitted). "The party asserting equitable estoppel bears the burden of establishing all the elements." *Id.* at 638, 682 S.E.2d at 7.

There is no evidence to satisfy the elements of estoppel as to Pruett. Counsel for both parties discussed the terms and conditions of an arbitration; it was Brookdale who failed to satisfy the conditions, and it was Pruett who detrimentally relied on Brookdale's representation that it would provide full and complete discovery responses without objection and arbitrate the week of January 21, 2013. It was then Brookdale who breached the conditions to an arbitration which resulted in Pruett's withdrawal from arbitration and a loss of time and money.

As support for its estoppel argument, which is not properly before this court, Brookdale cites to *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). The citation is misplaced because it does not apply to the facts or procedure of the Pruett case. In *Pearson*, a doctor brought a breach of contract claim against his employer based on a contract that contained an arbitration provision. *Id.* at 286, 733 S.E.2d at 599. The Court held that because the doctor asserted a breach of contract claim and therefore sought damages under the contract between the corporation and hospital, and benefited from their contract, he could not disclaim the arbitration provision. *Id.* at 297, 733 S.E.2d at 605. Unlike in *Pearson*, this appeal involves negotiations between counsel concerning arbitration, not an arbitration provision in a contract. Further, Pruett has not asserted a breach of contract action claiming benefits under an agreement because, as the circuit court correctly found, there was no binding agreement to arbitrate.

Brookdale's attempt to circumvent, on appeal, the lower court's correct ruling that the parties did not have a binding agreement to arbitrate by asserting equitable estoppel for the first time on appeal should be disregarded. Not only did Brookdale fail to preserve the argument for appeal, its use of equitable concepts is misdirected. Brookdale cannot invoke equity where Brookdale is the very party that agreed, but then refused, to produce discovery responses without objection and satisfy the timeline for arbitration.

IV. BROOKDALE'S JURISDICTION ISSUE IS NOT PRESERVED FOR APPEAL AND IS WITHOUT MERIT.

The circuit court did not rule on Brookdale's argument that the issue as to Brookdale's failure to satisfy conditions precedent should have been ruled upon by an arbitrator, and thus the issue is not preserved for review on appeal. "An issue cannot be raised for the first time on appeal, but must have been raised to *and ruled upon* by the

circuit court to be preserved." *Hollis*, 394 S.C. at 406, 714 S.E.2d at 916 (internal quotation marks omitted) (emphasis added). The circuit court did not rule on this issue, and Brookdale did not ask the circuit court to rule on it in their Motion to Reconsider. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.").

Should the Court consider the jurisdictional issue, it cannot be disputed that the issue of whether a binding arbitration agreement exists is a matter for the circuit court to decide. "[T]he determination regarding whether a valid arbitration agreement existed was a 'gateway matter' that the circuit court could properly consider." *Davis*, 394 S.C. at 126, 713 S.E.2d at 804. The circuit court properly ruled that there was no binding agreement to arbitrate. Thus, there is nothing to take before an arbitrator. The issue involved on appeal is not a discovery dispute, as Brookdale argues, but whether the negotiations between counsel regarding arbitration in Mrs. Pruett's case rose to the level of a binding contract.

CONCLUSION

For the reasons set forth herein, and any others appearing in the Record, this Court should affirm the lower court's decision. There was no binding agreement to arbitrate because there was no writing signed by the parties and counsel, there was no meeting of the minds, and Brookdale breached the conditions precedent to an arbitration. Respondent Pruett respectfully requests that this Court affirm the lower court's Order denying Appellant Brookdale's motion to compel arbitration.

Respectfully submitted,

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ATTORNEYS FOR THE RESPONDENT SAMUEL H. PRUETT, AS PERSONAL REPRESENTATIVE FOR THE ETATE OF YVONNE CARRIE PRUETT

February 18, 2014

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

The undersigned hereby certifies that on February 18, 2014, the foregoing **INITIAL BRIEF OF RESPONDENT** was served on all counsel of record via U.S. Mail, addressed as follows:

Todd W. Smyth, Esq.
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Attorneys for Appellants Brookdale Senior Living, Inc. and Southern Assisted Living, LLC d/b/a Carolina House of Hilton Head

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

RESPONDENT'S DESIGNATION OF MATTER

The Respondent designates the following documents to be included in the Record on Appeal:

1. Amended Complaint, filed September 24, 2012;
2. Motion to Compel Arbitration, filed January 22, 2013;
    a. Exhibit A: October 5, 2012, letter from Kelly Jolley to Manton Grier;
    b. Exhibit B: October 5, 2012, and October 8, 2012, email chain between Manton Grier and Kelly Jolley;
3. Memorandum in Support of Motion to Compel Arbitration, dated June 10, 2013;
4. Memorandum in Opposition to Defendants' Motion to Compel Arbitration, filed June 11, 2013;

a. Exhibit 1: Pruett Residency Agreement;

b. Exhibit 2: July 30, 2011, Order Denying Defendants, Brookdale Senior Living, Inc., and Southern Assisted Living, LLC's Motion to Dismiss and Compel Arbitration;

c. Exhibit 3: November 8, 2012, email from Kelly Jolley to Manton Grier;

d. Exhibit 4: September 18, 2012, Order Granting Plaintiff's Motion to Compel Responses to Plaintiff's First Set of Interrogatories, Requests for Production to Defendants, and Plaintiff's Subpoena Duces Tecum and 30(b)(6) Deposition of Southern Assisted Living, LLC, in Case No. 2011-CP-07-2654;

e. Exhibit 5: November 7, 2012, email from the Court ordering Defendants to produce the internal investigation documents in the *Scheerle* case (2011-CP-07-2654);

f. Exhibit 6: November 12, 2012, email exchange between Kelly Jolley and Manton Grier with subject line "RE: Pruett";

g. Exhibit 7: November 12, 2012; October 8, 2012; and October 5, 2012, email chain between Manton Grier and Kelly Jolley with subject line "RE: Pruett vs. Brookdale Senior Living";

h. Exhibit 8: November 15, 2012. email chain between Manton Grier, Kelly Jolley, and the Honorable Thomas W. Cooper, Jr., with subject line "RE: Arbitration 1/21/13 – Pruett vs. Brookdale Senior Living";

i. Exhibit 9: Brookdale Defendants' Responses to Plaintiff's First Set of Requests for Production, dated November 20, 2012, and Brookdale Defendants' Answers to Plaintiff's First Set of Interrogatories, dated November 20, 2012;

5. Order Denying Defendants' Motion to Compel Arbitration, filed June 18, 2013;
6. Motion to Reconsider and Memorandum in Support, filed July 1, 2013;
7. Transcript of Proceedings, dated June 11, 2013;
8. Plaintiff's Memorandum in Opposition to Defendants' Motion to Reconsider, filed July 8. 2013;
9. Brookdale Defendants' Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion to Reconsider, filed July 15, 2013;
10. Order Denying Defendants' Motion to Reconsider, filed August 5, 2013.

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

Respectfully submitted,

February 18, 2014

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ATTORNEYS FOR THE RESPONDENT SAMUEL H. PRUETT, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF YVONNE CARRIE PRUETT

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

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v.

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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

The undersigned hereby certifies that on February 18, 2014, the foregoing **RESPONDENT'S DESIGNATION OF MATTER** was served on all counsel of record via U.S. Mail, addressed as follows:

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February 18, 2014

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Samuel H. Pruett, as Personal Representative for the Estate of Yvonne Carrie Pruett v. Brookdale Senior Living, Inc., Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head, and Sonia S. King*
Appellate Case No.: 2013-001808

Dear Ms. Kitchings:

Enclosed for filing, please find the original and one copy of the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal in the above-referenced case. I have also enclosed a Proof of Service. Please file these documents and return a stamp-filed copy to me in the enclosed self-addressed stamped envelope.

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

If you have any questions, please do not hesitate to call my office. With kind regards, I am

Very truly yours,

McNAIR LAW FIRM, P.A.

Susan Taylor Wall

STW:jh
Enclosures

cc: Todd W. Smyth, Esq. (*w/ Enclosures, via U.S. Mail*)
Kelly Jolley, Esq. (*w/ Enclosures, via U.S. Mail*)
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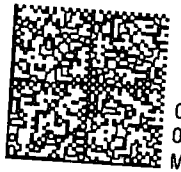

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The Honorable Jenny Abbott Kitchings
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