THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2012-207289

M3284

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AUG 20 2014

SC Court of Appeals

Linda Johnson, as Personal Representative of the Estate of Inez Roberts.....Respondent,

v.

Heritage Healthcare of Estill, LLC, d/b/a Heritage of the Lowcountry and/or Uni-Health Post Acute Care of the Lowcountry, United Clinical Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation .....Appellants.

RESPONDENT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the Respondents respectfully move the Court for Rehearing and/or to Alter its Opinion number 201-UP-318 of August 6, 2014, which reversed the trial court's denial of Appellants'[1] Motion to Compel Arbitration. Respondents also respectfully petition and suggest the desirability of rehearing by the Court *en banc* because the proceeding involves questions of exceptional importance.

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[1] The Defendants/Appellants Heritage Healthcare of Estill, LLC, d/b/a Heritage of the Lowcountry and/or Uni-Health Post Acute Care of the Lowcountry, United Clinical Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation are referred to collectively herein as "HHE."

Rehearing or alteration of the Opinion is needed because the unpublished Opinion misinterprets *Dean v. Heritage Healthcare of Ridgeway,* Op. No. 27401 (S.C. Sup. Ct. filed June 18, 2014) (Shearouse Adv. Sh. No. 24 at 47) and also utterly fails to undertake the factual analysis required to determine the issue of waiver. The Opinion cites *Dean* in support of reversal, yet fails to perform any analysis of the facts and procedural history of this case under the *Dean* framework. By its refusal to perform a factual analysis of the waiver issue, the Opinion conflicts with *Dean* and longstanding precedent addressing the determination of waiver. The Court of Appeals erred in reversing the trial court's ruling that HHE waived its right to demand arbitration, and rehearing is warranted. Furthermore, rehearing or alteration is warranted so that the merits of the dispositive issue can be addressed, based on the facts and procedural background of this case.

As to the issue of waiver, this Court ruled as follows:

> We reverse as to whether the trial court erred in ruling Heritage waived arbitration. See Dean at 47 (ruling the appellants did not delay in filing their demand for arbitration when the appellants participated in the statutorily required mediation process, and after the respondent filed her formal complaint, moved to compel arbitration at their first opportunity.

(Opinion, Paragraph 3).

Whether waiver occurs is a fact specific analysis. *Liberty Builders Inc. v. Horton,* 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999). Nothing in the *Dean* opinion changes the case-by-case, fact specific approach followed by our Appellate Courts for decades. In fact, *Dean* reaffirms that a party can waive its claim for arbitration. When the *Dean* case is examined, it actually supports the trial court's conclusion in this case that HHE waived any demand for arbitration. In *Dean,* the Supreme Court held:

> We find that Appellants did not delay in filing their demand for arbitration. Rather, Appellants participated in the statutorily required mediation process, and after Respondent filed her formal complaint, **Appellants moved to compel arbitration at their first opportunity**.

Id. at 47. (emphasis added).

There is no evidence in the record before this Court that HHE moved to compel arbitration at its first opportunity; in fact, the record shows the exact opposite. Arbitration was not sought by motion for years after a dispute arose between the parties and for over 10 months after a formal complaint was filed, and after numerous motions were heard by the trial court. Furthermore, the record shows that HHE participated in voluminous discovery over this course of time. Considering the facts of this case, under *Dean* and every previous appellate case addressing waiver, the trial court correctly found that HHE waived its right to demand arbitration.

Furthermore, to the extent the "first opportunity" language of *Dean* alters the historic fact specific analysis of waiver, *Dean* only strengthens the trial court's decision to find waiver. If the standard for waiver is whether the party seeking arbitration moved to compel arbitration "at the first opportunity," then HHE clearly fails the test.

Rational analysis of the facts in this record can lead to but one conclusion: Appellant HHE waived its right to arbitration. The arbitration agreement sought to be enforced by HHE states as follows:

> ...any and all controversies, claims, disputes, disagreements or demands of any kind... arising out of or relating to the [patient's residency agreement] with the Facility... or any service or care provided to the [patient] by the Facility shall be settled exclusively by binding arbitration.

(R. p. 645). As set forth below, there were numerous "disputes" between the parties to this Agreement that served as a trigger for HHE's "right" to demand arbitration, and correspondingly, to trigger the standard waiver analysis undertaken by our Courts.

Appellant HHE simply waited too long to move for arbitration.[2] HHE's resort to the protections, benefits, rules, and procedures of the Courts of this state began when it defended the initial *Ex Parte* TRO seeking the nursing home chart which was filed by the Plaintiff in September of 2008 when the dispute concerning Linda Johnson's ability to collect her mother's medical records arose. When this dispute, disagreement, and/or controversy arose, Appellant HHE could have moved to compel arbitration but did not. The dispute between the parties concerning the release of the medical chart involved months of Appellant HHE availing itself of the court system, including resort to the Court of Appeals, when the dispute was settled while on appeal. A motion to compel arbitration was never filed. Then, almost two years after the initial lawsuit for records, the instant proceedings were commenced by filing two Notices of Intent that were served on the Defendants on or about April 13, 2010. Again, Appellant HHE had an opportunity to move to compel arbitration and failed to do so. Then, the Summons and Complaints in this matter were filed on October 13, 2010. Immediately after HHE filed its Answers on November 21, 2010, Johnson moved to strike HHE's defenses of arbitration. (R. pp. 138-141). A hearing was held on February 11, 2011. Johnson argued to the trial court that if HHE wanted to move for arbitration it could do so immediately. (R. pp 568-575), again inviting HHE to move to compel arbitration. Rather than do so, HHE chose to participate in extensive discovery, to participate in two mediations (not pre-suit NOI mediation, but

[2] A full explanation of the long procedural history before HHE moved to compel arbitration, with citations to the record, is contained in Respondent's Final Brief to the Court. For the sake of brevity, Respondent craves reference to this recitation and incorporates the same by reference.

post-suit mediations) and to participate in multiple court hearings. HHE waited ten months past the filing of the Complaints, and approximately three years and seven past the first lawsuit and dispute between the parties arose before moving to compel arbitration. Even aft an invitation by Johnson to move for arbitration "at the first opportunity," HHE chose not to and refused to move to compel arbitration. Accordingly, the trial court's ruling on waiver should not be reversed.

The facts are clear and compelling: despite all the different controversies and disputes between the parties that HHE claims are covered by this Arbitration Agreement, it waited for years after the initial "dispute," for over a year after the filing of the notices of intent, and for ten months after the filing of the present lawsuit before moving to compel arbitration. The trial court properly reviewed the facts of this case and determined that HHE had waived its right to demand arbitration. This Court's unpublished opinion does not address the factual analysis of waiver, and issues an incorrect, blanket ruling that *Dean* requires reversal of the waiver issue. A fair reading of *Dean*, coupled with analysis of the procedural facts here, requires affirmation on the issue of waiver.

For these reasons, the Respondent respectfully seeks reconsideration and alteration of the Opinion on this issue. *Dean* compels a factual analysis to be undertaken and under that factual analysis, this Court must conclude that Appellant HHE waived its right to demand arbitration.

SIGNATURE PAGE FOLLOWS

PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P.A.

BY: _____

LEE D. COPE, ESQUIRE
MATTHEW CREECH, ESQUIRE
101 Mulberry Street East
Post Office Box 457
Hampton, South Carolina 29924
(803) 943-2111

AND

Margie Bright Matthews, Esq.
Bright Matthews Law Firm
Post Office Box 499
Walterboro, SC 29488

ATTORNEYS FOR PLAINTIFFS

Hampton, South Carolina
August 20, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
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Carmen T. Mullen, Circuit Court Judge

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CERTIFICATE OF SERVICE

I, the undersigned, paralegal with the law offices of Peters, Murdaugh, Parker, Eltzroth & Detrick, attorneys for the Respondents, do hereby certify that I have served all counsel in this action with a copy of the Petition for Rehearing and Suggestion for Rehearing *En Banc* by mailing a copy of the same to counsel via Untied States Mail, postage prepaid, at the following address(es):

Sowell, Gray, Stepp, & Laffitte, LLC
Monteith P. Todd, Esquire
J. Michael Montgomery, Esquire
P.O. Box 11449
Columbia, SC 29211

Tyler Arnold, Esquire
Jason Bring, Esquire
Jerad Rissler, Esquire
Arnall Golden Gregory, LLP
171 17th Street NW, Suite 2100
Atlanta, GA 30363-1031

August 20, 2014

Tammy M. Lee, Legal Assistant

LAW OFFICES
PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK
PROFESSIONAL ASSOCIATION
690 NORTH GREEN STREET
P.O. BOX 2500
RIDGELAND, SOUTH CAROLINA
29936-2500

JOHN E. PARKER
J. PAUL DETRICK
DANIEL E. HENDERSON
MARK D. BALL
RANDOLPH MURDAUGH, IV
RONNIE L. CROSBY
R. ALEXANDER MURDAUGH
BERT G. UTSEY, III
RANDOLPH MURDAUGH, III
GRAHAME E. HOLMES
LEE D. COPE
MATHEW V. CREECH
LEAGUE B. CREECH
STEVEN D. MURDAUGH
WILLIAM F. BARNES, III
AUSTIN H. CROSBY

RANDOLPH MURDAUGH, SR.
(1887-1940)
RANDOLPH MURDAUGH, JR.
(1915-1998)
J. ROBERT PETERS, JR.
(1927-2008)
CLYDE A. ELTZROTH, JR.
(Retired)

TELEPHONE
(843) 726-6131
TOLL FREE
(866) 943-2113
FACSIMILE
(843) 726-6057
www.pmped.com

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August 20, 2014

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

Re: *Linda Johnson, as Personal Representative of the Estate of Inez Roberts v. Heritage Healthcare of Estill, LLC, d/b/a Heritage of the Lowcountry and/or Uni-Health Post Acute Care of the Lowcountry, United Clinical Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation*;
Appellate Case No. 2012-207289

Dear Ms. Kitchings:

Enclosed please find one original and seven (7) copies of Respondent/Petitioner Laura Riley's *Petition for Rehearing and Suggestion for Rehearing En Banc*. I have also enclosed the appropriate filing fee. Please do not hesitate to contact me if there are any questions or concerns.

With kind regards, I am,

Sincerely,

Matthew V. Creech

cc: Monteith P. Todd, Esquire
J. Michael Montgomery, Esquire
Tyler Arnold, Esquire
Jason Bring, Esquire
Jerad Rissler, Esquire