THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case Nos. 2010-CP-25-489 and 2010-CP-25-490
South Carolina Court of Appeals No. 2012-207289

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.

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

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INTRODUCTION

On August 6, 2014, this Court reversed the trial court's decision, which had refused to enforce an arbitration agreement. *Johnson v. Heritage Healthcare of Estill, LLC*, No. 2014-UP-318 (S.C. Ct. App. Aug. 6, 2014) (the "Decision"). The Court's Decision followed the Supreme Court's recent decision in *Dean v. Heritage Healthcare of Ridgeway*, Op. No. 27401 (S.C. Sup. Ct. filed June 18, 2014) (Shearouse Adv. Sh. No. 24 at 34), which was entirely dispositive of all of the arguments that had been set forth by Plaintiff and accepted by the trial court.

Plaintiff now seeks to have this Court revisit its Decision based on the doubtful premise that this Court "misinterpret[ed] [*Dean*] and also utterly fail[ed] to undertake the factual analysis required to determine the issue of waiver." (Resp.'s Pet'n for Reh'g and Suggestion for Reh'g *En Banc* ("Pl.'s Petition") at 2.) However, it appears on the face of this Court's Decision that no point raised by Plaintiff was "overlooked or misapprehended by the court." Rule 221, SCACR. Therefore, rehearing is unnecessary. Further, since the Supreme Court has already decisively spoken on the sole issue raised in Plaintiff's petition, rehearing *en banc* is entirely unnecessary. Rule 219, SCACR.

ARGUMENTS

I. This Court Correctly Decided that Defendants Did Not Waive the Right To Enforce the Arbitration Agreement.

A. This Court properly relied on the Supreme Court's decision in *Dean* in concluding that Defendants did not waive arbitration.

On the face of the Decision, it is clear that this Court fully considered and rejected Plaintiff's waiver claim following the binding precedent established in *Dean*:

> 3. 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.

(Decision at 2.)

In *Dean*, the Supreme Court noted:

> the FAA requires courts to resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration, whether the problem at hand is the construction of the contract language itself or *an allegation of waiver, delay*, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (emphasis added). Thus, there is a presumption against finding a party has waived its right to compel arbitration, *E. Dredging & Constr., Inc. v. Parliament House, L.L.C.*, 698 So. 2d 102, 103 (Ala. 1997), and a "party seeking to prove a waiver of a right to arbitrate carries a heavy burden . . . ." [*Blue Cross Blue Shield of Ala. v.*] *Rigas*, 923 So. 2d [1077] at 1093 [(Ala. 2005)]; *accord Green Tree* [*Fin. Corp.-Ala. v. Randolph*], 531 U.S. [79] at 91 [(2000)]. Specifically, the party seeking to avoid arbitration "must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders*, [*Inc. v. Horton*], 336 S.C. [658] at 665, 521 S.E.2d [749] at 753 [(Ct. App. 1999)].

Dean, Shearouse Adv. Sh. No. 24 at 46.

The Supreme Court held that the skilled nursing facility in *Dean* had not waived arbitration by participating in mediation and limited discovery during a four-month period between the plaintiff's filing of a notice of intent and a formal complaint. *Dean*, Shearouse Adv. Sh. No. 24 at 46. Rather than focusing on pre-complaint activities, the Court found "that Appellants did not delay in filing their demand for arbitration" because "*after Respondent filed her formal complaint*, Appellants moved to compel arbitration at their first opportunity." *Id.* at 47 (emphasis added). *Dean*, therefore, makes it clear that a waiver analysis focuses on post-complaint litigation activity, not on prior disputes between the parties. *Id.*; *see also Carlson v. S.C. State Plastering, LLC*, 743 S.E.2d 868, 872 (S.C. App. 2013) ("[I]t would be inappropriate to consider actions undertaken in other cases for purposes of determining the extent of discovery that has been undertaken

in the instant case."). The Court further noted that even if it had found a delay, it would not have found a waiver because the plaintiff had "shown no prejudice or undue burden to her from the four month delay." *Dean*, Shearouse Adv. Sh. No. 24 at 47.

In light of *Dean*, this Court correctly focused its attention on the Defendants' attempts to promptly move for arbitration following Plaintiff's filing of a formal complaint. (Decision at 2.)

B. Plaintiff's Petition Persists in Raising the Same Arguments that this Court Properly Noted Were Rejected by the Supreme Court in *Dean*.

Plaintiff's Petition for Rehearing is virtually identical to her response brief in its heavy reliance on pre-complaint activity to attempt to manufacture a claim of waiver. (*Compare* Pl.'s Pet'n at 3-5 *with* Final Br. of Resp. ("Pl.'s Resp. Br.") at 23-26.) Despite the clear instruction from the Supreme Court in *Dean* and this Court in *Carlson* that waiver must be based on post-complaint activity, Plaintiff continues to rely heavily on completely unrelated pre-complaint activity wherein Defendants defended themselves against actions (wholly distinct from the wrongful death and survival actions underlying this appeal) brought by Linda Johnson. (Pl.'s Pet'n at 3-4; Pl.'s Resp. Br. at 23-24.) Both *Dean* and *Carlson* make it clear that this Court properly focused on post-complaint activity and not activity in prior, unrelated litigation. *Dean*, Shearouse Adv. Sh. No. 24 at 47 ("*[A]fter Respondent filed her formal complaint*, Appellants moved to compel arbitration at their first opportunity.")(emphasis added); *Carlson*, 743 S.E.2d at 872 ("[I]t would be inappropriate to consider actions undertaken in other cases for purposes of determining the extent of discovery that has been undertaken in the instant case.").

With respect to post-complaint activity, Plaintiff continues to provide a grossly misleading narrative regarding the Defendants' supposed participation in the litigation.

(Pl.'s Pet'n at 4-5; Pl.'s Resp. Br. at 24-26.) Defendants raised the issue of arbitration in their Answers, which were the first responsive pleadings filed by Defendants. (*See* Final Br. of Apps. ("Def. Br.") at 1.) The entirety of Defendants' participation in the post-complaint litigation was limited to (1) conducting discovery limited to enforcing the arbitration agreement and (2) defending against Plaintiff's improper use of the courts in violation of the arbitration agreement. (*See id.* at 1-2, 4.) Nevertheless, Plaintiff attempts to characterize this limited participation by Defendants—which occurred only *after* Defendants made it perfectly clear through their Answers that Plaintiff's claims belonged in arbitration—as a "choice" by Defendants to use litigation rather than arbitration. (Pl.'s Pet'n at 4-5; Pl.'s Resp. Br. at 24-26.)

Defendants' reply to this identical argument raised by Plaintiff in her Response Brief is equally applicable here:

> Plaintiff contends that the Defendants have waived the right to arbitration simply by responding to Plaintiff's use of the court system and engaging in limited discovery targeted solely at enforcement of the Arbitration Agreement, even though Defendants asserted the Arbitration Agreement as a defense in their initial pleadings. Plaintiff's argument fails to demonstrate any action of Defendants that could constitute a voluntary and intentional abandonment of the right to arbitrate. Rather, Plaintiff seeks to deprive Defendants of their contractual right to arbitration simply because Defendants defended against Plaintiff's use of the court system and obtained discovery necessary to enforce the Arbitration Agreement. (Respondent's Brief at 23-26.) Plaintiff has failed to cite any authority in support of its contention that Defendants waived the right to enforce the Arbitration Agreement merely by defending themselves in litigation initiated by Plaintiff, responding to discovery, and engaging in discovery limited to enforcement of the Arbitration Agreement.[1] Such limited engagement in the litigation process (caused by Plaintiff's failure to abide

[1] Plaintiff's reliance on Defendants' response to other actions initiated by Plaintiff is particularly misplaced, as "it would be inappropriate to consider actions undertaken in other cases for purposes of determining the extent of discovery that has been undertaken in the instant case." *Carlson v. S.C. State Plastering, LLC*, Ct. App. Opinion No. 5143 (June 12, 2013).

> by the Arbitration Agreement) is insufficient to establish a knowing and voluntary waiver of the right to compel arbitration, particularly where Defendants immediately raised arbitration in their Answers; challenged the Plaintiff's Motion to Strike the arbitration defenses; and conducted limited discovery for the express purpose of enforcing the Arbitration Agreement. Defendants have not waived their right to enforce the Arbitration Agreement. *See Carlson*, Ct. App. Op. No. 5143 (finding no waiver despite two-year delay while defendants pursued a motion to dismiss on the merits where defendants raised the issue of arbitration since the inception of the case). (*See also* Appellants' Brief at 22-25.)

(Final Reply Brief of Appellants ("Defs.' Reply Br.") at 15-16.)

The Supreme Court's decision in *Dean* fully supports Defendants' argument. As in *Dean*, "after [Plaintiff] filed her formal complaint," Defendants here "moved to compel arbitration at their first opportunity." *Id.* at 47. Defendants filed Answers asserting the arbitration agreement as a defense. After responding to Plaintiff's attempts to strike the arbitration defenses, Defendants conducted limited discovery necessary to move to compel arbitration. Following this limited discovery, Defendants promptly moved to compel arbitration. (*See* Defs.' Br. at 1-2, 4.) Thus, there was no undue delay in seeking to enforce the arbitration agreement, and Defendants took no action before the trial court that was inconsistent with its position that Plaintiff's claims belonged in arbitration. *See Sanford v. South Carolina State Ethics Comm'n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (citing *Eason v. Eason*, 384 S.c. 473, 682 S.E.2d 804 (2009)) ("A waiver is a voluntary and intentional abandonment or relinquishment of a known right."). Further, as in *Dean*, the Plaintiff "has shown no prejudice or undue burden to her." *Dean*, Shearouse Adv. Sh. No. 24 at 47; *see also Carlson*, *Carlson*, 743 S.E.2d at 872-73.

CONCLUSION

Following the Supreme Court's guidance in *Dean* regarding the "presumption against finding a party has waived its right to compel arbitration" and its mandate to

focus the analysis on post-complaint litigation activity, *Dean*, Adv. Sh. No. 24 at 46-47, this Court properly found that Defendants did not waive arbitration. For the reasons set forth herein and in the Final Brief and Reply Brief of Appellants, Defendants respectfully request that the Court deny Plaintiff's Petition for Rehearing.

Respectfully submitted,

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September 2, 2014

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PROOF OF SERVICE

I, the undersigned legal assistant, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the Return to Respondent's Petition for Rehearing and Suggestion for Rehearing *En Banc* by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

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