THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Opinion No. 2014-UP-318 (S.C. Ct. App. filed Aug. 6, 2014)

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

v.

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

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STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals err by failing to address the Petitioner's dispositive issue of waiver, by failing to undertake any factual analysis of waiver, and by issuing a conclusory ruling on the issue which is inconsistent with the record before the Court?

2. Did the Court of Appeals err by finding the failure of the AAA as the aribitral forum to be immaterial to the Arbitration Agreement and therefore enforcing the agreement?

STATEMENT OF THE CASE

At the age of eighty-five and while in good physical condition, Mrs. Inez Roberts was admitted to Respondent Heritage Healthcare of Estill, LLC's ("HHE")[1] nursing home facility in Estill, South Carolina on August 22, 2007. (R. p. 69; R. p. 656). At the time of her admission, she was free of any pressure sores. (R. p. 656). On January 20, 2008, Mrs. Roberts was first noted as having pressure sores. (R. p. 192). Throughout the remainder of Mrs. Roberts' residency, her pressure sores worsened (R. pp. 194-230) and eventually Mrs. Roberts had to have her leg amputated. (R. p. 232). On July 3, 2009, Mrs. Inez Roberts died in Hampton County, South Carolina.

Prior to Roberts' admission to HHE's Estill facility, her daughter Linda Johnson held a duly recorded, general Power of Attorney. (R. pp. 647-651). Linda Johnson signed the Arbitration Agreement at issue as part of the process of admitting her mother to HHE's facility.

On August 14, 2008, Linda Johnson filed a Summons and Complaint in the Hampton County Court of Common Pleas, that Complaint being styled as an *Ex Parte* Motion for Temporary Restraining Order ("TRO") Pursuant to Rule 65(b), SCRCP. At that time, her mother was 86 years old, in poor health, and still a resident of the Respondents' nursing home facility. At the time of the filing of the TRO, Johnson and her counsel were informed and believed that the negligence of the Respondents and its staff was the cause of the pressure sores that had developed in January 2008. In an effort to investigate the cause of Mrs. Roberts' injuries and pursue possible legal remedies, Johnson sought to review the nursing chart and medical records of Mrs. Roberts, which were in the control and possession of Respondents.

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[1] All Respondents in this matter, unless addressed by their specific corporate name, are collectively referred to herein as "Respondents" or "HHE."

The TRO alleged that Linda Johnson was the Personal Representative of Mrs. Roberts upon her admission to the facility and that throughout Roberts' stay, the Petitioner was consulted by the facility concerning her mother's treatment and care by HHE. However, upon Johnson's request for the records, Respondents refused to provide Petitioner with a copy of Mrs. Roberts' chart pursuant to 42 C.F.R. 483.10. Petitioner brought the TRO action seeking to restrain the Respondents from in any way changing, altering, destroying, or manipulating Mrs. Roberts' nursing home chart or other evidence related to the care of Roberts, and Petitioner requested that the she or her representatives be allowed to enter upon Respondents' premises for the purpose of inspecting, viewing, and copying the same nursing chart, or in the alternative, that Petitioner be provided a color copy of the chart.

On September 5, 2009, Judge Carmen Mullen granted Petitioner's *Ex Parte* Motion for a Temporary Restraining Order. Upon being served with the Court's Order Granting the *Ex Parte* Temporary Restraining Order, Respondents immediately filed a Motion to Dissolve Temporary Restraining Order, Objection to Injunctive Relief, and Memorandum in Support. Respondents argued at that production of her mother's records and chart would violate certain provisions of the Health Insurance Portability and Accountability Act and the *Standards for Privacy of Individually Identifiable Health Information* codified at 45 C.F.R. §164.500, collectively referred to as HIPAA.

Thereafter, Linda Johnson was appointed by the Court as Mrs. Roberts' Guardian ad Litem. Again, HHE refused to produce the records and nursing chart of Mrs. Roberts after the request by Mrs. Johnson as her duly appointed Guardian ad Litem. A final hearing was held on December 3, 2008. On December 16, 2008, the Court issued an Order for HHE to produce Mrs. Roberts' records and nursing chart based upon the inherent power of the court to control the

litigation. HHE filed a notice of Appeal and sought review by the Court of Appeals. The parties fully briefed the issues and while on appeal, the dispute was resolved. That appeal was dismissed by the consent of the parties.

Having received her mother's nursing home chart and records, Linda Johnson, as Personal Representative of Roberts' Estate, filed a wrongful death and a survival action Notice of Intent on April 13, 2010. (R. pp. 20-65). Standard interrogatories and requests for production, along with responses to the same, were served along with the Notices of Intent. (Id.) The parties convened for a pre-suit mediation on September 9, 2010. Following the declaration of impasse at mediation, on October 13, 2010, suits for wrongful death and survival were filed in the Court of Common Pleas. (R. pp. 643-644; R. pp. 66-89). Respondents timely served Answers to the Complaints on November 21, 2010. Each Answer included a qualified general denial and numerous affirmative defenses. (R. pp. 90-137). Relevant to this appeal, Respondents claimed that the suits were barred and subject to arbitration. (Id.) Immediately after receiving the Answers, on December 2, 2010, Johnson moved to strike a number of defenses, including the arbitration defenses. (R. pp. 138-141). The trial court heard Johnson's Motions to Strike on February 11, 2011 and denied Johnson's motion to strike the arbitration defenses. (R. pp. 16-17).

After filing the lawsuits, Johnson served discovery upon the Respondents on November 8, 2010. HHE requested and received from Johnson an extension to respond to her discovery requests and partial responses. HHE responded partially to Petitioner's first interrogatories and requests to produce on January 21, 2011. The same day Respondents UHS Pruitt Corporation, United Rehab, and United Clinical responded to Johnson's first requests for production. Johnson served her First Supplemental Requests for Production on Defendant HHE on February 14, 2011.

On July 26, 2011, Defendant HHE served its response to Johnson's First Supplemental Requests for Production.

During this discovery process, Johnson was forced to file a motion to compel certain discovery responses from the Respondents on February 16, 2011. (R. pp. 142-143). Respondent HHE appeared and defended Johnson's motion to compel before the circuit court in a hearing on March 16, 2011. Petitioner also filed a Motion to Compel responses from the various Respondents on June 8, 2011. (R. pp. 144-145). At no time during this discovery process did Respondents object to producing the information on the grounds that it might waive any rights to seek arbitration.

Respondent HHE also actively took advantage of the discovery process afforded by the circuit court and the Rules of Civil Procedure. In February of 2011, HHE served Requests for Admission upon Johnson. HHE also engaged and participated in a course of discovery concerning the arbitration issues. HHE served written discovery upon Johnson. Johnson fully replied to these discovery requests in a timely fashion.

On May 5, 2011, Respondents participated in depositions related to the arbitration defense. HHE noticed and took the deposition of the personal representative of Ms. Roberts' estate, Linda Johnson. That same day Petitioner's counsel deposed Ms. Sally Dobson, the admissions director at HHE who participated in the admissions process for Mrs. Roberts at the facility.

Throughout the course of discovery in this matter, Respondent HHE has produced thousands of pages of discovery documents to the Petitioner. Furthermore, Respondent HHE participated in a second, failed mediation on August 11, 2011.[2]

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[2] In Hampton County, and across the 14th Circuit, mediation is mandatory pursuant to Court Order.

On August 2, 2011, HHE moved for an order dismissing Johnson's lawsuits and compelling arbitration. (R. p. 146). The trial court held a hearing on HHE's motion on October 7, 2011, after which the court denied the motion by an Order of November 9, 2011. (R. pp. 1-13). Following the denial of its motion to compel arbitration, HHE moved for reconsideration. (R. p. 447). The trial court denied HHE's motion for reconsideration by an Order entered January 17, 2012. (R. p. 14). HHE's Notice of Appeal was filed on February 2, 2012. (R. p. 545).

In a per curiam, unpublished opinion the Court of Appeals reversed the lower court's denial of Respondents' Motion to Compel Arbitration. *Johnson v. Heritage Healthcare of Estill, LLC*, Op. No. 2014-UP-318 (Ct. App. Aug. 6, 2014). The Court of Appeals reversed as to each of the four bases for the lower court's order. Specifically, it reversed as to: (1) the trial court's finding that the Arbitration agreement was not governed by the Federal Arbitration Act; (2) the trial court's refusing "to enforce the parties Arbitration Agreement in accordance with its plain terms" related to the Arbitration Agreement's selection of the arbitral forum and that selection's materiality; (3) the trial court's determination that Respondents had waived arbitration under *Dean v. Heritage Healthcare of Ridgeway*, Op. No. 27401 (S.C. Sup. Ct. filed June 18, 2014); and, (4) as to the trial court's finding that there was no meeting of the minds between the parties.

On August 20, 2014, Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc in the Court of Appeals. The Court of Appeals denied the Petition on October 23, 2014.

Linda Johnson, as Personal Representative of the Estate of Inez Roberts, now files this Petition for Writ of Certiorari before this Court. For the reasons stated below, Petitioner requests that this Court review the Opinion below as to the issue of waiver, which was improperly

decided by the Court, and as to the issue of the materiality of the arbitral forum. As to each of these issues, the Court of Appeals erred.

ARGUMENT

Under Rule 242(b), SCACR, a "writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." The Rule states further that "the character of reasons" to be addressed when considering review includes where "the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court." Id.

Here, the Court of Appeals' decision requires review. While the petitioner disagrees with the rulings on the two salient issues, the important reason for review is the Court of Appeals' method of arriving at its erroneous conclusions.

I. UNDER ALL EXISTING PRECEDENT, RESPONDENTS WAIVED THE RIGHTS TO ENFORCE THE ARBITRATION; YET, AS TO THIS DISPOSITIVE ISSUE, THE COURT OF APPEALS FOUND NON-WAIVER BY FAILING, OR REFUSING, TO UNDERTAKE THE REQUIRED FACTUAL ANALYSIS TO ADDRESS THE ISSUE ON ITS MERITS.

Review is required because the Court of Appeals failed to address the dispositive issue of waiver in any meaningful or substantive way. The Court's issued an unpublished Opinion and gave short shrift to the issue of waiver. The holding states in conclusory fashion, and with no analysis, 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, ¶3. Then, following Johnson's Petition for Reconsideration, the Court of Appeals refused to address the issue on its merits, again failing to perform the fact-based and cases-by-

case analysis that has been the hallmark of waiver analysis. Most glaringly, even if the Court of Appeals' analysis of *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014), is correct and the "first opportunity" language above is the standard, then the Court' application of the facts of this case to that law is absolutely wrong. Even the Respondents in this matter could not argue with a straight face that they moved to compel arbitration "at their first opportunity." In fact, the record on appeal – had even cursory analysis been undertaken by the Court below – reveals quite the opposite.

This matter should be reviewed so that sound jurisprudence wins out over result driven rulings. Respectfully, a lower court should not be allowed to ignore a party's arguments on a dispositive issue, ignore the factual analysis required to be undertaken, ignore the actual facts of the record, and then issue an unpublished opinion which is likely to receive a lesser chance of review by virtue of it being unpublished and non-binding. Had the Court of Appeals actually reviewed the record on waiver, addressed the facts and applied the law, mere disagreement with those findings might not prompt this request for review. However, there is no analysis. There is no application of the law to the record. To be clear, on this record and the Respondents' years-long and clear course of availing themselves of the benefits and powers of the Court system, this is as strong of a factual case for a finding of waiver as can exist.

Sound jurisprudence should require a full analysis of a dispositive issue, and the Petitioner respectfully requests that this Court undertake the analysis and rule on the issue on its merits. To ignore the issue, has been done by the Court below, deprives the Petitioner, the Respondents, and in fact the Bench and Bar, of clear, consistent rulings and adjudication of this common issue.

To highlight the need for review, an overview of the law of waiver and the facts of this case is important. Respondents HHE have waived any right to seek arbitration. In South Carolina, parties can waive their right to enforce an arbitration agreement. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999). Three factors generally are considered to determine if a party has waived its right to enforce an arbitration clause: 1) the time between commencement of the action and moving for arbitration; 2) whether the party seeking to compel arbitration engaged in discovery before moving for arbitration; and, 3) prejudice to the non-moving party which must be more than mere inconvenience. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007).

The trial court correctly found that that Respondents waived their rights to mediation. HHE's resort to the protections, benefits, rules, and procedures of the Courts of this state began when it defendant the initial *Ex Parte* TRO seeking the nursing home chart which was filed by the Plaintiff all the way back in September of 2008. It is clear – at the point in time that the dispute concerning daughter and power of attorney Linda Johnson's ability to collect her mother's medical records arose – HHE could have moved to have even that matter referred to arbitration. The breadth of the "any dispute' language of the Arbitration Agreement presumably could have covered disagreement. Not only did HHE file a motion with the court to dissolve the TRO, but HHE appeared before the Court, argued motions concerning the issues, and ultimately appealed the circuit court's decision to this court. The dispute concerning the release of the chart involved months of the Respondents availing itself of the court system. After the initiation of the *first* lawsuit addressing the parties' dispute,

Then, almost two years after the initial suit 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. A nursing home negligence action cannot be commenced until the plaintiff has filed and served a Notice of Intent. *See* S.C. Code Ann. § 15-79-125. Again, HHE had an opportunity to move to compel arbitration. In fact, S.C. Code § 15-79-120 specifically addresses this issue and states that parties can agree to arbitrate prior to filing a medical malpractice action. Instead, the Appellant chose to participate in the Notice of Intent proceedings, attended a failed mediation, and the summonses and complaints were filed on October 13, 2010. HHE's motion was not filed until August 2, 2011. During that long delay, HHE engaged in discovery. Respondents have served and answered discovery, though they have attempted to limit that discovery only to "arbitration" issues. HHE has taken and defended depositions. Not only did HHE participate in the pre-suit mediation on September 9, 2010, but also a second mediation on August 11, 2011. Throughout this time frame HHE has also participated in procedural and discovery hearings before the trial court, rather than moving to compel arbitration. In this matter, Respondent HHE repeatedly availed itself of the court system since at least September of 2009.

Clearly, in South Carolina, the "right to enforce an arbitration clause may be waived." *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (2011). Our Courts have held that less time constitutes waiver. *Rhodes*, 374 S.C. at 125, 128 647 S.E.2d at 250, 252 (Ct. App. 2007). Recently waiver of arbitration was addressed arbitration in *Carlson v. S.C. State Plastering, LLC*, (Ct. App. Opinion No. 5143, June 12, 2013). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). The question of whether waiver exists is a fact based analysis based on the facts of each particular case. *Carlson*, p. 5. *Carlson* reinforces the three factors to consider when determining whether a party has waived its right to compel arbitration: (1) whether a substantial length of time

transpired; (2) whether the party seeking to compel arbitration engaged in extensive discovery; and, (3) whether the non-moving party was prejudiced by delay in seeking arbitration. *Id.*, citing *Davis v. KB Home of S.C., Inc.*, 394 S.C. at 131, 713 S.E.2d at 807.

Unlike the factual situation in *Carlson*, in this case – without question – HHE participated in extensive discovery. The parties have conducted extensive written and deposition discovery, participated in two mediations, and attended multiple Court hearings. The costs associated with discovery that may not have been expended in arbitration is an example of prejudice that is beyond mere inconvenience. *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003). The Estate has borne the costs of two failed mediations. Most prejudicially, Petitioner has been involved in years of appellate wrangling and delay before she can finalize discovery and prepare for trial. At least if HHE had moved in a timely manner, these issues might have been resolved by this point. Respondent HHE has availed itself of the courts and delayed pursuing purported rights to arbitration. The trial court properly denied HHE's request on this ground alone.

However, the Court of Appeals failed to address the issue in any manner. Furthermore, the conclusory ruling of the Court of Appeals conflicts with this Court's case of *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (2011) and all other precedential cases on the issue. The Petitioner therefore respectfully requests that this Court address the issue of waiver, undertaking the factual analysis required on the issue, and applying the law to the facts of the case. Under that analysis, it should be found that Respondents have waived the right to seek arbitration and this matter should be remanded to the Hampton County Court of Common Pleas.

II. THE COURT OF APPEALS' FINDING THAT THE FAILURE OF THE ARBITRAL FORUM WAS NOT MATERIAL TO THE AGREEMENT CONFLICTS WITH PRECEDENT.

Second, the Opinion below requires review because of its inconsistency and conflict with this Court's decision of *Grant v. Magnolia Manor-Greenwood,* 383 S.C. 125, 678 S.E.2d 425 (2009). The Court of Appeals ruled as follows:

> We reverse as to whether the trial court erred in refusing to enforce the parties' Arbitration Agreement in accordance with its plain terms. *See Dean* at 42 (determining the American Arbitration Association (AAA) arbitral forum was not a material term to the arbitration agreement, and therefore, there was no reason any potential arbitration proceeding between the parties could not "follow the rules of" the AAA in a different arbitral forum).

Opinion, ¶ 2.

The agreement at issue was prepared by HHE and calls for any "claim or claims" between the resident and HHE to be handled under the auspices of the American Arbitration Association (AAA). In this case, Appellant HHE drafted a standard form Arbitration Agreement which was executed at the same time of the larger packet of admissions documents to the facility. This Arbitration Agreement was provided to the decedent's daughter to sign in the process of the decedent's admission to HHE's Estill facility.

Although parties are free to contract away their rights, it cannot be ignored that this "take-it-or-leave-it" contract was drafted by the superior party, the Respondents HHE. HHE, as the superior party and the drafter of this Agreement, chose the American Arbitration Association's rules as the governing guidelines for any arbitration with the resident. More importantly, HHE was free to include any terms it desired concerning arbitration in their Arbitration Agreement and to present those same "take-it-or-leave-it" terms to all potential residents.

The arbitration agreement, entitled "Resident and Facility Arbitration Agreement," states in pertinent part as follows:

> It is hereby understood and agreed by Heritage of the Low Country and _____ and or "Authorized Representative," together referred to as the "Resident") that, regardless of any other agreement or understanding between the Facility and the Resident, any and all controversies, claims, disputes, disagreements or demands of any kind (referred to as a "Claim" or "Claims") arising out of or relating to the Resident's Admission Agreement with the Facility (the "Admission Agreement") or any service or care provided to the Resident by the Facility shall be settled exclusively by **binding arbitration**. This means the parties are waiving their right to a trial before a jury or a judge.
>
> * * *
>
> Any arbitration proceeding that takes place under this **Arbitration Agreement** shall follow the rules of the American Arbitration Association ("AAA") and any resulting decision shall be enforceable by a court of competent jurisdiction. The **arbitration** shall be conducted where the Facility is located or as close to the Facility as practical. The arbitration proceeding shall be conducted before one neutral arbitrator selected in accordance with the rules of the AAA. The parties agree to bear their own attorneys' fees and costs associated with the arbitration proceeding.

(R. p. 653) (emphasis in original).

"Where a contract is unambiguous, clear and explicit, it must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense." *Warner v. Weader,* 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983). Courts are "not at liberty to consider the undisclosed or secret intentions of the patties but must be governed by their outward expressions." *Kable v. Simmons,* 217 S.C.161, 60 S.E.2d 79, 81 (1950). The Court is "without authority to alter a contract by construction or to make new contracts for the parties." *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Servs. Fin. Comm'n,*

296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) (citing *Gilstrap v. Culpepper,* 283 S.C. 83, 86,320 S.E.2d 445 (1984)).

Here, the agreement unambiguously and clearly states that any dispute arising between the parties shall be resolved in accordance with "the rules of the American Arbitration Association." HHE could have included conditional language or provided alternate administrators, rules, or forums but it did not. HHE could have added language providing for "fall back" procedures if the chosen forum would not allow arbitration. It did not.

Effective January 1, 2003, the AAA published a notification that it would not accept administration of cases involving individual patients without a post-dispute agreement to arbitrate such cases as the one before this Court. *See*, AAA Healthcare Policy Statement, January 1, 2003. This occurred *over four years* before HHE's form take-it-or-leave-it Arbitration Agreement was presented to the decedent's sister. The agreement drafted unilaterally by HHE includes the forum selection provision requiring adherence to the AAA rules. HHE knew or should have known the AAA's position on arbitrating health care cases involving individual patients long before the Agreement at issue was entered into. Because the AAA no longer arbitrates healthcare disputes arising under pre-injury arbitration agreements, the arbitration clause is therefore unenforceable.

Moreover, HHE's choice of the AAA as a forum was an essential term of the arbitration agreement and the failure of the AAA to accept this type of case voids the Agreement.

Rule R-2 of the Commercial Arbitration Rules and Administrative Procedures of the American Arbitration Association provides as follows:

> **When parties agree to arbitrate under these rules,** or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, **they thereby authorize the AAA to administer the arbitration. The authorities and duties of the AAA are prescribed in the agreement of the parties and in these rules,** and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its officers.

(Emphasis supplied). *See*, http://www.adr.org/sp.asp?id=22440. Thus, by the plain and unmistakable language of the AAA – which HHE chose – "the agreement to arbitrate under these rules" directly appoints the AAA as the arbitral forum. The choice of these rules "authorize[s] the AAA to administer the arbitration." *Id.*

Rule R-3 refers to the National Roster of Arbitrators. This Rule provides:

> The AAA shall establish and maintain a national roster of commercial arbitrators (National Roster) and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

See, Rule 3, AAA.

Rule R-49 addresses administrative fees and provides that "[a]s a Not-For-Profit Organization, the AAA shall prescribe an initial filing fee and a case service fee to compensate it for the costs of providing administrative services." Sub-paragraph C of Rule 51 addresses the neutral Arbiter's compensation and provides that: "Any arrangement" for the compensation of a neutral arbiter shall be paid through the AAA and not directly between the parties and the arbitrator. The American Arbitration Association Rules conclude by stating that:

> These rules are the copyrighted property of the American Arbitration Association (AAA) and are intended to be used in conjunction with the AAA's administrative services. Unauthorized use or modification of these rules may violate copyright laws and other applicable laws.

Rule R-49, AAA.

The American Arbitration Association also has a specific fee structure upon which the AAA charges the parties to administer the claims based on the amount of the claim and counterclaims. Initial filing fees range from Seven hundred fifty ($750.00) dollars to Ten thousand ($10,000.00) dollars, and the case service fee ranges from Two hundred ($200.00) dollars to Four thousand ($4,000.00) dollars. For any claims above Ten million ($10,000,000.00) dollars, then the base fee is Twelve thousand, five hundred ($12,500.00) dollars, plus .01% of the amount of the claim above Ten million ($10,000,000.00) dollars, as well as a case service fee of Six thousand ($6,000.00) dollars. Nothing in the AAA Rules addresses, authorizes, or even contemplates the application of its rules outside the scope of its own administration of arbitrations.

Finally, the specific, in-depth rules of the AAA apply to all disputes before it. AAA rules apply to the "initiation" of arbitration, service, and answering. AAA rules and procedures direct the parties concerning the production of evidence, the production ("sharing" in AAA-speak) of documents before a hearing, the parties' ability to obtain discovery, communications with the AAA, form and manner of award, and every aspect involved in the arbitration process from the filing of an award through post award procedures. Therefore, a review of the AAA's Rules and Procedures weighs heavily against any argument by the Appellant that the application of the AAA's rules, based on the language of the Arbitration Agreement, do not rise to the level of selecting a failed forum for arbitration.

An understanding of the detailed, all-encompassing nature of the AAA rules is important to consider in light of *Grant v. Magnolia-Manor* and its analysis of whether the failure of the chosen arbitral forum voided a similar pre-injury arbitration agreement. In *Grant*, the Court's analysis centered upon whether the selection of a named arbitrator constituted an

integral part of the arbitration agreement. "To determine whether a named arbitrator is an integral part of the agreement or an ancillary logistical concern, courts look to the 'essence' of the arbitration agreement." *Grant*, (citations omitted). Under the Supreme Court's analysis, the rules of the forum chosen in *Grant* (the American Health Lawyers Association ("AHLA")) were not merely ancillary and logistical, but rather essential to the agreement. *See, Grant.*

Simply put, the detailed, intricate Rules and Procedures of the AAA cannot be deemed to be merely ancillary and logistical. These rules and procedures affect the substantive outcome of the resolution of the issues.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and review the issues herein. Respectfully, upon such review, the Court should find that the Respondents have waived the right to seek arbitration and this case should be remanded for trial to the Hampton County Court of Common Pleas.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below, a copy of the foregoing *Petition for Writ of Certiorari* was served on all counsel of record via U.S. Mail with first class postage prepaid to the following addresses:

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The undersigned further certifies that on the date indicated below, she has caused a copy of the foregoing *Petition for Writ of Certiorari* and *Appendix* to be served on the following, at the following addresses:

The Honorable Daniel Shearouse
CLERK OF COURT

S.C. SUPREME COURT
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(Petition and Appendix)

The Honorable Jenny Kitchings
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S.C. COURT OF APPEALS
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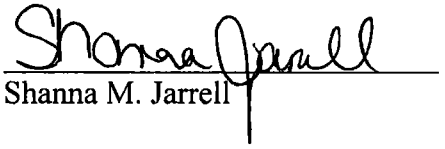
(Petition for Certiorari w/out Appendix)



Shanna M. Jarrell

November 21, 2014