

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 18 2014

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

S.C. Supreme Court

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
Care of the Lowcountry, UNITED CLINICAL SERVICES,
INC., UNITED REHAB, INC., and UHS-PRUITT
CORPORATION,

Respondents.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Monteith P. Todd
J. Michael Montgomery
Robert E. Horner
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
Phone: (803) 929-1400

Jason E. Bring
W. Jerad Rissler
Arnall Golden Gregory LLP
171 17th Street, NW, Suite 2100
Atlanta, Georgia 30363
Phone: (404) 873-8500

Attorneys for Respondents

INTRODUCTION

On August 6, 2014, the Court of Appeals, following this Court's then-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), entered a unanimous decision reversing 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"). For each issue upon which it ruled, the Court of Appeals stated its ruling and identified the authority for its ruling. (Decision at 2-3.) "[T]his format is sufficient to meet the requirement of giving a reason for deciding each issue raised in the appeal." *In re Memorandum Decisions by Court of Appeals*, 322 S.C. 53, 55, 471 S.E.2d 456, 457 (1993).

Dissatisfied with the Court of Appeals' Decision, and under the belief that the Decision "utterly fails to undertake the factual analysis required to determine the issue of waiver," Petitioner filed Respondent's Petition for Rehearing and Suggestion for Rehearing *En Banc* ("Petition for Rehearing"). (Petition for Rehearing at 2.) The sole issue raised in the Petition for Rehearing was the issue of waiver. (*Id.*) On October 23, 2014, the Court of Appeals indicated that the "petition for rehearing en banc was distributed to the judges, but it has been rejected" pursuant to Rule 219, SCACR. (Oct. 23, 2014 Letter from Clerk, S.C. Ct. App. to Counsel.) The Court of Appeals determined that "[a]fter careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing." (Oct. 23, 2014 Order on Petition for Rehearing.)

Remaining dissatisfied with the Court of Appeals' Decision, Petitioner now seeks to have this Court review and overturn the Court of Appeals. Mistaking the Court of Appeals' brevity for a "fail[ure] to address the dispositive issue of waiver in any meaningful or substantive way," Petitioner argues that "the important reason for review is the Court of Appeals' method of arriving at its erroneous conclusions." (Petition for Writ of Certiorari at 7). Petitioner is not entitled to the more fulsome explanation that she desires. *In re Memorandum Decisions by Court of Appeals*, 322 S.C. 53, 55, 471 S.E.2d 456, 457 (1993). More importantly, the Court of Appeals' Decision with respect to waiver is fully consistent with this Court's ruling in *Dean* and the Court of Appeals' prior decision in *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013). Because the case law with respect to waiver is fully developed in the recent cases of *Dean* and *Carlson*, and because the present case falls squarely within those decisions, this issue is not deserving of this Court's review. Rule 242(b), SCACR.

In addition, Petitioner seeks review of the Court of Appeals' determination that the purported unavailability of the American Arbitration Association did not render the arbitration agreement unenforceable. (Petition for Writ of Certiorari at 12-17.) This Court has determined this issue—in an agreement used by Respondent's affiliate containing identical language—in Respondent's favor. *Dean* at 42.¹ Apparently recognizing this Court's decision in *Dean* as controlling on this issue, Petitioner did not raise this issue in her Petition for Rehearing. (*See* Petition for Rehearing.) Therefore, this issue cannot be raised here. "Only those questions raised in the Court of Appeals and in the petition for

¹ Remarkably, even though the Court of Appeals' Decision cited *Dean* as the basis for its determination that the arbitration agreement was enforceable notwithstanding its reference to the AAA Rules, the Petition for Writ of Certiorari completely ignores *Dean* in its discussion of the issue. (Petition for Writ of Certiorari at 12-17.)

rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.” Rule 242(d)(2), SCACR.

ARGUMENTS

I. The Court of Appeals Correctly Decided that Respondents Did Not Waive the Right To Enforce the Arbitration Agreement.

A. The Court of Appeals properly relied on this Court’s decision in *Dean* in concluding that Respondents did not waive arbitration.

On the face of the Decision, it is clear that the Court of Appeals fully considered and rejected Petitioner’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*, this 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.

This 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*, 404 S.C. at 258, 743 S.E.2d at 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."). This 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*, the Court of Appeals 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 Rejected in *Dean*.

Ignoring *Dean* and *Carlson*, Petitioner continues to rely heavily on pre-complaint activity (including pre-complaint activity by Linda Johnson in her individual capacity in separate litigation) to attempt to manufacture a claim of waiver. Despite this Court's clear instruction in *Dean* that waiver must be based on post-complaint activity, Petitioner 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 personally. (Petition for Writ of Certiorari at 2-4, 9.) Both *Dean* and *Carlson* make it clear that the Court of Appeals 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.”).

Further with respect to post-complaint activity, Petitioner continues to provide a grossly misleading narrative regarding the Respondents’ supposed participation in the litigation. (Petition for Writ of Certiorari at 4-5, 10-11.) Respondents raised the issue of arbitration in their Answers, which were the first responsive pleadings filed by Respondents. (See Final Br. of Apps. (“Def. Br.”) at 1.) The entirety of Respondents’ 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, Petitioner attempts to characterize this limited participation by Respondents—which occurred only *after* Respondents made it perfectly clear through their Answers that Petitioner’s claims belonged in arbitration—as a choice by Petitioners to use litigation rather than arbitration. (Petition for Writ of Certiorari at 10-11.)

Respondents’ reply to this identical argument raised by Petitioner 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.² Such limited engagement in the litigation process (caused by Plaintiff's failure to abide 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.)

This Court's decision in *Dean* fully supports the Court of Appeals' Decision. As in *Dean*, "after [Petitioner] filed her formal complaint," Respondents "moved to compel arbitration at their first opportunity." *Id.* at 47. Respondents filed Answers asserting the arbitration agreement as a defense. After responding to Petitioner's attempts to strike the arbitration defenses, Respondents conducted limited discovery necessary to move to compel arbitration. Following this limited discovery, Respondents promptly moved to

² 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).

compel arbitration. (See Defs.' Br. at 1-2, 4.) Thus, there was no undue delay in seeking to enforce the arbitration agreement, and Respondents took no action before the trial court that was inconsistent with their position that Petitioner'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.

Because the case law with respect to waiver is fully developed in the recent cases of *Dean* and *Carlson*, and because the present case falls squarely within those decisions, this issue is not deserving of this Court's review. Rule 242(b), SCACR. Accordingly, this Court should decline to grant certiorari with respect to the waiver issue.

II. Petitioner's Complaint With Respect to The Arbitral Forum Was Preserved, And In Any Event The Court of Appeals' Decision Was Fully Consistent With This Court's Controlling Decision in *Dean*.

A. Petitioner did not seek reconsideration of the Court of Appeals' Decision with respect to the effect of the arbitration agreement's reference to the AAA Rules.

Petitioner did not raise the issue of the arbitration agreement's reference to the AAA Rules in her Petition for Rehearing. (See Petition for Rehearing.) Therefore, this issue is waived and cannot be raised here. "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 242(d)(2), SCACR.

B. The Court of Appeals properly relied on this Court's decision in *Dean* in concluding that reference to the AAA Rules did not render the arbitration agreement unenforceable.

Even if this Court were to consider this unpreserved issue, the Court of Appeals' Decision was controlled by this Court's decision in *Dean*, which involved *identical* language to the arbitration agreement in this case. (*Compare* Petition for Writ of Certiorari at 13 *with Dean* at 35-36.) In *Dean*, this Court "adopt[ed] the majority rule distinguishing between 'in accordance with' and 'administered by.'" *Dean* at 42. "More specifically, we find that the named arbitral forum is not a material term to agreements in which the parties agree to arbitrate 'in accordance with' the named forum's rules, absent other evidence to the contrary." *Id.* This holding is entirely dispositive of this issue.

Even though the Court of Appeals' Decision cited *Dean* as the basis for its determination that the arbitration agreement was enforceable notwithstanding its reference to the AAA Rules, Petitioner relies exclusively on *Grant v. Magnolia Manor-Greenwood*, 383 S.C. 125, 678 S.E.2d 425 (2009), and completely ignores *Dean*. (Petition for Writ of Certiorari at 12-17.) Because *Grant* involved an arbitration agreement containing "administered by" language, it is inapposite to the present case which involves "in accordance with" language. *Dean* at 42 (distinguishing between "in accordance with" and "administered by"). Accordingly, Petitioner's reliance on *Grant* is misplaced.

Because Petitioner has waived this issue and because the case law with respect to this issue has been fully developed in *Dean*, and because the present case falls squarely within *Dean* (and outside of *Grant*), this issue is not deserving of this Court's review. Rule 242(b), SCACR. Accordingly, this Court should decline to grant certiorari with respect to the arbitral forum issue.

CONCLUSION

Following this Court's guidance in *Dean*, the Court of Appeals properly found that the arbitration agreement was enforceable notwithstanding its reference to the AAA Rules and that Respondents did not waive arbitration. *Dean*, Adv. Sh. No. 24 at 42, 46-47. The issues raised by Petitioner have been fully addressed in this Court's decision in *Dean*, and the Court of Appeals' Decision is fully consistent with *Dean*. Accordingly, review by this Court is unnecessary, and Respondents respectfully request that the Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

SOWELL GRAY STEPP & LAFFITTE

BY: 

Monteith P. Todd (SC Bar 5591)
J. Michael Montgomery (SC Bar 74930)
Robert E. Horner (SC Bar 16326)
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street,
Post Office Box 11449
Columbia, South Carolina 29211
Phone: (803) 929-1400

Jason E. Bring (SC Bar 100275)
W. Jerad Rissler (SC Bar 71662)
Arnall Golden Gregory LLP
171 17th Street, NW, Suite 2100
Atlanta, Georgia 30363
Phone: (404) 873-8500

Attorneys for Respondents

December 18, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

RECEIVED

DEC 18 2014

S.C. Supreme Court

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
Care of the Lowcountry, UNITED CLINICAL SERVICES,
INC., UNITED REHAB, INC., and UHS-PRUITT
CORPORATION,

Respondents.

PROOF OF SERVICE

I, the undersigned legal assistant, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Respondents, do hereby certify that I have served all counsel in this action with a copy of the Return to Petition for Writ of Certiorari by mailing copies of same to counsel via United States Mail, postage prepaid, at the following addresses:

Lee D. Cope, Esquire
Peters, Murdaugh, Parker, Eltzroth & Detrick
101 Mulberry Street East
P.O. Box 457
Hampton, SC 29924

Charles McCutchen, Esquire
Lanier & Burroughs, LLC
P.O. Drawer 2789
Orangeburg, SC 29116

Margie Bright Matthews, Esquire
P.O. Box 499
Walterboro, SC 29488

Matthew V. Creech, Esquire
Peters, Murdaugh, Parker, Eltzroth & Detrick, PA
P.O. Box 2500
Ridgeland, SC 29936



Robin C. Owens
Legal Assistant

12/18, 2014



RECEIVED

DEC 18 2014

MICHAEL MONTGOMERY
Direct Dial 803 231.7833
Direct Fax 803 231.7890
Email mmontgomery@sowellgray.com

S.C. Supreme Court

December 18, 2014

VIA HAND DELIVERY

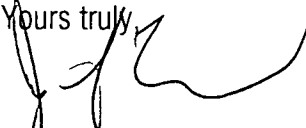
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

RE: Linda Johnson, as PR of the Estate of Inez Roberts v.
Heritage Healthcare of Estill, LLC d/b/a Heritage of the Lowcountry
and/or d/b/a Uni-Health Post Acute Care of the Lowcountry,
United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt Corporation
Opinion No. 2014-UP-318 (S.C. Ct. App. Filed Aug. 6, 2014)
SC Supreme Court Case No. 2014-002502
Our File No. 5593/1509

Dear Mr. Shearouse:

I enclose for filing the original and seven (7) copies of the Return to Petition for Writ of Cert on behalf of Respondents in the above-referenced matter. Please return a clocked-in copy of same to me for our records.

By copy of this letter to counsel shown below, I am serving a copy of same upon them by mail. Thank you for your assistance.

Yours truly

J. Michael Montgomery

JMM:rc0

Enclosures

cc: Lee D. Cope, Esquire
Charles McCutchen, Esquire
Matthew Creech, Esquire
Margie Bright Matthews, Esquire