THE STATE OF SOUTH CAROLINA
In The 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,.....Respondent,

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,.....Petitioners.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENTS

Respondent's Return to the Petition for Certiorari highlights the need for this Court to grant the Petition, particularly with regard to the issue of waiver. To say that the Court of Appeals misapplied the *Dean* case to the facts of this case is euphemistic; in fact, the Court of Appeals never undertook *any* factual analysis required of the issue and then refused to apply the facts after the Petition for Rehearing. Likewise, Respondent – eager to avoid responsibility for its decision to delay moving for arbitration at its earliest or any reasonable opportunity – completely ignores the distinguishing and glaring facts that clearly separate this case from *Dean*. The Court of Appeals' decision summarily states that waiver is inapplicable here:

> 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.

While that may have been the factual situation in *Dean*, it is not the case here. Realizing that, Respondents have gone to great lengths to avoid factual analysis of this issue. The Court of Appeals twice chose not to address this dispositive issue, presumably based upon end-oriented decision making, because to address the issue under existing precedent would require affirmation of the trial court and denial of arbitration in this matter.

After Respondent filed and served its answer, Petitioner immediately filed a motion to strike the defense of arbitration. At the hearing on this Motion, Petitioner invited Respondent to file its Motion to Compel Arbitration. At that hearing in February of 2011, almost four years ago, Petitioner challenged counsel for Respondents to do so

and told the circuit court exactly what the course to be taken by the Respondents would be:

> I mean, he[1] does what he wants to do and he is satisfied that he's got what he wants, he can file his motion to file arbitration; but I can't go depose the people that supposedly presented and explained these arbitration agreements to them, because when I styled my notice of deposition they [Respondents] can file a motion to compel arbitration and everything stops. It's unfair. They [Respondents] want to avail themselves of the Court when it suits them. They want to run us through the mill and put our family through it, as long as it suits them – but the moment things start getting a little risky, a little bit hairy, bam, we're going to file our motion to compel arbitration. It's almost like they have this ace up their sleeves.

ROA pp. 575-576.

Having been challenged to file the Motion to Compel Arbitration in February of 2011, and knowing that Petitioner contended that waiver had already occurred, the Respondent then engaged in discovery. Admittedly, Respondent used limited discovery for its sake but participated in normal litigation discovery propounded by Petitioner. At no time, did Respondent seek a court order limiting discovery to arbitration issues. Only after numerous court hearings and thousands of pages of discovery, did Respondent decide to change course and seek arbitration. This was years after the first "controversy" arose and six months after being challenged to seek arbitration. The ace up the Respondents' sleeve was pulled, and to this point has worked. More than six (6) years after the first controversy concerning medical records, the Respondents are not one step closer to the courtroom than when the initial litigation started. Because the Court of

[1] "He" is referring to counsel for the Respondents. This quoted language is follow up to Respondents' counsel's discussion with the trial court seeking to use written discovery and deposition testimony limited only to the issue of arbitration.

Appeals refused to apply the law of this state to the facts of this case, we are still without a real ruling on whether waiver has occurred.

Clearly Petitioner the Petitioner has suffered in time and expense by the dilatory tactics of Respondent that, in light of the Motion to Strike, can only been viewed as an affirmative decision to delay responsibility for its negligence.

Respectfully submitted,

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December 24, 2014

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below, a copy of the foregoing *Reply to Return to 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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December 24, 2014