THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2014-002502
Lower Court Case No. 2010-CP-25-489
Lower Court Case No. 2010-CP-25-490

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.

BRIEF OF RESPONDENTS

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

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STATEMENT OF THE CASE

This appeal involves the trial court's denial of a motion to compel arbitration of a nursing home dispute. On August 6, 2014, the Court of Appeals issued a unanimous *per curiam* opinion reversing the trial court's Order and holding that the arbitration agreement is enforceable and that Defendants did not waive their right to compel arbitration. *Johnson v. Heritage Healthcare of Estill, LLC*, Op. No. 2014-UP-318 (S.C. Ct. App. Aug. 6, 2014).

Plaintiff filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. (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.)

Plaintiff then sought review in this Court. This Court granted certiorari on the issue of waiver, which was presented by the Plaintiff as: "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." (Petition for Writ of Certiorari at 1; March 4, 2015 Order Granting Petition for Writ of Certiorari in Part.)

By way of background, on October 13, 2010, Plaintiff/Petitioner Linda Johnson ("Plaintiff" or "Ms. Johnson") commenced wrongful death and survival actions alleging

nursing home negligence. (ROA at 68-89.)[1] Plaintiff sued Heritage Healthcare of Estill, LLC, United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt Corporation (collectively referred to herein as "Defendants"). Defendants timely served answers to the complaints on November 24, 2010. (ROA at 90-137.) In their Answers, Defendants asserted as a defense that Plaintiff's claims were barred pursuant to the terms of an arbitration agreement covering Plaintiff's claims. (ROA at 92, ¶¶ 16-17; ROA at 98, ¶¶ 16-17; ROA at 104, ¶¶ 16-17; ROA at 110, ¶¶ 16-17.) On December 1, 2010, Plaintiff moved to strike certain of Defendants' defenses, including defenses relating to arbitration. (ROA at 138-41.) A hearing on these motions was held on February 11, 2011. (ROA at 564-83.) By Orders dated March 4, 2011, the Court denied Plaintiff's motions to strike the arbitration defenses. (ROA at 16-19.)

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[1] Plaintiff devotes a substantial portion of her brief to entirely separate and unrelated proceedings from 2008 to 2009, which are not part of the underlying proceedings and which were not made a part of the trial court record. (*See* Brief of Petitioner at 2-4, 10-12.) Although Plaintiff generally referred to these proceedings at the hearing on her Motion to Strike (*see* ROA at 564-83), these earlier proceedings were never made a part of the trial court record. Further, Plaintiff did not rely on these earlier proceedings, either in her Memorandum in Opposition to Defendants' Motion to Compel Arbitration (ROA at 178-88) or at the Hearing on the Motion to Compel (ROA at 584-608.) Indeed, in her Memorandum in Opposition, Plaintiff set the starting point for the waiver analysis at the filing of the Notice of Intent, not on the earlier, unrelated proceedings that were never made a part of the record. (ROA at 186 ("The Defendants waited too long to move for arbitration. *The Plaintiff began these proceedings by filing a Notice of Intent that was served on the Defendants on or about April 15, 2010.*) (emphasis added).) Plaintiff's argument here with respect to matters not of record and not argued to the trial court in response to the Motion to Compel Arbitration ought not be considered in this appeal. *See* Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal."); *Kennedy v. S.C. Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001) (holding new arguments presented in Petition for Rehearing should not be considered given Appellants had the opportunity to present those arguments and evidence when this case was originally heard by the trial court); *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-780 (2004) (emphasizing "importance and absolute necessity" of ensuring that all issues and arguments are presented to the lower court for its consideration). In any event, even if the prior proceedings could be considered, they do not support a finding of waiver, as discussed below.

Following the Orders denying the Motions to Strike, the Defendants engaged in limited discovery solely related to arbitration. Defendants moved for an order compelling arbitration on August 3, 2011. (ROA at 146-77.) Plaintiff filed a response to Defendants' motion on October 6, 2011. (ROA at 178-446.) Following a hearing held on October 7, 2011 (ROA at 584-608), the trial court entered an order drafted by the Plaintiff denying Defendants' Motion to Compel Arbitration (ROA at 1-13). Defendants timely filed a motion for reconsideration. (ROA at 447-537.) Plaintiff filed a response to this motion on December 13, 2011. (ROA at 538-44.) The court denied Defendants' motion for reconsideration by Order entered January 17, 2012. (ROA at 14-15.) On February 2, 2012, Defendants filed a Notice of Appeal. (ROA at 545-63.)

On August 6, 2014, the Court of Appeals, following this Court's then-recent decision in *Dean v. Heritage Healthcare of Ridgeway*, 408 S.C. 371, 759 S.E.2d 727 (2014), entered a unanimous decision reversing the trial court's Order and finding the arbitration agreement enforceable. *Johnson v. Heritage Healthcare of Estill, LLC*, Op. No. 2014-UP-318 (S.C. Ct. App. Aug. 6, 2014). On August 20,2014, Plaintiff filed a Petition for Rehearing and Suggestion for *En Banc* in the Court of Appeals. The Court of Appeals denied the Petition on October 23, 2014. Plaintiff petitioned this Court for certiorari. On March 4, 2015, this Court granted review on the issue of waiver.

ARGUMENT

I. Introduction

Mistaking the Court of Appeals' brevity for a "fail[ure] to address the dispositive issue of waiver in any meaningful or substantive way," Plaintiff contends that the Court of Appeals "refused to perform the fact-based and case-by-case analysis that has been the hallmark of waiver analysis." (Petitioner's Brief at 8-9.) However, the Court of Appeals

fully considered Plaintiff's arguments—twice—and rejected them. Plaintiff is not entitled to the more fulsome explanation 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 (S.C. App. 2013). The record establishes that Defendants raised the issue of arbitration at the earliest opportunity, took limited discovery solely for the purpose of enforcing the arbitration agreement, and promptly moved to compel arbitration upon completion of the limited discovery. Because of Plaintiff's refusal to abide by the arbitration agreement, Defendants were forced to defend themselves against Plaintiff's improper use of the court system. Defendants never took any action that evidenced an intent not to enforce the arbitration agreement. Recognizing this fact, the Court of Appeals found no waiver. Because the Court of Appeals' decision is fully in accord with this Court's precedent, it should be affirmed.

II. The Court of Appeals Fully Addressed The Issue of Waiver and Issued a Proper Decision.

Plaintiff accuses the Court of Appeals of issuing a "result-driven, end-oriented ruling"; "ignor[ing] [Plaintiff's] arguments on a dispositive issue"; "ignor[ing] the factual analysis required to be undertaken"; "ignor[ing] the actual facts of the record"; and "issu[ing] an unpublished opinion likely to receive a lesser chance of review by this Court." (Petitioner's Brief at 7.) The Court of Appeals on the face of its decision fully considered and rejected Plaintiff's waiver claim following the precedent established by this Court in *Dean*. On the issue of waiver, the Court of Appeals held:

> 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.

Johnson, Op. No. 2014-UP-318 at 2. As this Court has previously held, "this 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).

Further, following the Court of Appeals' decision, Plaintiff sought reconsideration and *en banc* review. 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.) Accordingly, it is clear that the Court of Appeals gave full consideration to Plaintiff's waiver argument and rejected it in accord with existing precedent, including this Court's decision in *Dean*. As discussed below, that decision was correct.

III. The Court of Appeals' Determination that Defendants Did Not Waive Enforcement of the Arbitration Agreement Is In Accord with the Federal Arbitration Act and Fully Supported by this Court's Decision in *Dean*.

A. The Federal Arbitration Act Creates a Presumption Against Waiver.

"[T]here is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010). In enacting the FAA, Congress

established a strong federal policy in support of arbitration agreements, "requiring that [courts] 'rigorously enforce agreements to arbitrate.'" *Shearson/Amer. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

This strong federal policy in favor of arbitration reflects Congress's and the Supreme Court's belief that arbitration is fair and beneficial. The United States Supreme Court's decisions reflect a determination that "there are real benefits to the enforcement of arbitration provisions." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-123 (2001). "The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . . ." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H. R. Rep. No. 97-542, p. 13 (1982)). Recently, the Supreme Court has specifically held that this federal policy in favor of arbitration includes claims involving nursing care. *Marmet Healthcare Center v. Brown*, 132 S.Ct. 1201 (2012).

This Court has noted that the federal policy in favor of arbitration includes a presumption against a finding of waiver of an arbitration agreement. *Dean*, 408 S.C. at 387-388, 759 S.E.2d at 736. In *Dean*, this Court held that "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.'" *Dean*, 408 S.C. at 387-388, 759 S.E.2d at 736 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25 (1983))

(emphasis added). This Court further noted that "there is a presumption against finding a party has waived its right to compel arbitration." *Dean*, 408 S.C. at 388, 759 S.E.2d at 736 (citing *E. Dredging & Constr., Inc. v. Parliament House, L.L.C.*, 698 So. 2d 102, 103 (Ala. 1997)). Further, "a 'party seeking to prove a waiver of a right to arbitrate carries a heavy burden . . . .'" *Dean*, 408 S.C. at 388, 759 S.E.2d at 736 (quoting *Blue Cross Blue Shield of Ala. v. Rigas*, 923 So. 2d 1077 at 1093 (Ala. 2005)).

B. Defendants Did Not Take Any Act That Constituted a "Voluntary and Intentional Abandonment or Relinquishment of a Known Right."

"A waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Sanford v. South Carolina State Ethics Com'n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009) (citing *Eason v. Eason*, 384 S.C. 473, 682 S.E.2d 804 (2009)). The three factors generally considered to determine if a party has waived its right to enforce arbitration include: (1) the time between commencement of the action and moving for arbitration; (2) whether the party seeking arbitration engaged in extensive discovery; 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, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). "Specifically, the party seeking to avoid arbitration 'must show prejudice through an undue burden caused by delay in demanding arbitration.'" *Dean*, 408 S.C. at 388, 759 S.E.2d at 736 (quoting *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)).

In this case, the Defendants have never acted in a manner contrary to their contractual right to arbitrate. Certainly, Plaintiff can point to no action by Defendants that demonstrates a "voluntary and intentional relinquishment of" the right to compel arbitration. *Sanford*, 385 S.C. at 496, 685 S.E.2d at 607. The Defendants immediately

raised arbitration in their Answers. The Defendants then challenged the Plaintiff's Motion to Strike the arbitration defenses. Thereafter, the Defendants conducted limited discovery for the express purpose of enforcing the arbitration agreement. The Defendants' conduct has been the *exact opposite* of a knowing and voluntary relinquishment of the right to enforce the arbitration agreement. Thus, there has been no waiver.

1. Defendants' Pre-Complaint Activity in Unrelated Litigation Is Irrelevant to the Waiver Analysis.

In conducting its own waiver analysis, this Court has focused on post-Complaint activity. In *Dean*, this 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 388, 759 S.E.2d at 736 (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.* Further, the Court of Appeals has previously noted that "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*, 404 S.C. at 258, 743 S.E.2d at 872.

Despite this Court's clear instruction in *Dean* that waiver must be based on post-complaint activity, Plaintiff now relies primarily on 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. (Petitioner's Brief at 2-4, 10-12.) While Plaintiff made reference to the earlier litigation initiated by Linda Johnson in the hearing on the Motion to Strike (ROA at 564-83), Plaintiff did not rely on Ms. Johnson's earlier litigation in opposing the Motion to

Compel Arbitration (ROA at 178-88, 584-608).[2] Moreover, as described in Petitioner's Brief, the earlier litigation was initiated by Ms. Johnson, who obtained a TRO requiring the production of medical records. The sum and substance of Defendants' response to this litigation was to respond to the trial court's *ex parte* orders regarding Ms. Johnson's attempts to obtain medical records. An arbitrator would not have had the authority to set aside or invalidate any order of the Hampton County Court of Common Pleas. Thus, regardless of whether Ms. Johnson's litigation activity in connection with obtaining medical records was a violation of the arbitration agreement, the only option for responding to the *ex parte* orders was to seek relief in the court that issued that order or in the appellate courts. Defendants' attempts to defend themselves against Ms. Johnson's *ex parte* use of the trial courts does not evidence a "voluntary and intentional abandonment or relinquishment" by Defendants of the right to compel arbitration. *Sanford*, 385 S.C. at 496, 685 S.E.2d at 607; *see also Carlson*, 404 S.C. at 258, 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.").

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[2] The record does not contain any filings with respect to the prior litigation initiated by Ms. Johnson, and Plaintiff did not rely on this prior litigation in opposing Defendants' Motion to Compel Arbitration in the trial court. Thus, in addition to being irrelevant to the waiver analysis, Plaintiff's argument with respect to the prior litigation has not been preserved and should not be considered by this Court. *See* Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal."); *Kennedy v. S.C. Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001) (holding new arguments presented in Petition for Rehearing should not be considered given Appellants had the opportunity to present those arguments and evidence when this case was originally heard by the trial court); *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-780 (2004) (emphasizing "importance and absolute necessity" of ensuring that all issues and arguments are presented to the lower court for its consideration).

2. Defendants Timely Asserted the Right to Enforce the Arbitration Agreement and Moved for Arbitration at the Earliest Possible Opportunity Following the Filing of the Complaints.

With respect to post-complaint activity, Plaintiff continues to provide a misleading narrative regarding the Defendants' supposed participation in the litigation. (Petitioner's Brief at 4-6, 12-15.) Plaintiff's Complaints were filed on October 13, 2010. (ROA at 66-78, 79-89.) On November 24, 2010, Defendants raised the issue of arbitration in their Answers, which were the first responsive pleadings filed by Defendants. (ROA at 92, ¶¶ 16-17; ROA at 98, ¶¶ 16-17; ROA at 104, ¶¶ 16-17; ROA at 110, ¶¶ 16-17.) On December 1, 2010, the Plaintiff moved to strike the portions of the Defendants' Answers that raised arbitration as a defense. (ROA at 138-39, 140-41.) The Motions to Strike were denied by Orders dated March 4, 2011. (ROA at 16-17, 18-19.) After the court denied the Plaintiff's Motion to Strike the arbitration defenses, the Defendants conducted limited discovery *solely* on the issue of arbitration, which included depositions of the individuals who signed the arbitration agreement. (ROA at 609-29, 630-35.) After receiving the transcripts in July 2011, the Defendants moved to compel arbitration on August 4, 2011. (ROA at 146-77.)

The entirety of Defendants' participation in the post-complaint litigation was limited to Defendants' efforts to compel arbitration and defending against Plaintiff's improper use of the courts in violation of the arbitration agreement. (*See* Petitioner's Brief at 12 (acknowledging that "HHE have served and answered discovery, though they have attempted to limit that discovery only to 'arbitration' issues").) Nevertheless, Plaintiff attempts to characterize this limited participation by Defendants—which

occurred only *after* Defendants made it clear through their Answers that Plaintiff's claims belonged in arbitration—as a "delay tactic." (Petitioner's Brief at 13.)

Less than ten months passed from the filing of the Complaint, which was reasonable given that arbitration was immediately raised as an issue in Defendants' Answers and delay in conducting the limited discovery necessary to enforce the arbitration agreement was caused, in part, by the Plaintiff's Motion to Strike the arbitration defenses. 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 their 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.").

3. Defendants Sought Only Expressly Limited Discovery Solely for the Purpose of Enforcing the Arbitration Agreement, and Defendants Should Not Be Punished for Responding to Plaintiff's Discovery.

Plaintiff argues that "HHE participated in extensive discovery." (Petitioner's Brief at 15.) She further asserts that "[o]n issues unrelated to arbitration, the parties have filed and a conducted extensive written discovery, participated in two mediations, and attended multiple Court hearings." (*Id.*) However, Plaintiff concedes, as she must, that Defendants "attempted to limit that discovery only to 'arbitration' issues." (*Id.* at 12.) As Defendants explained in response to Plaintiff's argument at the hearing on the Motion to Strike:

> And as our discovery is limited. He's saying that we're trying to avail ourselves to the Court to get discovery on the merits. We haven't sent any discovery on the merits of their underlying claim. The only discovery we've sent, and purposely to limit it, so that we didn't waive the claim, the only discovery we've sent was on the issue of arbitration, and only because they haven't complied with the arbitration agreement. This

> discovery can be done fairly quickly. We can get this motion to compel filed so that it's in a procedural posture so that they can respond. If they need to take discovery do to that, that's fine. We're not suggesting that they can't. We're not suggesting that they not be allowed and that they be put at a disadvantage to respond to the motion to compel arbitration. Nobody has suggested that. All we're asking for is that we give out reasonable discovery on the arbitration issues and then we can present it to the Court so that we will be in a position to address the merits of the arbitration agreement.

(ROA at 577, line 24 to ROA at 578, line 17.) Further, in response to the trial court's inquiry why discovery was necessary prior to filing the Motion to Compel, Defendants explained:

> Well, because he's going to raise these defenses of the authority of the people who signed it, of the Triple A issue, and we need to know what defenses he's going to raise and be able to investigate those defenses and be able to respond to those defenses, not the underlying claims. We're not seeking discovery on that. We're not seeking – and that's what waiver is about, seeking to avail yourself of discovery that you wouldn't be able to get in arbitration on underlying claims; not to go forward and present your case on whether the arbitration agreement is valid. I think the Court has a right to hear all the evidence relating to the arbitration before it makes a decision whether these agreements are enforceable or not.

(ROA at 581, lines 1-14.) Thus, Defendants made clear at the outset that they intended to enforce the arbitration agreement and that they simply needed limited discovery in order to present the arbitration issues fully to the trial court.

The two depositions in this case both occurred on May 5, 2011 and totaled less than 90 minutes. (ROA at 609, 618, 631, 635.) At the beginning of Ms. Johnson's deposition, the parties stipulated that the depositions were limited to arbitration:

> MR. COPE: Let's put on the record first, Matt Creech and I are here today on behalf of Linda Johnson, and it is our understanding that this deposition is for limited purposes of issues relating to an arbitration agreement and whether or not that arbitration agreement is enforceable. We agree with that; however, we obviously believe that it should be strictly applied and that no questions outside that issue can be asked. Of course, reserving the right should this arbitration agreement be found – if the defendants file a Motion to Compel Arbitration and if it is denied, we will allow him to

> come back and take Ms. Johnson's deposition ... in accordance with the Rules of Civil Procedure.
>
> MR. RISSLER: And that's our understanding as well....

(ROA at 609-10.) Similarly, at the beginning of Ms. Dobson's deposition, the parties stipulated:

> MR. COPE: Okay. We've agreed to take Ms. Sally Dobson's deposition for the limited purposes of her involvement with the admission and arbitration issues in the Cherry Scott case. agreement and whether or not that arbitration agreement is enforceable. By taking her deposition today we're not waiving our rights should we be allowed to proceed with litigation or if the Defendant does not move to compel arbitration that we would be allowed to take her deposition again if necessary on the merits of the case.
>
> MR. RISSLER: We agree.

(ROA at 631.) Thus, Plaintiff stipulated that the sole purpose of taking the depositions was for "purposes of issues relating to an arbitration agreement and whether or not that arbitration agreement is enforceable." Of course, a deposition limited solely to arbitration issues would have served no purpose if Plaintiff believed that Defendants had earlier waived arbitration. Moreover, it is illogical to argue that a party waives arbitration by engaging in discovery for the sole purpose of enforcing an arbitration agreement and inaccurate to argue that Defendants "participated in extensive discovery," (Petitioner's Brief at 15) when it is clear that Defendants' discovery was limited to enforcing the arbitration agreement.

Plaintiff further contends that the Defendants have waived the right to arbitration by responding to Plaintiff's use of the court system and responding to Plaintiff's broad discovery requests. Defendants indicated in their Answers that they intended to enforce the arbitration agreement, and they repeated this in the hearing on the Motion to Strike. Plaintiff's argument fails to demonstrate any action of Defendants that could be

interpreted as a voluntary and intentional abandonment of the right to arbitrate. Rather, Plaintiff seeks to deprive Defendants of their contractual right to arbitration because Defendants defended against Plaintiff's use of the court system. The Defendants appeared in court only to defend motions *filed by the Plaintiff*. As to the Defendants' production of documents, Defendants should not be punished for *responding* to the *Plaintiff's* discovery requests. The Defendants' actions with respect to the discovery they sought were wholly consistent with their position that the Plaintiff's claims must be submitted to arbitration.

Plaintiff has failed to cite any authority in support of its illogical contention that Defendants somehow waived the right to enforce the arbitration agreement merely by defending themselves in litigation initiated by Plaintiff, responding to discovery and motions filed by Plaintiff, and seeking discovery limited to enforcement of the arbitration agreement. 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 by Defendants 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, as they promptly moved to compel arbitration following completion of limited discovery necessary to support the motion. *See Carlson*, 404 S.C. at 257-258, 743 S.E.2d at 872-873 (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).

4. Plaintiff Has Not Been Prejudiced.

Defendants raised the issue of arbitration in their Answers and attempted to follow a logical progression towards a motion to compel arbitration by conducting limited discovery on the arbitration issue after Plaintiff's Motion to Strike the arbitration defenses was finally resolved. After this limited discovery was conducted, the Defendants timely moved to compel arbitration. Defendants have engaged in no conduct in the litigation that is inconsistent with their position that Plaintiff's claims must be submitted to arbitration. Plaintiff now claims prejudice based on "extensive written discovery, participat[ion] in two mediations, and attend[ing] multiple Court hearings." (Petitioner's Brief at 15.) However, as explained above the only "extensive written discovery" was that served by Plaintiff on Defendants; the multiple court hearings were to resolve motions filed by Plaintiff after Defendants already had indicated their intent to enforce the arbitration agreement; one of the mediations occurred pre-suit and the other occurred after Defendants had already moved to compel arbitration. Plaintiff cannot manufacture a claim of prejudice based on her own decision to conduct broad discovery and pursue motions knowing full well that her claim was subject to an arbitration agreement that Defendants consistently and repeatedly indicated from the outset of the litigation they intended to enforce as soon as they completed limited necessary discovery on the arbitration issues. *See Rich v. Walsh*, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003) (holding that mere delay, regardless of its duration, should not be considered as a factor independent of the actual prejudice it occasions). This Court noted in *Dean* 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*, 408 S.C. at 388, 759 S.E.2d at 736. Here, as in *Dean*, the Plaintiff "has shown no prejudice or undue burden to

her." *Dean*, 408 S.C. at 388, 759 S.E.2d at 736; *see also Carlson*, 404 S.C. at 257-258, 743 S.E.2d at 872-73.

Numerous South Carolina courts have addressed waiver issues and have rejected waiver defenses in cases similar to the present case. *See Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 557, 544 S.E.2d 643, 645 (Ct. App. 2001) (finding an eight-month period where the "litigation consisted of routine administrative matters and limited discovery [that] did not involve the taking of depositions or extensive interrogatories" did not establish waiver); *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding a thirteen-month period in which discovery was limited in nature did not demonstrate waiver). This Court's decision in *Dean* fully supports the Court of Appeals' decision.

Conclusion

For the reasons set forth herein, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

SOWELL GRAY STEPP & LAFFITTE

BY: _____

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

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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 Brief of Respondents by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

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

Charles J. McCutchen
Lanier & Burroughs, LLC
Post Office Drawer 2789
Orangeburg, SC 29116

Margie Bright Matthews
Post Office Box 499
Walterboro, SC 29488

Matthew Creech
Peters, Murdaugh, Parker, Eltzroth & Detrick
Post Office Box 2500
Ridgeland, SC 29936

Robin C. Owens
Legal Assistant

4/30, 2015

SOWELL SG GRAY

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

April 30, 2015

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 sixteen (16) copies of the Brief of Respondents in the above-referenced matter, together with the Proof of Service on all counsel. 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:rco
Enclosures
cc: Lee D. Cope, Esquire
Charles McCutchen, Esquire
Matthew Creech, Esquire
Margie Bright Matthews, Esquire