THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

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

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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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# REPLY BRIEF OF PETITONER

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Lee D. Cope
Matthew v. Creech
PETERS, MURDAUGH,
PARKER, ELTZROTH &
DETRICK
Post Office Box 457
Hampton, SC 29924
(803) 943-2111

Charles J. McCutchen
LANIER & BURROUGHS,
LLC
Post Office Drawer 2789
Orangeburg, SC 29116
(803) 268-9800

Margie Bright-
Matthews
Post Office Box 499
Walterboro, South
Carolina, 29488
(843) 549-6028

ATTORNEYS FOR PETITIONER

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Petitioner Linda Johnson, as Personal Representative of the Estate of Inez Roberts, submits the following Reply Brief in response to Respondents' Brief of April 30, 2015. While incorporating by reference all arguments previously made, the limited scope of this reply is to respond to Respondents' arguments contained in its Brief.

## ARGUMENTS

As an initial matter, the facts and procedural history of the dispute between Linda Johnson and her mother's care providers are unique. The Respondents argue that this Court should not consider any "pre-Complaint" activity before Johnson filed her Summonses and Complaints in the fact-based waiver analysis. This assertion is illogical. The Respondents, however, must urge adoption of this shortsighted view because to look at the controversy between the parties as a whole – from the moment Respondents knew there was a dispute concerning the care of Ms. Roberts and her daughter wanted the nursing home chart[1] – there can be no real contention by Respondents that the delay in moving to compel arbitration does not amount to waiver. Under these facts, the previous controversy concerning the records and the attendant delay are precisely why waiver analysis exists in the first place. Factually speaking, the first controversy between the parties concerned medical records, the necessary linchpin of Ms. Roberts' and her family's ability to assess whether actionable negligence caused Ms. Roberts' injuries. Ms. Roberts' and her family's very ability to assert her rights were tied to access to her chart, because without them she would not be able to go through the investigative process

[1] The arbitration clause at issues provides that "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." (ROA p. 309). Furthermore, a claim is defined as broadly as "violations of any right granted to the Resident by law or by the Admission Agreement." (Id.) Clearly, the right to one's own medical records is a right granted to the resident.

necessary to get an expert's affidavit to initiate the Notice of Intent proceedings. Respondents' argument that the activities before the filing of the actual Complaint are irrelevant to the analysis must be denied.

In support of its arguments, Respondents rely heavily upon *Carlson v. South Carolina State Plastering, LLC,* 404 S.C 250, 743 S.E.2d 868 (Ct. App. 2013). Review of that case, however, reveals that *Carlson* is completely distinguishable from the facts and procedural history here. The distinguishing features of *Carson* and the case at bar actually militate towards a finding of waiver in this matter.

*Carlson* arose from the circuit court's finding of waiver as against developers/builders in the Sun City development in Beaufort County. The Carlsons purchased a home there and the purchase agreement contained an arbitration clause. In 2008 the Carlsons filed a complaint against the Defendants alleging construction defects in their home's stucco siding. The Carlsons' case was one of nearly 140 cases pending against the defendants for alleged stucco defects. In December of 2008, the Defendants answered, including the defense of arbitration and also failure to follow the Right to Cure Act of S.C. Code Ann. Section 40-59-810, *et seq*. Throughout 2009, the parties addressed the Right to Cure issue in the Carlsons' matter and the case was stayed for a short time. Throughout 2009 and into May of 2010 there were various procedural movements, including the Plaintiff moving to amend the Complaint in May of 2010 and ultimately being allowed to do so in December of 2010. After addressing the Right to Cure issues in these cases and dismissal not being granted on those grounds, in February of 2011 Defendants moved to compel arbitration. By an Order later that year, the circuit court the

Defendants had waived their right to seek arbitration due to the delay in filing their motion.

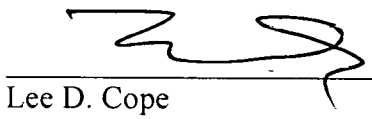
The Court of Appeals reversed the finding of waiver and found that the Carsons were not prejudiced by the delay on essentially three grounds. First, the Court found that despite the amount of time that had passed between the Answer and the ultimate filing of the motion to compel, that "the delay in filing the motion to compel was the result of the circuit court's decision to address the Right to Cure Act issue first, and not because of any dilatory actions or tactics" by the Defendants. *Id.* Second, the Court found that no discovery had occurred in the *Carlson* case. The trial court, though, had relied upon Defendants' actions taken in most of the other 140 cases to find waiver, and the Court found this to be improper. Last, the Court of Appeals noted there was a "relatively limited amount of activity" occurring in the *Carlson* case.

The opposite of all these factors exists in the case at bar. First, responsibility in the delay in filing the motion to compel in this matter is borne only by the Respondents. As addressed in detail in Petitioner's earlier brief, the first controversy for which Respondents could have sought arbitration and chose not to avail themselves of the Court system was the controversy over the records. Respondents chose not to do so. Next, there existed an opportunity at the Notice of Intent stage. Respondents chose not to do so, but again availed themselves of the Courts. Finally, upon the filing of Answers containing the defense of arbitration, the Petitioner and her counsel immediately challenged Respondents to move for arbitration if they intended to do so. Petitioner moved to strike the defense and at the hearing explicitly challenged them to move to compel arbitration. As to the second prong in the *Carlson* analysis, voluminous discovery has been

undertaken in the case at bar. The Respondents availed themselves of discovery, though limited to the issues of arbitrability. Respondents also answered discovery and defended motions regarding their discovery responses. As to the third *Carlson* prong, clearly there has been a substantial amount of activity in the case at bar, including multiple depositions, multiple hearings before the trial court, and extensive written discovery. As such, *Carlson* in fact bolsters the Petitioner's arguments that a finding of waiver is required in the case at bar.

In an important final point, the analysis above still carries the day for a required finding of waiver even if this Court were only to address "post-Complaint" activities in the waiver analysis. Even ignoring the legal wrangling and an appeal concerning Ms. Robert's records, Petitioner has been prejudiced by the delay *after* filing her Complaints. In the period of waiting to determine whether Respondents might finally move to compel arbitration, she undertook the discovery necessary to prosecute her case. The alternative was to sit back and do nothing until the arbitration issue was raised. Under the facts of this case, there is nothing to support any argument that waiting to move to compel arbitration has been anything other than dilatory action and a delay tactic by the Respondents. Such a defense must not be rewarded and the Court of Appeals should have found waiver.

Respectfully submitted,



Lee D. Cope
Matthew V. Creech
Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A.
Post Office Box 457
Hampton, South Carolina 29924
(803) 943-2111

Margie Bright Matthews
BRIGHT MATTHEWS LAW FIRM
Post Office Box 499
Walterboro, SC 29488
(843) 549-6028

Charles J. McCutchen, Esq.
LANIER & BURROUGHS, LLC
Post Office Drawer 2789
Orangeburg, SC 29116
(803) 268-9800

Attorneys for Petitioner

May 11, 2015
Hampton, S.C.

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PROOF OF SERVICE

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The undersigned hereby certifies that on the date indicated below, a copy of the foregoing *Reply Brief of Petitioner* were served on all counsel of record via U.S. Mail with first class postage prepaid to the following addresses:

Sowell, Gray, Stepp, & Laffitte, LLC
Monteith P. Todd, Esquire
J. Michael Montgomery, Esquire
PO Box 11449
Columbia, SC 29211

Tyler Arnold, Esquire
Jason Bring, Esquire
Jerad Rissler, Esquire
Arnall Golden Gregory, LLP
171 17th Street NW,
Suite 2100
Atlanta, GA 30363-1031

Shanna M. Jarrell

May 11, 2015

LAW OFFICES
PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK
PROFESSIONAL ASSOCIATION
101 MULBERRY STREET EAST
P.O. BOX 457
HAMPTON, SOUTH CAROLINA
29924-0457

JOHN E. PARKER
* CLYDE A. ELTZROTH, JR.
J. PAUL DETRICK
DANIEL E. HENDERSON
MARK D. BALL
RANDOLPH MURDAUGH, IV
RONNIE L. CROSBY
R. ALEXANDER MURDAUGH
BERT G. UTSEY, III
RANDOLPH MURDAUGH, III
GRAHAME E. HOLMES
LEE D. COPE
MATTHEW V. CREECH
LEAGUE B. CREECH
STEVEN D. MURDAUGH
WILLIAM F. BARNES, III
AUSTIN H. CROSBY
* INACTIVE

RANDOLPH MURDAUGH, SR.
(1887-1940)
RANDOLPH MURDAUGH, JR.
(1915-1998)
J. ROBERT PETERS, JR.
(1927-2008)

TELEPHONE
(803) 943-2111
TOLL FREE
(866) 943-2113
FACSIMILE
(803) 943-3943
(803) 914-2014
WEBSITE
www.pmped.com

May 11, 2015

Honorable Daniel E. Shearouse
CLERK OF COURT
S.C. SUPREME COURT
1231 Gervais Street
Columbia, S.C. 29211

Re: *Linda Johnson v. Heritage Healthcare, et al.*
Opinion No. 2014-UP-318 (S.C. Ct. App. Filed August 6, 2014)
**SC Supreme Court Case No. 2014-002502**

Dear Mr. Shearouse:

I enclose for filing the original and fifteen (15) copies of Reply Brief of Petitioner in the above referenced matter. Please file the original and return a clocked 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.

With kind regards, I am,

Sincerely,

Lee D. Cope

LDC/smj
Enclosures
cc: Monteith P. Todd, Esquire
Jason Bring, Esquire
Jerad Rissler, Esquire
Margie Bright-Matthews, Esquire
Matthew Creech, Esquire