

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,.....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.

APPENDIX Vol. III

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Case Nos. 2010-CP-25-489 and 2010-CP-25-490
South Carolina Court of Appeals No. 2012-207289

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Respondent,

v.

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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,

Appellants.

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in concluding that the Motion to Compel Arbitration was not governed by the Federal Arbitration Act where the parties acknowledged interstate commerce in their arbitration agreement and the Plaintiff alleged in her Complaint that out-of-state companies were responsible for the level of care provided?
 - A. The FAA governs because the parties specifically acknowledged interstate commerce and agreed that the FAA would apply.
 - B. The FAA governs because the transaction between the parties involves interstate commerce.
- II. Did the trial court err in refusing to enforce the Arbitration Agreement in accordance with its plain terms?
 - A. The trial court erred in finding that there was no "meeting of the minds" between the parties regarding the arbitration agreement.
 - B. The trial court erred in concluding that the Arbitration Agreement's reference to the AAA Rules rendered the parties' agreement unenforceable.
 - C. The trial court erred in finding that the Defendants waived the right to enforce the arbitration agreement.

STATEMENT OF THE CASE

This appeal involves the denial of a motion to compel arbitration of a nursing home dispute in accordance with the terms of a pre-dispute arbitration agreement.

On October 13, 2010, Plaintiff/Respondent Linda Johnson ("Plaintiff" or "Ms. Johnson") commenced wrongful death and survival actions alleging nursing home negligence. (R. pp. 68-89) Plaintiff sued Heritage Healthcare of Estill, LLC ("Heritage"), United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt Corporation ("UHS-Pruitt") (collectively referred to herein as "Defendants").

Defendants timely served answers to the complaints on November 24, 2010. (R. pp. 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. (R. p. 92, ¶¶ 16-17; R. p. 98, ¶¶ 16-17; R. p. 104, ¶¶ 16-17; R. p. 110, ¶¶ 16-17)¹ On December 1, 2010, Plaintiff moved to strike certain of Defendants' defenses, including defenses relating to arbitration. (R. pp. 138-141) By Orders dated March 4, 2011, the Court denied Plaintiff's motions to strike the arbitration defenses. (R. pp. 16-19)

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. (R. pp. 146-177) Plaintiff filed a response to Defendants' motion on October 6, 2011. (R. pp. 178-446) Following a hearing held on October 7, 2011, the trial court entered an order drafted by the Plaintiff denying Defendants' Motion to Compel Arbitration. (R. pp. 1-13) Defendants received a copy of the Order on

¹ The Answers of the four Defendants were filed concurrently and are identical in all respects material to this appeal. These have been collectively cited as "Answers," for the sake of brevity.

November 16, 2011. On November 28, 2011, Defendants filed a motion for reconsideration. (R. pp. 447-537) Plaintiff filed a response to this motion on December 13, 2011. (R. pp. 538-544) The court denied Defendants' motion for reconsideration by Order entered January 17, 2012. (R. pp. 14-15) On February 2, 2012, Defendants filed a Notice of Appeal. (R. pp. 545-563)

FACTS

Defendant Heritage operates a skilled nursing facility known as Heritage of the Lowcountry ("Lowcountry") located in Estill, South Carolina, in which Inez Roberts was a resident from August 22, 2007 through July 3, 2009. Ms. Roberts was admitted to Lowcountry by her daughter and power of attorney, Plaintiff Linda Johnson. (R. p. 611, page 12, lines 6-13) At the time of Ms. Roberts's admission to Lowcountry, Ms. Johnson was her agent pursuant to a duly recorded general Power of Attorney dated March 31, 2005. (R. pp. 647-651) The Power of Attorney specifically authorized Ms. Johnson "to perform all and every act and thing whatsoever requisite and necessary to be done in and about my affairs as full and to all intents and purposes as I might or could do if personally present at the doing thereof...hereby ratifying and confirming all that my said attorney substitute shall lawfully do or cause to be done by virtue hereof." (R. p. 649) Plaintiff admitted that she "had authority to sign the Arbitration Agreement on behalf of Inez B. Roberts pursuant to the Power of Attorney." (R. p. 654)

At the time of her admission to Lowcountry, Ms. Roberts had two children, Ms. Johnson and Gloria Gordon. Ms. Johnson and Ms. Gordon were Ms. Roberts's closest living relatives. (R. p. 611, page 9, line 11—page 10, line 1) Ms. Roberts and Ms. Gordon both understood that Ms. Johnson was going to admit Ms. Roberts to Lowcountry and did

not object to Ms. Johnson admitting her to Lowcountry. (R. p. 612, page 13, line 1—page 14, line 13)

In order to admit Ms. Roberts to Lowcountry, Ms. Johnson contracted with Lowcountry on behalf of Ms. Roberts. Among the contracts that Ms. Johnson entered into on behalf of Ms. Roberts in connection with her admission to Lowcountry was the Resident and Facility Arbitration Agreement (“Arbitration Agreement”). (R. p. 613, page 18, lines 16-25; R. p. 653) Ms. Johnson denied reading the Arbitration Agreement before signing it, but admitted that she was not prevented from reading it. (R. p. 613, page 19, lines 1-10) Ms. Johnson is a college graduate. (R. p. 610, page 8, lines 5-17) Based on these contracts, Heritage admitted Ms. Roberts to Lowcountry, and Ms. Roberts remained a resident of Lowcountry from August 22, 2007 until July 3, 2009. During this time, Ms. Roberts accepted the benefits of the contracts entered into on her behalf, including the admission to Lowcountry and the receipt of skilled nursing care from Lowcountry.

The Arbitration Agreement provides in part that “any and all controversies, claims, disputes, disagreements or demands of any kind . . . arising out of or related to the Resident’s Admission Agreement with the Facility . . . or any service or care provided to the Resident by the Facility shall be settled exclusively by **binding arbitration**.” (R. p. 645) (emphasis in original) The Arbitration Agreement expressly states “that the parties are waiving their right to a trial before a jury or a judge.” (R. p. 645) The Arbitration Agreement encompasses all claims involving “negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract.” (R. p. 645, ¶ 1) The Arbitration Agreement has never been revoked. (R. p. 617, page 36, lines 4-8)

Despite the clear terms of the Arbitration Agreement that she personally signed on behalf of Ms. Roberts, Plaintiff filed her civil Complaints alleging that the Defendants were liable for injuries that Ms. Roberts allegedly sustained while she was a resident of Lowcountry. (R. pp. 68-89) Plaintiff's allegations were based upon a theory that Ms. Roberts did not receive proper care and treatment while at Lowcountry as a result of the actions or inactions of the Defendants. (R. pp. 68-89)

Because Plaintiff's claims fell within the scope of the Arbitration Agreement, the Defendants asserted defenses in their Answers that Plaintiff's claims were barred by the Arbitration Agreement. (R. p. 92, ¶¶ 16-17; R. p. 98, ¶¶ 16-17; R. p. 104, ¶¶ 16-17; R. p. 110, ¶¶ 16-17) Following the denial of Plaintiff's motions to strike Defendants' arbitration-based defenses, Defendants engaged in discovery that was expressly limited to issues related to arbitration. (R. pp. 609-610, page 4, line 13—page 5, line 8) Following this limited discovery period, the Defendants moved to compel arbitration of the claims asserted in the Complaints. (R. pp. 146-177) It is from the denial of this motion and a subsequent motion for reconsideration that the Defendants appeal.

STANDARD OF REVIEW

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). This determination is subject to de novo review. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). A circuit court's factual findings

will not be reversed on appeal if any evidence reasonably supports the findings. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).²

ARGUMENTS

- I. The trial court erred in concluding that the Motion to Compel Arbitration was not governed by the Federal Arbitration Act because the transaction involved interstate commerce.

The FAA provides that “[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity.” 9 U.S.C. § 2. The FAA applies in federal or state court to any arbitration agreement that “in fact” involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).³

The South Carolina Court of Appeals has succinctly stated:

The words ‘involving commerce’ have been interpreted by the United States Supreme Court as being the functional equivalent of ‘affecting commerce’-words signaling ‘an intent to exercise Congress’ commerce power to the full.’ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) . . . ‘Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce-that is, within the flow of interstate commerce.’ *Citizens Bank*

² There is obviously some conflict between these two standards of review as “[d]e novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court’s findings.” *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654–55 (2011).

³ *Munoz* expressly overruled *Mathews v. Fluor Corp.*, 312 S.C. 404, 440 S.E.2d 880 (1994), to the extent that the *Mathews* court considered “whether the parties contemplated interstate commerce as a factor in determining if the FAA applied.” *Munoz*, at n. 3.

[v. *Alafabco, Inc.*], 539 U.S. [52,] [] 56, 123 S.Ct. [2037,] [] 2040 [(2003)].

Thornton v. Trident Medical Center, LLC, 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2004). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117.

A. The FAA governs because the parties specifically acknowledged interstate commerce and agreed that the FAA would apply.

In the Arbitration Agreement, the parties specifically acknowledged that their transaction involved interstate commerce and would be governed by the FAA:

The Resident and the Facility acknowledge and agree that the Resident's Arbitration Agreement effects a transaction involving interstate commerce, therefore the enforcement of this Arbitration Agreement shall be governed by federal law, specifically, the Federal Arbitration Act, notwithstanding any contrary provision of the Admission Agreement or state law.

(R. p. 646, ¶ 5) South Carolina courts have held that such agreement alone is sufficient to invoke the FAA.⁴ Courts outside of South Carolina agree that the parties' acknowledgment that the arbitration agreement involves interstate commerce and will be

⁴ See, e.g., *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) ("The parties' arbitration agreement provides that the arbitration shall be administered pursuant to the FAA."); *Munoz*, 343 S.C. at 539, 542 S.E.2d at 363-364 ("Here, the arbitration agreement which applies to 'this contract and the relationships which result from this contract,' provides it shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms."); *McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 U.S. Dist. Lexis 144288 at *13 (D.S.C. Dec. 15, 2011) ("The Arbitration Agreement here clearly states that 'the services and reimbursement thereof effects a transaction that involves interstate commerce.' [cit.] Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate commerce."); *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 U.S. Dist. Lexis 103638 at *4, n.3 (D.S.C. Sept. 13, 2011) ("The parties here do not dispute that the FAA applies.").

governed by the FAA is dispositive of the issue.⁵ Accordingly, the parties were entitled to rely on their stipulation that their transaction involved interstate commerce and that the Arbitration Agreement would be governed by the FAA, and the trial court erred in holding that this matter did not involve interstate commerce.⁶

B. The FAA governs because the transaction between the parties involves interstate commerce.

In addition to the parties' express agreement that their transaction involved interstate commerce, the Complaints and the surrounding facts evidence interstate commerce. The Plaintiff alleges that Defendant Heritage is a South Carolina skilled nursing facility organized under the laws of South Carolina with a principal place of business in Hampton County. (R. p. 68, ¶ 2) The Plaintiff alleges that Defendants United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt are all *Georgia* corporations doing business in South Carolina. (R. p. 69, ¶¶ 3-5; R. p. 80, ¶¶ 3-5) The Plaintiff alleges that these out-of-state Defendants are responsible for the care provided to Ms. Roberts at Lowcountry and that acts or omissions of these out-of-state Defendants caused Lowcountry to deliver care to Ms. Roberts that failed to meet the standard of care. (R. p.

⁵ See, e.g., *Bales v. Arbor Manor*, 2008 U.S. Dist. Lexis 99215 (D. Neb. July 3, 2008) (involving stipulation in admission agreement that interstate activity was involved); *Ivey v. Horton*, 2008 U.S. Dist. Lexis 52971 (D.S.C. July 10, 2008) (recognizing broad reach of *Allied-Bruce*); *Thomas v. Cook*, 350 S.W.3d 382 (Tex. App. 2011) (holding that when the parties expressly invoke the FAA in the arbitration agreement, the FAA governs and the parties are not required to establish that the transaction at issue affects interstate commerce); *In re Choice Homes, Inc.*, 174 S.W.3d 408 (Tex. App. 2005) (same); *In re Ledet*, 2004 Tex. App. Lexis 11474 (Tex. App. Dec. 22, 2004) (holding that when parties agree to arbitrate under the FAA, no independent showing of interstate commerce is necessary).

⁶ The trial court's conclusion that "parties cannot 'stipulate' to interstate commerce that would invoke the FAA," (R. p. 6) is not supported by any cited authority and is contrary to the numerous cases inside and outside of South Carolina applying the FAA based on the parties' stipulation (either in the arbitration agreement or before the trial court). See cases cited *supra*, notes 4 and 5.

69, ¶ 6; R. p. 80; ¶ 6) On their face, the Complaints aver a relationship involving interstate commerce under the provisions of the FAA. *See Pickering v. Urbantus, LLC*, 827 F. Supp. 2d 1010 (S.D. Iowa 2011) (noting that the FAA is applicable to nursing facilities that are operated by entities from other states). Though the out-of-state Defendants deny the allegations regarding the alleged level of control over Lowcountry, these allegations assert claims that involve interstate commerce, and thus bring the matter within the purview of the FAA. Additionally, the out-of-state Defendants admitted that UHS-Pruitt provided services in Hampton County. (R. p. 91, ¶ 6; R. p. 97, ¶ 6; R. p. 103, ¶ 6; R. p. 109, ¶ 6)

In reaching its conclusion that interstate commerce was not implicated and thus the FAA was inapplicable, the trial court based its decision on *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993). (R. pp. 5-7) In *Timms*, the parties had not agreed that their transaction involved interstate commerce or that their arbitration agreement would be governed by the FAA, and *Timms* is distinguishable on that basis alone. Moreover, *Timms* relied on a narrow interpretation of "involving commerce" that has since been rejected by the United States Supreme Court. *Allied-Bruce*, 513 U.S. 265. South Carolina consistently has followed *Allied-Bruce*. *See, e.g., Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 454-55, 730 S.E.2d 312, 315-16 (2012); *see also Citizens Bank*, 539 U.S. 52 (holding that no elaborate explanation needed to show an impact on interstate commerce upon consideration of the 'general practice' those transactions represent). The trial court erred in ignoring the evidence of interstate commerce (including the parties' acknowledgement) and in relying on *Timms* and failing to rely on the more recent cases following *Allied-Bruce*.

II. The trial court erred in refusing to enforce the Arbitration Agreement in accordance with its plain terms.

"[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 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*, 513 U.S. at 280 (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).

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Zabinski*, 346 S.C.

at 597, 553 S.E.2d at 118. "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to *any* interpretation which would cover the asserted dispute." *Id.* at 597, 553 S.E.2d at 118-19 (emphasis added).

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving commerce. 9 U.S.C. § 2 (2006). Section 4 of the FAA provides, in pertinent part, as follows:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration* in accordance with the terms of the agreement.

9 U.S.C. § 4 (2006) (emphasis added). "By its terms, the act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

It is undisputed that Plaintiff signed the Arbitration Agreement, a two-page, standalone agreement clearly titled "Resident and Facility Arbitration Agreement." (R. pp. 645-646) Plaintiff acknowledged that she was authorized to execute the Arbitration Agreement on behalf of Ms. Roberts pursuant to a Power of Attorney. (R. p. 654, No. 7)

The Arbitration Agreement states, in pertinent part, as follows:

It is hereby understood and agreed by Heritage of the Lowcountry and Linda Johnson 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 that the parties are waiving their right to a trial before a jury or a judge.

(R. p. 645) (emphasis in original)

The execution of the Arbitration Agreement was knowing and voluntary. In fact, the Arbitration Agreement advises of the right to contact an attorney to obtain further explanation regarding the Arbitration Agreement. (R. p. 646, ¶ 6) ("Right to Consultation. The Resident understands that the Resident has the right to consult an attorney of his or her choice about this Arbitration Agreement and to receive an explanation or clarification from the Facility's admissions coordinator. The Resident is not required to sign this Arbitration Agreement in order to be admitted to or to remain in the Facility.") (emphasis in original))

Plaintiff, on behalf of Ms. Roberts, represented that she had the opportunity to read the Arbitration Agreement and understood its contents. Immediately above the signature line and in all upper case type, the Arbitration Agreement states as follows:

BY SIGNING THIS AGREEMENT, THE RESIDENT
ACKNOWLEDGES THAT THE RESIDENT HAS HAD THE
OPPORTUNITY TO READ THIS AGREEMENT OR IT HAS BEEN
READ TO THE RESIDENT AND THE RESIDENT UNDERSTANDS
ITS CONTENTS.

(R. p. 646)

A. The trial court erred in finding that there was no "meeting of the minds" between the parties regarding the Arbitration Agreement.

The trial court ruled that there was no meeting of the minds as to the essential parts of the contract. (R. p. 7) (citing *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989)).) Because there is no evidence of a failure of the parties to agree to essential

contractual terms, the trial court erred in refusing to enforce the arbitration agreement on the basis of a lack of a meeting of the minds.

It is well established in South Carolina that courts must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). "It is elementary that, if the contracting party is in position to learn the contents of a written contract and thereby protect himself by reading it or having it read, one who is unable to read is bound to have the instrument read to him before signing it, just as one who can read is bound to read it before signing. So, also, if one signs a contract before it is completely filled out, he is bound thereby, in the absence of fraud." *White v. S. Ry. Co.*, 208 S.C. 319, 343-44, 38 S.E.2d 111, 123 (1946).

The trial court based its conclusion that there was no meeting of the minds on a portion of the deposition testimony of Sally Dobson, Lowcountry's admissions director. The trial court focused on Ms. Dobson's lack of familiarity with the rules applicable to any arbitration which might take place under the Arbitration Agreement. (R. p. 7-8) However, it is undisputed that Ms. Dobson did not discuss the applicable rules with Plaintiff or Ms. Roberts. (R. p. 633, page 11, lines 10-22; R. p. 613, page 17, line 21—page 18, line 6) Ms. Dobson explained that the information that she provides to individuals signing the Arbitration Agreement is that "[w]hen they sign the Arbitration Agreement, that [waives] their right to a jury trial or, you know, having it in court.... They are informed of this whenever they are there to sign." (R. p. 632, page 8, lines 9-14)

Plaintiff acknowledged that she had an opportunity to read the Arbitration Agreement before she signed it. (R. p. 613, page 19, lines 1-10) Plaintiff is a college graduate capable of reading and understanding the Arbitration Agreement. In fact, Plaintiff testified that she understood from the language of the Arbitration Agreement "[t]hat my rights to a trial would be [waived]. They [waived] it." (R. p. 614, page 24, lines 14-21) The South Carolina Supreme Court recently held that failure to read an arbitration agreement is not a defense:

The [plaintiffs] both admitted they did not read the arbitration agreement, and their deposition testimony confirmed the failure to read the documents was solely attributed to them and not to Century's actions. Our jurisprudence forbids us to allow the [plaintiffs] to invalidate the enforceability of the arbitration agreement by claiming they did not read it.

Herron, 387 S.C. at 533, 693 S.E.2d at 398 (citing *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) (citing *Sims v. Tyler*, 276 S.C. 640, 281 S.E.2d 229 (1981)) ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it.")). Finally, the intent of parties to a contract is determined by the written language in the contract, not by the subjective thoughts of either party to the contract. Therefore, Ms. Dobson's knowledge or lack of knowledge of the exact parameters of the arbitration agreement (which was never communicated to Plaintiff or Ms. Roberts) is irrelevant as to whether the written contract evidences a certain undertaking by the parties to arbitrate.⁷

⁷ By Plaintiff's logic, a wholly unambiguous loan agreement could be wiped out by the testimony of a loan officer who did not fully understand the mechanics of every provision of a loan document. Such a position is inconsistent with South Carolina law, particularly where, as in this case, the person signing the agreement admits that she was not misled and did not rely on the other party to explain the agreement to her.

The case cited by the trial court, *Player v. Chandler*, involved alleged oral modifications to a lease contract where at least some of the essential terms of the lease were never discussed and, therefore, there was no meeting of the minds. 299 S.C. at 105, 382 S.E.2d at 894. In the present case, Defendants seek to enforce the written Arbitration Agreement in accordance with its clear, unambiguous terms. There are no essential terms missing from the contract. Simply put, *Player* is not in any way relevant to the current case. Moreover, by signing the arbitration agreement, Plaintiff acknowledged that she read and understood the agreement.

B. The trial court erred in concluding that the Arbitration Agreement's reference to the AAA Rules rendered the parties' agreement unenforceable.

The trial court's Order held that the following language in the Arbitration Agreement required any arbitration "to be handled under the auspices of the [AAA]":

Proceeding. 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 proceedings 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.

(R. p. 2) The trial court erroneously concluded that the AAA was "unavailable" based on a mistaken assumption that the AAA could no longer administer these types of claims.

(R. p. 3) (citing *Grant*, 383 S.C. 125, 678 S.E.2d 435).)

This conclusion was erroneous because: (1) the Arbitration Agreement does not require administration by the AAA; (2) the AAA will arbitrate these claims and is, therefore, available; and (3) in any event, administration by the AAA was not integral to the Arbitration Agreement, and a substitute arbitrator can be appointed.

1. The Arbitration Agreement does not require administration by the AAA.

By its express terms, the Arbitration Agreement requires only that the parties “follow the rules of the [AAA],” not that arbitration be administered by the AAA. This distinction is critical. Had the agreement at issue required the AAA to *administer* the arbitration, the rule enunciated in *Grant* may have controlled.⁸ However, the Arbitration Agreement here does not require administration by the AAA, but only requires that its rules be followed in conducting the arbitration. Additionally, the Arbitration Agreement only calls for a “neutral arbitrator selected in accordance with the rules of the AAA” and not an arbitrator associated with or employed by the AAA. (R. p. 645, ¶ 2.) Accordingly, this case is not controlled by *Grant* and the trial court erred in so ruling.

Numerous courts have correctly recognized the distinction between an arbitration agreement requiring use of the AAA Rules and one requiring administration by the AAA. The North Carolina Court of Appeals has held that the AAA’s policy of refusing to accept healthcare arbitration based on pre-dispute arbitration agreements did not mandate the invalidation of an arbitration agreement containing provisions identical to the one at issue in the instant case. *Westmoreland v. High Point Healthcare, Inc.*, 721 S.E.2d 712 (N.C. Ct. App. 2012).⁹ In that case, the court held that the arbitration agreement, which merely required that the AAA rules be used, “did not provide that an AAA arbitrator must be used to conduct the arbitration” and “did not render the performance of the

⁸ In *Grant*, the arbitration agreement required “arbitration *administered* by the National Health Lawyers Association (the ‘NHLA’).” *Grant*, 383 S.C. at 128, 678 S.E.2d at 436-37 (emphasis added).

⁹ The arbitration agreement at issue in *Westmoreland* is attached to the court’s opinion and is, in all relevant respects, identical to the Arbitration Agreement. See *Westmoreland*, 721 S.E.2d at 724-25.

Arbitration Agreement impossible.” *Id.* at 719. Instead, “[i]t simply meant that the arbitration could not be conducted under the auspices of the AAA.” *Id.* at 719-20. In a later case where the arbitration agreement “specifically require[d] the use of ‘arbitrators selected from the [AAA],’” the court held that the “language indicate[d] the parties’ intention to arbitrate under the auspices of the AAA, unlike the procedure contemplated in *Westmoreland*.” *Crossman v. Life Care Centers of America, Inc.*, 2013 N.C. App. Lexis 68 (N.C. Ct. App. Jan. 15, 2013). This distinction between provisions which merely require use of particular rules and those which require administration by a particular arbitral forum is reflective of the approach taken in courts across the country.¹⁰

¹⁰ *Mathews v. Life Care Centers of America, Inc.*, 177 P.3d 867, 872 (Ariz. Ct. App. 2008) (arbitration agreement requiring “a board of three arbitrators, selected from the American Arbitration Association [AAA]” could be enforced because the term simply provided the manner of selecting the arbitrator and did not require a particular forum); *Blue Cross Blue Shield of Alabama v. Rigas*, 923 So. 2d 1077, 1092 (Ala. 2005) (arbitration agreement that provided for the arbitration to be conducted according to the AAA rules and procedure could be enforced because “the statement of the AAA provides only that the AAA will not administer a dispute such as this one; it does not provide that [the] claims are not arbitrable”); *Covenant Health & Rehabilitation of Picayune, LP v. Moulds*, 14 So. 3d 695, 708-09 (Miss. 2009) (recognizing the distinction in cases between arbitration agreements requiring AAA administration and arbitration agreements requiring the use of AAA rules); *Fellerman v. American Retirement Corp.*, 2010 U.S. Dist. Lexis 43177 at *14 (E.D. Va. May 3, 2010) (addressing Rule R-2 of the AAA Rules and concluding that authorization to administer arbitration by using AAA rules “does not rise to the level of contractual assent to have the matter *exclusively* before that forum” and that courts tend to enforce arbitration agreements whose terms specify that the parties be bound only by the rules of the AAA); *Nail v. Consolidated Resources Health Care Fund I*, 229 P.3d 885, 889 (Wash. Ct. App. 2010) (holding that “AAA did not, and could not invalidate all pre-dispute arbitration agreements regarding individual health care claims unsupported by an additional post-dispute arbitration agreement” and that in specifying the method of choosing arbitrators, the agreement did not require exclusive AAA administration); *Oesterle v. Atria Mgmt. Co., LLC*, 2009 U.S. Dist. Lexis 60057 at *26 (D. Kan. July 14, 2009) (“Guided by the Supreme Court, this Court finds that the appropriate way to construe the arbitration provision is to read it as simply requiring arbitration in accordance with AAA rules and not AAA policy. Thus, the AAA provision covers the rules to abide by when conducting the arbitration, while AAA policy on the types of arbitrable claims is simply just that-AAA’s policy.”); *Deeds v. Blueshield of*

The arbitration agreement in this case does not require the arbitrator to be a member of the AAA. The only requirement is that the arbitrator is "neutral" and selected in accordance with the rules of the AAA. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (1999) (citations omitted). Unlike the agreement at issue in *Grant*, the arbitration agreement here does not mandate that the AAA administer the arbitration. Rather, it merely requires the use of the AAA Rules and a neutral arbitrator. Thus, the arbitration agreement is not impacted by the AAA Policy Statement, which only involves the *administration* of arbitrations, and which courts across the country have correctly distinguished from the mere use of the AAA Rules.

Idaho, 141 P.3d 1079, 1080-81 (Idaho 2006) (even if the AAA would not designate an AAA arbitrator to administer the dispute in light of the Policy Statement, "no reason" why the arbitration could not proceed in accordance with the AAA Rules using a different arbitrator); *Trinity Mission Health & Rehab. v. Scott*, 19 So. 3d 735 (Miss. Ct. App. 2008) ("While it would appear that the AAA would not administer the arbitration of this claim since there is only a pre-dispute agreement to arbitrate, it does not mean that arbitration is precluded. Arbitration pursuant to the AAA's rules and procedures would still be possible."); *Meskill v. GGNSC Stillwater Greeley, LLC*, 862 F. Supp. 2d 966, 973 (D. Minn. 2012) (arbitration agreement requiring arbitration "in accordance with the [NAF] Code of Procedure" did not mandate that the NAF conduct the arbitration, even where NAF rules provided that arbitrations using its rules and procedures could only be administered by the NAF and noting that "if the parties had contemplated the NAF would be their exclusive arbitral forum, they could have easily said so – there would be no need for them to do so obliquely by specifying that the arbitration must be conducted by the NAF's rules").

2. The AAA is not "unavailable."¹¹

Even if the Arbitration Agreement had required administration by the AAA, as Plaintiff argues, the Policy Statement¹² does not render the AAA "unavailable." The AAA Policy Statement at issue stated in relevant part:

As a result of a review of its caseload in the health care area, the American Arbitration Association has announced that it will no longer accept the administration of cases involving individual patients without a post-dispute agreement to arbitrate. In order to provide sufficient notice to provide for an orderly transition, this change will become effective on January 1, 2003.¹³

By its plain language, the AAA Policy Statement simply requires a post-injury agreement to arbitrate; it does not completely close the doors of the AAA to the types of claims asserted in Plaintiff's Complaints. If, as Plaintiff has argued and the trial court held, the use of AAA's Rules requires administration by the AAA, then the Plaintiff can have the result demanded by her proposed interpretation of the Arbitration Agreement simply by filing her demand for arbitration with the AAA. The plain language of the AAA Healthcare Policy Statement indicates that the AAA has not refused access to its

¹¹ The AAA rules cited by the trial court do not require administration by the AAA. Rule R-2 does not make AAA the exclusive administering body of the arbitration, as it simply states that AAA could administer the arbitration if the parties chose. Likewise, Rules R-3, R-49, and R-51 would only apply in arbitrations where AAA is administering the arbitration. Furthermore, the copyrighting prohibition certainly does not mean that the AAA rules can only be used in such limited proscriptions as the AAA administration of an arbitration.

¹² It is important to note that the AAA Policy Statement effective January 1, 2003 is not a "rule" under the AAA. Other cases, including *Grant*, 383 S.C. 125, 678 S.E.2d 435, have addressed a similar issue involving the National Health Lawyers' Association (NHLA), who issued a *rule* change requiring a post-injury agreement to arbitrate before accepting arbitration. Those cases are distinguishable, in part, because of the difference in the AAA's Policy Statement, which does not render arbitration agreements invalid, and the NHLA's rule change, which would invalidate pre-injury arbitrations following those rules under that change.

¹³ R. p. 696

forum for all healthcare disputes in general or to Plaintiff's dispute in particular. Instead, the Policy Statement is based solely on AAA's "review of its caseload in the healthcare arena."¹⁴

Although the Arbitration Agreement does not require administration by the AAA, the Defendants consistently have indicated their willingness to perform whatever formalities may be required by the AAA to have this dispute resolved in the arbitral forum that Plaintiff claims is demanded by the Arbitration Agreement. (R. pp. 591-592; R. p. 462) The Plaintiff cannot avoid her obligation to arbitrate by creating an artificial obstacle to the performance of her obligation. *See Tate v. Lemaster*, 231 S.C. 429, 99 S.E.2d 39 (1957) (recognizing general rule that a party to a contract cannot avoid its obligation upon the ground that the other party has not fulfilled a condition precedent to such liability when he himself has prevented such fulfillment); *Huffines Co. v. Lockhart*, 365 S.C. 178, 617 S.E.2d 125 (Ct. App. 2005) (party may not claim protection of a condition precedent which he prevents from occurring); *see also New Port Richey Medical Investors, LLC v. Stern*, 14 So.3d 1084 (Fla. App. 2 Dist. 2009) (holding that the parties' arbitration agreement is not rendered invalid or unenforceable simply because the AAA is unavailable to conduct the arbitration). Therefore, the Policy Statement does not preclude AAA administration of any arbitration of Plaintiff's claims, and the AAA is not "unavailable."

3. Administration by the AAA was not integral to the Arbitration Agreement, and a substitute arbitrator can be appointed.

Once a valid and enforceable arbitration agreement is found to exist, Section 4 of the FAA mandates that the matter be submitted to arbitration. Congress contemplated the

¹⁴ R. p. 696

possibility that a designated arbitrator might not be available.¹⁵ Therefore, it enacted Section 5 of the FAA, which provides that “if for any other reason there shall be a lapse in the naming of an arbitrator . . . then upon application of either party to the controversy the Court shall designate and appoint an arbitrator . . . who shall act under the same force and effect as if he . . . had been specifically named therein.” 9 U.S.C. § 5.¹⁶

The trial court relied on *Grant* to determine that a substitute arbitrator could not be appointed pursuant to Section 5 of the FAA. But the trial court’s Order overlooks several significant differences between this case and *Grant*. First, in *Grant*, the arbitration agreement mandated administration by the National Health Lawyers Association (NHLA). There is no such strong pronouncement in the Arbitration Agreement here regarding the *administration* of the arbitration. As the *Grant* court emphasized, the parties there specified an *exclusive* arbitral forum. See *Grant*, 678 S.E.2d at 438-439 (“There is a dispute in the case law as to whether Section 5 [of the FAA] applies in cases where, as here, the parties have specified an exclusive arbitral forum....” and “We see great merit in the Second Circuit’s view that Section 5 does not apply in cases where a specifically designated arbitrator becomes unavailable” and “...in our view, the specific

¹⁵ As discussed previously, the Arbitration Agreement here does not require AAA to administer the arbitration and only requires a neutral arbitrator. And, even if it did require AAA administration, it is within the Plaintiff’s power to submit her claims to the AAA for its administration of the arbitration. Accordingly, the agreement can be performed according to its terms and without the appointment of a substitute arbitrator.

¹⁶ See also *Reddam v. KPMG, LLC*, 457 F.3d 1054 (9th Cir. 2006) (arbitration agreement enforceable though named arbitrator will not administer arbitration); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000) (compelling arbitration though designated arbitral forum no longer existed); *Trade & Transport, Inc. v. Natural Petroleum Charters, Inc.*, 931 F.2d 191, 194 (2nd Cir. 1991); *McGuire, Cornwell & Blakely v. Gilder*, 771 F. Supp. 319, 320 (D. Colo. 1991) (arbitration agreement enforceable though arbitral forum unwilling to arbitrate claims); *Zechman v. Merrill Lynch*, 742 F. Supp. 1359, 1365 (N.D. Ill. 1990); *Astra Footwear Indus. v. Harwyn Int’l, Inc.*, 442 F. Supp. 907, 910 (S.D.N.Y. 1978) *aff’d* 578 F.2d 1366 (2d Cir. 1978).

designation of the AHLA as arbitrator is an integral term of this arbitration agreement.”). Unlike *Grant*, the Arbitration Agreement here only requires that the parties use the AAA Rules and a “neutral arbitrator.” It does not require AAA administration.

The trial court’s conclusion that the provisions relating to the AAA Rules were integral parts of the agreement is simply conclusory and not supported by any evidence. In fact, the trial court’s holding that the AAA provisions were integral to the Arbitration Agreement is directly contradicted by the testimony of Plaintiff, who signed the Arbitration Agreement. Plaintiff testified that she did not have any discussions regarding the use of the AAA Rules before she signed the Arbitration Agreement and that at the time she signed the Arbitration Agreement, the reference to the AAA Rules was not important to her. (R. p. 615, page 25, line 13—page 27, line 23) It is illogical to conclude that the AAA provisions were an integral portion of the arbitration agreement when the person who executed the documents specifically admitted that the use of the AAA Rules was not important to her at the time she signed the Arbitration Agreement. *See, e.g., Stern*, 14 So.3d 1084 (substitute arbitrator provisions proper where plaintiff did not present any evidence that the choice of the AAA as the forum was an integral part of the agreement to arbitrate); *Deeds*, 141 P.3d 1079 (substitute provisions of FAA proper because there was no evidence that AAA provisions were central to the agreement to arbitrate because “the AAA simply provides a list of potential arbitrators from which the parties can choose, as well as procedural rules for conducting the arbitration”); *Mathews*, 177 P.3d 867 (“Moreover, the record contains no evidence that an AAA arbitration panel was a significant or material term to [plaintiff] when she executed the Agreement.”); *Estate of Eckstein v. Life Care Ctrs. of Am., Inc.*, 623 F. Supp. 2d 1235, 1238 (E.D. Wash.

2009) ("Plaintiff has not convinced the Court that the designation of AAA as arbitrator was a material term."); *Wiggins*, 2011 U.S. Dist. Lexis 103638 (holding that no evidence was presented that plaintiff was aware of the existence of the AHLA rules or possible conflict). Moreover, it is inconsistent for Plaintiff to refuse to submit her claim to the AAA, while at the same time claiming that the AAA was an integral part of the arbitration agreement.

C. The trial court erred in finding that the Defendants waived the right to enforce the arbitration agreement.

At the outset, the Defendants submit that once it has been determined that a valid arbitration agreement has been entered, the matter must be sent to arbitration. The arbitrator would then have the authority to rule on any defenses, such as waiver, that may be raised by the Plaintiff. Thus, the issue of waiver is not properly before this Court. Nonetheless, the Defendants will address the trial court's Order, which held that the Defendants had waived their right to enforce the arbitration clause. This determination was in error.

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).

In this case, the Defendants have never acted in a manner contrary to their contractual right to arbitrate. 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 a known right.

The trial court's Order failed to consider several important facts with respect to the analysis of the time between commencement of the action and the motion to compel arbitration. First, the Complaint was filed on October 13, 2010. Although a Notice of Intent was filed earlier, the Defendants' contractual right to arbitrate was not breached until the Complaint was filed. Given the courts' policy to encourage settlement of disputes through mediation,¹⁷ participating in a pre-suit mediation should not be held against the Defendants for purposes of calculating the time lapse between notice of a dispute and moving for arbitration. The only relevant date is the filing of the Complaint, which was the first time that Arbitration Agreement was breached.

Furthermore, *one week* after the Defendants answered the Complaints, the Plaintiff moved to strike the portions of the Defendants' Answers that raised arbitration as a defense. The trial court conducted a hearing on Plaintiff's Motion to Strike in February 2011 and denied the Motion to Strike by Order dated March 4, 2011. 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

¹⁷ See, e.g., *Cox & Floyd Grading, Inc.*, 356 S.C. 512, 516, 589 S.E.2d 789, 792 n.2 (Ct. App. 2003) (noting "the state's policy favoring alternative dispute resolution"); *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010) (noting state's "strong public policy favoring the settlement of disputes").

of the individuals who signed the arbitration agreement: (R. p. 631, page 4, lines 12-22; R. pp. 609-610, page 4, line 13—page 5, line 8) The depositions occurred in May 2011 and after receiving the transcripts in July 2011, the Defendants moved to compel arbitration on August 4, 2011. Therefore, the lapse of time was less than ten months from the filing of the Complaint, and the justification for the passage of time 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.

As to the issue of engaging in discovery, the Defendants only requested limited discovery on the issue of arbitration. The trial court's determination that the Defendants "decided to participate in procedural and discovery hearings" and "repeatedly availed themselves of the court system," is erroneous in that the Defendants appeared in court only to defend motions *filed by the Plaintiff*. As to the Defendants' production of documents, the trial court improperly punished the Defendants for *responding* to the *Plaintiff's* discovery requests. Because the Defendants limited *their* discovery to issues necessary to enforce the Arbitration Agreement, the trial court erred in ruling that the defendants had engaged in "extensive discovery." The Defendants' actions with respect to discovery were wholly consistent with their position that the Plaintiff's claims must be submitted to arbitration.

Finally, as to the issue of prejudice, the Court found that the only explanation for moving to compel arbitration when the Defendants did was to cause an "unnecessary delay and unfair prejudice to the Plaintiff." (R. p. 10) However, this conclusion is not supported by the record. 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 cannot claim prejudice based on her own decision to conduct broad discovery knowing full well that her claim was subject to an Arbitration Agreement that Defendants indicated they intended to enforce. *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). 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).

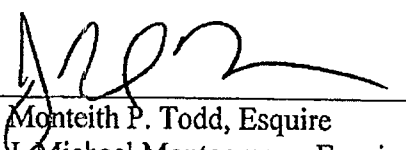
Conclusion

For the reasons set forth herein, the Court of Appeals should reverse the trial court's decision and remand the matter to the trial court for the entry of an order compelling arbitration.

Counsel for Appellants certifies that the Final Brief of Appellants complies with
Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted,

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August 30, 2013

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ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-25-489 and 490

RECORDED

SEP 03 2013

SC Court of Appeals

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 Care of the Lowcountry, United Clinical
Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation Appellants.

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STATEMENT OF THE ISSUES ON APPEAL

- I. Whether the Circuit Court correctly refused to compel arbitration by following the controlling authority of *Grant v. Magnolia Manor-Greenwood*, and when an essential term of the agreement at issue here – the choice of the arbitral forum of the American Arbitration Association – failed and was unavailable?
- II. Whether the Circuit Court correctly refused to compel arbitration when the Appellant HHE waived any rights to pursue arbitration?
- III. Whether the Circuit Court correctly determined that the Arbitration Agreement at issue was unenforceable because it failed as a matter of contractual formation and did not involve interstate commerce?

STATEMENT OF THE CASE

This appeal stems from the trial court's denial of a motion to compel arbitration. On August 14, 2008, Plaintiff/Respondent Linda Johnson filed a Summons and Complaint in the Hampton County Court of Common Pleas. Respondent's Complaint was filed as an *Ex Parte* Motion for Temporary Restraining Order Pursuant to Rule 65(b), SCRCP. Respondent Linda Johnson is the daughter of Inez Roberts, who at the time was 86 years old, in poor health, and a resident of the Appellant's nursing home facility in Estill, South Carolina.

Inez Roberts was admitted to the Appellant's facility in September of 2007 and subsequently, on or about January 8, 2008, Mrs. Roberts developed serious health concerns while in the Appellant's custody. (R. pp. 20-89). At the time of the TRO, Linda Johnson and her counsel were informed and believed that the negligence of the Appellant and its staff were the cause of the incident of January 2008. In an effort to investigate the cause of Mrs. Roberts' injuries and pursue possible legal remedies, the Respondent sought to review the nursing chart and medical records of Ms. Roberts, which were in the control and possession of Appellant.

The TRO further alleged that the Respondent was the Personal Representative of Mrs. Roberts upon her admission to Appellants' facility and that throughout Roberts' stay the Respondent was consulted by the facility concerning the treatment and care of her mother. However, upon request by Johnson, Appellant refused to provide the Respondent with a copy of Mrs. Roberts' chart pursuant to 42 C.F.R. 483.10. Respondent brought the TRO action seeking to restrain Appellant from in any way changing, altering, destroying, or manipulating Mrs. Roberts' nursing home chart or other

evidence related to the care of Roberts, and she requested that the she or her representatives be allowed to enter upon Appellant's premises for the purpose of inspecting, viewing, and copying the same nursing chart, or in the alternative, that she be provided a color copy of the chart.

On September 5, 2009, Judge Carmen Mullen granted Respondent's *Ex Parte* Motion for a Temporary Restraining Order. Upon being served with the Court's Order Granting the *Ex Parte* Temporary Restraining Order, Appellant HHE immediately filed a Motion to Dissolve Temporary Restraining Order, Objection to Injunctive Relief, and Memorandum in Support. Appellant argued at that stage that production of chart at issue 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, Respondent Johnson petitioned and was appointed by the Court as Mrs. Roberts' Guardian ad Litem. Again Appellant refused to produce the 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. Thereafter, on December 16, 2008, the Court issued an Order for Appellant to produce the nursing chart of Mrs. Roberts based upon the inherent power of the court to control the litigation. Appellant filed a notice of Appeal and sought review by this Court. The parties briefed the issues and while on appeal, the dispute was resolved and the appeal was dismissed by the consent of the parties.

On July 3, 2009, Mrs. Inez Roberts died in Hampton County, South Carolina.

Having received the nursing home chart of Mrs. Roberts, Respondent Linda Johnson 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 Johnson's 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). Appellant 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, Appellant 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 Appellant on November 8, 2010. Appellant HHE requested and received from Johnson an extension to respond to her discovery requests and partial responses. Defendant HHE responded partially to Respondent's first interrogatories and requests to produce on January 21, 2011. The same day defendants 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 process, Scott was forced to file a Motion to Compel certain discovery responses from the Appellant on February 16, 2011. (R. pp. 142-143). Appellant HHE appeared and defended Scott's motion to compel before the circuit court in a hearing on March 16, 2011. Plaintiff also filed a Motion to Compel responses from the various defendants on June 8, 2011. (R. pp. 144-145). At no time during this discovery process did Appellants object to producing the information on the grounds that it might waive any rights to seek arbitration.

Appellant 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. Appellant HHE served written discovery upon Johnson. Johnson fully replied to these discovery requests in a timely fashion.

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

Throughout the course of discovery in this matter, Appellant HHE has produced thousands of pages of discovery documents to the Plaintiff. Furthermore, Appellant HHE participated in a second, failed mediation on August 11, 2011.¹

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

¹ In Hampton County, and across the 14th Circuit, mediation is mandatory pursuant to Court Order.

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. pp. 14). Appellant HHE's Notice of Appeal was filed on February 2, 2012. (R. p. 545).

STATEMENT OF THE FACTS

Mrs. Inez Roberts was admitted to the Heritage Healthcare of Estill LLC ("HHE") facility on August 22, 2007. (R. p. 69). At that time she was an eighty-five year old female who was in good physical condition and without 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, the pressure sores worsened. (R. pp. 194-230). Ms. Roberts eventually had to have her leg amputated. (R. p. 232).

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

I. THE TRIAL COURT PROPERLY DENIED APPELLANT HHE'S MOTION TO COMPEL ARBITRATION PURSUANT TO *GRANT V. MAGNOLIA MANOR-GREENWOOD*.

Appellant's arguments that the circuit court erred in denying its Motion to Compel Arbitration lack merit in light of well-settled law concerning the interpretation of arbitration agreements as matters of contract, particularly the Supreme Court decision of *Grant v. Magnolia Manor-Greenwood*, 383 S.C. 125, 678 S.E.2d 425 (2009). The trial court's denial of arbitration is founded primarily upon the failure of the Agreement's

chosen forum – the American Arbitration Association ("AAA") – to accept pre-dispute arbitration agreements in the field of health care disputes.

The court denied arbitration for three alternative reasons and found that: (1) pursuant to *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) the arbitration agreement itself does not involve interstate commerce; (2) the agreement fails as a matter of contract because there was no meeting of the minds between the parties; and, (3) that even if arbitration were available, by their conduct and participation before the court, Appellant HHE has waived any claim to arbitration.

The trial court's order is consistent with the Supreme Court's decision of *Grant*, *supra*, and no other issues must be addressed. However, even if review is expanded to the alternative grounds of denying arbitration, the Order should be affirmed. On each issue ruled upon, the trial court's findings and rulings conform to applicable principles of South Carolina law.

From the outset, it is important to note that the Appellant's reliance on the "presumption toward the arbitrability" of disputes is misplaced. As usually occurs when a party seeks to compel arbitration, the "presumption of arbitrability" phrase and the arguments that flow from it achieve talismanic importance in arguing for arbitration. In South Carolina, though, the presumption in favor of arbitration does not overcome the fact that such agreements are subject to common law rules of contract interpretation. Regardless of the Appellant's reliance upon the legislative and judicial presumption in favor of the arbitrability of disputes, South Carolina law clearly holds that our courts will not impose judicial re-writing of agreements to arbitrate. *Dobyns v. South Carolina Dept. of Parks, Recreation & Tourism*, 325 S.C. 97, 103, 480 S.E.2d 81, 84 (1997) (citing

Patterson v. Aetna Life Ins. Co., 248 S.C. 374, 378, 149 S.E.2d 915, 917 (1966)). Nor does the presumption of arbitration supplant common law notions of contractual interpretation such as the requirement of the meeting of parties' minds in forming an agreement.

The Federal Arbitration Act itself acknowledges the underlying contractual basis of any arbitration agreement. Under the Federal Arbitration Act, the party seeking arbitration must show two things in order to compel arbitration: (1) that a *written agreement to arbitrate exists*, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2 (2006) (emphasis added). Section 4 of the FAA reads, in part, as follows:

The court shall hear the parties, *and upon being satisfied that the making of the agreement for arbitration or the failure therewith is not the issue*, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (2006) (emphasis added).

Here, under the first prong concerning the existence of an agreement, the trial court ruled correctly that there was no contract. While the issues need not be reached due to the failure of the first test of the validity of the arbitration agreement, the trial court also ruled correctly under the second prong that the contract does not involve interstate commerce pursuant to 9 U.S.C. §2. The Arbitration Agreement at issue fails on all grounds addressed by the trial court.

A. Standard of Review

Determinations of arbitrability are subject to *de novo* review. *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (2002). Unless the parties

provide otherwise, the question of arbitrability is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Furthermore, the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664-665, 521 S.E.2d 749, 753 (Ct. App. 1999).

B. While Arbitration is Favored as a Matter of Policy, Questions Concerning the Enforceability of Arbitration Agreements Are Nevertheless Subject to General Principles of Contract Law.

Respondent fully acknowledges that the arbitration of disputes is favored as a matter of both state and federal legislative and judicial policy. The Courts of South Carolina have noted a "strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor the arbitration of disputes." *Towles v. United Healthcare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839 (Ct. App. 1999); *Toler's Cove Homeowners' Ass'n. v. Trident Construction Co., Inc.* 355 S.C. 506, 612, 583 S.E.2d 581, 585 (2003). With respect to the breadth of arbitration clauses and questions of whether a dispute is covered by the clause, unless a court can say with assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, generally arbitration will be ordered. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

Yet, despite the existence of this presumption of favoring arbitration, courts are bound to interpret arbitration clauses within the familiar strictures of contractual interpretation. "Although [South Carolina Courts] are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis." *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720

(2007). Arbitration agreements are still required to satisfy the basic tenets and requirements of contract law. *Towles*, 338 S.C. at 37, 534 S.E.2d at 844 (Ct. App. 1999).

"Arbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law." *Grant v. Magnolia Manor-Greenwood, Inc.*, *supra* (citing, *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001)). In determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.' " *Towles*, 338 S.C. at 37, 524 S.E.2d at 844 (citing, *Johnson v. Circuit City Stores*, 148 F.3d 373 (4th Cir. 1998) (quoting, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995))). "Arbitration is a matter of contract and controlled by contract law." *South Carolina Pub. Serv. Auth. v. Great Western Coal (Kentucky) Inc.*, 312 S.C. 559, 437 S.E.2d 22 (1993) (citing, 5 *Am.Jur.2d Arbitration and Award* §11 (1962)). "The Federal Arbitration Act recognizes that arbitration is strictly a matter of contract and that the parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate." *Dowling v. Home Buyers Warranty Corp., II*, 311 S.C. 233, 236 428 S.E.2d 709, 710 (1993) (citing *Volt Info Sys., Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488, 500 (1989)). General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001).

In fact, strict construction of the plain terms of arbitration agreements was confirmed days ago by the United States Supreme Court. In *American Express*

Company, et al., v. Italian Colors Restaurant, et al., 570 U.S. ____ (Slip Opinion No.12-133, June 20, 2013), Justice Scalia, writing for the majority, wrote:

This text [9 U.S.C. § 2] reflects the overarching principle that arbitration is a matter of contract. (Citation omitted). And consistent with that text, courts must "rigorously enforce" arbitration agreements according to their terms, *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985), including terms that "specify with whom [the parties] choose to arbitrate their disputes," (citation omitted), and "the rules under which that arbitration will be conducted," *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

(Slip Opinion, p. 3.).

Under South Carolina common law, in order to have a valid and enforceable contract there must be a meeting of the minds between the parties to all essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 108, 382 S.E.2d 891 (1989) (citing *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975)). Moreover, the parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate. *Dowling*, 311 S.C. at 236, 428 S.E.2d at 710.

Respondent does not ask this Court to ignore state and federal policies in favor of arbitration. Rather, Respondent asks this court to interpret the agreement between the parties based upon the plain language of the arbitration agreement itself and to resist HHE's invitation to judicially rewrite and author the contract beyond the terms chosen by the parties in the Arbitration Agreement. Respondent requests that this Court "rigorously enforce" the plain meaning of the Arbitration Agreement at issue. "The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract." *Dobyns v. South Carolina Dept. of Parks, Recreation & Tourism*, 325 S.C. 97, 103, 480

S.E.2d 81, 84 (1997) (citing *Patterson v. Aetna Life Ins. Co.*, 248 S.C. 374, 378, 149 S.E.2d 915, 917 (1966)).

C. Even if the Arbitration Agreement Were Valid, the Parties to the Agreement Agreed To A Specific Arbitration Clause Stating That Any Arbitration "Shall Follow the Rules of the American Arbitration Association."

The Arbitration Agreement signed by Ms. Johnson on behalf of her mother is not enforceable as a matter of contract. There is no dispute that 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 this Court recognizes that 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 Appellant HHE. Appellant 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, Appellant 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 parties 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)). "The court's duty is to enforce the contract made by the parties regardless of

its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully." *Blakeley v. Rabon*, 266 S.C. at 73, 221 S.E. 2d at 769 (citing *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 33 S.E.2d 501, 509 (1945)).

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." The Appellant could have included conditional language or provided alternate administrators, rules, or forums but it did not. The Appellant 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.

D. The Appellant's Choice of Arbitral Forum Requiring Adherence to the AAA Rules is an Integral Part of the Agreement and the Failure of This Forum Nullifies the Arbitration Agreement.

The Arbitration Agreement in this case should not be enforced because there has been a failure of the arbitral forum. The Appellant'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. Appellant attempts to argue that the choice of "the rules of the" AAA does not constitute the failure of the arbitration forum and that another arbitrator could administer the arbitration under the chosen AAA rules. This argument is unavailing under applicable law and the plain language of the AAA rules and procedures.

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 the Appellant 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 Arbitrator's compensation and provides that: "Any arrangement" for the compensation of a neutral arbitrator 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. In arriving at the conclusion that the selection of the AHLA was an essential term of the arbitration agreement the Court stated:

Under the AHLA policy, the parties may not vary the rules on communications, service, counting of days, publication and form of the award, release of documents, or administration. The parties are bound by a panel of arbitrators selected by the service. In our view, the parties' waiver of this set of rights in agreeing to arbitrate before the AHLA reflects their specific intent to arbitrate *exclusively* before that body. Furthermore, the designation of a forum such as the AHLA "has wide-ranging substantive implications that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration." (Citations omitted). Where designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution, we believe that it is neither "logistical" nor "ancillary". (See *Smith v. Barney, Inc. v. Critical Health Systems of North Carolina, Inc.*, 212 F.3d 858, 862 (4th Cir. 2000) ("It is far better to interpret the agreement based on what is specified, rather than attempt to incorporate other remote rules by reference."))

See, *Grant*. Simply put, the Supreme Court's analysis in *Grant* directly squares with the issues of the AAA before this Court. 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. Appellant HHE, the drafters of the Arbitration Agreement at issue, should have been aware that for approximately four (4) years prior to the decedent's sister's signature of this agreement, the rules and forum that it chose were no longer available as a means of dispute resolution. Furthermore, in choosing that forum, it is inconceivable that Appellants can now argue that the application of the intricate rules of the AAA to disputes do not have real, substantive effects on the rights of the parties. If not, why choose the AAA specifically? Because the AAA no longer accepts such pre-injury

arbitration agreements, the failure of the arbitral forum renders the Arbitration Agreement at issue unenforceable.

Under the binding precedent of *Grant*, the circuit court's Order Denying Appellants' Motion to Compel Arbitration should be affirmed without the necessity of reaching the question of the application and effect of the Federal Arbitration Act. However, even if the FAA applies, the Court's refusal to appoint a substitute arbitrator is proper.

E. Due to the Failed Forum Selection Clause, No Substitute Arbitrator Can Be Appointed.

The Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (1999) codifies federal policy on arbitration and arbitration agreements. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreements regarding a transaction that involves interstate commerce, regardless of whether the parties contemplated an interstate transaction. *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363. Even if the FAA applied to this arbitration clause and interstate commerce were involved, the trial did not err in refusing to designate a substitute arbitrator pursuant to § 5 of the FAA, because the arbitration agreement is void and unenforceable as a matter of law for the reasons previously stated.

Appellant relies on the mandatory language of §4 of the FAA to argue that the trial court was bound and required to enforce the Arbitration Agreement at issue despite the failure of an essential term of the agreement. As noted by Appellants, "where an arbitration agreement governed by the FAA covers claims that have been asserted in a lawsuit, the court having jurisdiction *must* compel arbitration." This argument simply ignores the applicable law and improperly seeks to elevate the presumption of

arbitrability over the careful analysis the law requires of courts in determining the validity of arbitration agreements. The relevant portion of Section 4 of the FAA provides:

[t]he court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

Appellant then invokes the language of Section 5 of the FAA to argue that the unavailability of the AAA forum and rules is immaterial and that the court is required to appoint a substitute arbitrator. This argument is based upon the "lapse in the naming of an arbitrator" language of § 5. Section 5 provides:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

The plain language of §5 prevents its application in this instance. Here, there has not been a "lapse in naming an arbitrator." The parties specifically named an arbitral forum and set of rules, the AAA, that no longer accepts these disputes. Based upon the analysis under *Grant*, the provision did not merely "name" an arbitrator, but chose specific substantive, procedural, and administrative choices that formed an

essential element of the agreement to arbitrate. Therefore, this contract is unenforceable because a material part of the arbitration clause no longer exists.

While Appellant HHE cites several cases in which courts applied §5 to appoint a substitute arbitrator, these cases are countered by numerous decisions favorable to the Respondent's position.² These same cases were considered by the Supreme Court in *Grant*, and that decision requires a finding by this Court that the selection of the AAA rules was the exclusive selection of a forum in the arbitration agreement. Because that forum fails, the arbitration agreement, as drafted, is unenforceable. Even if this Court were to reach the issue of whether Section 5 of the Agreement requires arbitration, which the *Grant* Court did not reach, those cases relied upon by Respondent are more persuasive and should be followed.

In *Smith Barney v. Critical Health Systems of North Carolina*, 212 F.3d 858, 860 (4th Cir. 2000), the arbitration agreement provided that arbitration would proceed in accordance with the rules of three self-regulatory organizations, the NASD, the NYSE and the AMEX. "Where the parties have agreed explicitly to settle their disputes before particular arbitration fora, that agreement must control. To hold otherwise would require us to impose a strained construction on a straightforward

² See, *In Re: Solomon*, 68 F.3d 554 (2d Cir. 1995) (Where the Court concluded, in essence, that the language stating that the rules of the NYSE were to apply was the same as providing that the matter could only be arbitrated before the NYSE.); *Smith Barney, Inc. vs. Critical Health Systems in North Carolina, Inc.*, 212 F.3d 858, CA4 (N.C. 2000) (Where the Fourth Circuit, after conducting an exhaustive review of other decisions, concluded that there was no difference between an agreement that provided for arbitration "only before" specified entities and an agreement that provided for arbitration "in accordance with the rules" of several entities and holding that where parties agreed explicitly to settle their disputes before a particular arbitration forum, that agreement must hold); and, *Buice vs. WMA Securities, Inc.*, WL 6063508 (Ct. App. 10/14/08) (Upholding order denying arbitration where failure of forum occurred.)

agreement." *Id.* at 862 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis*, 903 F.2d 109, 113 (2d Cir. 1990)).

Likewise, in *In re Salomon Inc. Shareholders' Derivative Litigation*, 68 F.3d 554 (2d Cir. 1995) the arbitration clause provided that the parties arbitrate disputes before the NYSE. Defendants sought appointment of a substitute arbitrator under § 5 of the FAA when the NYSE declined to arbitrate the dispute. The Court stated that "although federal policy favoring arbitration obliges us to resolve any doubts in favor of arbitration, we cannot compel a party to arbitrate a dispute before someone other than the NYSE when that party had agreed to arbitrate disputes only before the NYSE." *Id.* at 559. The Court in *Salomon* states that §5 of the FAA applies when there is a "lapse in the naming of an arbitrator... or in filling a vacancy." 9 U.S.C §5. Because the parties had contractually agreed that only the NYSE would arbitrate any disputes between them, and there was no lapse in naming or filling a vacancy, the Court declined to appoint substitute arbitrators and compel arbitration in another forum. *Id.* at 559.

In the case before this Court, the "lapse" argument is not compelling as there was no lapse in naming an arbitrator or lapse in filling a vacancy. Furthermore, Appellant was aware before the presentation of this agreement to the decedent's family upon the admission Ms. Roberts that the AAA would no longer arbitrate such disputes. If Appellant intended any other entity to arbitrate in place of the AAA or under its rules with a different arbitral forum, then they could have chosen to include appropriate language in their Agreement. As the superior, drafting party, this failure should be held against the Appellant HHE, rather than the Estate of Ms. Roberts.

Similarly, any argument by HHE that the FAA would somehow force the Personal Representative of Ms. Roberts' Estate to now execute a "post-injury" arbitration agreement is untenable. There is absolutely no authority for this. This cannot be the purpose of the Federal Arbitration Association, and to require such would allow parties who have failed in the construction of contracts, specifically arbitration agreements, to force the same result by after the fact, imposed modification. At its core, arbitration agreements are based upon the meeting of the minds and intentions of the parties. To argue that the Personal Representative is now compelled to enter into an agreement flies in the face of logic and the will and intent of parties to contract and make agreements.

II. APPELLANT HHE HAS WAIVED THE RIGHTS TO ENFORCE THE ARBITRATION AGREEMENT EVEN IF IT WERE VALID.

HHE has 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:³ 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 Appellant HHE waived their rights to mediation. Appellant 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. Make no mistake – 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 – Appellant 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 Appellant 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 Appellant HHE availing itself of the court system.

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. (Certificates of Service). 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, Appellant 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. Appellant has 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, Appellant HHE has 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 S.E.2d at 250, 252 (Ct. App. 2007). This Court recently addressed the waiver of 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, now the respondent faces 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. Appellant 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.

III. AS A MATTER OF CONTRACT, THE ARBITRATION AGREEMENT FAILS AND IS INVALID BECAUSE THERE IS NO MEETING OF THE MINDS BETWEEN THE PARTIES.

In order to have a contract, there must be a meeting of the minds as to essential parts of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). Here, there is no meeting of the minds as to what the parties were entering into.

The admission director for HHE, Appellant's agent in the admissions process and who is charged with securing signatures including the Arbitration Agreement at issue, was Ms. Sally Dobson. Ms. Dobson described her role and responsibilities in the admissions process as follows:

A: I am the admissions director. I take referrals from the hospital or from home. We go over them, we check the pay sources, and then if we can help these people or can admit them for care then we do the process of admitting.

Q: Okay. What is your involvement in the actual admission process itself?

A: I sign – I have the paperwork signed by either the patient or a family member.

(R. p. 632).

Ms. Dobson further testified that she and the administrator explain to residents and family members that arbitration means that if "they have any complaints or any

concerns that are not being taken care of in a timely manner then we can go into arbitration." (R. p. 632). When asked if she was aware that the arbitration agreement required adherence to the AAA rules, she testified as follows:

Q Did you know, Ms. Dobson, that the Arbitration Agreement that we're here about today contains a provision that the American Arbitration Association rules have to be followed? Were you aware of that?

A If it's on that sheet of paper, Well, I don't know what the Arbitration Agreements are.

Q Well, how is it if you don't know, how would a resident know or their family member?

A I don't know.

Q Well, don't you think that's an important part of it?

A It is.

Q It's a material part of the contract?

A It is.

Q And but you don't know what it is?

A But I don't know what it is.

Q And so you can't expect a resident to know?

A That's --

MR. RISSLER: Object to the form.

A -- correct.

Q or their personal representative?

A Uh-huh (affirmative).

Q Right?

A Right.

Q Or power of attorney, right?

A Right.

Q Or their family member?

A Right.

(R. p. 633).

Astoundingly, the person HHE selected as the person to instruct residents and family members on the documents that they must sign in order to be admitted to the facility does not know what those very documents mean. Quite candidly, she further admitted that there could be no meeting of the minds as to an integral part of the contract.

(R. p. 633). Accordingly, there is no meeting of the minds and the arbitration agreement must fail.

IV. EVEN IF THE ISSUE OF INTERSTATE COMMERCE UNDER THE FAA IS REACHED, UNDER *TIMMS V. GREENE*, APPELLANT'S ARGUMENTS FAIL, AS INTERSTATE COMMERCE IS NOT EVIDENCED IN THE AGREEMENT.

The Arbitration Agreement of the parties is not a transaction involving interstate commerce. This issue was addressed long ago by the South Carolina Supreme Court in the case of *Timms vs. Greene*, 310 S.C. 469, 427, S.E.2d 642 (1993).

Timms stemmed from a nursing home resident's lawsuit seeking damages for injuries sustained while she was left unattended under a hair dryer at defendant's facility. The arbitration agreement in *Timms* required submission of any dispute to binding arbitration. The *Timms* defendant argued that interstate commerce was involved in the contract because the defendant was a division of a national corporation; the defendant hired employees from out of state; the defendant marketed its services out of state; the

defendant purchased majority of its goods and equipment from out of state; and, the defendant contemplated payments from Medicare and Medicaid. The lower court found the contract did not involve interstate commerce, rendering the FAA moot. The Supreme Court affirmed. The Court in *Timms* stated "although these factors could evidence the center's involvement in interstate commerce we find that their relationship to the agreement between the center and the respondent is insufficient to form the basis of a contract between the parties." *Id.*

Interstate commerce is a necessary basis for the application of the FAA. Because interstate commerce was absent in the contract between *Timms* and the defendant, the Supreme Court refused to require arbitration because the Plaintiff's cause of action was not subject to the Arbitration Act of South Carolina and the Federal Arbitration Act was inapplicable.

In this case, there is no evidence of interstate commerce in the actual Arbitration Agreement between the parties.³ The contract was entered into between Ms. Johnson, a South Carolina resident, and Heritage Healthcare of Estill, LLC, a South Carolina LLC. Furthermore, there has been no showing by HHE of any interstate commerce between the parties to the arbitration agreement. Furthermore, HHE's reference to involvement of Georgia corporations as parties to this lawsuit does not support a finding that the arbitration agreement itself involves interstate commerce. Clearly, the agreement *itself* is

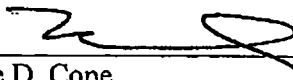
³ The trial court found correctly that parties cannot simply stipulate to the involvement of interstate commerce. It is well-established that parties cannot stipulate to subject matter jurisdiction before Courts. Similarly, parties cannot "stipulate" to interstate commerce that would invoke the FAA and deprive the Courts of jurisdiction over disputes. "Like the construction of a contract, it is improper subject for stipulation and any attempted stipulation is not binding on a court." *Morris v. Beacham*, 262 S.E.2d 921 (1980). It is not enough to say interstate commerce is involved; it must be evidenced in the contract itself. *Timms, supra*. The trial court properly concluded that it should not relinquish its jurisdiction and authority to hear the dispute merely because of a contract term.

the focus of the inquiry under *Timms*. Within its four corners, the Arbitration Agreement at issue does not mention any of the out of state entities. Rather, the agreement specifically limits arbitration to disputes involving the resident and the "facility." (R. pp. 645-646). The "facility" is HHE, d/b/a Heritage of the Low Country. There is no evidence that Ms. Johnson knew or should have known of the existence of the out-of-state corporations at the time she entered into this admission agreement. Additionally, the responsive pleadings of the out of state corporations deny that they are responsible for the care provided at the HHE facility. (R. pp. 91; 97; 103; 109; 115; 121; 127; and, 133). There is no signed arbitration agreement or any other contract signed by the decedent and UHS Pruitt, United Rehab and/or United Clinical Services. Accordingly, the FAA does not apply.

CONCLUSION

The trial court properly concluded that *Grant v. Magnolia Manor-Greenwood* is dispositive of the issues of arbitrability in this case and refused to compel arbitration. Furthermore, even if *Grant* does not end the analysis, Appellant HHE waived any rights to claim arbitration by participating in this litigation for the length of time and to the extent which is availed itself of the court system. Finally, the Arbitration Agreement fails as a matter of contract and the FAA is not triggered by the involvement of interstate commerce within the Arbitration Agreement itself. For these reasons, the trial court's Order Denying Appellant HHE's Motion to Compel Arbitration should be affirmed.

Respectfully submitted,



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August 29, 2013
Ridgeland, S.C.

ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case Nos. 2010-CP-25-489 and 2010-CP-25-490
South Carolina Court of Appeals No. 2012-207289

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

Appellants.

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SC Court of Appeals

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case Nos. 2010-CP-25-489 and 2010-CP-25-490
South Carolina Court of Appeals No. 2012-207289

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

Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The parties are in agreement regarding much of the law governing the "Resident and Facility Arbitration Agreement" ("Arbitration Agreement"), including:

- that Plaintiff Linda Johnson executed the Arbitration Agreement on behalf of Inez Roberts (*see* Appellants' Brief at 2-3; Respondent's Brief at 6-7);
- that federal and state legislative and judicial policies favor arbitration of disputes (*see* Appellants' Brief at 8-9; Respondent's Brief at 9-10); and
- that ordinary principles of State contract law govern formation and interpretation of the Arbitration Agreement (*see* Appellants' Brief at 11-14, 25; Respondent's Brief at 10-11).

Defendants seek to enforce the Arbitration Agreement according to its precise terms and the provisions of the Federal Arbitration Act ("FAA"), the law that the parties agreed would govern enforcement of the Arbitration Agreement. Plaintiff seeks to avoid her contractual obligation to arbitrate by:

- ignoring the parties' agreement that their transaction involved interstate commerce and that the FAA applied and Plaintiff's own allegations of interstate commerce (*see* Appellants' Brief at 5-8; Respondent's Brief at 28-30);
- arguing that there was no "meeting of the minds" despite the existence of an unambiguous written contract, the Arbitration Agreement, setting forth the respective contractual obligations of the parties (*see* Appellants' Brief at 11-14; Respondent's Brief at 26-28);
- using the AAA Healthcare Policy Statement to suggest an interpretation of the Arbitration Agreement that is contrary to the plain meaning of the Arbitration Agreement and that cannot be reconciled with the express terms of the Arbitration Agreement or the rules for interpretation of contracts; arguing that the effect of the AAA Healthcare Policy Statement is to render the AAA "unavailable" despite the absence of any evidence that the AAA has refused or would refuse to accept Plaintiff's claims for arbitration and language in the AAA Healthcare Policy Statement indicating that the AAA would administer an arbitration of Plaintiff's claims; and arguing that Section 5 of the FAA would not require the appointment of a replacement arbitrator even though there is no evidence that the AAA was integral to the Arbitration Agreement (Appellants' Brief at 14-22; Respondent's Brief at 12-23); and

- arguing that Defendants have waived their right to enforce the Arbitration Agreement 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 (Appellants' Brief at 22-25; Respondent's Brief at 23-26).

For these reasons, and as shown more fully below, the arguments raised by Plaintiff should be rejected, and the trial court's order should be reversed.

ARGUMENTS

I. The Federal Arbitration Act applies because the transaction involved interstate commerce.

Plaintiff contends that "there is no evidence of interstate commerce in the actual Arbitration Agreement between the parties." (Respondent's Brief at 30.) Contrary to Plaintiff's assertion, the parties specifically acknowledged in the Arbitration Agreement that their transaction involved interstate commerce and would be governed by the FAA:

The Resident and the Facility acknowledge and agree that the Resident's Arbitration Agreement effects a transaction involving interstate commerce, therefore the enforcement of this Arbitration Agreement shall be governed by federal law, specifically, the Federal Arbitration Act, notwithstanding any contrary provision of the Admission Agreement or state law.

(R. p. 646, ¶ 5) This agreement is sufficient evidence of a transaction between the parties involving interstate commerce. (See Appellants' Brief at 5-7.) Moreover, Plaintiff's Complaint, on its face, establishes interstate commerce in that Plaintiff contends that entities outside of South Carolina were involved with and responsible for care delivered at the nursing facility in South Carolina. (See Appellant's Brief at 7-8.)

Plaintiff seeks to equate the acknowledgment of a transaction involving interstate commerce to a stipulation regarding subject matter jurisdiction. (Respondent's Brief at 30, n.3.) Plaintiff makes no attempt to explain how an acknowledgment of interstate

commerce is the equivalent to a stipulation of subject matter jurisdiction or to distinguish the numerous cases in which courts have relied upon a stipulation of interstate commerce to determine that the FAA applies. (See Appellants' Brief at 7, notes 5-6.) Rather, Plaintiff offers the conclusory assertion that:

Similarly, parties cannot "stipulate" to interstate commerce that would invoke the FAA and deprive the Courts of jurisdiction over disputes. "Like the construction of a contract, it is improper subject for stipulation and any attempted stipulation is not binding on a court." *Morris v. Beacham*, 274 S.C. 320, 262 S.E.2d 921 (1980).

(Respondent's Brief at 30, n.3.) *Morris* does not hold that whether a transaction involves interstate commerce or whether the FAA applies "is improper subject for stipulation" as Plaintiff suggests; rather, the "improper subject for stipulation" there was whether "the instrument in question created enforceable charitable trusts." *Morris*, 274 S.C. at 322, 262 S.E.2d at 922. *Morris* is inapposite to the issue of whether the FAA applies and in no way contradicts the numerous decisions in which courts have relied on the parties' acknowledgment of interstate commerce to determine that the FAA applies.

II. The unambiguous written terms of the Arbitration Agreement demonstrate a "meeting of the minds."

Plaintiff contends that Sally Dobson, Lowcountry's admissions director, "admitted that there could be no meeting of the minds as to an integral part of the contract." (Respondent's Brief at 28.) Plaintiff focuses on Ms. Dobson's lack of familiarity with the rules applicable to any arbitration which might take place under the Arbitration Agreement (Respondent's Brief at 27-28) even though it is undisputed that Ms. Dobson did not discuss the applicable rules with Plaintiff Johnson (R. p. 633, page 11, lines 10-22; R. p. 613, page 17, line 21—page 18, line 6) Plaintiff ignores that Ms. Dobson explained that the information that she does provide to individuals signing the

Arbitration Agreement is wholly accurate and consistent with the written Arbitration Agreement: "When they sign the Arbitration Agreement, that [waives] their right to a jury trial or, you know, having it in court.... They are informed of this whenever they are there to sign." (R. p. 632, page 8, lines 9-14) There is no evidence of a failure of the parties to agree to essential contractual terms. To the contrary, the Arbitration Agreement is a written contract that fully sets forth the parties' respective rights and obligations. There are no essential terms missing. Accordingly, there was a meeting of the minds with respect to the Arbitration Agreement. (See Appellants' Brief at 11-14.)

III. The AAA Healthcare Policy Statement does not render the parties' agreement unenforceable.

The requirement in the Arbitration Agreement that any arbitration "shall follow the rules of the American Arbitration Association ('AAA')" does not render the Arbitration Agreement unenforceable because: (i) this provision does not require administration by the AAA (see Appellants' Brief at 15-17);¹ (ii) even if it did require administration by the AAA, the AAA is not "unavailable" (see Appellants' Brief at 18-19); and (iii) if AAA administration is required and the AAA is unavailable, a substitute arbitrator must be appointed pursuant to Section 5 of the FAA (see Appellants' Brief at 20-22).

¹ Plaintiff mistakenly claims that "[t]here is *no dispute* that the agreement at issue that 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)*." (Respondent's Brief at 12 (emphasis added).) The Arbitration Agreement requires that "any arbitration ... shall follow the rules of the [AAA]." (R. p. 645, ¶ 2) It does not require that any arbitration be administered by or "under the auspices of" the AAA.

A. Application of ordinary contract principles requires enforcement of the Arbitration Agreement.

Plaintiff relies upon *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 425 (2009), in which the Supreme Court affirmed a trial court's refusal to enforce an arbitration agreement based on the unavailability of the designated forum. However, as that case indicates, arbitration agreements are matters of contract and, therefore, each arbitration agreement must be interpreted according to its own terms. *Grant*, 383 S.C. at 130, 678 S.E.2d at 438. The Arbitration Agreement here is significantly different from the agreement in *Grant*. Interpreted in accordance with general principles of contract interpretation, the Arbitration Agreement does not mandate the use of an exclusive forum and is enforceable in accordance with the precise terms used by the parties.

"The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract." *Dobyns v. South Carolina Dept. of Parks, Recreation & Tourism*, 325 S.C. 97, 103, 480 S.E.2d 81, 84 (1997). "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). "Common sense and good faith are the leading touchstones of construction of provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail. [Cit.] In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the

parties. [Cit.] When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. [Cit.] Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible. [Cit.]” *C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Commission*, 296 S.C. 373, 377-78, 373 S.E.2d 584, 586 (1988).

The Arbitration Agreement provides, in pertinent part, as follows:

It is hereby understood and agreed by Heritage of the Low Country and Linda Johnson 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**.

(R. p. 645) (emphasis in original) The Arbitration Agreement further declares the parties’ intention to resolve any dispute solely by arbitration by stating: “This means that the parties are waiving their right to a trial before a jury or a judge.” (R. p. 645) This language is clear and unambiguous and susceptible of no interpretation other than that the parties agreed to resolve any claims “exclusively by **binding arbitration**” and to “waiv[e] their right to a trial before a jury or a judge.” (R. p. 645) This language differs significantly from the language used by the parties in *Grant*. In *Grant*, there was no general statement of the parties’ agreement to arbitrate exclusively by binding arbitration or to waive the right to trial by jury or judge. The parties in *Grant* agreed only to resolve any claims “by binding arbitration administered by the [American] Health Lawyers Association (the [‘AHLA’]).” *Grant*, 383 S.C. at 128, 678 S.E.2d at 436-37. Therefore, in *Grant*, when the AHLA became unavailable, there was no separate general statement of

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intent to arbitrate to demonstrate the parties' agreement to arbitrate in the event the AHILA became unavailable.

The Arbitration Agreement in the present case provides that "[a]ny 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." (R. p. 645, ¶ 2) (emphasis added) Again, this language is clear and unambiguous and susceptible of only one interpretation: The arbitration will "follow the rules of the [AAA]." In *Grant*, the parties had specifically agreed to "binding arbitration *administered by the [AHILA]*," allowing an inference that administration of the arbitration by the AHILA (rather than simply pursuant to its rules) was important to the parties under the very terms of their agreement. In the present case, however, the Arbitration Agreement did not require that any arbitration be *administered by the AAA*. This distinction alone makes *Grant* inapplicable to this case. (See Appellants' Brief at 15-17.)

Despite the clear language and intent of the Arbitration Agreement, Plaintiff attempts to use the AAA Healthcare Policy Statement to invalidate the Arbitration Agreement. (See Respondent's Brief at 12-23.) Plaintiff relies on AAA Rule R-2 which, by its very terms, does not *require* the AAA to administer the parties' arbitration, but merely "*authorizes*" it to do so. (See Respondent's Brief at 15-16; AAA Rule R-2.) Additionally, the Rule acknowledges that 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." (*Id.*) This language is consistent with well-settled authority that arbitration is a matter of contract and the

designated arbitrator may not exceed the powers designated to the arbitrator by the parties. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001); *Dowling v. Home Buyers Warranty Corp., II*, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993). However, nothing in Rule R-2, nor in any of the other AAA Rules, "directly appointments [sic] the AAA as the arbitral forum" as Plaintiff contends. (Respondent's Brief at 16.) Nor is there any prohibition against use of the AAA Rules in an arbitration administered outside of the AAA. Moreover, the Arbitration Agreement does not grant to the AAA the authority to alter or invalidate the Arbitration Agreement or to decide that claims covered by the Arbitration Agreement cannot be arbitrated. The rules cited by Plaintiff are insufficient to overcome the parties' express agreement to resolve any disputes "exclusively by **binding arbitration**." (R. p. 645)

Notwithstanding the clear and unambiguous agreement to arbitrate, Plaintiff seeks to avoid arbitration by arguing that the AAA Healthcare Policy Statement renders the Arbitration Agreement invalid. The Arbitration Agreement does not mention the AAA Healthcare Policy Statement (which is not a part of the AAA Rules) and does not require administration by the AAA. Rather, the Arbitration Agreement requires only that any arbitration "*follow the rules of the [AAA]*." (R. p. 645, ¶ 2) (emphasis added) Plaintiff interprets this language to preclude any arbitration, even though such interpretation directly contradicts every other provision, and indeed the entire purpose, of the Arbitration Agreement. Plaintiff's interpretation leads to the result that the parties entered into a stand-alone arbitration agreement, the sole purpose of which was to agree to resolve all disputes "exclusively by **binding arbitration**," but intended that the AAA

Healthcare Policy Statement (not referenced anywhere in the Arbitration Agreement) would preclude arbitration.

It cannot seriously be contended that the parties, by entering into an Arbitration Agreement, actually intended not to arbitrate. At least two other interpretations are possible which comport with the language used in the Arbitration Agreement and avoid the absurd result that follows from Plaintiff's proposed interpretation:

- (1) The parties meant what they said when they agreed that any arbitration would merely "*follow the rules of the American Arbitration Association ('AAA')*." In other words, the parties intended that the arbitration, which they agreed would be the exclusive means of resolving any disputes between them, would be conducted in accordance with the AAA Rules, but not necessarily administered by the AAA; or
- (2) The parties, recognizing that the AAA Healthcare Policy Statement would not prevent them from submitting their dispute to the AAA (because the AAA will administer consumer healthcare disputes if the parties choose to submit this dispute there), intended to perform the ministerial task of confirming their binding agreement to arbitrate with a submission agreement so that the AAA would administer their arbitration.

"Common sense and good faith are the leading touchstones of construction of provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail." *C.A.N. Enterprises*, 296 S.C. at 377-78, 373 S.E.2d at 586. To say the least, interpreting a provision which merely requires application of the AAA Rules to wholly invalidate the entire Arbitration Agreement in which that provision is located would be unusual and extraordinary. Defendants' construction, which comports with the parties' agreement to resolve all disputes exclusively by arbitration, is much more reasonable than the

construction proposed by Plaintiff, which leads to the result that the parties' agreement to arbitrate is, and was from the outset, an agreement not to arbitrate.

B. Section 5 requires appointment of a substitute arbitrator in the event of a vacancy or lapse in naming an arbitrator.

Once a valid and enforceable arbitration agreement is found to exist, Section 4 of the FAA mandates that the matter be submitted to arbitration. 9 U.S.C. § 4. Congress contemplated the possibility that an arbitrator designated by the parties may not be available to the parties for any host of reasons. Therefore, it enacted Section 5 of the FAA, which provides that

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or *if for any other reason there shall be a lapse in the naming of an arbitrator . . .*, or in filling a vacancy, then upon application of either party to the controversy *the Court shall designate and appoint an arbitrator . . .* who shall act under the same force and effect as if he . . . had been specifically named therein.

9 U.S.C. § 5 (emphasis added). The parties expressly agreed that the Arbitration Agreement would be governed by the FAA. Therefore, they have a right to expect that all relevant provisions of the FAA (including Section 5) will be applied. *See Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012) (finding that Section 5 of the FAA required appointment of a substitute arbitrator where the designated forum (NAF) had ceased arbitration of consumer claims and was therefore no longer available).

In an effort to avoid the Arbitration Agreement, Plaintiff argues that an arbitrator cannot be appointed as required by Section 5 because the AAA was "integral" to the Arbitration Agreement. However, as noted above, the Arbitration Agreement does not require that the AAA administer any arbitration, but merely requires arbitration to take

place pursuant to the AAA Rules. As the Arbitration Agreement does not even designate the AAA as the administrator of any arbitration, the AAA's administration of arbitration cannot be integral to the Arbitration Agreement. In *Grant*, the parties had agreed to "binding arbitration administered by the [AHLA]." *Grant*, 383 S.C. at 128, 678 S.E.2d at 437. The parties' decision in the present case not to require administration by the AAA demonstrates that administration by the AAA was not integral to the Arbitration Agreement.

Grant indicates that "[t]here is a dispute in the case law as to whether Section 5 applies in cases where, as here, the parties have specified an *exclusive* arbitral forum, but that forum is *no longer available*." *Grant*, 383 S.C. at 130, 678 S.E.2d at 438 (emphasis added). Unlike the arbitration agreement at issue in *Grant*, the parties here did not designate any arbitral forum (much less an exclusive one), but merely agreed to follow the AAA Rules. (R. p. 645, ¶ 2) Moreover, the AAA is available. Thus, *Grant* is inapposite.

Plaintiff further relies on the cases of *In Re Salomon*, 68 F.3d 554 (2d Cir. 1995); *Smith Barney v. Critical Health Systems in North Carolina, Inc.*, 212 F.3d 858 (4th Cir. 2000); and *Buice v. WMA Securities, Inc.*, 380 S.C. 149, 668 S.E.2d 430 (Ct. App. 2008). However, none of these cases stands for the proposition that mere reference to a particular arbitral forum or arbitral rules automatically renders the forum or rules "integral" to the parties' arbitration agreement. Moreover, the AAA Rules can be applied by any arbitrator pursuant to the Arbitration Agreement. Additionally, the AAA will administer the parties' dispute if the parties so choose.

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In *In Re Salomon*, the defendants "had signed an agreement to arbitrate (under the Constitution and rules of the NYSE) any dispute arising out of their employment by Salomon Brothers." *In Re Salomon*, 68 F.3d at 556. The trial court ordered shareholder derivative claims to arbitration before the NYSE. The NYSE determined that "shareholder controversies were not appropriately within the mandatory provisions of its Constitution" and that "jurisdiction must be based on the consent of the parties to arbitrate, and neither the shareholders who initiated the derivative action nor Salomon have consented to arbitration." *Id.* (internal punctuation omitted). The Second Circuit noted that "under the arbitration agreements, all disputes were to be arbitrated by the NYSE and only the NYSE, 'in accordance with the [NYSE] Constitution and rules.' The NYSE Constitution clearly permits the NYSE to refuse the use of its facilities for the arbitration for any particular dispute. NYSE Const. Art. XI, Sec. 3. When the NYSE so refuses, there is no further promise to arbitrate in another forum." *Id.* at 557. The Second Circuit noted that "we cannot compel a party to arbitrate a dispute before someone other than the NYSE when that party had agreed to arbitrate disputes *only* before the NYSE and the NYSE, in turn, exercising its discretion under its Constitution, has refused the use of its facilities to arbitrate the dispute in question." *Id.* at 558. Notably, the arbitration agreements at issue in *In Re Salomon* allowed the NYSE to decline jurisdiction in particular cases, did not specify that they covered shareholder derivative claims, and did not contain a general statement requiring all disputes to be resolved "exclusively by binding arbitration" or waiving the right to trial by jury or judge. The Second Circuit "read the agreements here as providing for arbitration *only* before the NYSE." *Id.* at 561 (emphasis added). It further held that "whether the NYSE would arbitrate the dispute

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'was *central* to the parties' agreement to arbitrate.'" *Id.* (emphasis added). The court also held that "the '*dominant intent*' of the parties was 'to arbitrate before particular arbitrators.'" *Id.* (emphasis added). Also, the NYSE refused to arbitrate based on concerns over "the problems shareholder derivative suits pose." *Id.* at 560. Thus, *In Re Salomon* involved a unique circumstance in which the identity of the arbitrator was at least as important to the parties as whether to arbitrate. As the language in the Arbitration Agreement in the present case differs significantly from the language at issue in *In Re Salomon*, this case is inapposite.

In *Smith Barney*, the Court held that the claimant was required to pursue its arbitration before one of the three specified fora (NYSE, NASD, or AMEX) and could not pursue its claims before another forum (AAA) because "the NASD, NYSE, and AMEX arbitration rules provide that claims based on transactions that occurred more than six years before arbitration was filed are not eligible for arbitration [and] Smith Barney was entitled to rely upon [these rules]." *Smith Barney*, 212 F.3d at 862. There was no claim that the NYSE, NASD, or AMEX was unwilling to arbitrate the dispute. Therefore, *Smith Barney* did not involve a failed forum as Plaintiff contends is the case here. *Id.* ("Here Critical Health has the choice of three fora. We can see no reason to pass over the three specified fora and allow arbitration to proceed in a fourth unspecified arena."). This case does not support Plaintiff's position.

In *Buice*, the Court of Appeals found that a claimant was not required to arbitrate a securities dispute against a firm whose membership in the NASD had been terminated, suspended, canceled, or revoked. In reaching its decision, the Court of Appeals found significant the legislative history of NASD Rule 10301 which indicated that the reason

the NASD refused to enforce pre-dispute arbitration agreements in such situations was that "terminated, suspended, barred or otherwise defunct firms have a significantly higher incidence of nonpayment of arbitration awards than do active firms." *Buice*, 380 S.C. at 155-56, 668 S.E.2d at 433. Thus, NASD Rule 10301 which assured a customer that it would only be required to arbitrate if the respondent member remained in good standing with the NASD was integral to the arbitration agreement. Thus, *Buice* involved specific facts demonstrating that the designated forum was important to the parties' agreement to arbitrate and does not support Plaintiff's position.

As in the previous cases, the Court in *Grant* did not merely presume that the designated forum was integral, but relied on evidence indicating the importance of that forum to the parties. *Grant*, 383 S.C. at 131, 678 S.E.2d at 438-39. The Court noted that "[t]o 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." *Id.*

The Court noted that

[u]nder AHLA policy, the parties may not vary the rules on communications, service, counting of days, publication and form of the award, release of documents, or administration. The parties are bound by a panel of arbitrators selected by the service. In our view, the parties' waiver of this set of rights in agreeing to arbitrate before the AHLA reflects their specific intent to arbitrate *exclusively* before that body. Furthermore, the designation of a forum such as the AHLA has wide-ranging substantive implications that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration.

Id. The present case differs from *Grant* in that the parties indicated only that the AAA Rules would apply, and these rules can be applied by any arbitrator. The parties agreed to resolve all disputes "exclusively by binding arbitration," but did not agree to arbitrate exclusively in an AAA forum. Accordingly, submitting the parties' dispute to arbitration

pursuant to the AAA Rules—whether administered by the AAA or someone else—does not contradict any provision of the parties' Arbitration Agreement. Moreover, if Plaintiff truly believes that the Arbitration Agreement requires her to arbitrate exclusively in an AAA forum, this forum is available.²

IV. Defendants did not waive the right to enforce the Arbitration Agreement.

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,

² Plaintiff's suggestion that Defendants have argued "that the FAA would somehow force the Personal Representative of Ms. Roberts' Estate to now execute a 'post-injury' arbitration agreement" (Respondent's Brief at 23) is a misstatement of Defendants' argument and misses the point. Plaintiff seeks to avoid the Arbitration Agreement on the false premises that the Arbitration Agreement requires the AAA to administer the parties' arbitration and that the AAA is "unavailable" to her. Defendants have shown that the AAA is not "unavailable" and that the Arbitration Agreement can be enforced in accordance with Plaintiff's purported preferred interpretation (administration by the AAA) if Plaintiff simply submits her dispute to the AAA. (Appellants' Brief at 18-19.) If Plaintiff's interpretation of the Arbitration Agreement as requiring arbitration administered by the AAA is a serious construction of the language of the contract rather than a contrived attempt to avoid her contractual obligations, then it defies logic that she would not simply submit her claims to the AAA as she claims the contract requires.

responding to discovery, and engaging in discovery limited to enforcement of the Arbitration Agreement.³ 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.)

CONCLUSION

The parties entered into an arbitration agreement which covers Plaintiff's claims. The parties agreed that their transaction involved interstate commerce and that the FAA applies. Defendants asserted the issue of arbitration in their Answers and have consistently maintained their position that Plaintiff's claims belong in arbitration. Plaintiff asserts no fault with the substance of the Arbitration Agreement other than the purported unavailability of the AAA. The Arbitration Agreement, by its own express terms, requires only that arbitration proceed under the AAA Rules, not necessarily in an AAA forum. Therefore, there is no reason that the present dispute cannot be resolved in

³ 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).

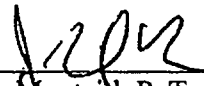
an arbitration under the AAA Rules as required by the parties' Arbitration Agreement. Moreover, the AAA is available and willing to arbitrate Plaintiff's claims with a submission agreement. Therefore, if arbitration in an AAA forum is truly important to Plaintiff, that forum is available to her. Given these available alternatives, federal and State policies favoring arbitration, and provisions of the FAA mandating enforcement of the Arbitration Agreement, the Arbitration Agreement must be enforced rather than invalidated.

For the reasons set forth herein and in Appellants' Brief, Defendants respectfully request that the Court reverse the trial court's Order Denying Defendants' Motion To Compel Arbitration and Stay Proceedings and remand this matter for an Order compelling Plaintiff to pursue her claims in arbitration and staying the litigation.

Counsel for Appellants certifies that the Final Reply Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted,

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Attorneys for Appellants

August 30, 2013

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-25-489 and 490
Court of Appeals No. 2012207289

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. Appellants.

PROOF OF SERVICE

I, the undersigned legal assistant, of the law offices of Sowell Gray Stepp
& Laffitte, LLC, attorneys for Appellants, do hereby certify that I have served all counsel
in this action with a copy of the Final Reply Brief of Appellants by mailing a copy of
same to counsel via United States Mail, postage prepaid, at the following address(es):

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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, Appellants.

Appellate Case No. 2012-207289

Appeal From Hampton County
Carmen T. Mullen, Circuit Court Judge

Unpublished Opinion No. 2014-UP-318
Heard May 5, 2014 – Filed August 6, 2014

REVERSED

Monteith Powell Todd, John Michael Montgomery, and
Robert E. Horner, all of Sowell Gray Stepp & Laffitte,
LLC, of Columbia; and Jason Edward Bring, W. Jerad
Rissler, both of Arnall Golden Gregory, LLP, of Atlanta,
Georgia, for Appellants.

Lee Deer Cope, of Peters Murdaugh Parker Eltzroth &
Detrick, PA, of Hampton; Charles McCutchen, of Lanier

& Burroughs, LLC, of Orangeburg; Matthew Vernon Creech, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Ridgeland; and Margie Bright Matthews, of Bright Matthews Law Firm, LLC, of Walterboro, for Respondent.

PER CURIAM: In this wrongful death and survival action alleging nursing home negligence, 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 (collectively, "Heritage") appeal from the trial court's denial of its motion to compel arbitration. Heritage argues the trial court erred in (1) concluding the arbitration agreement was not governed by the Federal Arbitration Act (FAA) when the transaction between the parties involved interstate commerce and (2) refusing to enforce the parties' Arbitration Agreement in accordance with its plain terms. We reverse.

1. We reverse as to whether the trial court erred in concluding the arbitration agreement was not governed by the FAA. *See Dean v. Heritage Healthcare of Ridgeway*, Op. No. 27401 (S.C. Sup. Ct. filed June 18, 2014) (Shearouse Adv. Sh. No. 24 at 40) (overruling *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993), in its entirety, and finding the arbitration agreement involved interstate commerce, and thus was governed by the FAA).

2. 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).

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).

4. We reverse as to whether the trial court erred in ruling there was no meeting of the minds between the parties. The trial court found there was no meeting of the minds as to what the parties were entering into because the admissions director for

Heritage stated during her deposition that she did not know what the Arbitration Agreement meant. However, Johnson admitted she signed the Arbitration Agreement without first reading it. *See Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it."). Furthermore, the Arbitration Agreement itself states, "The Resident is not required to sign this Arbitration Agreement in order to be admitted to or to remain in the Facility." *See Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) ("South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement."); *id.* at 105, 382 S.E.2d at 894 ("The 'meeting of minds' required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known.").

Accordingly, the decision of the trial court is

REVERSED.

FEW, C.J., and SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2012-207289

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SC Court of Appeals

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 Care of the Lowcountry, United Clinical
Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation Appellants.

RESPONDENT'S PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING *EN BANC*

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the Respondents respectfully move the Court for Rehearing and/or to Alter its Opinion number 201-UP-318 of August 6, 2014, which reversed the trial court's denial of Appellants'¹ Motion to Compel Arbitration. Respondents also respectfully petition and suggest the desirability of rehearing by the Court *en banc* because the proceeding involves questions of exceptional importance.

¹ The Defendants/Appellants 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 are referred to collectively herein as "HHE."

Rehearing or alteration of the Opinion is needed because the unpublished Opinion misinterprets *Dean v. Heritage Healthcare of Ridgeway*, Op. No. 27401 (S.C. Sup. Ct. filed June 18, 2014) (Shearouse Adv. Sh. No. 24 at 47) and also utterly fails to undertake the factual analysis required to determine the issue of waiver. The Opinion cites *Dean* in support of reversal, yet fails to perform any analysis of the facts and procedural history of this case under the *Dean* framework. By its refusal to perform a factual analysis of the waiver issue, the Opinion conflicts with *Dean* and longstanding precedent addressing the determination of waiver. The Court of Appeals erred in reversing the trial court's ruling that HHE waived its right to demand arbitration, and rehearing is warranted. Furthermore, rehearing or alteration is warranted so that the merits of the dispositive issue can be addressed, based on the facts and procedural background of this case.

As to the issue of waiver, this Court ruled 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, Paragraph 3).

Whether waiver occurs is a fact specific analysis. *Liberty Builders Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999). Nothing in the *Dean* opinion changes the case-by-case, fact specific approach followed by our Appellate Courts for decades. In fact, *Dean* reaffirms that a party can waive its claim for arbitration. When the *Dean* case is examined, it actually supports the trial court's conclusion in this case that HHE waived any demand for arbitration. In *Dean*, the Supreme Court held:

We find that Appellants did not delay in filing their demand for arbitration. Rather, Appellants participated in the statutorily required mediation process, and after Respondent filed her formal complaint, Appellants moved to compel arbitration at their first opportunity.

Id. at 47. (emphasis added).

There is no evidence in the record before this Court that HHE moved to compel arbitration at its first opportunity; in fact, the record shows the exact opposite. Arbitration was not sought by motion for years after a dispute arose between the parties and for over 10 months after a formal complaint was filed, and after numerous motions were heard by the trial court. Furthermore, the record shows that HHE participated in voluminous discovery over this course of time. Considering the facts of this case, under *Dean* and every previous appellate case addressing waiver, the trial court correctly found that HHE waived its right to demand arbitration.

Furthermore, to the extent the "first opportunity" language of *Dean* alters the historic fact specific analysis of waiver, *Dean* only strengthens the trial court's decision to find waiver. If the standard for waiver is whether the party seeking arbitration moved to compel arbitration "at the first opportunity," then HHE clearly fails the test.

Rational analysis of the facts in this record can lead to but one conclusion: Appellant HHE waived its right to arbitration. The arbitration agreement sought to be enforced by HHE states as follows:

...any and all controversies, claims, disputes, disagreements or demands of any kind... arising out of or relating to the [patient's residency agreement] with the Facility... or any service or care provided to the [patient] by the Facility shall be settled exclusively by binding arbitration.

(R. p. 645). As set forth below, there were numerous "disputes" between the parties to this Agreement that served as a trigger for HHE's "right" to demand arbitration, and correspondingly, to trigger the standard waiver analysis undertaken by our Courts.

Appellant HHE simply waited too long to move for arbitration.² HHE's resort to the protections, benefits, rules, and procedures of the Courts of this state began when it defended the initial *Ex Parte* TRO seeking the nursing home chart which was filed by the Plaintiff in September of 2008 when the dispute concerning Linda Johnson's ability to collect her mother's medical records arose. When this dispute, disagreement, and/or controversy arose, Appellant HHE could have moved to compel arbitration but did not. The dispute between the parties concerning the release of the medical chart involved months of Appellant HHE availing itself of the court system, including resort to the Court of Appeals, when the dispute was settled while on appeal. A motion to compel arbitration was never filed. Then, almost two years after the initial lawsuit 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. Again, Appellant HHE had an opportunity to move to compel arbitration and failed to do so. Then, the Summons and Complaints in this matter were filed on October 13, 2010. Immediately after HHE filed its Answers on November 21, 2010, Johnson moved to strike HHE's defenses of arbitration. (R. pp. 138-141). A hearing was held on February 11, 2011. Johnson argued to the trial court that if HHE wanted to move for arbitration it could do so immediately. (R. pp 568-575), again inviting HHE to move to compel arbitration. Rather than do so, HHE chose to participate in extensive discovery, to participate in two mediations (not pre-suit NOI mediation, but

² A full explanation of the long procedural history before HHE moved to compel arbitration, with citations to the record, is contained in Respondent's Final Brief to the Court. For the sake of brevity, Respondent craves reference to this recitation and incorporates the same by reference.

post-suit mediations) and to participate in multiple court hearings. HHE waited ten months past the filing of the Complaints, and approximately three years and seven past the first lawsuit and dispute between the parties arose before moving to compel arbitration. Even aft an invitation by Johnson to move for arbitration "at the first opportunity," HHE chose not to and refused to move to compel arbitration. Accordingly, the trial court's ruling on waiver should not be reversed.

The facts are clear and compelling: despite all the different controversies and disputes between the parties that HHE claims are covered by this Arbitration Agreement, it waited for years after the initial "dispute," for over a year after the filing of the notices of intent, and for ten months after the filing of the present lawsuit before moving to compel arbitration. The trial court properly reviewed the facts of this case and determined that HHE had waived its right to demand arbitration. This Court's unpublished opinion does not address the factual analysis of waiver, and issues an incorrect, blanket ruling that *Dean* requires reversal of the waiver issue. A fair reading of *Dean*, coupled with analysis of the procedural facts here, requires affirmation on the issue of waiver.

For these reasons, the Respondent respectfully seeks reconsideration and alteration of the Opinion on this issue. *Dean* compels a factual analysis to be undertaken and under that factual analysis, this Court must conclude that Appellant HHE waived its right to demand arbitration.

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Hampton, South Carolina
August 20, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case Nos. 2010-CP-25-489 and 2010-CP-25-490
South Carolina Court of Appeals No. 2012-207289

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

Appellants.

RETURN TO RESPONDENT'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC*

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SC Court of Appeals

INTRODUCTION

On August 6, 2014, this Court reversed 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"). The Court's Decision followed the Supreme Court's 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), which was entirely dispositive of all of the arguments that had been set forth by Plaintiff and accepted by the trial court.

Plaintiff now seeks to have this Court revisit its Decision based on the doubtful premise that this Court "misinterpret[ed] [*Dean*] and also utterly fail[ed] to undertake the factual analysis required to determine the issue of waiver." (Resp.'s Pet'n for Reh'g and Suggestion for Reh'g *En Banc* ("Pl.'s Petition") at 2.) However, it appears on the face of this Court's Decision that no point raised by Plaintiff was "overlooked or misapprehended by the court." Rule 221, SCACR. Therefore, rehearing is unnecessary. Further, since the Supreme Court has already decisively spoken on the sole issue raised in Plaintiff's petition, rehearing *en banc* is entirely unnecessary. Rule 219, SCACR.

ARGUMENTS

I. This Court Correctly Decided that Defendants Did Not Waive the Right To Enforce the Arbitration Agreement.

A. This Court properly relied on the Supreme Court's decision in *Dean* in concluding that Defendants did not waive arbitration.

On the face of the Decision, it is clear that this Court fully considered and rejected Plaintiff'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*, the Supreme 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.

The Supreme 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 v. S.C. State Plastering, LLC*, 743 S.E.2d 868, 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

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in the instant case.”). The 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*, this Court 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 Properly Noted Were Rejected by the Supreme Court in *Dean*.

Plaintiff’s Petition for Rehearing is virtually identical to her response brief in its heavy reliance on pre-complaint activity to attempt to manufacture a claim of waiver. (*Compare* Pl.’s Pet’n at 3-5 with Final Br. of Resp. (“Pl.’s Resp. Br.”) at 23-26.) Despite the clear instruction from the Supreme Court in *Dean* and this Court in *Carlson* that waiver must be based on post-complaint activity, Plaintiff 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. (Pl.’s Pet’n at 3-4; Pl.’s Resp. Br. at 23-24.) Both *Dean* and *Carlson* make it clear that this Court 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.”).

With respect to post-complaint activity, Plaintiff continues to provide a grossly misleading narrative regarding the Defendants’ supposed participation in the litigation.

(Pl.'s Pet'n at 4-5; Pl.'s Resp. Br. at 24-26.) Defendants raised the issue of arbitration in their Answers, which were the first responsive pleadings filed by Defendants. (See Final Br. of Apps. ("Def. Br.") at 1.) The entirety of Defendants' 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, Plaintiff attempts to characterize this limited participation by Defendants—which occurred only *after* Defendants made it perfectly clear through their Answers that Plaintiff's claims belonged in arbitration—as a "choice" by Defendants to use litigation rather than arbitration. (Pl.'s Pet'n at 4-5; Pl.'s Resp. Br. at 24-26.)

Defendants' reply to this identical argument raised by Plaintiff 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.¹ Such limited engagement in the litigation process (caused by Plaintiff's failure to abide

¹ 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).

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.)

The Supreme Court's decision in *Dean* fully supports Defendants' argument. As in *Dean*, "after [Plaintiff] filed her formal complaint," Defendants here "moved to compel arbitration at their first opportunity." *Id.* at 47. Defendants filed Answers asserting the arbitration agreement as a defense. After responding to Plaintiff's attempts to strike the arbitration defenses, Defendants conducted limited discovery necessary to move to compel arbitration. Following this limited discovery, Defendants promptly moved to compel arbitration. (*See* Defs.' Br. at 1-2, 4.) 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 its 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."). 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.

CONCLUSION

Following the Supreme Court's guidance in *Dean* regarding the "presumption against finding a party has waived its right to compel arbitration" and its mandate to

focus the analysis on post-complaint litigation activity, *Dean*, Adv. Sh. No. 24 at 46-47, this Court properly found that Defendants did not waive arbitration. For the reasons set forth herein and in the Final Brief and Reply Brief of Appellants, Defendants respectfully request that the Court deny Plaintiff's Petition for Rehearing.

Respectfully submitted,

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September 2, 2014

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-25-489 and 490
Court of Appeals No. 2012-207289

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. Appellants.

PROOF OF SERVICE

I, the undersigned legal assistant, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the Return to Respondent's Petition for Rehearing and Suggestion for Rehearing *En Banc* by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

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SC Court of Appeals

The South Carolina Court of Appeals

Linda Johnson, as Personal Representative of the Estate
of Inez Roberts, Respondent,

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

Appellate Case No. 2012-207289

ORDER

After 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. Accordingly, the petition for rehearing is denied.


John Cannon, Jr. C.J.
Paul E. Short, Jr. J.
John D. Besten J.

Columbia, South Carolina

FILED
10/23/14

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