

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case Nos. 2010-CP-21-00835 & 00836

Ann Coleman, Individually, and as Personal Representative of the Estate of Mary Brinson,

Respondent,

v.

Mariner Health Care, Inc. f/k/a Mariner Post Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., Grancare South Carolina, Inc., Individually and d/b/a Faith Health Care Center, SavaSeniorCare Management, LLC, SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Palmetto Health Care, LLC, Palmetto Faith Operating, LLC, Individually and d/b/a Faith Health Care Center, Ask Holdings, LLC, Leonard Grunstein, an Individual, Murray Forman, an Individual, Boyd P. Gentry, an Individual, Abraham Shaulson a/k/a Abraham Shavlson a/k/a A. Shawson a/k/a Abraham Shawson, an Individual, Avi Klein, an Individual, SC Property Holdings, LLC, SC Faith, LLC, and John Does 1-26,

of whom,

Mariner Health Care Management Company, Mariner Health Central, Inc., Grancare South Carolina, Inc., Individually and d/b/a Faith Health Care Center, Mariner Health Care, Inc. f/k/a Mariner Post Acute Network, LLC, Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Leonard Grunstein, an Individual, Boyd P. Gentry, an Individual, Murray Forman, an Individual are,

Appellants.

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APPELLANTS' RETURN TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENT AND AFFIRMANCE

HOLCOMBE BOMAR, P.A.
Perry D. Boulier
W. McElhaney White
Ginger Goforth
P.O. Box 1897
Spartanburg, South Carolina 29304
(864) 594-5300

YOUNG CLEMENT RIVERS, LLP
D. Jay Davis, Jr.
William L. Howard
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
(843) 577-4000

SERPE, JONES, ANDRES, CALLENDER & BELL,
PLLC
Lori D. Proctor
America Tower
2929 Allen Parkway, Suite 1600
Houston, Texas 77019
(713) 452-4400

*ATTORNEYS FOR APPELLANTS**

* Appellants for purposes of this return include only those appellants identified as represented by counsel in the signature block below. Specifically, those appellants are: Mariner Health Care, Inc. f/k/a Mariner Post Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., Grancare South Carolina, Inc., Individually and d/b/a Faith Health Care Center, National Senior Care, Inc., and Boyd P. Gentry (all of whom are represented by Young Clement Rivers, LLP and Lori Proctor) as well as SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, and SavaSeniorCare, Inc. (all of whom are represented by Holcombe Bomar, P.A.).

As set forth herein, the Appellants respectfully oppose the AARP's motion for leave to file an amicus brief in this appeal.

ARGUMENT

I. It is procedurally improper, or, at least, undesirable, for the AARP to be granted leave to file an amicus brief before the Respondent has submitted her brief.

Rule 213, SCACR, addresses amicus curiae briefing, and provides as follows:

A brief of an amicus curiae may be filed only by leave of the appellate court granted on motion, or at the request of the appellate court. The brief may be conditionally filed with the motion for leave to file. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. The brief shall be limited to argument of the issues on appeal as presented by the parties and shall comply with the requirements of Rules 208(b) and 211. If leave to file an amicus curiae brief is granted, the appellate court will specify the period in which a response to the brief may be filed.

The Appellants would draw the Court's attention to language in the Rule limiting amicus briefs "to argument of the issues on appeal **as presented by the parties . . .**" (emphasis added). The plain language of the Rule, therefore, does not contemplate consideration of amicus briefing before the submission of briefs by all parties. Here, the AARP has requested leave to file an amicus brief and conditionally filed its brief before the Respondent has filed her brief. Accordingly, the Appellants submit that the AARP's motion and conditional amicus brief are, at best, premature.

Moreover, it is not in the interest of justice or judicial economy/efficiency for leave to be granted to the AARP under these circumstances. Because the Respondent has not yet submitted her brief, to the extent that the AARP's conditional brief contains any substantive argument that the Respondent believes to be persuasive, the same can simply be included in the Respondent's own brief and, thereafter, replied to by the Appellants, if they desire to do so. According to the

AARP, its motion should be granted because “its brief would serve the ‘classic role’ of bring[ing] relevant matter to the attention of the Court that has not already been brought to its attention by the parties’” (AARP Mot. p. 2.) Under the circumstances, where all parties have not presented briefs, it is simply not possible to determine if the AARP’s conditional amicus brief does indeed bring relevant matter to the attention of the Court that has not already been brought to its attention by the parties. The proposed amicus briefing may be wholly cumulative and redundant to the Respondent’s future briefing.

II. The AARP’s conditional amicus brief is, on its face, not helpful to the Court’s decision-making process in this appeal.¹

The AARP’s conditionally amicus brief sets forth three arguments, each of which is patently without merit, irrelevant, and/or improper.

A. The AARP’s argument that South Carolina law does not permit a surrogate to enter legally binding contracts on behalf of an incapacitated person is fatally flawed because it is predicated on an unduly self-serving and, indeed, patently erroneous citation to the subject statute.

The AARP’s conditional amicus brief recognizes that “South Carolina law grants third parties the express right to ‘make decisions concerning health care’ on behalf of their incapacitated relatives,” but contends that the statutory definition of “‘health care’” is limited to “‘a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint’” (AARP Brief pp. 3-4) (citing S.C. Code Ann. §§ 44-66-30 and -20(1).) The AARP’s citation to the definition of “health care” set forth in § 44-66-20(1) is obviously and materially (and conspicuously) incomplete. The complete statutory definition set forth in § 44-66-20(1) is as follows: “‘Health care’ means a procedure to diagnose or treat a human disease, ailment, defect,

¹ Although it touches upon the matters presented in the AARP’s conditional amicus brief, the Appellants make this argument in opposition to the AARP’s motion for leave to file its amicus brief. To the extent that the Court may ultimately see fit to grant such leave to the AARP, the Appellants reserve and do not waive any and all rights to respond fully to the merits of the AARP’s amicus brief.

abnormality, or complaint, whether of physical or mental origin. **It also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled, or sick persons; and the placement in or removal from a facility that provides these forms of care.**” (emphasis added). The AARP’s conditional amicus brief never acknowledges or analyzes this language and, failing to do so, the AARP’s brief is not helpful to the Court’s decision-making process in this appeal. Likewise unhelpful is the AARP’s citation to extra-jurisdictional case law that is based upon different surrogacy statutes.

B. The AARP’s apparent authority argument is wholly irrelevant because apparent authority is not an issue on appeal.

The AARP’s argument about apparent authority is not helpful to the Court’s decision-making process and, indeed, wholly irrelevant, because the Appellants have not argued apparent authority on appeal.

C. The AARP’s argument about the alleged inadequacy of the regulatory enforcement process with respect to nursing facilities improperly injects into these appellate proceedings matters outside the bounds of the record below.

According to the AARP, regulatory protection of nursing facility residents’ rights is inadequate, and the ability to vindicate these rights is therefore “even more vital,” so “third parties should not be allowed to execute arbitration agreements that waive a residents’ right to due process without an express power of attorney to do so.” (AARP Br. pp. 10-11.) Assuming, *arguendo*, the validity of the AARP’s premise about the inadequacy of regulatory protection, this argument is patently specious, and at odds with the recent decision of the Supreme Court of the United States in Marmet Health Care Center, Inc. v. Brown, ___ U.S. ___, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012), wherein a unanimous Court emphatically rejected West Virginia’s categorical prohibition of predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes. It is therefore unnecessary and unhelpful for this Court to accept

the AARP's invitation to debate whether it would be better public policy to relieve nursing-home plaintiffs of their contractual duties to arbitrate so that they can litigate their claims in court, because that question was already decided by the Marmet Court in the negative. In so doing, the Marmet Court noted the "emphatic federal policy in favor of arbitral dispute resolution." Id. (citing KPMG LLP v. Cocchi, 565 U.S. ___, ___, 132 S.Ct. 23, 25, 181 L.Ed.2d 323 (2011) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).); *see also* Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 129, 678 S.E.2d 435, 437-38 (2009) ("We observe at the outset that it is the policy of this state to favor the arbitration of disputes."). Even if the AARP's premise about the inadequacy of regulatory enforcement is true, arbitration plainly provides an avenue for the vindication of rights that is, indeed, favored in both the federal and state court systems.

Moreover, the AARP argues that its amicus brief is desirable because it offers "additional context" on the supposed "detrimental impact that reversing the trial court's ruling would have for older persons." (AARP Mot. p. 1.) A reading of the AARP's conditional amicus brief shows that this context comes from matters outside the record below in the form of general reference to the allegedly high incidence of elder maltreatment. Injection of such "facts" into this appellate proceeding, which are not part of the record below, is patently improper. Rule 210(c) and (h), SCACR (providing that the Record on Appeal shall not include matter that was not presented to the lower court or tribunal below and that the appellate court will not consider any fact which does not appear in the Record on Appeal); *see also* McQueen v. S.C. Coastal Council, 340 S.C. 65, 530 S.E.2d 628 (2000), *vacated on other grounds*, 533 U.S. 943 (2001) (amici curiae are limited to arguing those issues that the parties presented to the lower court). Further still, by providing such general context, which does not pertain the particular parties in this litigation, the

AARP invites the Court to decide the issues between these particular parties on an improper and unduly prejudicial basis outside the bounds of this litigation. The Appellants respectfully submit that such context is neither helpful nor justly considered in resolving the dispute now before this Court.

WHEREFORE, the Appellants respectfully ask this Honorable Court to deny the AARP's motion for leave to file an amicus brief in this matter.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP



D. Jay Davis, Jr. (S.C. Bar No. 6723)
William L. Howard (S.C. Bar No. 1967)
P.O. Box 993
Charleston, South Carolina 29402
(843) 577-4000

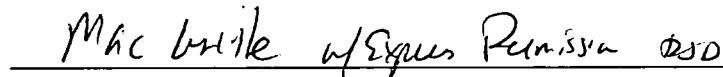
-and-

SERPE, JONES, ANDRES, CALLENDER & BELL,
PLLC

Lori D. Proctor (S.C. Bar No. 80117)
919 Milam Street, Suite 1700
Houston, Texas 77002
(713) 860-0585

*Attorneys for Appellants Mariner Health Care, Inc. f/k/a
Mariner Post Acute Network, LLC, Mariner Health Care
Management Company, Mariner Health Central, Inc.,
Mariner Health Group, Inc., MHC Holding Company,
MHC Florida Holding Company, MHC Gulf Coast
Holding Company, MHC MidAmerica Holding Company,
MHC Rocky Mountain Holding Company, MHC Northeast
Holding Company, MHC West Holding Company, MHC
Texas Holding Company, MHC MidAtlantic Holding
Company, Living Centers-Southeast, Inc., Grancare South
Carolina, Inc., Individually and d/b/a Faith Health Care
Center, National Senior Care, Inc., and Boyd P. Gentry*

HOLCOMBE BOMAR, P.A.



Perry D. Boulier
W. McElhaney White
Ginger Goforth
P.O. Box 1897
Spartanburg, South Carolina 29304
(864) 594-5300

*Attorneys for Appellants SavaSeniorCare Administrative
Services, LLC, SavaSeniorCare, LLC, and SavaSeniorCare,
Inc.*

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Appellants.

PROOF OF SERVICE

HOLCOMBE BOMAR, P.A.
Perry D. Boulier
W. McElhaney White
Ginger Goforth
P.O. Box 1897
Spartanburg, South Carolina 29304
(864) 594-5300

YOUNG CLEMENT RIVERS, LLP
D. Jay Davis, Jr.
William L. Howard
P.O. Box 993
Charleston, South Carolina 29402
(843) 577-4000

SERPE, JONES, ANDRES, CALLENDER & BELL,
PLLC
Lori D. Proctor
America Tower
2929 Allen Parkway, Suite 1600
Houston TX 77019
(713) 452-4400

*ATTORNEYS FOR APPELLANTS**

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I, D. Jay Davis, do hereby certify that a copy of the **Appellants' Return To Motion For Leave To File Brief Amicus Curiae Of AARP In Support Of Respondent And Affirmance** as sent to all counsel via United States Mail, postage pre-paid on August 23, 2012 addressed as follows:

Bluestein Nichols Thompson Delgado, LLC
John S. Nichols, Esquire
P. O. Box 7965
Columbia, SC 29202

Turner Padget Graham & Laney, P.A.
Carmelo B. Sammataro, Esquire
R. Gerald Chambers, Esquire
P.O. Box 1473
Columbia, SC 29202

Turner Padget Graham & Laney, P.A.
William C. Barnes, Jr., Esquire
P.O. Box 5478
Florence, SC 29502

Womble Carlyle Sandridge & Rice, PLLC
Sandra L. W. Miller, Esquire
P.O. Box 10208
Greenville, SC 29601

Holcombe Bomar, P.A.
W. McElhaney White, Esquire
Perry D. Boulter, Esquire
P.O. Box 1897
Spartanburg, SC 29304

Michael I. Bernstein, Esquire
1688 Meridian Avenue, Suite 418
Miami Beach, FL 33139

Proskauer Rose LLP
Malcolm J. Harkins III, Esquire
1001 Pennsylvania Avenue, N.W.
Suite 400 South
Washington, D.C. 20004

Serpe, Jones, Andres, Callender & Bell, PLLC
Lori D. Proctor, Esquire
America Tower
2929 Allen Parkway, Suite 1600
Houston TX 77019

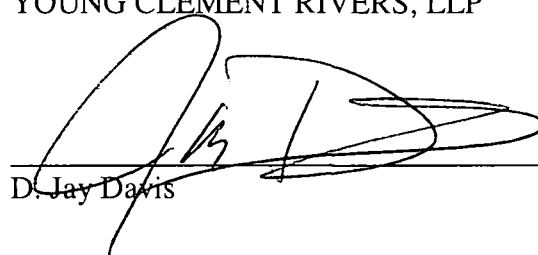
AARP Foundation Litigation
Kenneth W. Zeller, Esquire
601 E Street, NW
Washington, DC 20049

Christian & Davis LLC
Matthew W. Christian, Esquire
P. O. Box 332
Greenville, SC 29602

Fowler Law Firm, P.C.
Marion S. Fowler, III, Esquire
P. O. Box 1719
Lake City, South Carolina 29560

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

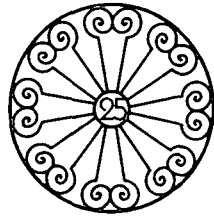


D. Jay Davis

Charleston, South Carolina

Dated: _____

8/23/12



YCR LAW
Young Clement Rivers, LLP

Jennifer L. Anderson
Secretary

Direct Dial: (843) 720-5488
Direct Fax: (843) 579-1369
E-mail: janderson@ycrlaw.com

August 23, 2012

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Ann Coleman, Individually and as Personal Representative of the Estate of Mary Brinson vs. Mariner Health Care, Inc., f/k/a Mariner Post-Acute Network, LLC, et al.
Case No.: 2010-CP-21-835; 836
Case Tracking Number: 2011194946
YCR File: 14264-20110818

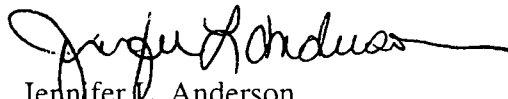
Dear Ms. Kitchings:

Enclosed for filing in the above matter please find the original and seven (7) copies of Appellants' Return to Motion For Leave to File Brief Amicus Curiae of AARP in Support of Respondent and Affirmance. Also enclosed are the original and two (2) copies of a Proof of Service concerning same. Kindly return one clocked copy of each document to us in the self-addressed, stamped envelope provided.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP


Jennifer L. Anderson
Secretary

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AUG 27 2012
SC Court of Appeals

JLA/jla

Enclosures

cc: Kenneth W. Zeller, Esquire
John S. Nichols, Esquire
Matthew W. Christian, Esquire
Marion S. Fowler, III, Esquire
Carmelo B. Sammataro, Esquire
William C. Barnes, Jr., Esquire
Gerald R. Chambers, Jr., Esquire

Michael I. Bernstein, Esquire
Perry D. Boulter, Esquire
Ginger D. Goforth, Esquire
W. McElhaney White, Esquire
Sandra L.W. Miller, Esquire
Malcom J. Harkins, III, Esquire
Lori D. Proctor, Esquire