

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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SC SUPREME COURT

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Appellate Case No. 2014-002502

APPEAL FROM HAMPTON COUNTY  
Court Of Common Pleas

Carmen T. Mullen, Circuit Court Judge

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Opinion No. 27639

Heard November 18, 2015 – Filed May 25, 2016

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

v.

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

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**RESPONDENTS' PETITION FOR REHEARING**

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During oral argument before this Court, Petitioner conceded that she did not preserve the issue regarding a prior *ex parte* temporary restraining order case; she conceded that the alleged facts regarding that action are not part of the record; and she conceded that the trial court did not consider that action in issuing its order. Yet, in its decision, this Court relied heavily on the TRO action in finding a waiver of arbitration on the part of Respondents.

Because the separate *ex parte* TRO action (filed by Petitioner) was never part of the record before this Court, it should not have formed the basis for the Court's opinion or entered into the Court's consideration. The Court's decision relies on or misapprehends facts and arguments that, as Petitioner conceded, were not properly preserved or supported by the record on appeal. Moreover, the decision overlooks and misapprehends the law of waiver under federal law that mandates arbitration. Therefore, pursuant to Rule 221, S.C.A.C.R., Respondents respectfully submit this petition for rehearing and request that this Court grant a rehearing, withdraw the opinion filed May 25, 2016, and issue an amended opinion upholding the Court of Appeals' decision finding the Respondents did not waive or voluntarily relinquish their contractual right to arbitrate the underlying dispute.

### **ISSUES PRESENTED**

1. Whether the Court erroneously relied on facts not properly preserved on appeal to find waiver in its self-described "heavily fact-driven" analysis?
2. Whether the Court failed to properly apply federal law mandating arbitration?

## ARGUMENT

### I. THE COURT ERRONEOUSLY USED FACTS NOT PROPERLY BEFORE THE COURT, AS CONCEDED BY PETITIONER AT ORAL ARGUMENT, TO MAKE AN ERRONEOUS FACTUALLY DEPENDENT CONCLUSION.

Using a “heavily fact-driven” analysis, the Court found that Respondents “waived” their right to compel arbitration. Op. at 4. However, a substantial portion of the facts that the Court used in its decision and analysis were conceded at oral argument by Petitioner not to have been properly preserved on appeal and were not proper for the Court’s consideration. See Elam v. S.C. DOT, 361 S.C. 9 (S.C. 2004) (holding “a great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court”) (internal citations and quotations omitted); see also Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding “[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review”); Rule 210(c), SCACR (stating “[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal”).

By way of background, in her brief, Petitioner asserted at length that Respondent’s pre-Notice of Intent (“NOI”) activity bore relevance on the question of waiver of the arbitration agreement. In fact, this very argument forms a substantial portion, if not the majority portion, of the facts the Court relied on to find waiver in this case. At oral argument, however, Petitioner’s counsel clearly conceded the facts pre-dating the filing of the NOI were not relevant or preserved

for this Court's review. Specifically, in the first minute of oral argument, the following colloquy occurred:

Justice Beatty: You said 16 months after the lawsuit commenced. Are you talking about a TRO, or are you talking about the filing of the complaint, or the NOI, or what?

Mr. Cope: No, sir. We are not. We did not preserve that issue on the TRO. We're looking solely at the NOI. I know we've briefed it. I have gone back and checked. That's not part of the record on appeal. And Judge Mullen did not consider it, so we're not going forward on the TRO...

Exhibit A (Transcript at 3, l 17 through 4 at l. 2) (emphasis added).<sup>1</sup>

Later, in oral argument, Justice Beatty again clarified when the time to begin the clock on waiver analysis began, and Petitioner again stated it would start at the time of the NOI. See id. at 12, ll. 18-20 (asking “[y]ou start the time to run at the NOI,” Answering, “Yes Sir”). And yet again, regarding questioning on the commencement of the action at the summons and complaint stage, Petitioner's counsel again conceded that the TRO and all facts preceding the filing of the NOI were not preserved, when he stated, “If I had protected the statute, I mean protected the record, it would go back even further. But in this record before the court today . . .” Id. at 15, ll. 5-7. Despite these clear concessions that the record was not preserved as to any TRO action and despite the Petitioner's waiver of those arguments, the Court's waiver determination relies substantially, if not nearly exclusively, on alleged pre-NOI activity.

It is clear that on three separate occasions, Petitioner conceded that none of the facts preceding the NOI was properly before the Court for its waiver analysis. And this was the proper concession for Petitioner to make, as this argument was not included as part of the record

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<sup>1</sup> The video is available online at <http://media.sccourts.org/videos/2014-002502.mp4>; however, for the Court's convenience, Respondent attaches as Exhibit A a duly certified transcript.

for the trial court to consider when deciding the motion to compel arbitration. Furthermore, this argument was not put forward at oral argument at the motion to compel arbitration hearing and, in fact, Petitioner put the starting point of waiver analysis at the filing of the NOI in her briefing to the trial court. See ROA 186. Therefore, without question, the factual analysis including the pre-NOI activity was not preserved or used by the trial court in its analysis, as conceded by the Petitioner at oral argument and is prohibited from being used in resolving this appeal pursuant to Rule 210(c) on the issue of waiver.

The court misapprehended the nature of the facts before it and apparently did not appreciate the concession made by the Petitioner at oral argument. Pointedly, immediately after stating the following: “[i]n this fact-driven issue, we find the court of appeals’ summary reversal inappropriate, particularly when compared with the circuit court’s order, which clearly considered the facts of the case,” op. at 5, the Court then recounted and relied upon a host of facts that Petitioners conceded at oral argument (on three separate occasions) that the circuit court had indeed not “clearly considered.” This is the very essence of misapprehension of the record. This misapprehension of the record wholly demonstrates the exact purpose of Rule 221 and the opportunity to rectify an obvious mistake.

Likewise, the Court apparently relied on findings of fact about the underlying case that are also not in the record, including a statement that: “At the time, Mrs. Roberts was eighty-five years old and enjoyed good health. However, within six months of entering HHE, she developed severe pressure ulcers, resulting in the amputation of her leg and ultimately, her death in 2009.” Op. at 2. At best, these are *allegations* in the complaint. Moreover, it is unreasonable to assume that an 85 year-old who enters a skilled nursing home enjoyed good health. This underscores the fact that the Respondents had limited their entire discovery to the issue of arbitrability. In fact,

before each deposition, *both* sides expressly stipulated that the depositions would be limited to arbitrability and not extend to the underlying facts of the case. Thus, the Court went too far in relying upon (and making these findings of) facts that are not in the record.

Given the breadth of reliance on facts that were not in the record and that were erroneously relied on by the Court in making its waiver determination, this matter should properly be reheard and the Court of Appeals' decision affirmed. Moreover, the decision, as filed, creates complications in application because there is no articulated standard regarding waiver pronounced. Heretofore, our trial courts used three factors to demonstrate whether a party had voluntarily relinquished their known contractual right to pursue arbitration.<sup>2</sup> Here, however, the Court solely relies on whether there has been prejudice to the non-moving party and used facts not properly preserved to find the prejudice. To not grant rehearing and to use the opinion as filed would not clearly direct our trial courts with a proper framework on what constitutes a relinquishment of the right to arbitrate. This outcome is further erroneous as it directly contradicts the edicts of federal law.

II. TO APPLY ERRONEOUS OR NOT PROPERLY PRESERVED FACTS TO FIND WAIVER IN THIS CASE IS CONTRARY TO THE EDICTS OF FEDERAL LAW THAT GREATLY FAVORS ARBITRATION

It is undisputed that there was a properly signed arbitration agreement by the power of attorney in this case. Thus, arbitration should be favored and enforced. See Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727, 731 (2014) (holding “[t]he basic purpose of the [Federal Arbitration Act “FAA”] is to overcome courts’ refusals to enforce

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<sup>2</sup> Those factors are (i) whether a substantial length of time transpired between the commencement of the action and motion to compel arbitration; (ii) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (iii) whether the non-moving party was prejudiced by the delay in seeking arbitration. See e.g., Rhodes v. Benson Chrysler –Plymouth, Inc., 374 S.C. 122 (Ct. App. 2007).

agreements to arbitrate” (quoting Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995)).<sup>3</sup> Moreover, the FAA was meant to “ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” Id. (quoting Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)). To that end, “the United States Supreme Court held in Allied-Bruce that, unless the parties specifically contracted otherwise, the FAA would apply whenever an arbitration agreement involves interstate commerce. Id. (citing Allied, 513 U.S. at 273-77); see also Bradley, 398 S.C. at 453-54, 730 S.E.2d at 315. Further, “the Supreme Court clarified that the reach of interstate commerce—and thus the FAA—was coextensive with the broad reach of the Commerce Clause.” Id. (citing Allied-Bruce, 513 U.S. at 277; see also Zabinski v. Bright Acres Assocs., 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Thus, “in practice, arbitration agreements enjoy a strong presumption of validity in federal and state courts.” Id. at 381, 759 S.E.2d at 732 (citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007); Zabinski, 346 S.C. at 596, 553 S.E.2d at 118. At bottom, 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)).

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<sup>3</sup> Although it is now clear that this is an enforceable arbitration agreement, at the time of the underlying litigation, Dean had not yet been decided and this Court’s jurisprudence still did not enforce arbitration agreements in the nursing home context pursuant to its decision in Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993). It was this reliance on an antiquated but controlling precedent that made the need for counsel to develop the proper record for the trial court to make the jurisdictional determination of whether the arbitration agreement was enforceable. Contrary to Petitioner’s repeated statements at oral argument, at no time was it ever trial counsel’s desire to test the “pool” of Common Pleas in Hampton County; rather, at all times, counsel was attempting to have the matter placed in arbitration by preparing the best possible jurisdictional record.

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 Supreme Court has specifically held that this federal policy in favor of arbitration includes claims involving nursing long-term care. See Marmet Healthcare Center v. Brown, 132 S.Ct. 1201 (2012). Our Supreme Court has followed this edict. See Dean, supra, 408 S.C. 371. 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). Thus, “[b]y its terms, the act leaves no place for the exercise of discretion by a [] court, but instead mandates that [] 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). Respectfully, this Court’s opinion misapprehends or is inapposite of this federal requirement. Here, the agreement was proper and should be enforced. Both this Court and the trial court acted contrary to the federal mandate that arbitration is favored and must be enforced where there is a proper agreement to arbitrate. The Court never found that Respondents voluntarily relinquished their right to arbitration, because Respondents never did. In fact, at each juncture, Respondents were attempting to produce a record that would give it the best prospect at compelling arbitration under the then state of the law. The Court could not find a relinquishment of the right to arbitrate under the FAA, so it

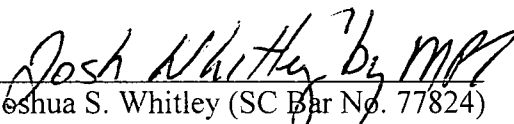
chose to not make such a finding and instead rely on facts not properly preserved on appeal. This is contrary to federal law and, respectfully, must be withdrawn.

**CONCLUSION**

For the foregoing reasons, this Court should grant rehearing, withdraw the Opinion filed May 25, 2016, and uphold the decision of the Court of Appeals.

Respectfully submitted,

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June 9, 2016

**EXHIBIT A**  
**(Transcript of Supreme Court Hearing**

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Linda Johnson, as )  
Personal Representative of )  
the Estate of Inez )  
Roberts, )  
Plaintiff, )  
-vs )  
Heritage Healthcare of )  
Estill, LLC, d/b/a )  
Heritage Healthcare of )  
the Lowcountry and/or )  
Uni-Health Post Acute )  
Network of the )  
Lowcountry, United )  
Clinical Services, Inc., )  
United Rehab, Inc., and )  
UHS-Pruitt Corporation, )  
Defendant(s). )

CASE NUMBER: 2014-002502

**Transcript**  
**Of**  
**Hearing**

HEARING DATE: Wednesday, November 18, 2015  
LOCATION: South Carolina Supreme Court  
1231 Gervais Street  
Columbia, SC 29201  
REPORTER: Lisa M. Kerns  
Professional Court Reporter

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**A-P-P-E-A-R-A-N-C-E-S**

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For the Court: The South Carolina Supreme  
Court  
By: Chief Justice Toal  
BY: Justice Beatty  
By: Justice Hearn  
By: Justice Pleicones  
By: Justice Moore  
1231 Gervais Street  
Columbia, SC 29201

Also present: None

**INDEX TO EXAMINATIONS**

PROCEEDINGS PAGE  
3

**INDEX TO EXHIBITS**

No Exhibits were proffered during this  
hearing.

**QUESTIONS WITNESS INSTRUCTED NOT TO ANSWER**

(None)

**PROCEEDINGS**

1  
2 BY MADAM CHIEF JUSTICE TOAL: The second case for oral  
3 argument this morning is Linda Johnson, as  
4 personal representative against Heritage  
5 Healthcare of Estill and others. Counsel  
6 you may proceed.

7 BY MR. COPE: Thank you, Your Honor. May it please The  
8 Court. We are asking this court to reverse  
9 the Court of Appeals decision, because  
10 contrary to its holding, one says holding,  
11 the Defendants in this case did not move to  
12 compel Arbitration at the earliest  
13 opportunity. In fact that they waited 16  
14 months after the lawsuit was commenced. The  
15 facts of this case make it very clear, that  
16 they waived their rights of Arbitration.

17 BY JUSTICE BEATTY: You said 16 months after the lawsuit  
18 commenced. Umm, are you talking about a  
19 TRO, or are you talking about the filing of  
20 the complaint, or the NOI, or what?

21 BY MR. COPE: No, sir. We're not, we did not preserve  
22 that issue on the TRO. We're looking solely  
23 at the NOI. I know we've briefed it. I  
24 have gone back and checked. That's my part  
25 of the record on appeal. And Judge Mullen

1 did not consider it, so we're not going  
2 forward on the TRO. We think that if you  
3 look solely at the NOI process, all the way  
4 til the date they actually finally move to  
5 compel Arbitration is 16 months, and that's  
6 a waiver. If you look at the three factors  
7 that this Court has consistently said to  
8 look at. The time between commencement and  
9 moving to compel Arbitration. Engaging in  
10 Discovery, and prejudice to the of  
11 Plaintiff.

12 BY JUSTICE BEATTY: Did this court say that, or did the  
13 Court of Appeals say that?

14 BY MR. COPE: I think that every court that has ever  
15 looked at it has looked at those three  
16 issues. In Dean you look at the same three  
17 issues. In Dean you said look at the time  
18 of commencement. And in that case same  
19 Defendant, different facility, they didn't  
20 file an answer, they filed a motion to  
21 dismiss to compel Arbitration.

22 BY JUSTICE HEARN: Does it make any difference that the  
23 Discovery that you talk about that  
24 contributes to the waiver was really limited  
25 to the issue of Arbitration?

1 BY MR. COPE: Not from our perspective, Your Honor. You  
2 know, Discovery is like Tango, in it takes  
3 two. We have --

4 BY JUSTICE HEARN: I've never thought of Discovery, you  
5 know, it's a whole new way to look at  
6 Discovery --

7 BY MR. COPE: I'm sorry.

8 BY JUSTICE HEARN: -- is the Tango.

9 BY MR. COPE: Well, you know, I wish they would let me  
10 do Discovery by myself. It would be a lot  
11 quicker and a lot easier and I would like  
12 the answers a whole lot better, but they  
13 never do that. And you put me in a  
14 precarious position by taking the position  
15 they would advocate this court to take. Hey  
16 Mr. Cope, we raised an affirmative defense.  
17 We tell you we're going to arbitrate this  
18 case, but they don't move to compel it.  
19 Interestingly, and I think we raised this,  
20 if you look at the rest of some of the  
21 defenses they raised in their answer, they  
22 raised statute of limitations. Well, if you  
23 look at the date we alleged the injury and  
24 the date we filed a lawsuit, it's clear  
25 there's no statute of limitations, but they

1 raised it. Now, could I sit back and do no  
2 Discovery because I anticipate they're going  
3 to raise and at some point moved to dismiss  
4 because the statute of limitations, of  
5 course not.

6 BY JUSTICE BEATTY: But was their Discovery really  
7 limited to the matters of Arbitration?

8 BY MR. COPE: There Discovery may have been limited in  
9 that respect, Your Honor, yes, but not ours.  
10 And that's the precarious position I'm  
11 talking about. In the 14th Circuit in  
12 particular, there's a judge there, a good, a  
13 very good judge. But if you don't mediate  
14 within the time limits prescribed by the  
15 order of this court, I would be in front of  
16 the Sanctions Roster. And if I somehow or  
17 another got past that, then I'm sitting  
18 there faced with the prospect of are they  
19 going to dismiss my case for failure to  
20 prosecute? Because an affirmative defense  
21 is something they can never bring up. They  
22 can withdraw prior to or during trial. They  
23 can, they can withdraw it and then I'm left  
24 saying, well, "Mr. Cope, how come you  
25 haven't done any Discovery? Your Honor, I

1 thought they were going to do something."  
2 You know, my line of work, depending on them  
3 to do what I think they will or should do,  
4 is a bad way to be in business. This case  
5 is a prime example. If they thought they  
6 had to arbitrate they could have filed a  
7 Motion to Compel Arbitration just like they  
8 did in Dean. They didn't. The unusual  
9 facts in this case are, Your Honor, I called  
10 them out on it. I filed a Motion to Strike.  
11 I respectfully understand that the ruling on  
12 the American Arbitration Association  
13 decision in Dean at the time, and still  
14 today, I'm not sure that I agree with that,  
15 but I understand that's the law of this  
16 state. We had no reason to believe that the  
17 Arbitration Agreement that they said was  
18 applicable, it was in fact applicable, and  
19 so that's why I moved to strike it. But I  
20 told them at the time, I said, "Your Honor,  
21 they've got an ace up their sleeve. They're  
22 going to sit back and wait, and they're  
23 going to test the waters." As justice  
24 Kittredge wrote at the court, the Court of  
25 Appeals, "wants to test the waters before

1                   they jump in and swim." They tested the  
2                   waters. And while one view of the facts of  
3                   this case could be they just wanted to build  
4                   up some evidence to win on Arbitration.  
5                   Another could be they were testing the  
6                   waters to see what they thought about the  
7                   court system, and after they had one Motion  
8                   to Compel Discovery with over 120 pieces of  
9                   Discovery, issues in Discovery that were at  
10                  issue, and they lost that motion and had to  
11                  produce almost 7000 pages of documents and  
12                  then had another Motion to Compel Discovery  
13                  filed against them. At that point they  
14                  decided we don't like this pool anymore,  
15                  we're going to get out. That's an option  
16                  they had that we don't, and it also goes to  
17                  show the prejudice in this case. If you  
18                  look at the timeline. As I was putting this  
19                  together yesterday, looking at the timeline,  
20                  from the day we filed the lawsuit, I'm  
21                  sorry. The day we filed the Notice of  
22                  Intent, almost every single month it is  
23                  documented things that we were doing to  
24                  prepare for trial. Not alone, in  
25                  conjunction with the Defendants. They

1 cannot say you served us with a bunch of  
2 Discovery, therefore we didn't engage in  
3 Discovery. If they did not want to answer  
4 our Interrogatories in our Request for  
5 Production, they, they could have just as  
6 easily gone straight to the courthouse and  
7 filed a Motion to Compel Arbitration and  
8 stopped it. They did not have to  
9 participate in the Motion to Strike the  
10 defense of Arbitration. As I told them at  
11 the hearing, file your Motion to Compel  
12 Arbitration. We don't have this hearing.  
13 They chose not to do that. That is a  
14 knowing decision that they, they made, and,  
15 and the record is clear. And the prejudice  
16 to us is every single month from the day we  
17 filed suit we are working to get ready for  
18 trial, and the time we argue the Motion to  
19 Compel Arbitration, the next term of court  
20 this case would have gone on the roster.  
21 But for me having to file all these Motions  
22 to Compel Discovery that they wouldn't give  
23 us full answers on, I would have been ready  
24 for trial. And if you'll send it back, give  
25 me three or four months, and I will be ready

1 for trial. And the reason is, in addition  
2 to getting almost 7000 pages of documents,  
3 we've hired experts and we've prepared for  
4 trial. The cost to our client, according to  
5 them, is a whole lot more today than if they  
6 had simply filed the Motion to Compel  
7 Arbitration. We wouldn't have had all this  
8 Discovery, and may not have needed all of  
9 the experts that we've had to retain. So  
10 the position it puts us in, to show the  
11 prejudice is, they've got something that  
12 they know and their holding on to, and we've  
13 got this Arbitration clause. We're not  
14 going to file it yet. And allow me to rack  
15 up all of these expenses, all this time, all  
16 this wasted time for the estate, get close  
17 to trial and then they throw it on the  
18 table. That's not fair, and that's what  
19 waiver law across this state has always  
20 held. If you look at the cases where the  
21 Court of Appeals in particular has found  
22 there is no waiver. It typically is because  
23 of marked inactivity. But that keeps --  
24 BY JUSTICE HEARN: One of your arguments here, isn't it  
25 in your brief, is that the Court of Appeals

1 reversed the trial court's finding of waiver  
2 without making any factual findings.

3 BY MR. COPE: None whatsoever. We sent a letter last  
4 week, Your Honor, on the Flexon case, which  
5 I thought was, was a prime example of what  
6 we said was lacking in the Court of Appeals.  
7 The Court of Appeal said based on Dean we  
8 don't believe there's any waiver here.  
9 Because they moved at the earliest  
10 opportunity. But if you look at the Flexon  
11 case, which I thought was, you know, very,  
12 very important here. You've raised as an  
13 affirmative defense, Life Point raises an  
14 affirmative defense Arbitration, and after  
15 the trial Judge, Judge Goldsmith said, you  
16 need to move to compel Arbitration, and they  
17 still didn't do it. They let the ruling on  
18 Coastal go. They let it go to the Court of  
19 Appeals, and then they come back and then  
20 they start doing Discovery, and then they  
21 moved to compel Arbitration. Well, I think  
22 Flexon shows that what should be done, if  
23 you're not going to do what they did in  
24 Dean. If you're not going to move to compel  
25 Arbitration and dismiss the case instead of

1 filing an answer, then you should move to  
2 compel Arbitration. If you think you need  
3 Discovery to prove Arbitration ask the court  
4 at that time to allow it and then have your  
5 hearing. You don't use the court system on  
6 a affirmative defense that you don't, that  
7 you actually don't move to compel  
8 Arbitration. That's the unfair prejudice.

9 I could stand up here and talk more,  
10 but I think I've made my point's. If  
11 there's any other questions I'll be glad to  
12 address them. I don't want to waste the  
13 court's time.

14 BY MADAM CHIEF JUSTICE TOAL: Well, you will have some  
15 follow-up.

16 BY JUSTICE BEATTY: One question.

17 BY MADAM CHIEF JUSTICE TOAL: Go ahead.

18 BY JUSTICE BEATTY: You, start the time to run at the

19 NOI --

20 BY MR. COPE: Yes, sir.

21 BY JUSTICE BEATTY: -- would they have been allowed to  
22 discard or avoid mediation, mandatory  
23 mediation? Would they have been able to do  
24 that --

25 BY MR. COPE: Yes.

1 BY JUSTICE BEATTY: -- and still go to the Arbitration?

2 BY MR. COPE: Absolutely. The Notice of Intent Statute  
3 specifically allows them to move to compel  
4 Arbitration at that point. NOI in  
5 particular Your Honor, is a creature of  
6 statute that only applies in civil  
7 litigation in this state. If there  
8 Arbitration agreement was meant to avoid  
9 litigation, they avoid that as well. We  
10 incurred expenses. I realize this Court in  
11 Dean said that we are not going to hold that  
12 four-month time period in one mediation to  
13 establish prejudice, but that's why waiver  
14 Cases have to look at all of the facts.  
15 They didn't move to compel Arbitration at  
16 the end of the NOI period. They waited an  
17 additional 10 months after that. And so I  
18 think once, once you look at the first prong  
19 of any waiver analysis, the time between  
20 commencement and actually moving to compel  
21 Arbitration, you can't commence a nursing  
22 home lawsuit until you file an NOI. That  
23 has to be the starting point. They did  
24 not --

25 BY JUSTICE PLEICONES: You can't commence an action

1                   until you file and serve a Summons and  
2                   Complaint; isn't that what the law is?

3       BY MR. COPE: I can't file a Summons and Complaint, Your  
4                   Honor, until I file a Notice of Intent and  
5                   go through that process.

6       BY JUSTICE PLEICONES: I understand that, but doesn't  
7                   the specific language in the rules say an  
8                   action is commenced by the filing and  
9                   service of the Summons and Complaint?

10      BY MR. COPE: It does say that, Your Honor. But I'm  
11                   also, but now I'm stuck in a position that I  
12                   can't, I can't get to that point without  
13                   going through the Notice of Intent process.

14      BY JUSTICE PLEICONES: Sure.

15      BY MR. COPE: So to the extent --

16      BY JUSTICE PLEICONES: You should of picked another word  
17                   other than commenced is all I'm saying.

18      BY MR. COPE: Institute. We couldn't institute, an  
19                   action. I'm just relying on the language,  
20                   because a lot of the waiver Law, obviously  
21                   predates the NOI statute process. But for  
22                   real world application, the time for them  
23                   when they know they can avoid all of this  
24                   process and make us not incur this expense,  
25                   is the time that we filed the NOI.

1 BY JUSTICE BEATTY: And it made them aware of the claim

2

--

3

BY MR. COPE: Absolutely.

4

BY JUSTICE BEATTY: -- at that moment in time?

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BY MR. COPE: If I had protected the statute, I mean

6

protected the record, it would go back even

7

further. But in this record before the

8

court today, they can't stand up here today,

9

or at any point, and honestly answer the

10

question that Judge Mullen asked at the

11

Motion to Strike this defense. And that

12

was, isn't Arbitration supposed to be

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quicker and less money? Because at every

14

opportunity they had to follow the Dean

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Analysis, and move at the earliest

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opportunity, they didn't do it. And that's

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why we think y'all should reinstate the

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trial judge's ruling. Thank you.

19

BY MADAM CHIEF JUSTICE TOAL: Counsel?

20

BY MR. WHITLEY: Madam Chief Justice, Your Honor's, and

21

may it please The Court. The Respondents

22

respectfully request this court to affirm

23

the decision of the Court of Appeals.

24

BY JUSTICE HEARN: How can we do that? They reversed

25

and they didn't give us any, any reason,

1                   really.

2       BY MR. WHITLEY: In this Court's 1993 opinion in regard  
3                   to memorandum of opinions of the Court of  
4                   Appeals, the Court said under 14-8-250, the  
5                   statute, and this court's rule at 220, that  
6                   identifying the issue. They identified  
7                   waiver, Justice Hearn, and then disposing of  
8                   it by citation to a case, is a proper and  
9                   acceptable format. When the Court of  
10                  Appeals cited to the most recent and  
11                  appropriate opinions --

12       BY JUSTICE HEARN: It seems like it is a factually  
13                  driven analysis, though. Whether or not  
14                  there was a waiver. So it's very difficult  
15                  when you read the one sentence that the  
16                  Court of Appeals used in reversing this to  
17                  find that it's supported by any, by  
18                  anything, by any analysis.

19       BY MR. WHITLEY: Respectfully, I think you can go to the  
20                  Dean decision, as they cited, go to the  
21                  facts of the Chief's opinion in Dean,  
22                  whether or not participation in pre-suite  
23                  mediation is waiver. Whether the time  
24                  elapsed and so forth, and you can get a  
25                  factual decision based on the proper format

1 of citation to Dean and find that there is  
2 no waiver.

3 BY MADAM CHIEF JUSTICE TOAL: Well, well, when I go to  
4 the three factors, uh, uh time and duration  
5 since commencement, or uh, uh initiation, or  
6 uh,uh whatever fancy word we want to use,  
7 extent of Discovery, and Prejudice, and I go  
8 to the extent of discovery, and I've got a  
9 completely different situation here. Uh,  
10 I've got a situation in which uh, uh, uh you  
11 all went way beyond in the Discovery you  
12 did, what it would take to have some  
13 Discovery on the issue of compelling  
14 Arbitration, uh did you not?

15 BY MR. WHITLEY: Respectfully, I disagree Madam Chief  
16 Justice.

17 BY MADAM CHIEF JUSTICE TOAL: Well, how about your  
18 request for admission number three and  
19 number four, in which you ask, uh Linda  
20 Johnson to admit that she was involved in  
21 healthcare decisions for Ms. Roberts during  
22 her stay at HHE. That the staff advised and  
23 consulted with her about her condition and  
24 treatment. Those requests go to the heart  
25 of her claims that HHE was grossly negligent

1 in providing care for Ms. Roberts. Uh, and  
2 just as tellingly, those request for  
3 admission have nothing to do with the  
4 Arbitration agreement or its validity.

5 BY MR. WHITLEY: Respectfully, Your Honor, I disagree.

6 Under Justice Pleicones opinion in Coleman,  
7 and even Dean, Footnote 13, where on remand,  
8 the Circuit Court had to consider the  
9 question of authority. Whether or not she  
10 was authorized to make healthcare decisions  
11 went directly to the enforceability of the  
12 Arbitration agreement in Coleman, and  
13 whether or not it merged under the  
14 Healthcare Consent Act. The intent had  
15 nothing to do with the underlying claims of  
16 pressure ulcers. Healthcare decisions had  
17 nothing to do with the substantive issues of  
18 the lawsuit. Those questions --

19 BY JUSTICE BEATTY: There's nothing in that admission,  
20 number four, the request for admission  
21 number four, that talks about authority --

22 BY MR. WHITLEY: Excuse me.

23 BY JUSTICE BEATTY: -- you're talking about, that  
24 admission only goes to whether or not she  
25 participated in treatment plan. It has

1 nothing to do with whether or not she had  
2 the authority to do so.

3 BY MR. WHITLEY: Yes, your honor. It does in this  
4 regard. At each --

5 BY JUSTICE BEATTY: But you're not asking about her  
6 authority in this request for admission.

7 BY MR. WHITLEY: We're trying to establish a pattern  
8 that she had authority to act on her  
9 mother's part.

10 BY JUSTICE BEATTY: Well, why not ask the direct  
11 question. Did you have the authority to do  
12 this?

13 BY MR. WHITLEY: Because we're lawyers and we ask it  
14 five ways. You can --

15 BY MADAM CHIEF JUSTICE TOAL: Well, if --

16 BY JUSTICE BEATTY: Well, you asked at five ways, but  
17 you never asked it the one way. Did you  
18 have the authority?

19 BY MR. WHITLEY: Well, Your Honor, respectfully, I think  
20 request to admit number one answers that  
21 almost conclusively. Did you have a Power  
22 of Attorney?

23 BY JUSTICE PLEICONES: Well, she clearly had the  
24 authority, did she not?

25 BY MR. WHITLEY: Correct.

1 BY JUSTICE PLEICONES: As in Mariner Health or Coleman,  
2 as you've, you've referred to it. This is  
3 the same situation where she was not  
4 required to sign the Arbitration Agreement  
5 in order to gain admission to your facility;  
6 am I correct?

7 BY MR. WHITLEY: Absolutely. In fact, it's the same  
8 Arbitration Agreement upheld in the Dean  
9 case.

10 BY JUSTICE PLEICONES: Okay. That's -- Okay. Thank  
11 you.

12 BY MADAM CHIEF JUSTICE TOAL: Well then what did you  
13 need all the -- If that's the case, why did  
14 you need the -- You asked for special  
15 additional limited Discovery to discover  
16 things that were pertinent to her authority  
17 and to the validity of the Arbitration  
18 Agreement, and yet all the rest of this  
19 Discovery doesn't, doesn't even dwell on  
20 that. It dwells on a whole bunch of things  
21 that have to do with the course of treatment  
22 Ms. Johnson received in your facility. Why  
23 do that and put them through all that, if  
24 all you were talking about was a legal  
25 question in the first instance?

1 BY MR. WHITLEY: I think the question is whether or not  
2 we relinquished the right, Your Honor?

3 BY MADAM CHIEF JUSTICE TOAL: Yes, Sir. One of the, one  
4 of the factors in that connection is length  
5 of time. We've got at least 15 months, and  
6 if you counted way back to the beginning of  
7 everything you've got three years. Uh, and  
8 uh, then we've got engagement and Discovery,  
9 and there's extensive Discovery engaged in,  
10 in this case that, that's what they're  
11 complaining about is the prejudice. You  
12 went way down the road towards engaging in a  
13 lot of Discovery that went way beyond just  
14 the legal question did, what happened about  
15 the Arbitration Agreement, and did she  
16 knowingly enter into it, and so forth.  
17 Y'all went way beyond that right down the  
18 road. Trial was set, times were set for  
19 trial, and suddenly at the very last minute  
20 you say, oh, hey, we're going to move to  
21 Compel Arbitration, and that's the very  
22 scenario in which courts say well, you've  
23 got the right to compel Arbitration and  
24 avoid all this. You don't go all the way  
25 down the road and put them through the

1 expense of a litigation oriented Discovery,  
2 only to jump back 15 months, well, some  
3 period of time later, and say hey, now I  
4 want to exercise my right to Arbitration now  
5 that I've done all this Discovery. That's  
6 what the fussing and about. Talk to me  
7 about that.

8 BY MR. WHITLEY: Several responses, Your Honor. We  
9 would argue that it's eight or nine months,  
10 not 15 months. Secondly, ten request to  
11 admit, which required ten words to answer.  
12 They answer admit or deny ten times. Ten  
13 words cannot be extensive Discovery if you  
14 look at the myriad of cases from the Court  
15 of Appeals. The Liberty case that Justice  
16 Hearn authored, or Justice Kittredge's case  
17 --

18 BY MADAM CHIEF JUSTICE TOAL: The Discovery was more  
19 than that, and it involved multiple  
20 appearances in court on various and sundry  
21 things that had to do with how a normal case  
22 would proceed; did it not?

23 BY MR. WHITLEY: Yes, your honor, but it's important it  
24 has to be reviewed from the light of what we  
25 did to avail ourselves of the judicial

1 system.

2 BY MADAM CHIEF JUSTICE TOAL: Well, see, that's the very  
3 point. This thing is a very fact driven,  
4 and yet the Court of Appeals just jumped  
5 right on reversing what the, uh, uh, uh  
6 trial court did with this thing, where it  
7 looked at all of these appearances in court  
8 and everything else that happened about a  
9 case that was barreling down the road to  
10 trial, and said hey, this thing went too  
11 far, all right. And therefore we're not  
12 going to let them jump at the last minute  
13 and go back to moving to Compel. The Court  
14 of Appeals doesn't say one thing about any  
15 of that.

16 BY MR. WHITLEY: I understand, Your Honor, your concern  
17 in that regard.

18 BY MADAM CHIEF JUSTICE TOAL: Well, then that's another  
19 problem with the case, isn't it? That this  
20 is fact driven just like you've been  
21 describing your view of the facts of what  
22 happened leading up to the motion and the  
23 Court of Appeals is not recited any; how can  
24 we deal with that?

25 BY MR. WHITLEY: Well, Your Honor, respectfully, I don't

1 think it was on the eve of trial.

2 Respectfully, they asserted their right to  
3 Arbitration at every time that the  
4 petitioners sought help from the court. We  
5 maintain -- Yes, Sir.

6 BY JUSTICE PLEICONES: I just want to ask you if you; go  
7 ahead and finish your answer.

8 BY MR. WHITLEY: We maintain that we had the right. The  
9 test is, the preeminent test from this  
10 Court, from the Court of Appeals, did we  
11 ever take any act contrary to, or relinquish  
12 our contractual right to Arbitration. Even  
13 at the May 5th deposition, petitioner's  
14 counsel stated, "it is our understanding we  
15 are here for the limited purpose of  
16 Arbitration and enforcement." If it wasn't  
17 waived on May 5th, the very next step we  
18 took was to move to Compel Arbitration.  
19 There wasn't a step for relinquishment  
20 between May 5th and August the 8th when we  
21 moved to compel. And the only delay in that  
22 regard was waiting on the transcripts so  
23 that the Circuit Court could have the proper  
24 record before it. Moreover -- Yes, sir.

25 BY JUSTICE PLEICONES: Let me ask you this. Do you

1           agree with the Petitioner that you could  
2           have moved to compel Arbitration immediately  
3           when the NOI was filed?

4       BY MR. WHITLEY: No, sir. I think, I think we are doing  
5           things to be overly cautious. I know, I'm  
6           not sure that's appropriate. I think Rule  
7           Four or Five is a Summons and Complaint  
8           commences the action. Dean is consistent  
9           with Your Honors statement in that regard,  
10          and therefore the timeframe would be eight  
11          months. Three months of which was dealt  
12          with the delay in doing with what the  
13          Petitioners Motion to Strike our defense of  
14          Arbitration. So you're really looking at a  
15          five-month delay in terms of the waiver  
16          analysis of Liberty and so forth according  
17          to the --

18       BY MADAM CHIEF JUSTICE TOAL: You're saying that the  
19           rules prohibit someone who has -- When a  
20           Notice of Intent to File Suit is filed,  
21           you're saying that the rules prohibit the  
22           party who holds the contract that has  
23           compelled Arbitration in it, the rules  
24           prohibit moving to compel Arbitration at  
25           that time?

1 BY MR. WHITLEY: I think, Your Honor. It's an  
2 unanswerd question in our courts --

3 BY MADAM CHIEF JUSTICE TOAL: That's what --

4 BY MR. WHITLEY: -- whether or not it's --

5 BY MADAM CHIEF JUSTICE TOAL: That's what Justice  
6 Pleicones is asking you, is your answer to  
7 that question. And you're going with all  
8 this well eight months and so forth and so  
9 on. It's a very direct question. Do the  
10 rules allow a party in your position that  
11 when the NOI is filed, at that juncture to  
12 compel Arbitration?

13 BY MR. WHITLEY: And respectfully, my answer is a  
14 direct. I believe the question is  
15 unanswerd, but my reading of the rules is  
16 the action commences upon the filing of a  
17 Summons and Complaint.

18 BY JUSTICE BEATTY: Now, counsel argues that the statute  
19 concerning NOI allows arbitrations,  
20 specifically speaks to it; is that your  
21 understanding of that statute?

22 BY MR. WHITLEY: My understanding is that it allows for  
23 the mediation, in fact, mandates the  
24 mediation process.

25 BY JUSTICE PLEICONES: It is another form of ADR that is

1 required during this period after the filing  
2 of the NOI. And obviously the Petitioner's  
3 perspective is that you could move to Compel  
4 Arbitration at any time, yours is that you  
5 can't. I understand.

6 BY MR. WHITLEY: Thank you Your Honor. If there is no  
7 further questions, thank you for The Court.  
8 Respectfully, we ask you to affirm the  
9 decision, or to remand it to the Court of  
10 Appeals at worst-case scenario, for a  
11 Factual Analysis of their decision on  
12 waiver. Thank you very much, Madam Chief  
13 Justice.

14 BY MADAM CHIEF JUSTICE TOAL: Thank you Sir. Mr. Cope,  
15 your reply?

16 BY MR. COPE: In mentioning the Liberty case. The  
17 Liberty case, I think goes to exactly what  
18 I'm talking about. There were two reasons  
19 why it was determined that there was no  
20 waiver there. One was marked inactivity on  
21 behalf of the person that object, didn't  
22 agree with waiver. And second, there was a  
23 court order that were going to first go into  
24 the right to cure issue. So, that's  
25 completely different than what we have here.

1 Completely different. And what's important,  
2 I think, is they can't explain in a logical,  
3 meaningful way why they didn't follow the  
4 Dean approach to this case. Why not file  
5 your Motion to Compel Arbitration? Now, I  
6 don't know why you would need any additional  
7 Discovery. Keeping, keeping in mind  
8 Arbitration rules, and I believe some of  
9 them were provided in the Record on Appeal  
10 here, but the Arbitration itself may or may  
11 not provide for Discovery. That's something  
12 that they say my client has already agreed  
13 to. The tools that they used to try to win  
14 Arbitration are litigation tools that they  
15 say they shouldn't be required to  
16 participate in. At no point, at no point  
17 did they ever stop and say we don't want to  
18 attend a Motion to Strike, we moved to  
19 Compel Arbitration. At no point did they  
20 say were not going to answer your Discovery

21 --

22 BY MADAM CHIEF JUSTICE TOAL: In fact they say don't  
23 consider the Motion to Strike until we have  
24 further Discovery --

25 BY MR. COPE: They objected to the Motion to Strike.

1 BY MADAM CHIEF JUSTICE TOAL: And they said don't  
2 consider the Motion to Strike, it's  
3 premature until we have further Discovery.

4 BY MR. COPE: Exactly Your Honor. And that is the  
5 problem. And the Motions to Compel  
6 Discovery were not because they filed  
7 objections based on Arbitration. It's  
8 because there answers were not fully  
9 responsive. They participated. They  
10 participated in a Motion to Compel when all  
11 they had to do was stop by the Clerk's  
12 Office on the way upstairs and say we're not  
13 going to be doing this today. They didn't  
14 do that and that is a known relinquishment  
15 of a right. The fact that they decided  
16 later and change their mind and decided they  
17 wanted to get out of the pool and file for  
18 Arbitration. That doesn't affect the fact  
19 that they had the opportunity from the very  
20 outset, whether we look at the NOI period,  
21 or we look at the summons and complaint  
22 period. They had an opportunity at both  
23 steps to stop it.

24 BY JUSTICE PLEICONES: Excuse me. I'm sorry.

25 BY MR. COPE: Yes, sir.

1 BY JUSTICE PLEICONES: What language can you point to in  
2 the NOI's provision that allows you to, or  
3 would allow them to file for Arbitration at  
4 that point in time?

5 BY MR. COPE: Your Honor, I think the more appropriate  
6 place to look is there Arbitration  
7 Agreement.

8 BY JUSTICE PLEICONES: Uh-huh.

9 BY MR. COPE: There Arbitration Agreement says we don't  
10 need to do this. We're not required to do  
11 this. We're not going to do this.

12 BY JUSTICE PLEICONES: Not required to; what is this?

13 BY MR. COPE: Notice of Intent. Any portion of the  
14 Notice of Intent. If, if there Arbitration  
15 Agreement means what they say it means --

16 BY JUSTICE PLEICONES: Specifically encompasses Notice  
17 of Intent.

18 BY MR. COPE: It encompasses all disputes. A Notice of  
19 Intent is an intent to sue you because I  
20 dispute the care you provided my client.  
21 How can that not be covered by the  
22 Arbitration Agreement. The fact that they  
23 decide to participate means that they have  
24 knowingly given up their right to arbitrate  
25 at that point in time. Now, this court and

1 I think rightfully so, has said we're not  
2 going to give a real short period of time,  
3 as in Dean, four months, and only one  
4 pre-suit mediation. We're not going to use  
5 that as the ax to cut off access to  
6 Arbitration. But if were looking for a rule  
7 or language that says you don't have to  
8 participate in the NOI, it's there  
9 Arbitration Agreement. The one they've been  
10 fussing about and fighting about for five  
11 years now, almost six years now. So how can  
12 they possibly point to any rule and say, you  
13 know what, we're required to do this. No  
14 you weren't. I'm required to do it. If I  
15 file the NOI I have to mediate or else I  
16 can't file my Summons and Complaint. The  
17 second mediation that they keep missing and  
18 they keep talking about, yeah we went to the  
19 second mediation. That's required in the  
20 14th circuit at that time. I didn't have a  
21 choice in that matter. It cost me money.  
22 They did have a choice in the matter. They  
23 could've said we're not going to another  
24 mediation, Motion to Compel Arbitration.  
25 Any day that you want to pick on the

1 continuum of time from filing the NOI or the  
2 Complaint, it was their opportunity, and  
3 solely their opportunity to exercise their  
4 right, and they didn't do it. In fact,  
5 while four months in the NOI period may not  
6 be that long of a period of time, why did it  
7 take them three months after the deposition  
8 of Linda Johnson, when they supposedly had  
9 what they needed to prove power and  
10 authority, where she admits, yes, I am a  
11 POA, and I, and I read it.

12 BY JUSTICE BEATTY: Let me interrupt you for a second.

13 We're talking about the NOI Statute  
14 15-79-125 says, "prior to filing or  
15 initiating." And would you tell me what  
16 your understanding of that, that  
17 differentiation might be, filing or  
18 initiating? Or are they talking about the  
19 same thing? Does the statement mean the  
20 same thing?

21 BY MR. COPE: I'm not sure if they're talking about the  
22 same thing. I believe that once, because we  
23 are the ones filing the claim, the NOI, and  
24 we can have mediation, Arbitration. But  
25 when you look at it from their perspective,

1 Justice Beatty, we have to look at it from  
2 could they have moved at that point in time  
3 to compel Arbitration and avoid litigation?

4 BY JUSTICE BEATTY: That's the reason for the question.  
5 Filing or initiating?

6 BY MR. COPE: Right. Right. And so we have to initiate  
7 our lawsuit through the NOI process, and  
8 they just continue to participate. And I  
9 believe they continue to participate until  
10 the trial court started ruling against them  
11 on the Motion to Compel Discovery, and they  
12 said I don't like this pool anymore and I  
13 want out. Thank you.

14 BY MADAM CHIEF JUSTICE TOAL: Thank you Mr. Cope. The  
15 Court will be in recess.

16 (Hearing concluded)

17 \* \* \*

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1 STATE OF SOUTH CAROLINA ) C-E-R-T-I-F-I-C-A-T-E  
2 COUNTY OF CHARLESTON )  
3

4 I, Lisa Kerns, Court Reporter and Notary Public,  
5 certify that I transcribed the above Hearing  
6 on June 2nd, 2016 for Smyth Whitley, LLC,  
7 located at 126 Seven Farms Drive, Suite 150,  
8 Charleston, South Carolina.

9 I hereby certify that the foregoing  
10 pages constitute a true and accurate  
11 transcript of the recording provided.

12 I further certify that I am not of  
13 counsel or kin to any of the parties to this  
14 cause of action, nor am I interested in any  
15 manner in its outcome.

16 IN WITNESS WHEREOF I have hereunto set  
17 my hand and seal this 2nd day of June 2016.  
18

19 \_\_\_\_\_  
20 Notary Public for South Carolina  
21 My commission expires June 27, 2018  
22  
23  
24  
25

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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JUN - 9 2016

SC SUPREME COURT

APPEAL FROM HAMPTON COUNTY  
Court Of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2014-002502

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Opinion No. 27639  
Heard November 18, 2015 – Filed May 25, 2016

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

v.

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

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**PROOF OF SERVICE**

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I, the undersigned Legal Assistant, do hereby certify that I have served all counsel with a copy of the foregoing Respondents' Motion for Rehearing by mailing a copy thereof, by first class mail, postage prepaid, to all counsel at the addresses shown below:


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