

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

Appellate Case No. 2014-002502

APPEAL FROM HAMPTON COUNTY  
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

**RECEIVED**

JUN 21 2016

Opinion No. 27639

Heard November 18, 2015- Filed May 25, 2016

**S.C. SUPREME COURT**

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.

**RETURN TO RESPONDENTS' PETITION FOR REHEARING**

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The Court properly ruled that the Court of Appeals failed to provide any factual or legal errors that were the basis for its reversal, and in light of the improper ruling by the Court of Appeals, this Court found correctly that the Respondent waived its right to enforce the arbitration agreement. In their Petition for Rehearing, the Respondents argue that this Court relied on unpreserved facts from outside the record of the appeal, and overlooked and misapprehended the presumption favoring arbitration that arises under federal law. However, this Court properly and correctly ruled that the basis of its opinion was to correct the error committed by the Court of Appeals, and then this Court provided the fact-driven analysis that should have been provided in an appellate court's *de novo* review. In doing so, this Court found that despite the presumption to favor arbitration, the fact-based analysis clearly indicates that Appellant was prejudiced by the delay of the Respondent to initiate arbitration, by having to incur costs that would otherwise not be incurred in arbitration, and by the looming uncertainty of whether the Respondent would cease availing itself of the Court system and move for arbitration. Furthermore, the Court was strongly persuaded by the circuit court's order which correctly and properly provided factual and legal findings based on a proper factual analysis.

### ARGUMENT

I. THIS COURT PROPERLY PROVIDED DE NOVO REVIEW AND MADE A FACT BASED HOLDING THAT THE RESPONDENT WAIVED THE RIGHT TO ARBITRATE.

This Court correctly determined that in this instance it was inappropriate for the Court of Appeals to summarily rule on the issues, and reinforced that sound jurisprudence requires a full factual analysis of the issue of waiver. The Court appropriately cites that "a circuit court's factual finding will not be reversed on appeal if any evidence reasonably supports the findings" Op. at 4 (citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007); Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 125-26, 647 S.E.2d 249, 250-51 (Ct.

App. 2007)). As is clearly articulated within this Court's opinion, the circuit court "set forth relevant facts in detail and made various factual and legal findings" and the Court of Appeals erred in its analysis, or lack thereof, in ruling summarily to reverse the circuit court. Op. at 5. In furthering its *de novo* review, the Court proceeded with its own review of the circuit court's findings.

This Court performed the factual analysis of three factors to determine waiver: (1) the time between the commencement of the action and moving for arbitration; (2) whether the party seeking to compel arbitration engaged in discovery; and (3) prejudice to the non-moving party which must be more than mere inconvenience. Rhodes 374 S.C. at 126. These factors are not mutually exclusive as the Respondent claims, but rather are likely and most often intertwined. Id. Despite the Respondents' assertion that the Court should not have considered pre-NOI information, the Court clearly rested its findings on other substantial facts that satisfy and support the elements necessary to prove waiver. As properly noted by the Court, the delay by the Respondent continued *long* after the filing of NOI. Respondent's systematic course of delay and failure to seek arbitration at its first opportunity continued during the pre-suit mediation, after the commencement of the lawsuit, and most notably through active engagement in the discovery process. The Respondents actively exchanged requests for production and interrogatories, took and defended depositions, and even appeared multiple times in court to defend motions to compel discovery. Op. at 6. In addressing this extended course of delay, this Court's opinion aptly recognized that the delay tactics employed by the Respondent resulted in the Appellant having to incur further expenses and "*preparing for litigation in the event that HHE never moved to compel at all*" Id. (emphasis added). The Respondents availed themselves of the court system, engaged in and sought discovery, and appeared in court multiple times, all of which would have

been avoided in arbitration. This Court properly noted that these continuous and prolonged delays were time consuming and came at great expense financially to the Appellant. Id.

Therefore, the delays intertwined with the additional unnecessary expenditures, the continuation of discovery, and preparation of needless work product in anticipation of future litigation in our court system was highly prejudicial to the appellant.

II. THIS COURT CLEARLY CONSIDERED THE FEDERAL AND STATE PRESUMPTION TO FAVOR ARBITRATION, BUT SUCH PRESUMPTION WAS OVERCOME BY THE FACT-DRIVEN ANALYSIS THAT DETERMINED THE RESPONDENTS WAIVED ARBITRATION.

The Respondent mistakes the Court's brevity in its opinion as an overlooking of the federal presumption favoring arbitration. In fact, the Court states in the first sentence of its analysis that "South Carolina courts favor arbitration" and cites to an earlier holding that the federal policy favoring arbitration is also recognized in South Carolina. Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 355 S.C. 605, 611, 586 S.E.2d 581, 585 (2003). This Court then provides specific, fact-based analysis to correctly determine that the Respondent waived its right to seek arbitration.

This Court should deny the Respondents' petition for rehearing because this Court's opinion was corrective of the Court of Appeals error and no points of the case were overlooked or misapprehended within its analysis.

**CONCLUSION**

This Court has provided a sound, well-reasoned opinion that is wholly consistent with precedent. The Opinion certainly takes into account the Federal and State favoring of arbitration, but correctly finds waiver. For these reasons, this Courts' opinion as filed on May 25, 2016 is proper and should remain in effect. The Court should deny the Respondents' Petition for Rehearing and remand the matter to the trial court to resume the course of its litigation.

Respectfully submitted,

PETERS, MURDAUGH, PARKER,  
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June 17, 2016  
Hampton, S.C.

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM HAMPTON COUNTY  
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

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

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PROOF OF SERVICE

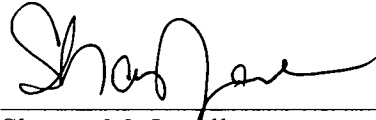
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The undersigned hereby certifies that on the date indicated below, a copy of the foregoing *Reply to Respondent's Petition for Rehearing* were served on all counsel of record via U.S. Mail with first class postage prepaid to all counsel at the addresses shown below:

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June 17, 2016