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 BRIEF OF APPELLANTS

Monteith P. Todd, Esquire
J. Michael Montgomery, Esquire
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
Phone: (803) 929-1400

Jason E. Bring, Esquire
W. Jerad Rissler, Esquire
Arnall Golden Gregory LLP
171 17th Street, NW, Suite 2100
Atlanta, Georgia 30363
Phone: (404) 873-8500

Attorneys for Appellants

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Arnall Golden Gregory LLP
171 17th Street, NW, Suite 2100
Atlanta, Georgia 30363
Phone: (404) 873-8500

Attorneys for 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*

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[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.

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[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

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[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]

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[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 arbital 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 Statement[12] 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

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[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 prevent 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,

SOWELL GRAY STEPP & LAFFITTE

BY:

Monteith P. Todd, Esquire
J. Michael Montgomery, Esquire
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street,
Post Office Box 11449
Columbia, South Carolina 29211
Phone: (803) 929-1400

Jason E. Bring, Esquire
W. Jerad Rissler, Esquire
Arnall Golden Gregory LLP
171 17th Street, NW, Suite 2100
Atlanta, Georgia 30363
Phone: (404) 873-8500

Attorneys for Appellants

August 30, 2013

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 Brief of Appellants by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

Lee D. Cope
Peters, Murdaugh, Parker, Eltzroth & Detrick
101 Mulberry Street East
Post Office Box 457
Hampton, SC 29924

Charles J. McCutchen
Lanier & Burroughs, LLC
Post Office Drawer 2789
Orangeburg, SC 29116

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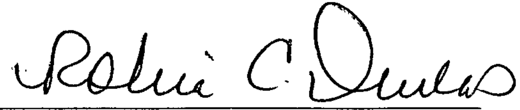
Margie Bright Matthews
Post Office Box 499
Walterboro, SC 29488



Robin C. Owens
Legal Assistant

8/30, 2013