THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
THE HONORABLE LARRY B. HYMAN, JR.
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2019-001185
CIVIL ACTION NO. 2018-CP-26-06576

Cleo Bertiaux as Guardian for Kathryn G. Parrish,

APPELLANT,

versus

NHC Healthcare/Garden City, LLC,

RESPONDENT.

INITIAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE CASE

The dispute in this case involves the question of whether a plaintiff must arbitrate her negligence claim against a nursing home under a valid and enforceable arbitration agreement. This appeal also raises the issue of whether this Court can consider on appeal the Trial Court's grant of a motion to compel arbitration.

On April 4, 2018, Cleo Bertiaux ("Plaintiff"), as Guardian for Kathryn G. Parrish, filed with the Horry County Clerk a Notice of Intent to File Suit in a Medical Malpractice Case against NHC Healthcare/Garden City, LLC ("Defendant NHC-Garden City") pursuant to S.C. CODE ANN. § 15-79-125. [R.pp. ___; NOI.] Thereafter, on November 14, 2018, the parties participated in mediation required under S.C. CODE ANN. § 15-79-125(C); however, this pre-suit mediation ended in an impasse. [R.p. ___; Compl., ¶ 19.]

Plaintiff subsequently filed a Complaint in the Horry County Court of Common Pleas on November 21, 2018 against Defendant NHC-Garden City. Plaintiff, who had been appointed the Guardian of her mother, Kathryn G. Parrish, alleged that Defendant NHC-Garden City rendered poor nursing home care that led to the fall and hospitalization of Ms. Parrish. Plaintiff brought a single cause of action for medical negligence against Defendant NHC-Garden City. [R.pp. ___; Compl.]

On December 27, 2018, Defendant NHC-Garden City filed an Answer and Amended Answer to the Complaint, denying the material allegations of the Complaint. [R.pp. ___; Answers.] Defendant NHC-Garden City also simultaneously filed a Motion to Dismiss and Compel Arbitration based upon an Agreement to Arbitrate and Waive Jury Trial (the "Arbitration Agreement") signed by Plaintiff on June 21, 2017. [R.pp. ___; Mtn to Dismiss and Compel Arbitration with attached exhibit.] Defendant NHC-

Garden City filed a Memorandum in Support of the Motion to Dismiss and Compel Arbitration on January 25, 2019. [R.pp. ___; Memo. with exhibits.]

Plaintiff filed a Memorandum of Law in Opposition to the Motion to Dismiss and Compel Arbitration on February 28, 2019, arguing that Defendant NHC-Garden City was not a party to the Arbitration Agreement because the Agreement listed "National Healthcare Garden City, LLC" as the name of the nursing home and the party to the Arbitration Agreement instead of "NHC HealthCare/Garden City, LLC," the named defendant in the action. [R.pp. ___; Memo. in Opp.]

A hearing on the Motion to Dismiss and Compel Arbitration was held before the Honorable Larry B. Hyman, Jr. on March 5, 2019. [R.pp. ___; Hearing Tr.] Following the hearing, the Trial Court issued a Form 4 order granting Defendant NHC-Garden City's Motion to Dismiss and Compel Arbitration. [R.pp. ___; Form 4.] A formal order followed on June 18, 2019 in which the Trial Court found the Arbitration Agreement was binding and enforceable between the parties and that the parties clearly intended to be bound by the Agreement. [R.pp. ___; Order.]

On or about July 17, 2019, Plaintiff filed and served her Notice of Appeal of the Order compelling arbitration.

COUNTERSTATEMENT OF FACTS

On or about August 3, 2015, the Horry County Probate Court issued an Order appointing Plaintiff Cleo Bertiaux as the Guardian of her mother, Kathryn G. Parrish, due to Ms. Parrish's dementia. [R.p. ___; Compl., ¶ 4.] Approximately two years later, on or about June 22, 2017, Kathryn Parrish ("Patient" or "Parrish") was admitted to NHC-Garden City, where she remains as a current resident. On June 21, 2017, NHC-Garden

City and Ms. Parrish's guardian, Plaintiff Cleo Bertiaux[1], entered into an Admission and Financial Agreement (the "Admissions Agreement") for the provision of heath care services to Ms. Parrish. [R.pp. ___; Admission and Financial Agreement.[2]]

Plaintiff also signed a Preadmission Agreement and Agreement to Arbitrate and Waive Jury Trial with Defendant NHC-Garden City (the "Arbitration Agreement"). [R.pp. ___; Arbitration Agreement.[3]]

The Arbitration Agreement provided that the parties—including "their employees, agents, representatives, affiliates, fiduciaries, medical directors, officers, directors, governing bodies, management companies, insurers, attorneys, predecessors, successors, assigns, third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated" —agreed to follow the dispute resolution procedure set forth in the Arbitration Agreement executed concurrently with the other admissions documents. The

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[1] Cleo Bertiaux brought this lawsuit as the legal Guardian of her mother, and she signed all of Defendant NHC-Garden City's documents as legal Guardian of her mother. The Probate Court Order gave Plaintiff actual as well as apparent authority to bring lawsuits as well as waive the right to jury trial. "The guardian of an incapacitated person has the same powers, rights, and duties respecting his ward that a parent has respecting his unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship." S.C. CODE ANN. § 62-5-312. There has never been any dispute or issue in this case as to Plaintiff's ability to agree to be bound to arbitration.

[2] The signed document was faxed, so some of the wording was cut off on Exhibit 1A attached to the Memorandum of Law in Support of the Motion to Dismiss and Compel Arbitration. A sample original showing all of the wording was attached to the Memorandum as Exhibit 1B. [See R.pp. ___.]

[3] The signed document was faxed, so some of the wording was cut off on Exhibit 2A attached to the Memorandum of Law in Support of the Motion to Dismiss and Compel Arbitration. A sample original showing all of the wording was attached to the Memorandum as Exhibit 2B. [See R.pp. ___.]

arbitration procedure set forth in the Arbitration Agreement can be generally summarized as follows:

1. The parties agree to follow the "Grievance Procedure" described in the Patient Rights Booklet for any claims or disputes arising out of or in connection with the care rendered to the Patient;
2. Where the amount in controversy does not exceed the statutory limits for submission to the South Carolina Small Claims Court, then the controversy shall be submitted to that court; and
3. Any disputes with an amount in controversy exceeding the statutory limits for submission to the South Carolina Small Claims Court shall be resolved by binding arbitration. There are no set limits on the award of actual or punitive damages in either of the Agreements.

[R.pp. ___; Arbitration Agreement.]

Ms. Parrish was admitted to Defendant NHC-Garden City on June 22, 2017. About a month later, on July 20, 2017, after Ms. Parrish had finished her bath and was in a wheelchair partially dressed in the bathroom, she fell forward out of the wheelchair and hurt her upper extremity. Prior to the fall, Ms. Parrish had no history of wandering, dizziness, or trunk restraint, and she did not exhibit unsafe behavior like trying to stand, transfer, or walk alone unsafely; climbing over bed rails or trying to get out of bed unsafely; walking when too tired to be safe; or propelling her wheelchair in unsafe areas. Prior to the fall, Ms. Parrish was known to Defendant's staff as someone who followed directions. As such, Defendant NHC-Garden City and its staff were unaware that Ms. Parrish would try to reach forward and fall out of her wheelchair. After the fall, one of

Defendant's staff wrote in the medical records not to leave the resident in the shower/bathroom unattended. Ms. Parrish was evaluated by an orthopedic surgeon and made non-weight bearing. It was estimated she would need an additional two months of long-term care as a result of the fall. [R.pp. ___; ___; Am. Answer, ¶ 9; Memo. in Support of Motion to Dismiss and Compel Arbitration, p. 3.]

Plaintiff, as the Guardian for Ms. Parrish, filed the Notice of Intent to File Suit in a Medical Malpractice Case on April 4, 2018 arising out of Ms. Parrish's fall. [R.pp. ___; NOI.] After participating in mandatory mediation, the parties reached an impasse, and Plaintiff filed the Complaint on November 21, 2018 against Defendant NHC-Garden City alleging that Defendant NHC-Garden City negligently provided care to Ms. Parrish resulting in her fall. [R.pp. ___; Compl.]

By filing the Complaint, Plaintiff failed to comply with the unambiguous terms set forth in the Arbitration Agreement. Specially, Plaintiff failed to follow the Grievance Procedure described in the Patient Rights Booklet for claims or disputes arising out of or in connection with Ms. Parrish's care. Moreover, despite the fact that the amount in controversy exceeded the limits for submission to small claims court, Plaintiff also failed to make an attempt to arbitrate the matter as required by the Arbitration Agreement.

Defendant NHC-Garden City filed its Motion to Dismiss and Compel Arbitration on December 27, 2018. The Arbitration Agreement provided that the parties agreed all disputes "arising out of or in any way related or connected to the Patient's stay and the care provided at the Center [NHC-Garden City], including but not limited to any disputes concerning alleged personal injury to the Patient caused by improper or inadequate care,

including allegations of medical malpractice" would be submitted to binding arbitration. [R.p. ___; Arbitration Agreement, p. 5.]

In response to the Motion to Compel Arbitration, Plaintiff did not disagree that Ms. Parrish's personal injury due to the alleged improper or inadequate care by Defendant NHC-Garden City and its employees was a dispute subject to the scope of the Arbitration Agreement. The only objection Plaintiff had to the Arbitration Agreement was that the name of the nursing home was handwritten into the Agreement as "National Healthcare Garden City, LLC" instead of "NHC HealthCare/Garden City, LLC," the named defendant in the action. Plaintiff thus contended that the defendant it sued, "NHC HealthCare/Garden City, LLC," was not a party to the Arbitration Agreement such that Plaintiff could not be compelled to arbitrate her claims against Defendant. [R.pp. ___; Memo. in Opp.]

Defendant NHC-Garden City agreed with Plaintiff that the entity listed as "National Healthcare Garden City, LLC" was a nullity and did not legally exist. Defendant NHC-Garden City argued that the legal name of Defendant was incorrectly and inadvertently handwritten into the Arbitration Agreement but the intent was clear that Plaintiff knew she was agreeing to binding arbitration with the Defendant, "NHC HealthCare/Garden City, LLC." [R.pp. ___; ___; Hearing Tr., pp. 7, l. 24 – 8, l. 22; 10, ll. 3-8; 10, l. 16 – 12, l. 4.]

The Trial Court agreed that the Arbitration Agreement clearly reflected the intent of the parties to arbitrate the claims alleged in Plaintiff's Complaint and compelled the matter to arbitration. [R.pp. ___; Order.] Plaintiff now challenges on appeal the Trial Court's Order compelling arbitration.

STANDARD OF REVIEW

The determination of whether a claim is subject to arbitration is subject to *de novo* review. Wellman, Inc. v. Square D Co., 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

ARGUMENT

I. The Trial Court's Order Compelling Arbitration is Not Immediately Appealable.

As an initial matter, this State's Supreme Court has long held that a trial court's order compelling arbitration is not immediately appealable. In Carolina Care Plan, Inc. v. United Healthcare Servs., Inc., 361 S.C. 544, 606 S.E.2d 752 (2004), the Supreme Court observed that under S.C. CODE ANN. § 15-48-200(a), an appeal may only be taken from:

> (1) An order denying an application to compel arbitration made under § 15-48-20;
>
> (2) An order granting an application to stay arbitration made under § 15-48-20(b);
>
> (3) An order confirming or denying confirmation of an award;
>
> (4) An order modifying or correcting an award;
>
> (5) An order vacating an award without directing a rehearing; or
>
> (6) A judgment or decree entered pursuant to the provisions of this chapter.

Carolina Care Plan, 361 S.C. at 558, 606 S.E.2d at 759 (citing § 15-48-200(a)).

Because Section 15-48-200(a) did not expressly permit an appeal from an order granting an application to compel arbitration, the Supreme Court held the appeal of the

lower court's order compelling arbitration of the claims against the defendants was not immediately appealable and could not be considered by the appellate court. Carolina Care Plan, 361 S.C. at 558-59, 606 S.E.2d at 759-60; see also Heffner v. Destiny, Inc., 321 S.C. 536, 537-38, 471 S.E.2d 135, 136 (1995) (holding an order compelling arbitration is not immediately appealable because it is not included in the list of appealable orders under subsection 15-58-200(a) of the South Carolina Code).

The Trial Court's Order compelling Plaintiff to arbitrate her claims against Defendant NHC-Garden City is accordingly not subject to review by this Court because the order is not immediately appealable.

II. This Court Should Affirm the Trial Court's Dismissal of Plaintiff's Action Pending Arbitration of the Claims Because (1) Plaintiff Did Not Preserve for Appellate Review Any Objection to the Dismissal as Opposed to the Remedy of a Stay; and (2) Plaintiff Cannot Establish Any Resulting Prejudice Due to Dismissal of the Action Pending Arbitration.

In conjunction with the order compelling arbitration, the Trial Court dismissed Plaintiff's action. Defendant NHC-Garden City recognizes this Court's Opinion in Widener v. Fort Mill Ford, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009) which held that an order dismissing an action without prejudice and allowing the parties to pursue arbitration was immediately appealable. In Widener, this Court reversed the lower court's dismissal of the action and ordered the lower court on remand to issue a stay pending arbitration instead of a dismissal. Id. Defendant NHC-Garden City can show that the facts underlying the Court's reasoning in Widener are distinguishable and that the Trial Court's dismissal of Plaintiff's action in this case should be affirmed.

In Widener, the plaintiff sued a car dealership and lender, alleging violations of South Carolina's Regulation of Manufacturers, Distributors, and Dealers Act and the

Unfair Trade Practices Act. The car dealership moved to dismiss or stay the proceedings and to compel arbitration. The trial court dismissed the action and compelled arbitration of the plaintiff's claims against the two defendants. Id. at 523, 674 S.E.2d at 173.

The plaintiff appealed the order dismissing his action and compelling arbitration and argued the order was immediately appealable. The car dealership argued to the contrary that the order was not appealable, citing S.C. CODE ANN. § 15-48-200. Id.

This Court held that the order dismissing the action was immediately appealable because the trial court's dismissal of the action finally determined the rights of the parties such that the order was appealable under S.C. CODE ANN. § 14-3-330. This Court noted that had the trial court stayed the action in conjunction with compelling arbitration, the order would not have been appealable. Id. at 524, 674 S.E.2d at 173-74.

This Court further determined that the trial court erred in dismissing the action because the plaintiff could be prejudiced due to the potential that the statute of limitations could bar refiling of any unarbitrated claims in court. Id. at 525, 674 S.E.2d at 174. This Court accordingly reversed the decision of the trial court and remanded the case for the trial court to vacate its dismissal of the plaintiff's claims and to enter an order staying the action pending the outcome of the arbitration proceedings. Id.

Notably, this Court did not reach the issue of whether the trial court erred in concluding that the plaintiff's causes of action were subject to arbitration. Instead, this Court only remanded the action to the trial court for the entry of a stay pending arbitration. Id. at 525-26, 674 S.E.2d at 174.

The Widener case does not compel reversal of the Trial Court's Order dismissing Plaintiff's action against Defendant NHC-Garden City and compelling arbitration in any

respect. The Trial Court's Order dismissing the action should be affirmed for two reasons.

First, Plaintiff never argued to the Trial Court that the court should issue a stay instead of a dismissal. For Plaintiff to have preserved any arguments she may have that the dismissal was inappropriate, it was incumbent for Plaintiff to have requested in a Rule 59(e) motion that the Trial Court consider issuing a stay instead of a dismissal. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Plaintiff failed to do so and any argument by Plaintiff that the Trial Court should not have dismissed the action is not preserved for review.

Second, Plaintiff has not argued to this Court or below that she is prejudiced by a dismissal of the action rather than a stay of the action pending arbitration. In Widener, the court was concerned that the statute of limitations could bar refiling of any unarbitrated claims after the action was dismissed pending the arbitration. 381 S.C. at 525, 674 S.E.2d at 174. In this case, Plaintiff has only brought one claim of negligence against Defendant NHC-Garden City and the entirety of that claim has been submitted to arbitration. There are no other claims asserted by Plaintiff which could potentially be barred by the applicable statute of limitations. The Trial Court's dismissal of the action pending arbitration does not prejudice Plaintiff and should be affirmed by this Court.

III. Should This Court Determine that Dismissal of Plaintiff's Action Was Not an Appropriate Remedy, It Should Limit Relief to the Entry of a Stay Pending Arbitration on Remand Because the Merits of the Trial Court's Order Compelling Arbitration is Not Immediately Appealable.

If this Court determines that the dismissal of Plaintiff's action by the Trial Court should be vacated, at most this Court should only direct the Trial Court on remand to enter a stay of the action pending arbitration. See Widener v. Fort Mill Ford, 381 S.C.

522, 525-26, 674 S.E.2d 172, 174 (2009). The portion of the Trial Court's Order compelling arbitration is not immediately appealable and should not be reached by the Court. See, e.g., Carolina Care Plan, Inc. v. United Healthcare Servs., Inc., 361 S.C. 544, 558-59, 606 S.E.2d 752, 559-60 (2004).

Therefore, Defendant NHC-Garden City requests this Court: (1) to hold the Order compelling arbitration is not immediately appealable; and (2) either (a) affirm the dismissal of the action pending arbitration, or (b) remand the case only for the sole purpose of the entry of a stay of the action pending arbitration.

IV. The Parties to this Action Agreed to Arbitrate Any Claims Against the Defendant Nursing Home Arising Out of the Care of the Patient; A Misnomer of the Name of the Nursing Home in the Arbitration Agreement Does Not Invalidate the Agreement Because the Contract Remains Valid Despite the Inadvertent Mistake Where the Parties Intended to Be Bound By the Agreement.

If this Court reaches the merits of the Trial Court's Order compelling arbitration, the Trial Court's submission of the case to arbitration should also be affirmed on appeal because the Arbitration Agreement controls and requires the claims asserted in Plaintiff's Complaint to be arbitrated.

Both state and federal policy favor arbitration of disputes. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001); see also Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 553, 606 S.E.2d 752, 757 (2004) (observing "the strong presumption favoring arbitration of disputes") (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)). Once it is clear that the parties have a contract that provides for arbitration between them, any doubts concerning the scope of the arbitration shall be resolved in favor of arbitration. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); S.C. Pub. Serv.

Auth. v. Great W. Coal (Ky.), Inc., 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993); Towles v. United Healthcare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999).

Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. Zabinski, 346 S.C. at 597, 553 S.E.2d at 118-19; see also Towles, 338 S.C. at 41-42, 524 S.E.2d at 846 ("Motions to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute."). "[A]rbitration agreements enjoy a strong presumption of validity in federal and state courts." Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 380, 759 S.E.2d 727, 731-32 (2014).

The Arbitration Agreement in the instant case provides that the parties agreed to submit to binding arbitration:

> all disputes against each other and their employees, agents, representatives, affiliates, fiduciaries, medical directors, officers, directors, governing bodies, management companies, insurers, attorneys, predecessors, successors, assigns, third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated, arising out of or in any way related or connected to the Patient's stay and the care provided at the Center [NHC Healthcare/Garden City, LLC], ***including but not limited to any disputes concerning alleged personal injury to the Patient caused by improper or inadequate care, including allegations of medical malpractice***; any disputes concerning whether any statutory or regulatory provisions relating to the Patient were violated; any dispute related to Center's charges to the Patient; and ***any other dispute under state or federal law based on contract, tort, or statute that exceeds the state's small claims court statutory limits as later defined.***

[R.p. ___; Arbitration Agreement, p. 5 (emphasis added).]

The Complaint alleges that Ms. Parrish suffered personal injury due to alleged improper or inadequate care by Defendant and its employees. Thus, the Arbitration

Agreement clearly reflects the intent of the parties to arbitrate the claims alleged in Plaintiff's Complaint.

In fact, Plaintiff does not dispute that the claims in her Complaint are within the scope of disputes required to be arbitrated under the terms of the Arbitration Agreement. Instead, Plaintiff's only objection to arbitration is her argument that she never agreed to arbitrate with Defendant NHC-Garden City. More particular, Plaintiff contends that Defendant NHC-Garden City was not a party to the Arbitration Agreement because the name of the nursing home was handwritten into the Agreement as "National Healthcare Garden City, LLC" instead of "NHC HealthCare/Garden City, LLC," the named defendant in the action.

Plaintiff therefore argues a principle of contract law, namely that the language of the contract alone determines the contract's force and effect, for her position that there was no legally binding Arbitration Agreement because the legal name of Defendant NHC-Garden City was incorrectly handwritten into the Agreement. Although the correct legal name of Defendant is "NHC Healthcare/Garden City, LLC," during the preparation of the admission documents for signature, the words "National Healthcare Garden City, LLC" were inadvertently handwritten for the name of the Defendant. The parties do not dispute that "National Healthcare Garden City, LLC" is a nullity and does not legally exist. [R.p. ___; Hearing Tr., p. 10, ll. 8, 16-20.]

Plaintiff argues that the Trial Court's order compelling arbitration should be reversed because there is no Arbitration Agreement between Plaintiff and the named Defendant, "NHC Healthcare/Garden City, LLC" due to the incorrect name written in the Arbitration Agreement. Plaintiff further states that the Trial Court effectively rewrote

the Arbitration Agreement to include Defendant "NHC Healthcare/Garden City, LLC" as a party.

The case law does not support Plaintiff's argument. In Cobb & Seal Shoe Store v. Aetna Ins. Co., 78 S.C. 388, 58 S.E. 1099 (1907), the plaintiff recovered a judgment on the defendant's policy of fire insurance covering a stock of shoes in plaintiff's store. The defendant appealed on the ground that it did not have a policy of insurance with the plaintiff. The plaintiff was incorporated under the name of Cobb & Seal Shoe Store, but did business under the name of Cobb & Seal. The insurance policy was issued in the name of Cobb & Seals instead of the proper corporate name. The defendant asked the court to hold, as a matter of law, the corporation Cobb & Seal Shoe Store could not recover on the insurance policy issued in the name of Cobb & Seals. Id. at 1099.

The South Carolina Supreme Court rejected the defendant's argument and observed that "[i]f the real meaning of the contract was to insure the corporate property for the benefit of the corporation, designating the corporation as Cobb & Seals, instead of its true corporate name, cannot have any effect to relieve the insurer from liability." Id. The Supreme Court held that a contract is "good between the parties, no matter how incorrect the names used in the paper may be, ***if it appears they were intended as the names of the parties to be bound by the contract or receive its benefits.***" Id. (emphasis added).

In Cobb & Seal, evidence produced at trial that there was no such legal entity as Cobb & Seals and that the defendant's agent, before issuing the policy, knew the property was owned by the corporation, Cobb & Seal Shoe Store, "tended strongly to show the failure to use the true corporate name in the policy was a mere inadvertence, and that

"Cobb & Seals," in the contract, meant the corporation." Id. The Supreme Court determined there was no such failure to show a contract with the plaintiff corporation to require the court to reverse the plaintiff's judgment against the defendant. Id.; see also South Carolina Ins. Co. v. Price, 315 S.C. 212, 213, 432 S.E.2d 508, 508-09 (Ct. App. 1993) (following Cobb & Seal in holding that an incorrect name of the party cannot be the basis of avoiding liability on an insurance policy).

As in Cobb & Seal, the evidence before the Trial Court demonstrates that no legal entity by the name of "National Healthcare Garden City, LLC" exists, the name listed in the Arbitration Agreement. Plaintiff admits in her Complaint that Ms. Parrish was admitted to the facility of Defendant "NHC Healthcare/Garden City, LLC." [R.p. ___; Compl., ¶ 10.] Upon the admission of Ms. Parrish, Plaintiff signed an Admission and Financial Agreement, as well as the Arbitration Agreement. [R.pp. ___; ___; Admission Agreement; Arbitration Agreement.] Even though the name of the facility was inaccurately described as "National Healthcare Garden City, LLC" in these agreements, Plaintiff knew, as evidenced by bringing suit against Defendant, that she was contracting with "NHC Healthcare/Garden City, LLC." Plaintiff accepted the benefits of these agreements by admitting her mother into Defendant's facility. The evidence indicates that the use of the incorrect name in the Arbitration Agreement was the result of mere inadvertence and that in fact what was meant by the name "National Healthcare Garden City, LLC" was the defendant in this action, "NHC Healthcare/Garden City, LLC." Therefore, a valid arbitration agreement exists between Plaintiff and Defendant "NHC Healthcare/Garden City, LLC."

Plaintiff relies upon an unpublished opinion from the United States Court of Appeals for the Fourth Circuit, Weckesser v. Knight Enters. S.E., 735 Fed. Appx. 816 (4th Cir. 2018), as the basis for her argument. Plaintiff's reliance upon Weckesser, however, is misplaced as the present case is factually and legally distinct from Weckesser.

The Weckesser case involved an arbitration agreement between a cable service technician and his putative employer for various employment-related claims. In Weckesser, the plaintiff signed a Service Agreement with the defendant, wherein the name of the putative employer/defendant written into the Service Agreement was correctly listed as Knight Enterprises, LLC. The Service Agreement did not contain any reference to arbitration. The plaintiff signed a separate Arbitration Rider; however, in the Arbitration Rider the name of the company identified as contracting with the plaintiff was listed as Jeffry Knight, Inc. d/b/a Knight Enterprises[4]. Other language within the Arbitration Rider also noted that the agreement was with "Jeffry Knight, Inc. d/b/a Knight Enterprises and the undersigned." Id. at 817-18.

Significantly, as the Fourth Circuit recognized, Jeffry Knight, Inc. d/b/a Knight Enterprises, and Knight Enterprises, LLC were separate and legally distinct entities. Id. at 820. The Fourth Circuit noted: "Jeffry Knight is an actual legal entity. And that entity is no stranger to Patrick Weckesser [the plaintiff] - it's the parent company of Knight Enterprises, for whom he worked." Id. The Court found that it was reasonable "to believe that Jeffry Knight might (for example) require employees of its subsidiaries to

[4]Apparently, in Weckesser, the individual who signed the Arbitration Rider for the defendant also signed it Jeffry Knight, Inc. d/b/a Knight Enterprises as the parent company of Knight Enterprises. 735 Fed. Appx. at 818.

sign an arbitration waiver to cabin its own liability. For this reason alone, it's much more plausible than in Cobb & Seal that the parties intended what the writing stated: that the Arbitration Rider applied to disputes between Weckesser and Jeffry Knight, and not to disputes with its subsidiary." Id.

This case is plainly factually distinct from Weckesser, as there is no legal entity in South Carolina known as "National Healthcare Garden City, LLC," the name which was incorrectly handwritten into the Arbitration Agreement. Unlike in Weckesser, Plaintiff can neither show that there was any confusion about with whom she thought she was contracting at the time nor can she show she was misled by the inadvertent mistake. While Plaintiff contends that the Trial Court erroneously rewrote the Arbitration Agreement, the law provides that a court only has no authority to "rewrite a contract and impose ***unwanted*** obligations and terms." Lowcountry Open Land Trust v. Charleston So. Univ., 376 S.C. 399, 411, 656 S.E.2d 775, 781 (Ct. App. 2008) (emphasis added). The Trial Court has not done that in this case but simply imposed what was intended by the parties all along.

The Court should determine what the parties' intentions were when signing the Arbitration Agreement, and clearly the intention was that Defendant NHC-Garden City would provide nursing care services to Ms. Parrish, and in exchange would receive remuneration and the benefit of the Arbitration Agreement should any disputes arise regarding Ms. Parrish's care. See Southern Atlantic Fin. Servs., Inc. v. Middleton, 349 S.C. 77, 80, 562 S.E.2d 482, 484 (Ct. App. 2002) ("In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties.").

The reasoning of the Weckesser case supports the argument that the Arbitration Agreement in question is enforceable. As noted by the Fourth Circuit, the primary issue is whether the two "companies" at issue both legally exist to form a real and substantive question as to who the proper contracting parties may be to the agreement. In this case, the scrivener's error in the handwritten portion of the Arbitration Agreement is not a legal entity, which Plaintiff has conceded. There exists no potential for confusion as to with whom Plaintiff was agreeing to contract in signing the Arbitration Agreement as there was in Weckesser. Accordingly, Defendant NHC-Garden City requests this Court to find that the Arbitration Agreement is binding and enforceable between the parties because the only legal conclusion which can be drawn is that the parties intended to be bound by the Agreement.

CONCLUSION

For the reasons set forth herein, Respondent NHC Healthcare/Garden City, LLC respectfully requests this Court to affirm the Trial Court's Order dismissing the action and compelling arbitration. More specifically, NHC-Garden City requests this Court to do the following:

(1) hold the Order compelling arbitration is not immediately appealable;

(2) (a) affirm the dismissal of the action pending arbitration, or

(b) remand the case only for the sole purpose of the entry of a stay of the action pending arbitration; or

(3) Should the Court reach the merits of the Trial Court's Order compelling arbitration, affirm the Trial Court's Order because the Arbitration Agreement controls and requires the claims asserted in Plaintiff's Complaint to be arbitrated.

[*signature on following page*]

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT NHC HEALTHCARE/GARDEN CITY, LLC

January 31, 2020.

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondent NHC Healthcare/Garden City, LLC, do hereby certify that I have this date served the foregoing Initial Respondent's Brief, dated January 31, 2020, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

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Dated: January 31, 2020.

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January 31, 2020

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: ***Cleo Bertiaux as Guardian for Kathryn G. Parrish v. NHC Healthcare/Garden City, LLC***
Appellate Case No.: 2019-0001185
RPR File No.: 5622-61

Dear Ms. Kitchings:

Enclosed for filing are the original Initial Respondent's Brief of NHC HealthCare/Garden City, LLC and the Respondent's Designation of Matter to be Included in the Record on Appeal in the above referenced matter, along with our original Certificates of Service.

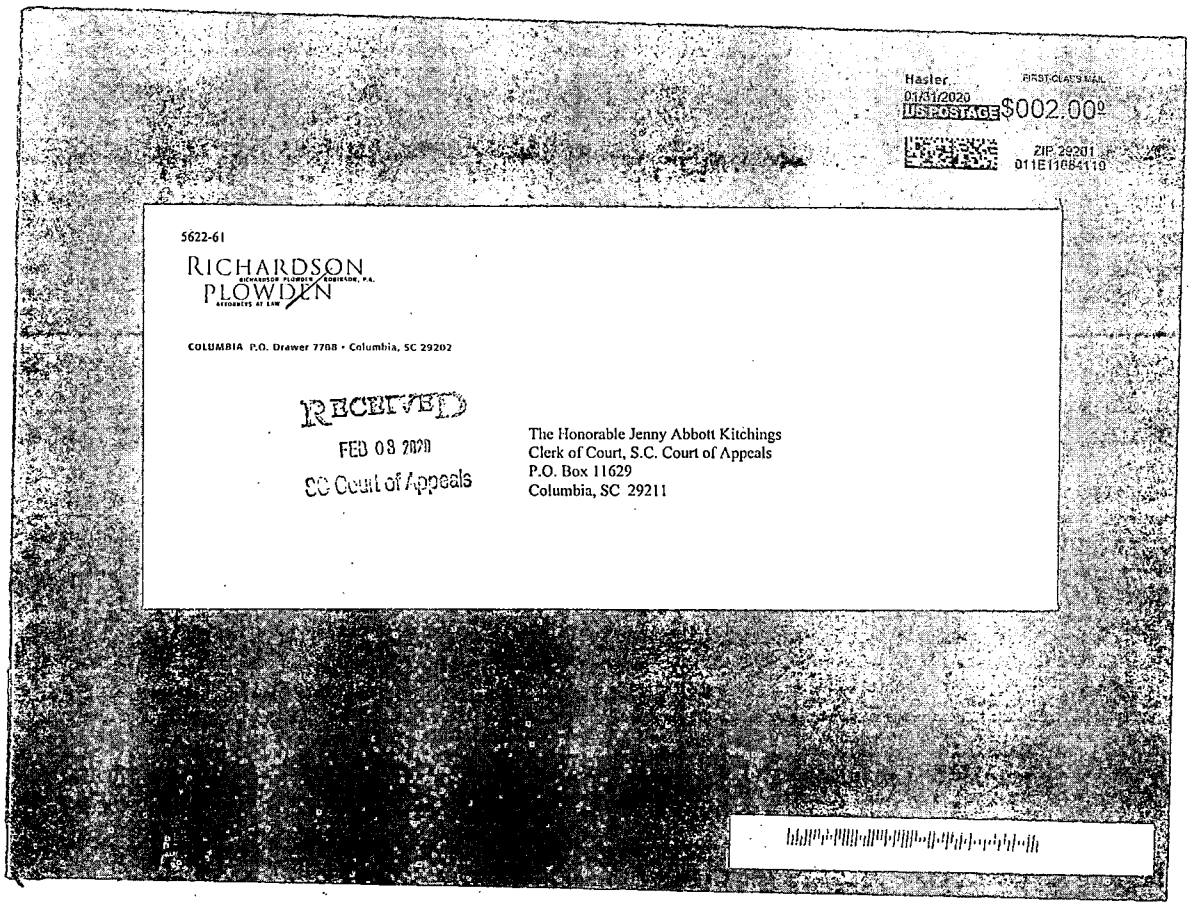
By copy of this letter, we are this day serving a copy of our Initial Brief and Designations on opposing counsel.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,

Carmen V. Ganjehsani

Encs.
cc: Robert D. Dodson
Marian W. Scalise (FYI)
Lydia M. Magee (FYI)



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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
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