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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
CIRCUIT COURT

STEVEN H. JOHN, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2021-001342

Jessica Bennett and Thuy N. Gasser, individually and on behalf of those similarly situated,

Respondent,

v.

ACS Primary Care Physicians-Southeast P.C.,

Appellant.

RESPONDENT THUY N. GASSER'S FINAL BRIEF

J. Clay Hopkins (SC Bar No. 102053)
clay@hopkinsfirm.com
HOPKINS LAW FIRM, L.L.C.
171 Church Street, Suite 160
Charleston, SC 29401
(843) 314-4202 – Telephone
(843) 314-9365 – Facsimile

Attorney for Respondent

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STATEMENT OF THE CASE

Appellant is a Georgia corporation which provides physician services to Emergency Departments in hospitals. (R. p. 67, ¶ 8). Appellant is an in-network provider for Blue Cross Blue Shield of South Carolina (hereinafter "BCBSSC") under the terms of a preferred provider organization agreement ("Provider Agreement). (R. p. 68, ¶ 18).

On December 9, 2019, Respondent was involved in a motor vehicle collision in which she sustained serious injuries. (R. p. 68, ¶ 13). Respondent received medical treatment at Grand Strand Regional Medical Center from one (1) of Appellant's emergency room physician employees. (R. p. 68, ¶ 14). On the date of her treatment, Respondent was covered by a health insurance policy issued by BCBSSC. (R. p. 68, ¶ 15). Respondent provided her insurance information to Appellant who was a preferred provider in the BCBSSC network according to its Provider Agreement with BCBSSC. (R. p. 68, ¶ 16). Appellant refused to submit Respondent's medical bills for the emergency room treatment to BCBSSC for payment despite Respondent's BCBSSC health insurance coverage and Appellant's preferred provider contract under the Provider Agreement. (R. p. 69, ¶ 19).

The fact that Respondent did not sign and is not a party to the Provider Agreement is not disputed. There is also no dispute that Respondent was not a party to the negotiation or execution of the Provider Agreement.

On May 21, 2020, Respondent filed a Summons and Complaint in the Court of Common Pleas for Horry County, asserting claims for breach of contract and unjust enrichment both individually, and on behalf of a class of similarly situated persons, respectively. (R. p. 64). On June 26, 2020, Appellant removed the case to the United States District Court for the District of South Carolina, Florence Division, alleging federal question jurisdiction under 28 U.S.C § 1331, diversity jurisdiction under § 1332(d), and supplemental jurisdiction under § 1367. (R. p. 74).

Thereafter, Appellant filed a motion to remand the action, disputing the federal court's jurisdiction. (R. p. 77). On August 13, 2020, the federal court remanded the case to State court. (R. p. 15). After remand, Appellant filed a motion to compel arbitration and dismiss or stay. (R. p. 172). The circuit court denied in the motion on November 23, 2021. (R. p. 31). On December 3, 2021, Appellant filed its notice of appeal. (R. p. 524).

STANDARD OF REVIEW

"Determinations of arbitrability are subject to *de novo* review, but if any evidence reasonably supports the circuit court's factual findings, [the Court of Appeals] will not overrule those findings." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT EQUITABLE ESTOPPEL SHOULD NOT APPLY TO THIS CASE.

Appellant argues that Respondent in fact has actively exploited the Provider Agreement by alleging a claim for breach of contract alleging that she is a third-party beneficiary of that agreement. (App.'s Br. 8). In its Order denying Appellant's motion to stay/dismiss and compel arbitration, the trial court found that Respondent was completely unaware that the Provider Agreement between Appellant and BCBSSC existed when she received her medical treatment. (R. p. 34). The trial court also held that Respondent did not "actively exploit" the Provider agreement, and that Respondent underwent medical treatment with "the understanding that she would not bear the full responsibility of paying her medical bills given her valid health insurance." (*Id.*).

The trial court relied on South Carolina law regarding equitable estoppel, stating that the doctrine is "reserved for instances where a beneficiary of a contract 'actively exploits' the agreement or 'misleads[s] [the other party] to his injury.'" (*Id.*). Because the trial court's analysis was sound, and the evidence supports the trial court's factual findings, the trial court's decision should be affirmed.

State law controls when an arbitration agreement may be enforced against someone who has not signed it. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 173–74 (2019); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31, 129 S. Ct. 1896, 173 L.Ed.2d 832 (2009). South Carolina law recognizes several theories whereby a nonsignatory can be bound by an arbitration agreement. *Malloy v. Thompson*, 409 S.C. 557, 561–62, 762 S.E.2d 690, 692 (2014) (listing theories as incorporation by reference,

assumption, agency, veil piercing/alter ego, and estoppel). Appellant relies on just one: equitable estoppel.

This theory, known also as direct benefits estoppel in the arbitration realm, estops a nonsigner from refusing to comply with an arbitration provision of a contract if (1) the nonsigner's claim arises from the contractual relationship, (2) the nonsigner has "exploited" other parts of the contract by reaping its benefits, and (3) the claim relies solely on the contract terms to impose liability. *Wilson*, 426 S.C. at 340–44, 827 S.E.2d at 175–77.

A. Respondent does not seek a "direct benefit" under the Provider Agreement.

Appellant insists direct benefits estoppel funnels Respondent's claims to arbitration because her ability to sue Appellant stems from the Provider Agreement, which includes the arbitration provision. (App. Br. 8). Initially, it is important to distinguish direct benefits from indirect[1] benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 (citing *Belzberg v. Verus Invs. Holdings Inc.*, 977 N.Y.S.2d 685, 999 N.E.2d at 1134 (N.Y. 2013)). A benefit is direct if it flows directly from the agreement. *Id.; see also MAG Portfolio Consult, GMBH v. Merlin Biomed Grp. LLC*, 268 F.3d 58, 61 (2d Cir. 2001) (stating direct benefits estoppel requires that a nonsignatory knowingly accept the benefits of an agreement with an arbitration clause in order to be bound by an arbitration clause).

[1] Appellant also argues that the trial court erred in "failing to recognize that Respondent[] … alleges she received a 'direct benefit' under the Provider Agreement." (App. Br. 14). That is not correct. As stated, *supra*, any benefit that Respondent alleges she received was indirect under South Carolina precedent.

In contrast, “any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.” *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176; *MAG Portfolio Consult*, 268 F.3d at 61; *accord Belzberg*, 977 N.Y.S.2d 685, 999 N.E.2d at 1134; *cf. Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1172 (11th Cir. 2011) (observing that, under Georgia law, a plaintiff's claims must be directly, not just indirectly, based on the contract containing the arbitration clause for equitable estoppel to compel arbitration of those claims); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740–41 (Tex. 2005) (stating that, under direct benefits estoppel, although a nonsignatory's claim may relate to a contract containing an arbitration provision, that relationship does not, in itself, bind the nonsignatory to arbitration, and a nonsignatory plaintiff cannot be compelled to arbitrate on the sole ground that, but for the contract containing the arbitration provision, it would have no basis to sue; rather, a nonsignatory should be compelled to arbitrate a claim only if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision).

Notably, in those opinions addressing equitable estoppel in the arbitration context, the nonsignatory's contractual benefit is not typically an alleged benefit of arbitration such as "avoiding the expense and delay of extended court proceedings" or being "capable of enforcing the [AA]," but, rather, the contractual benefit typically arises from another provision of the same contract that includes the arbitration provision. *See Pearson*, 400 S.C. at 296–97, 733 S.E.2d at 605 (ability to work at the defendant's hospital facility and receive payment for work); *see also Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 418 (4th Cir. 2000) (warranty provisions); *Jackson v. Iris*

Com., 524 F. Supp. 2d 742, 750 (E.D. Va. 2007) (entitlement to retain a $150,000 payment pursuant to the contract's liquidated damages provision); *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (lower insurance rates on a yacht and the ability to sail under the French flag); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993) (continuing use of a name).

Here, just as the trial court correctly determined, Respondent has not knowingly exploited and received a direct benefit from the Provider Agreement. The Provider Agreement was purely for the benefit of the parties to the contract in outlining their business relationships and the rights of the parties to the Provider Agreement. According to the Provider Agreement, Respondent's only "benefit" would be (1) the negotiated "network rate," which is presumably less than the "market rate," and (2) Appellant's promise that it would not seek any money from Respondent other than the payment from BCBSSC – neither of which she received from Appellant. As such, Respondent received no benefit from the Provider Agreement because Appellant sought the entire balance directly from her and refused to accept its negotiated or reduced rate from the Provider Agreement. Therefore, Respondent received no direct benefit from the Provider Agreement, and Appellant's reliance on this theory is misplaced.

B. Respondent has not "actively exploited" the Provider Agreement.

Despite Appellant's contentions, Respondent has not attempted to procure any direct benefit from the Agreement herself while attempting to avoid its arbitration provision. The Provider Agreement by its express terms was inapplicable to other parties, and Appellant does not attempt to argue that it did. As a BCBSSC insured, Respondent

would have received medical treatment at the emergency room regardless of whether Appellant was a preferred provider.

Additionally, there is nothing in the Record that Appellant's patients, or customers of BCBSSC, knew when they submitted their health insurance information to healthcare providers like Appellant that any claims nonpayment would be subjected to an arbitration provision in an agreement between other parties. *See Wilson*, 426 S.C. at 345, 827 S.E.2d at 177. Furthermore, "any possible benefit emanating from the [Provider Agreement] alone is offset by the agreement's requirement that [Respondent] waive her right to access to the courts and her right to a jury trial. Therefore, equitable estoppel under federal substantive law has no application to the present case." *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016).

C. A holding that the "direct benefit" test does not apply here would not be preempted by the Federal Arbitration Act (the "FAA").

Respondent argues that the trial court's conclusion that the "direct benefits" test is not satisfied here is preempted by the FAA, 9 U.S.C.A. § 2, "because that conclusion subjects arbitration agreements to special rules that apply only to contracts containing arbitration agreements and not to contracts generally." (App. Br. 12). The FAA applies in state or federal court to any arbitration agreement involving interstate commerce unless the parties' contract otherwise. *Wilson*, 426 S.C. at 326, 827 S.E.2d at 167; *see also Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). The purpose of the FAA is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).

However, the consideration of contract validity is normally addressed applying general principles of state law governing the formation of contracts. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364 ("General contract principles of state law apply to arbitration clauses governed by the FAA."). "State law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, recoverability, and enforceability of all contracts generally." *Id.*; *see also* 9 U.S.C.A. § 2 (stating a written provision for arbitration in any contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

The consideration of scope is evaluated under the "federal substantive law of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) ; se*e also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (stating section 2 of the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," and noting "[t]he effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act").

"[T]he presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement." *Carr v. Main Carr Development, LLC*, 337 S.W.3d 489, 496 (Tex. App. 2011) (emphasis added). "Even the exceptionally strong policy favoring arbitration cannot justify requiring litigants to forego a judicial remedy when they have not agreed to do so." *Id.*

In the current matter, it is undisputed that Respondent is a nonsignatory to the arbitration agreement. Whether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law. *See Arthur Andersen LLP*, 556 U.S. at 630–31, 630 n.5, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009) (observing state law is applicable to determine which contracts are binding under section 2 of the FAA, and traditional principles of state law may permit a contract to be enforced by or against nonparties to a contract through theories of assumption, piercing the corporate veil, and estoppel, among others); *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351, 1355 n.1 (11th Cir. 2017) (citing *Arthur Andersen LLP* and noting state, not federal, law controls the analysis of equitable estoppel issues in the arbitration context); *Walker v. Collyer*, 85 Mass. App. Ct. 311, 9 N.E.3d 854, 858–59 (Mass. App. Ct. 2014) (relying on *Arthur Andersen LLP* and stating traditional principles of state contract law determine whether nonsignatories can be compelled to arbitrate).

Since state law must be considered when determining whether a nonsignatory has consented to an arbitration agreement, nothing in the trial court's determination created an issue of preemption, and for those reasons, the Court should dismiss Appellant's appeal entirely.

II. RESPONDENT'S CLAIMS ARE NOT SUBJECT TO ARBITRATION UNDER EITHER THE FAA OR THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (THE "SCUAA").

Appellant argues that this case is subject to "bilateral arbitration under the FAA because both of Respondent's causes of action are covered by the arbitration clause at issue here." (App. Br. 15). Likewise, Appellant contends that, if the Court determined that

the Provider Agreement "did not involve interstate commerce[,] arbitration would still be required under the SCUAA." (App. Br. 17).

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 598, 553 S.E.2d 110, 118 (2001). The arbitration clause is silent regarding threshold issues of arbitrability, and, in any event, Appellant is not a signatory to the provision. So, whether the provision applies to Appellant's claims is for the Court to determine.

Although arbitration is viewed favorably by the courts, it is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) (recognizing that arbitration under the FAA "is a matter of consent, not coercion" (citation omitted)); *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997) ("Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate."); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.").

"A party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). Further, whether a party has agreed to arbitrate an issue is a matter of contract interpretation. *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88 (4th Cir. 1996).

Moreover, because arbitration, while favored, exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration is anonsignatory to the written agreement to arbitrate. *Global Pac., LLC v. Kirkpatrick*, 88 N.E.3d 431, 435 (Ohio Ct. App. 2017) ("Because no party can be required to submit to arbitration when it has not first agreed to do so, in a case where the party resisting arbitration is not a signatory to any written agreement to arbitrate, a presumption against arbitration arises."); *cf. Comer v. Micor, Inc.*, 436 F.3d 1098, 1103–04 (9th Cir. 2006) (noting "the general rule that a nonsignatory is not bound by an arbitration clause").

In this case, the arbitration provision is not broad and is limited to specific disputes between two (2) explicit entities: “BCBSSC and [Respondent] agree to arbitrate such problem or dispute” and then only after they “meet and confer in good faith to resolve” disputes between them that “arise under” the Provider Agreement. (*See* R. p. 195, § IX(M)). Notably, the provision does ***not*** require the arbitration of any and all disputes arising from ***or relating to*** the Provider Agreement. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012) (arbitration provision required arbitration of "[A]ny controversy or claim arising out of or relating to the interpretation, enforcement or breach of this Agreement or the relationship between the parties hereto.”) (emphasis added). For these reasons, the arbitration clause does not apply to this dispute.

Specifically, for nonsignatories "[t]he presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement *or to the identity of the parties who may be bound* to such an agreement." *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173 (citing *Carr*, 337 S.W.3d at 496 (emphasis

added)). "Even the exceptionally strong policy favoring arbitration cannot justify requiring litigants to forego a judicial remedy when they have not agreed to do so." *Id*. “Moreover, because arbitration, while favored, exists solely by agreement of the parties, a *presumption against arbitration* arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate. *Global Pac., LLC v. Kirkpatrick*, 88 N.E.3d 431, 435 (Ohio Ct. App. 2017).

To compel Respondent to arbitrate her claims, Appellant must demonstrate that (1) the arbitration provision is valid; and (2) the claims fall within the scope of the provision. *See Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 228, 847 S.E.2d 268, 271 (2020). Respondent has failed to address whether the arbitration provision is valid.

As to the second requirement, South Carolina law applies to resolve “[a]ny doubts concerning the scope of arbitrable issues . . . [and] unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.” *Swane Co. v. Berkeley Cty. S.C.*, No. 2:15-CV-02586, 2015 WL 6688072, at *4 (D.S.C. Oct. 30, 2015).

But even if the scope of the provision encapsulates Respondent’s claims, the arbitration provision contains a condition precedent that was not met. This deficiency renders the provision unenforceable as to Appellant’s claims. *See M & M Group, Inc. v. Holmes*, 379 S.C. 468, 477 (Ct. App. 2008) (internal quotations and citations omitted) ("A condition precedent to a contract is any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.”); *McGill v. Moore*, 381 S.C. 179, 187 (2009) (“If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises.”).

Under the arbitration provision, the following condition precedent must be met prior to initiation of arbitration: BCBSSC and Appellant must first meet and confer in a good faith attempt to resolve their dispute. (*See* R. p. 195, § IX(M)) (emphasis added). Only in the event "the parties through mutual negotiation are not able to satisfactorily resolve" the dispute does the obligation to arbitrate arise. (*Id.*).

Here, Respondent, a non-signatory to the Agreement, has no right (and did not agree) to participate in a pre-arbitration meet and confer. The condition precedent cannot bind or apply to Respondent, a non-party, because the provision explicitly contemplates a process involving only BCBSSC and Appellant. Because it is impossible for Respondent to meet the condition precedent, the arbitration provision cannot be enforced against her. *See Perdue Farms Inc. v. Design Build Contracting Corp.,* 263 Fed. App'x 380, 383 (4th Cir. 2008) ("Where a condition precedent to arbitration is not fulfilled, a party to a contract does not have a right to arbitration."); *HIM Portland LLC v. DeVito Builders Inc.,* 317 F.3d 41, 44 (1st Cir. 2003) (refusing to compel arbitration because "[u]nder the plain language of the contract, the arbitration provision of the agreement is not triggered until one of the parties requests mediation"); *Kemiron Atl. Inc. v. Aguakem Int'l Inc.,* 290 F.3d 1287, 1291 (11th Cir. 2002) (same).

Moreover, the failure to meet the condition precedent cannot be cured because the scope of the provision does not permit a third party, like Respondent, pre-arbitration dispute resolution rights. Rather, the arbitration provision is plainly limited to disputes that persist following such a conference between **only** BCBSSC and Appellant. The provision does not require the arbitration of "any and all disputes arising under or relating to the agreement." To the contrary, it limits itself solely to arbitration of BCBSSC and Appellant's

disputes. These deficiencies preclude this Court from accepting Appellant's position, and the arbitration clause is inapplicable in this case. For these reasons, Respondent's appeal should be dismissed in its entirety.

Put simply, there is nothing in the Record showing Respondent forming the intent or having the requisite knowledge to mislead Appellant or to assent to the Provider Agreement's arbitration terms.[2] For these reasons, Respondent's claims are not subject to arbitration under the FAA, and Appellant's appeal should be dismissed entirely.

A. South Carolina law clearly and specifically exempts insurance contracts from mandatory arbitration provisions.

Even if Appellant could establish that the contract between it and BCBSSC applies to Respondent, the arbitration argument still fails. Appellant and BCBSSC agreed that their "Agreement shall be construed and enforced in accordance with the laws of the State of South Carolina." (R. p. 194, ¶ J).

South Carolina Code Ann. § 15-48-10(b)(4), under the SCUAA, specifically provides that a written agreement to arbitrate shall not apply to "any claim arising out of *personal injury*, based on contract or tort, or to any *insured* or beneficiary under any insurance policy or annuity contract." S.C. Code Ann. §15-48-10(b)(4) (2019) (emphasis added). Appellant has agreed that South Carolina law would apply in interpreting and enforcing the Provider Agreement and is therefore bound by the state statute and is

[2] Other courts have held that when an insurer-health care provider contract specifically limits arbitration to its parties, a third-party beneficiary's claims are not subject to arbitration. For example, in *Rath v. Managed Health Network, Inc.*, 844 P.2d 12 (Idaho 1992), the court refused to submit a third-party beneficiary's claim to arbitration when the contract specifically limited arbitration to disputes "between the parties to this Agreement."

legally precluded from forcing Respondent into arbitration where it has no such right under South Carolina law.

South Carolina appellate courts have found that "§15-48-10(b)(4) specifically exempts any insured or beneficiary under any insurance policy or annuity contract' from the South Carolina Arbitration Act' find that '§15-48-10(b)(4) was enacted for the purpose of regulating the business of insurance." *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 731 S.E.2d 324 (Ct. App. 2012) (citing *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001); *and Am. Health & Life Ins. Co. v. Heyward,* 272 F. Supp. 2d 578, 582 (D.S.C. 2003) (holding §15-48-10(b)(4)'s prohibition on arbitration "reverse preempts" the FAA through application of the McCarran-Ferguson Act and "prohibits the enforcement of arbitration clauses in insurance policies governed by South Carolina law")).

"[Section] 4 of the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that "arbitration proceed in the manner provided for in [the parties'] agreement." *Volt Info. Scis. Inc. v. Board of Trs.*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). In addition to the fact that Appellant did not sign the Provider Agreement, the FAA was not intended to govern Respondent's relationship to Appellant and BCBSSC. "Despite [the] expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration." *Volt*, at 474 (citing 9 U.S.C. § 4).

In *Volt*, the United States Supreme Court found a California statute was not pre-empted by the FAA where the parties agreed their arbitration agreement would be governed by California law." *Id.* The contract in *Volt* contained an agreement to arbitrate

all disputes between the parties "arising out of or relating to this contract or the breach thereof." *Volt* at 470. The contract also contained a choice-of-law provision whereby "[t]he Contract shall be governed by the law of the place where the Project is located." *Id.* The project was in California. California Arbitration Code permits a court to stay arbitration for the parties to resolve related disputes with third parties not bound by the arbitration agreement, since there was a possibility of conflicting rulings. *Id.* at 471. The defendant moved to stay arbitration. *Id.* The United States Supreme Court affirmed the California appellate court's finding that Voltage Services, "had no such right [to arbitration] in the first place, *because the parties' agreement did not require arbitration* to proceed in this situation." *Id.* (emphasis added). The choice of law provision by which the parties in *Volt* agreed to enforce their contract is almost identical to the clause in Appellant's Provider Agreement with BCBSSC.

The *Volt* Court also addressed displacement of state law by the FAA. The Supreme Court concluded in *Volt*, "that even if §§3 and 4 of the FAA were fully applicable in state-court proceedings, they do not prevent application of Cal. Civ. Proc. Code Ann. §1281.2(c) to stay arbitration where, as here, the parties have agreed to arbitrate in accordance with California law." *Volt* at 477. Without rehashing the arguments above, Appellant and BCBSSC chose South Carolina law to govern their contract and are therefore foreclosed from forcing an insured – like Respondent – from arbitrating her claims.

III. THE PROVIDER AGREEMENT IS UNCONSCIONABLE.

Should this Court determine that Respondent has received a "direct benefit" from the Provider Agreement, Respondent submits this does not prevent this Court from

determining that the arbitration clause in the Provider Agreement is unconscionable as to third-party beneficiaries, like Respondent.

A court may invalidate an arbitration clause based on defenses applicable to contracts generally, including unconscionability. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, ––– U.S. ––––, 137 S.Ct. 1421, 1426, 197 L.Ed.2d 806 (2017). To prove the arbitration provision unconscionable, a party must show that (1) she lacked a meaningful choice as to whether to arbitrate because the agreement's provisions were one-sided, and (2) the terms were so oppressive no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). Unconscionability is gauged at the time the contract was made. *Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020).

A. Respondent had no meaningful choice when accepting the Provider Agreement's terms.

Determining whether Respondent meaningfully chose to arbitrate involves sizing up "the fundamental fairness of the bargaining process." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016). Accordingly, "courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669. The Court also considers whether the parties were represented by independent counsel. *Smith*, 417 S.C. at 49, 790 S.E.2d at 4.

There simply is no other conclusion for the Court to reach other than Respondent had no meaningful choice in accepting the non-negotiable Provider Agreement. There is

no evidence that Respondent knew of the Provider Agreement, or that she was ever presented with it or reviewed it when she became a BCBSSC insured.

B. The Provider Agreement contains unreasonable, oppressive, and one-sided terms.

The Court must then look next to the terms of the Agreement to see if they are so harsh and oppressive no reasonable person would offer or accept them. The Provider Agreement contemplates marketing of the preferred provider advantages to members and the member communications state charges will be at network rate. This is one (1) of the major advantages to a consumer of purchasing this plan. Accordingly, the PPO network is published to consumers and plan members as advantages of doing business with the health care providers "in the network." It would be unforeseeable and unconscionable to the consumer, such as Respondent, that an undisclosed, confidential provision in Appellant's Provider Agreement with BCBSSC would foreclose suit when a provider – like Respondent – violates the published terms of the Provider Agreement to consumers by billing patients both directly and in excess of the rate agreed upon by the member's insurance plan.

Furthermore, it would be unconscionable to entice consumers to use the "preferred" providers in the network – healthcare providers – based on promises of the network price discounts, and then, in an undisclosed provision, remove the consumer's ability to seek legal redress for those healthcare providers who disregard their promises. Respondent's position essentially allows it to use its arbitration clause with BCBSSC as both a shield and a sword from <u>any</u> misdeed originating from its billing practices for its patients. Were the Court to determine that its Provider Agreement's arbitration clause was conscionable, Appellant would free reign to ***intentionally*** violate its Provider

Agreement for all its patients without fear of reprisals as the arbitration of individual claims – with the individual bearing its own costs and fees – would result in a financial Catch-22 for the individual like Respondent: either pay Appellant for its misdeeds or pay for an arbitration decision finding Appellant violated its Provider Agreement.

Finally, the South Carolina Supreme Court has raised the issue of whether an arbitration agreement is unconscionable and narrows the applicability of arbitration provisions to claims for "outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 151, 644 S.E.2d 705 (2007). It would follow that, construing the Provider Agreement, Appellant's conduct is equally unconscionable because not only is the agreement invisible to Respondent and other insureds, but Appellant's contract violations were unforeseeable. For these reasons, the Provider Agreement is unconscionable, and Appellant's appeal should be dismissed entirely.

IV. ANY ARBITRATION DOES NOT NEED TO BE ON A BILATERAL BASIS.

While Respondent concedes that the Provider Agreement is silent as to class arbitration, Respondent submits that is because the Provider Agreement only contemplated two (2) parties: Appellant and BCBSSC. However, the Provider Agreement does state, "In the event that the ***parties*** through mutual negotiation are not able to satisfactorily resolve any problem or dispute…. BCBSSC and [Appellant] agree to arbitrate such problem or dispute." (R. p. 195). Respondent submits that should this Court determine that Respondent is bound by the terms of the Provider Agreement and its arbitration provision, the remaining class members would be as well. With that being said, the Provider Agreement's use of the term "parties" indicates a willingness on Appellant's

part to subject itself to arbitration by more than one (1) other party. For that reason, if the Court were to determine that Respondent is subject to the terms and conditions of the Provider Agreement, the Court should determine that class arbitration is permitted too.

V. RESPONDENT'S CLAIMS SHOULD NOT BE DISMISSED.

Finally, Appellant argues that Respondent's claims should be dismissed, rather than stayed, because all her claims are subject to arbitration. (App. Br. 19). For the foregoing reasons, *supra*, Respondent submits that her claims are not subject to arbitration, and, for those reasons, dismissal is improper.

CONCLUSION

Based upon the foregoing, Respondent respectfully requests Appellant's appeal be dismissed in its entirety. Additionally, Respondent would ask that the appeal be dismissed, or the family court's judgments be affirmed, for any other reason appearing in the record of the case.

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HOPKINS LAW FIRM, L.L.C.

s/ J. Clay Hopkins.
J. Clay Hopkins (SC Bar No. 102053)
171 Church Street, Suite 160
Charleston, SC 29401
(843) 314-4202 – Telephone
(843) 314-9365 – Facsimile
clay@hopkinsfirm.com

MORRIS LAW LLC

Ian A. Taylor (SC Bar #81410)
Jeffrey D. Morris (SC Bar #102081)
783 Sandy Lane
Post Office Box 14724
Surfside Beach, SC 29575
(843) 232-0944 – Telephone
(843) 353-2440 – Facsimile
ian@jeffmorrislawfirm.com
jm@jeffmorrislawfirm.com

Attorneys for Respondent

June 21, 2022

Charleston, South Carolina

Other Counsel of Record:

A. Victor Rawl, Jr.
40 Calhoun Street, Suite 350
Charleston, SC 29401
vrawl@grsm.com
(843) 278-5900

Attorney for Appellant

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
CIRCUIT COURT

STEVEN H. JOHN, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2021-001342

Jessica Bennett and Thuy N. Gasser, individually and on behalf of those similarly situated,

Respondent,

v.

ACS Primary Care Physicians-Southeast P.C.,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

J. Clay Hopkins (SC Bar No. 102053)
clay@hopkinsfirm.com
HOPKINS LAW FIRM, L.L.C.
171 Church Street, Suite 160
Charleston, SC 29401
(843) 314-4202 – Telephone
(843) 314-9365 – Facsimile

Attorney for Respondent

June 21, 2022