THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson., Circuit Court Judge

Appellate Case No.: 2019-000451
Published Opinion No. 5934 (S.C. Ct. App. Filed Aug. 10, 2022)

Nicole Lampo ..... Petitioner,

v.

Amedisys Holding, LLC, and Leisa Victoria Neasbitt,.....Respondents.

PETITION FOR WRIT OF CERTIORARI

J. Paul Porter (#100723)
Cromer Babb Porter & Hicks, LLC
1418 Laurel Street, Suite A
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Facsimile 803-799-9533

Attorney for Nicole Lampo

Other Counsel of Record:

George A. Reeves, III
FISHER & PHILLIPS, LLP
1320 Main Street, Suite 750
Columbia, South Carolina 29201
greeves@fisherphillips.com
Attorney Amedisys Holding, LLC and Leisa Victoria Neasbitt

Jason D. Keck
FISHER & PHILLIPS, LLP
10 South Wacker Drive, Suite 3450
Chicago, Illinois 60606
jkeck@fisherphillips.com
Attorney for Amedisys Holding, LLC and Leisa Victoria Neasbitt

TABLE OF CONTENTS

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that she filed a Petition for Rehearing on August 25, 2022 (J.A. 271), and the South Carolina Court of Appeals denied the petition on August 30, 2022 (J.A. 284).

QUESTIONS PRESENTED

1. Is a contract to arbitrate formed under South Carolina law where an employee clicks "acknowledge" on a pop-up that does not describe the terms of the proposed arbitration agreement; the employee never electronically signs or affirmatively "agrees" to the underlying arbitration agreement; but the employee does not take an affirmative step to "opt-out" of the alleged arbitration agreement?

2. Should a jury resolve the question of acceptance where the evidence of acceptance is a pop-up acknowledgement that does not define the terms of the underlying arbitration agreement?

3. Should a jury decide the question of actual notice of a proposed arbitration agreement that was sent inconspicuously via email, with a nondescript pop-up acknowledgement, where there is no evidence, the offeree ever saw the underlying arbitration agreement, and where the terms of the arbitration agreement are not described within the four corners of the pop-up?

INTRODUCTION

The Petitioner asks this Court to resolve these novel issues of law pursuant to Rule 242(b)(1), SCACR.

The novelty in this case appears to be how the proposed arbitration agreement was delivered to the petitioner; however, the real novel issue is whether you can form a contract, without a formal acceptance, based on a pop-up "acknowledgement" of an offer to contract and a failure to "opt out" thereafter. The base question before the Court is: can you make a contract in South Carolina by sending an offeree an invitation to contract that imposes on the offeree a duty to "opt out" or be bound?

The Court of Appeals decision in this case, reversing the Circuit Court, allows for arbitration agreements to be formed in this fashion. That decision's focus on the technological aspects of this case overlooked the core problem; that there is no acceptance here. Allowing adhesive arbitration agreements to be formed like this encourages a dangerous policy, especially in the consumer and employment contexts, where sophisticated business entities are rewarded for making proposed arbitration agreements less conspicuous than they already are.

This Court does not need to make a new rule to address this novel problem; instead, it simply has to recognize that an "acceptance" is still required to form a contract in South Carolina.

STATEMENT OF THE CASE

Petitioner filed this lawsuit in Georgetown County on December 7, 2018. (J.A. 12). The Complaint alleges wrongful discharge and post-termination tort claims of defamation and tortious interference with contract. (*Id.*). Respondent Amedisys filed a Motion to Compel Arbitration on February 4, 2019. (J.A. 27). The parties filed lengthy supporting memoranda with evidentiary exhibits. (J.A. 29-148). The Circuit Court denied Respondent Amedisys' motion on March 11, 2019. (J.A. 3-11).

The Court of Appeals reversed and remanded the Circuit Court's order on August 10, 2022, and subsequently denied Petitioner's Petition for Rehearing on August 30, 2022. (J.A. 263-270-284).

Petitioner Nicole Lampo was a Physical Therapist at Respondent Amedisys Holding, LLC. (J.A. p. 12, Complaint ¶ 12). She was hired on July 8, 2013. (*Id.*). Respondent Leisa Neasbitt was her final supervisor. (Compl. ¶¶ 20-22, 48). Petitioner alleges she was wrongfully terminated on March 26, 2018, after she made internal complaints about patient care and safety issues. (Compl. ¶¶ 48, 57-62). After she was terminated, Petitioner alleges that Respondent Neasbitt spread false reasons for her termination to unprivileged former coworkers, and that Respondent Amedisys prevented Petitioner's reemployment at a third-party facility that wanted to hire her as Facility Director. (Compl. ¶¶ 63-92). Petitioner alleges wrongful termination based on her separation of employment from Respondent Amedisys and defamation and tortious interference with contract claims based on post-termination occurrences.

Petitioner never signed an arbitration agreement, and she did not know a purported arbitration agreement "even existed" until discussions between counsel prior to this lawsuit. (J.A. p. 144, ¶ 5). Petitioner received a company-wide email from Amedisys on August 6, 2013. (J.A, 52). The email had the subject line "Important Policy Change – Must Read;" and the body of the email contained a hyperlink that read: "This email contains important time-sensitive materials that the Company requires that you read as they could affect your legal rights. Please click here to receive them." (*Id.*). The email body did not mention "arbitration" and implied a unilateral policy change rather than a proposed bilateral agreement. (*Id.*). The email looked like many other generic company-wide emails that Petitioner received from Amedisys throughout her tenure. (J.A. 144).

Respondents' brief to the lower Circuit Court said that when an employee clicked to open the email a pop-up Acknowledgement form appeared. (J.A. p. 30).[1] The pop-up read:

> THE AMEDISYS ARBITRATION PROGRAM
>
> **ACKNOWLEDGMENT FORM**
>
> By clicking "Acknowledge" below, you will be given access to the Amedisys Arbitration Program materials, which include a Cover Letter, the Dispute Resolution Agreement, and FAQs. You are required to review these materials. Please read the materials carefully. **Unless you opt out of the Dispute Resolution Agreement within 30 days of today's date, you will be bound by it, which will affect your legal rights.**
>
> By clicking the "Acknowledge" button below on this screen, I acknowledge and understand that I will be given access to the materials described in the above paragraph and that I am required to review these materials.

(J.A. 54). There is no screen-shot in the record showing the "Acknowledge" button, but according to Respondent employees were "required" to click the "Acknowledge" button. (J.A. 48, ¶ 5). After clicking "Acknowledge" an employee was transported to a landing page where there were "links" to a cover letter, an Arbitration Agreement, and FAQs. (*Id.* at ¶ 6). Appellant supposedly clicked Acknowledge. (J.A. 60).

There is no record evidence of how long Lampo was on the web page, if she clicked any links, if the webpage even used the word "Arbitration," or if Lampo scrolled through the purported unsigned arbitration agreement. There is not a copy of the landing page in the record.

The arbitration agreement is titled "Dispute Resolution Agreement." (J.A. 62). According to the agreement, agreeing to arbitration "is not a mandatory condition of [an] Employee's employment." (R. p. 67) There is no place on the agreement to affirm or electronically sign it. (R. pp. 62-68). To "opt out" of the agreement an employee must print out a particular form that is an attachment to the

[1] However, a supporting affidavit to Respondents' brief claimed that the pop-up appeared after the employee clicked on the hyperlink in their email. (J.A. p. 48).

agreement, sign it, and mail it to Amedisys corporate headquarters in Louisiana. (J.A. 67). The employee is required to do this within 30 days of clicking "Acknowledge" on the pop-up shown above.

Amedisys conducted regular in-service meetings, where employees were told about new directives or important changes to policy. Important documents were often circulated to employees during those meetings. The proposed arbitration agreement was never discussed at one of those meetings. (J.A. p. 145 ¶¶ 11-13).

Petitioner has admitted she was unaware of the arbitration agreement. (J.A. 144-145). She did not submit an opt-out form, as prescribed by the agreement.

ARGUMENT

The initial question before the Court is whether a contract can be formed, as a matter of law, where there is no affirmative acceptance to an agreement, but also no affirmative rejection? The second and third questions posed in this case ask if underlying fact questions on acceptance and actual notice should be decided by a jury before arbitration is compelled.

The Court of Appeals, reversing the Circuit Court, focused its determination, in the first instance, on whether Petitioner had actual notice of Respondent Amedisys' offer to arbitrate and then determined, as a secondary consideration, that Petitioner accepted that offer merely by continuing to work for Amedisys and failing to opt out of the agreement. *Lampo v. Amedisys Holding, LLC,* Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 71). The Court made its holding on acceptance, based on its prior decision in *Towles v. United HealthCare Corp.* 338 S.C. 29, 39, 524 S.E.2d 839, 845 (Ct. App. 1999). The Court overlooked important distinctions with respect to the language in the "Acknowledgement" in *Towles* and the circumstances in *Towles.*

Clicking "Acknowledge" on the pop-up in this case and continuing to work thereafter was not enough to form a contract under established South Carolina law.

I. A VALID ACCEPTANCE IS REQUIRED FOR A CONTRACT TO BE FORMED UNDER SOUTH CAROLINA LAW. THERE IS NO VALID ACCEPTANCE IN THIS CASE AS A MATTER OF LAW.

The Court of Appeals' opinion makes it possible to form a contract by showing an individual a proposed contract and imposing a self-serving duty on the offeree to reject the proposal. That does not satisfy the elements of a valid contract.

"The necessary elements of a contract are an offer, acceptance, and valuable consideration." *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). "A valid offer 'identifies the bargained for exchange and creates a **power of acceptance** in the offeree.'" *Sauner*, 581 S.E.2d at 166; *quoting, Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122 (Ct.App.1993) (emphasis added). "A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997); *Gaskins v. Blue Cross–Blue Shield of South Carolina*, 271 S.C. 101, 245 S.E.2d 598 (1978).

"General contract principles of state law apply to arbitration clauses governed by the FAA." *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (S.C. 2001); *see also, Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713, 212 L. Ed. 2d 753 (2022)("[T]he FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules. [] Th[e] policy,' we have explained,' is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'").

The Court of Appeals focused too narrowly on the intricate technological details of this case and not the threshold question: does not rejecting an offer equate to acceptance? (J.A. pp. 157:1-4) ("**Circuit Court:** So, the legal question is whether or not rejection of an offer or failure to reject an

offer is acceptance[?] **Counsel for Respondents:** Correct, your honor). That question does not require considering technological complexities, but instead can be answered with basic contract law.[2]

The Appellate Court focused its analysis, in the first instance, on whether Petitioner had actual notice of Respondent Amedisys' offer to arbitrate and it determined that she did, as a matter of law. Consequent to that determination, the Court held that because Petitioner continued her employment, she accepted the offer to arbitrate. *Lampo v. Amedisys Holding, LLC*, *Op.* NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 71). The Court based this holding on their prior ruling in *Towles v. United HealthCare Corp.* however, 338 S.C. 29, 39, 524 S.E.2d 839, 845 (Ct. App. 1999).

There are many distinctions between the facts of *Towles* and the facts in this case. In *Towles*, an employee signed a code of conduct and an "Employee Handbook Acknowledgement Form" that stated nothing in the handbook but "the provisions of the Employment Arbitration Policy, establish a contract or any particular terms or a condition of employment between myself and [United]." 524 S.E. 2d 839, 842. The Employee Arbitration Policy was "summarized in the acknowledgement" that Towles "signed"... which provided in pertinent part:

> I acknowledge that I have received a copy of the United HealthCare Corporation (UHC) code of Conduct and the Employee Handbook. I understand that these documents contain important information on UHC's general personnel policies and

---

[2] The Circuit Court provided the following analogy in oral argument:

> THE COURT: So you're saying by not opting out she accepted.
>
> MR. REEVES: That is exactly what I was leading into is that by, by acknowledging it, and which we can show through the system that she acknowledged, and –
>
> THE COURT: But I mean, is that contract law? If I offer you to sell my house and you tell – and I say, "You don't contact me back and tell me you don't want to do it." Then we've got a contract and you got to buy my house?

(J.A. 155:23-156:6).

> on my obligations as an employee. I will remain familiar with, and agree to abide by these policies.
>
> . . .
>
> *At-Will Employment*
>
> I understand that the provisions in this Handbook are guidelines and, **except for the provisions of the Employment Arbitration Policy,** do not establish a contract or any particular terms or condition of employment between myself and [United].
>
> . . .
>
> I understand that arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim. **I agree to submit all employment related disputes based on a legal claim to arbitration under [United's] policy.**

Towles, 524 S.E.2d at 845. (Emphasis added). The *Towles* Court found that the above acknowledgment, that specifically described the material terms of the parties' arbitration agreement and advised Towles that he would be bound to arbitrate, "constitutes a specific communication of an offer which conditioned Towle's continued employment on his acceptance of the Employment Arbitration Policy as part of his employment contract." *Towles*, 524 S.E.2d 845.

The acknowledgment in *Towles* is critically different from the acknowledgment in this case. First, the "Acknowledgement" Petitioner received from Respondent Amedisys was a non-descript pop-up that did not describe the material terms of the parties' purported arbitration agreement. (J.A. 54); (*Supra* at p. 3 reprinted in full). In comparison, the Acknowledgment in *Towles* specifically described arbitration and concluded: "I agree to submit all employment related disputes based on a legal claim to arbitration[.]" *Towles*, 524 S.E.2d at 845. Next, the arbitration offer in *Towles* "conditioned Towles' continued employment on his acceptance of the Employment Arbitration policy" which "Towles [therefore] accepted [] by continuing in his employment." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 40, 524 S.E.2d 839, 845 (Ct. App. 1999). Here, continued employment "is not a mandatory condition of Employee's employment[.]" (R. p. 67) ("Arbitration is not a mandatory condition of

Employee's employment at the Company, and therefore an Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Agreement."); *Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 72) ("To be sure, Amedisys did not mandate arbitration as a condition of employment."). Last, in *Towles* the acknowledgement was printed, physically presented, and signed by the employee. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 33, 524 S.E.2d 839, 842 (Ct. App. 1999)[3]

The Court of Appeals' analysis focused in isolation on the third distinction, how the acknowledgements were presented, and decided the difference in presentation was not enough to differ from how it ruled in *Towles*. This overlooked the other distinctions in *Towles*, the descriptiveness of the acknowledgment and whether it was a condition of continued employment, which are more critical to the question of acceptance. Here, the material terms of the arbitration agreement were not adequately described within the four corners of the pop-up acknowledgment and agreeing to arbitration was not a term of continued employment. In this regard, failing to "opt-out" or reject Amedisys' offer to contract does not amount to acceptance.

---

[3] The Montana Supreme Court has directly declined to extend *Towles* to a similar acknowledgment to the one in this case because of non-specificity within the four corners of the acknowledgment. The acknowledgment in that case did not "contain unambiguous language of consent to binding arbitration." *Hubner v. Cutthroat Commc'ns, Inc.*, 2003 MT 333, ¶ 23, 318 Mont. 421, 430, 80 P.3d 1256, 1262 (2003); *distinguishing Towles*, 524 S.E. 2d 839 ("Unlike Cutthroat's language, this language [in *Towles*] made clear to the signing employee what they were agreeing to by signing the handbook."). The Montana Supreme Court, addressing *Towles* and another case, held that "[t]he arbitration agreements in each of these cases are of no help to [the Employer] because, unlike the language at issue here, each contains unambiguous language that clearly indicated the employee was agreeing to binding arbitration." *See also, Douglass v. Pflueger Hawaii, Inc.*, 110 Haw. 520, 533, 135 P.3d 129, 142 (2006), *as corrected* (May 30, 2006) (Distinguishing *Towles* because the acknowledgement in *Towles* specifically stated that all provisions in the Handbook were merely guidelines "except for the provisions" of the "arbitration policy.").

II. THE QUESTION OF ACCEPTANCE IS A FACT QUESTION FOR THE JURY ESPECIALLY HERE WHERE THE ONLY AFFIRMATION OF THE PURPORTED AGREEMENT IS A POP-UP "ACKNOWLEDGEMENT" THAT DOES NOT DEFINE THE TERMS OF THE AGREEMENT.

If the Supreme Court does not find there is no acceptance in this case as a matter of law, then Petitioner would still be entitled to a fact finding on acceptance and actual notice.

"What happens when it's just not clear whether the parties opted for or against arbitration? The FAA tells [] courts to 'proceed summarily to the trial' of the relevant facts." *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 977 (10th Cir. 2014). Petitioner requested a jury trial on fact issues regarding the making of this arbitration agreement. (J.A. 24-25). Under the FAA, if the party opposing arbitration does not demand a jury trial "then court shall hear and determine" arbitrability. 9 U.S.C. § 4. However, where a party opposing arbitration does make a jury demand, "the court shall make an order referring the issue or issues to a jury." *Id.* Here, fact issues abound particularly with respect to the concepts of acceptance and actual notice and those fact issues must be heard by a jury. *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980) ("Moreover, the party who is contesting the making of the agreement has the right to have the issue presented to a jury.") *El Hoss Eng'g & Transp. Co. v. Am. Indep. Oil Co.*, 289 F.2d 346, 351 (2d Cir. 1961) ("These issues should not be determined on affidavits, but rather a full trial should be had.").

Issues of offer, acceptance, and contract formation should also be submitted to the jury "if the evidence is conflicting or raises more than one reasonable inference[.]" *Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003); *Benya v. Gamble*, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984) ("A trial court should submit to the jury the issue involving the existence of a contract where its existence is questioned and the evidence is either conflicting or admits of more than one inference.").

There is no evidence in this case that Petitioner e-signed the arbitration agreement, scrolled through it, or even accessed it. The acknowledgement Petitioner supposedly clicked does not define the terms of the arbitration agreement alleged. *See, Hubner v. Cutthroat Commc'ns, Inc.*, 2003 MT 333, ¶ 23, 318 Mont. 421, 430, 80 P.3d 1256, 1262 (2003); *distinguishing Towles*, 524 S.E. 2d 839 ("[t]he arbitration agreements in each of these cases are of no help to [the Employer] because, unlike the language at issue here, each contains unambiguous language that clearly indicated the employee was agreeing to binding arbitration."). Further, there is an obvious difference between affirming "I agree" regarding the terms of an agreement and clicking "I acknowledge." *Douglass v. Pflueger Hawaii, Inc.*, 110 Haw. 520, 533, 135 P.3d 129, 142 (2006), *as corrected* (May 30, 2006) ("Here, Douglass merely acknowledged his receipt and understanding of the items presented to him.")

Continuing to work pursuant to a separate at-will contractual agreement is also not enough to manifest assent on its own; especially here, where unlike in *Towles*, agreeing to arbitration was not a condition of continued employment. *See, Shaffer v. ACS Gov't Servs., Inc.*, 321 F. Supp. 2d 682, 688 (D. Md. 2004) (finding continued employment, "particularly" where the employee did not sign a "explicit consent or acknowledgement form" was not enough to create an agreement to arbitrate)[4]; *see also, Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 380, 548 S.E.2d 207, 208 (2001) (Continued at-will employment is not sufficient consideration to support a noncompete agreement); *and Hall v. UBS Fin. Servs. Inc.*,

---

[4] The relevant language from that decision is persuasive:

> The decision to forfeit one's right to a judicial forum is significant and requires a more affirmative action that simply continued employment. The Court is not convinced that Plaintiff bound himself to an arbitration agreement—particularly, where he has not signed an explicit consent or acknowledgment form—simply because he did not quit his job by a certain date.

Shaffer v. ACS Gov't Servs., Inc., 321 F. Supp. 2d 682, 688 (D. Md. 2004).

435 S.C. 75, 85, 866 S.E.2d 337, 341 (2021) ("All at-will employment relationships . . . are contractual relationships.").

The Court of Appeals found that a contract was formed in this case as a matter of law, but then later opined that "the arbitration agreement designed by Amedisys may well be at the outer limits of what constitutes a valid offer to modify the terms an employment agreement to add an arbitration agreement." *Lampo v. Amedisys Holding, LLC, Op.* NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 72). This relative language – "may well be at the outer limits" – shows there are underlying jury issues. *See, El Hoss Eng'g & Transp. Co. v. Am. Indep. Oil Co.*, 289 F.2d 346, 351 (2d Cir. 1961) ("These issues should not be determined on affidavits, but rather a full trial should be had."). There are, at worst, material facts in dispute about whether Petitioner accepted Amedisys' offer to arbitrate. Under 9 U.S.C. § 4, those fact issues are for a jury.

III. THE QUESTION OF ACTUAL NOTICE IS A FACT QUESTION FOR THE JURY; IN THIS CASE, WHERE THE ARBITRATION AGREEMENT WAS NEVER AFFIRMATIVELY AGREED TO AND WHERE THE CIRCUMSTANCES OF THE AGREEMENT'S DISTRIBUTION WERE INCONSPICUOUS BY DESIGN.

The Court of Appeals correctly acknowledged that "[u]sually, the question of whether an employee has received actual notice is for the jury[.]" *Lampo v. Amedisys Holding, LLC, Op.* NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 71). But then, the Court of Appeals held that Appellants had "conclusively prove[n]" actual notice as a matter of law. *Id.*

The Court of Appeals held that there was actual notice in this case irrespective of the inconspicuous technological means by which this arbitration agreement was distributed. The technological means of distribution for this agreement was the main focus of the Court of Appeals'

analysis.[5] The Court of Appeals, with that particular focus, overlooked distinctions between this case and *Towles* to conclude that actual notice was conclusively proven based on its prior decision in *Towles*. *Lampo v. Amedisys Holding, LLC*, *Op.* NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 71), *citing*, *Towles* 524 S.E.2d at 845. The descriptiveness of the acknowledgement in this case in comparison to *Towles* and the inconspicuous means of distribution of this agreement both, together, give rise to a fact question on actual notice.

The law, to modify even a unilateral employment contract, imposes a "reasonable notice requirement for modification [that] requires actual notice to the employee." *Fleming v. Borden, Inc.*, 316 S.C. 452, 463, 450 S.E.2d 589, 596 (1994). "Whether the employer has provided actual notice of a modification of the employment contract created by an employee handbook in most cases will be for the jury to determine." *Fleming*, 316 S.C. 452, 463, 450 S.E.2d at 596; *see also*, *Reese v. Commercial Credit Corp.*, 955 F. Supp. 567, 570 (D.S.C. 1997) ("[T]he court believes that the South Carolina Supreme Court would apply the same actual notice requirement to an employer's implementation of an arbitration agreement. [] It is not too much to ask an employer to provide actual notice to its employees before significantly restricting rights created by decades of state and federal legislation."). Actual notice can be express or implied. *Strother v. Lexington County Recreation Com'n*, 332 S.C. 54, 63, 504 S.E.2d 117, 122 (S.C. 1998). Express actual notice has been found in employment cases when plaintiffs have received, read, understood, and signed new agreements. *See, Shelton v. Oscar Mayer Foods Corp.*, 319 S.C. 81, 89-90, 459 S.E.2d 851, 856-57 (S.C. Ct. App. 1995). Actual notice can also be implied through act,

[5] The opinion's technology-heavy focus is particularly pronounced on this issue. By way of example, the opinion discusses how an e-signature has the same force and effect as a written signature pursuant to S.C. Code Ann. § 26-6-70. This was not in dispute. Yet, the Court does not consider (at least not to the same degree of depth) whether clicking "Acknowledge" amounted to an e-signature establishing assent or agreement to arbitrate based on the face of this acknowledgment. Petitioner respectfully asserts, perhaps due to her counsel's own focus on many of the unique technological aspects of this case, that the Court of Appeals overlooked that an underlying contract still was not formed (or at least not formed *as a matter of law*) by this acknowledgment applying traditional contract law principles.

such as attending a meeting, personally disseminating information to others, or filing a claim through mediation. *Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (4th Cir. 2001) (applying North Carolina law). None of those circumstances are present here.

The facts of this case, including the nondescript pop-up used and automatic opt-in thereafter, give rise to a jury issue on actual notice under 9 U.S.C. § 4. The Court of Appeals should not have decided actual notice in favor of the Respondents as a matter of law.

CONCLUSION

Petitioner respectfully asks this Honorable Court to grant her Writ of Certiorari in order to reverse the holding of the Court of Appeals and remand this case to proceed on to discovery in the Court of Common Pleas.

Respectfully Submitted,

CROMER BABB PORTER & HICKS, LLC

J. Paul Porter, Esquire (#100723)
1418 Laurel Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone: (803) 799-9530
Fax: (803) 799-9533
Attorney for Petitioner

Columbia, South Carolina
September 29, 2022

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson., Circuit Court Judge

Appellate Case No.: 2019-000451
Published Opinion No. 5934 (S.C. Ct. App. Filed Aug. 10, 2022)

Nicole Lampo ..... Petitioner,

v.

Amedisys Holding, LLC, and Leisa Victoria Neasbitt,.....Respondents.

PROOF OF SERVICE

I certify that I, the undersigned employee of Cromer Babb Porter & Hicks, LLC, caused to have served **Petitioner's Petition for Writ of Certiorari and Joint Appendix** by depositing a copy of it in the United States Mail, postage prepaid and electronic mail, on September 29, 2022, to attorney of record, at the following addresses:

George A. Reeves, III, Esquire
Fisher & Phillips, LLP
1320 Main Street, Suite 750
Columbia, SC 29201
greeves@fisherphillips.com

Jason Keck, Esquire
Fisher & Phillips, LLP
10 South Wacker Drive, Suite 3450
Chicago, IL 60606
jkeck@fisherphillips.com

CROMER BABB PORTER & HICKS, LLC

BY: _____

J. Paul Porter (#100723)
1418 Laurel Street, Suite A
Post Office Box 11675 (29211)
Columbia, South Carolina 29201
Phone 803-799-9530
Fax 803-799-9533

Attorney for Petitioner