THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Court of Common Pleas of Beaufort County, South Carolina
The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2011-199666

Elizabeth O'Meara,..... Respondent,

v.

Brookdale Senior Living, Inc., Southern Assisted Living, LLC, and Sonia S. King,
.....Defendants,

Of whom Brookdale Senior Living, Inc. and Southern Assisted Living, LLC
.....are the Appellants.

Yvonne Carrie Pruett,..... Respondent,

v.

Brookdale Senior Living, Inc., Southern Assisted Living, LLC, and Sonia S. King,
.....Defendants,

Of whom Brookdale Senior Living, Inc. and Southern Assisted Living, LLC,
.....are the Appellants.

Janet Sue Scheerle,..... Respondent,

v.

Brookdale Senior Living, Inc., Southern Assisted Living, LLC, and Sonia S. King,
.....Defendants,

Of whom Brookdale Senior Living, Inc. and Southern Assisted Living, LLC,
.....are the Appellants.

APPELLANTS' FINAL BRIEF

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BACKGROUND OF THE CONSOLIDATED APPEALS

This consolidated appeal seeks to enforce three similar arbitration agreements that were voluntarily entered on behalf of the three Respondents, who were residents of the Carolina House of Hilton Head ("Carolina House"), an assisted-living community. The Respondents are not related, and each entered the Carolina House on different dates. They allege that they were abused by Sonia King, a former employee at the Carolina House, during the early morning hours of December 31, 2010. After each Respondent filed a complaint, the Appellants moved to dismiss the cases and compel arbitration pursuant to the arbitration clauses found in each Residency Agreement. The lower court, Judge Carmen T. Mullen, denied the motions, which led to this appeal.

ISSUES ON APPEAL

I. Whether the Residency Agreements signed on behalf of each Respondent involve interstate commerce and are governed by the Federal Arbitration Act?

II. Whether Respondents Elizabeth O'Meara and Janet Sue Scheerle, who are beneficiaries under the Residency Agreements, should be equitably estopped from refusing to comply with the terms of their agreements?

III. Whether the Respondents' claim of unconscionability are not yet ripe and should first be decided by an arbiter, and not a Court?

IV. Whether the Residency Agreements are not unconscionable; and, in the alternative, whether the Court should enforce arbitration and sever any provisions it finds unconscionable?

STATEMENT OF THE CASE

These consolidated appeals seek to enforce three similar arbitration clauses found in the admission agreements to an assisted-living community. The Respondents—Elizabeth O'Meara, Yvonne Carrie Pruett, and Janet Sue Scheerle—

are former residents of the Carolina House. They each filed separate suits against the Appellants Southern Assisted Living d/b/a Carolina House of Hilton Head and Brookdale Senior Living, Inc. (collectively "Appellants"). They also sued Sonia King, a former employee of the Carolina House, but it does not appear that she has appeared in any of the actions.[1] Respondent O'Meara served her Amended Complaint on the Appellants on May 4, 2011; Respondent Pruett served a Complaint on May 6, 2011 and an Amended Complaint on September 24, 2012; and Respondent Scheerle served a Complaint on July 10, 2011 and an Amended Complaint on June 26, 2012. (R. pp. 8-34; 156-87; 316-46). The Respondents alleged that Ms. King verbally and physically assaulted them. They alleged causes of action for negligence, intentional infliction of emotional distress, violation of the South Carolina Unfair Trade Practices Act, and assault and battery. Id. Respondent Pruett also brought a wrongful death and survival action, alleging Ms. King's actions led to her death on May 30, 2012.

In each case, Appellants filed a Motion to Dismiss and Compel Arbitration, arguing that an arbitration clause in the Respondent's Residency Agreement governed this dispute. (R. pp. 35-70; 188-225; 347-71). The Motions were filed on the following dates: June 3, 2011 in the O'Meara action; June 6, 2011 in the Pruett action; and August 10, 2011 in the Scheerle action. Id. Respondents O'Meara and Pruett served Memoranda in Opposition on June 21, 2011, and the Appellants

[1] Ms. King was not acting for the benefit of the Appellants; therefore, she is not being defended or indemnified by the Appellants.

served a Memorandum in Support on June 22, 2011. [R. pp. 71-86; 226-38; 87-140; 239-95].

In the O'Meara and Pruett actions, a hearing was held on June 14, 2011 before the Honorable Carmen Tevis Mullen. The Appellants received a written copy of the Orders Denying the Motion to Dismiss and Compel Arbitration on August 23, 2011. (R. pp. 2-7; 151-55). Appellants served a Motion to Reconsider on September 2, 2011 in the O'Meara action and September 6, 2011 in the Pruett action. (R. pp. 141-48; 296-303). The lower court denied the Motions to Reconsider, and Appellants received written notice of the lower court's decisions on September 22, 2011 (R. pp. 1; 149-50). On that same day, September 22, 2011, Appellants filed their Notice of Appeal in the O'Meara and Pruett actions.

As to the Scheerle action, a hearing on the Motion to Compel Arbitration was held on October 19, 2011. The lower court denied the Motion, and the Appellants received written notice of the decision on November 3, 2011. (R. pp. 311-15). On November 11, 2011, Appellants filed a Motion to Reconsider. (R. pp. 372-76).

The Motion to Reconsider was not immediately placed on the lower court's motion roster, and the case languished for almost ten months. In the meantime, Respondent Scheerle filed an Amended Summons and Complaint on June 26, 2012, to which the Appellants responded on June 28, 2012 with a renewed Motion to Dismiss. (R. pp. 330-46; 377-401). On September 4, 2012, a hearing was held on the motions. The Appellants filed a Notice of Appeal on September 7, 2012, before

receiving an Order from the lower court that was filed on September 18, 2012.[2] (R. pp. 311-15).

Because of issues concerning difficulty securing a transcript for these hearings, the parties agreed to move forward with these appeals without the transcripts below. On October 3, 2012, the Respondents filed a Motion to Consolidate all three appeals, which this Court granted on January 16, 2013.

FACTS

The three cases involve three separate but virtually identical arbitration agreements. Each is discussed below.

A. The Yvonne Carrie Pruett Arbitration Agreement.

On March 31, 2009, Respondent Pruett entered into a Residency Agreement with Appellant Southern Assisted Living d/b/a Carolina House of Hilton Head, an assisted-living facility owned and controlled by Appellant Brookdale Senior Living, Inc. Respondent's husband, Sam Pruett, signed the Agreement as "Responsible Party." (R. p. 210). Mr. Pruett also signed a "Responsible Party Agreement" whereby he agreed to provide necessary assistance and payments on behalf of Respondent. (R. p. 213).

The arbitration clause states as follows:

> **A. ARBITRATION PROVISION**
>
> 1. Any and all claims or controversies arising out of or in any way relating to this Agreement or the Resident's stay at the Company, excluding any action for eviction, and including disputes regarding the interpretation of this Agreement, whether arising out of State or

[2] The Order was styled "Order Denying Defendants, Brookdale Senior Living, Inc. and Southern Assisted Living, LLC d/b/a Carolina House of Hilton Head's Motion to Dismiss and Compel Arbitration on Amended Complaint."

> Federal Law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. **The parties to this Agreement further understand that a jury will not decide their case**. The Federal Arbitration Act shall govern the procedure, except if inconsistent with this Arbitration Provision or expressly stated otherwise in this Agreement. Further, nothing in this Agreement is to be construed to contradict any applicable South Carolina statutory grievance or mediation procedure. Any party who demands arbitration must do so for all claims or controversies that are known, or reasonably should have been known, by the date of the demand for arbitration, and if learned of during the course of the arbitration proceedings shall amend the claims or controversies to reflect the same. All current damages and reasonably foreseeable damages arising out of such claims or controversies shall also be incorporated into the initial demand or amendment thereto.

(R. p. 202) (emphasis in original). Underneath this clause are subsections regarding arbitration procedures. (R. pp. 202-05). As responsible party, Mr. Pruett initialed underneath each arbitration section acknowledging "as having read and understood the provisions [relating to arbitration]." (R. p. 205).

A separate part of the Agreement contained a section titled, "**BENEFITS OF ARBITRATION AND LIMITATION OF LIABILITY PROVISION**," which outlines the benefits of arbitration that flow to both resident and facility. The section informs the resident that the arbitration provision allows the facility to provide services at an affordable rate, while at the same time providing a quick resolution for elderly residents who may have a limited life expectancy. The section is also designed to give a resident a meaningful choice about whether to accept arbitration, as it informs the resident or her responsible party "that other assisted living companies' Agreements may not contain an arbitration provision, or limitations of liability

provision." (R. p. 206) (emphasis in original). Further, the section contains an acknowledgment in bold font that "**[t]he undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an Attorney.**" (R. p. 206) (bold in original).

The arbitration provision is not buried inconspicuously in the Agreement, as it takes up five pages (more than 25%) of the 19-page Agreement. The front page of the Agreement states that "**THIS AGREEMENT IS SUBJECT TO ARBITRATION.**" and further recommends that "**you consult your legal counsel to ensure proper understanding of this Agreement before signing.**" (R. p. 191) (bold in original).

B. The Elizabeth O'Meara Arbitration Agreement.

On September 30, 2008, Respondent O'Meara entered into the same Residency Agreement that Respondent Pruett entered. Ms. O'Meara's signature appears on the O'Meara Agreement, and her daughter, Julie Stanton, signed as "Responsible Party." (R. p. 56). Like Sam Pruett, Ms. Stanton also signed a "Responsible Party Agreement" whereby she agreed to provide necessary assistance and payments on behalf of Ms. O'Meara.

The O'Meara Agreement appears identical to the Pruett Agreement. The arbitration clause is the same, and the same encouragement to seek legal counsel is found in the O'Meara Agreement. Ms. Stanton likewise initialed under the provisions, acknowledging "as having read and understood the provisions [relating to arbitration]." (R. p. 51).

C. The Janet Sue Scheerle Arbitration Agreement.

Respondent Scheerle entered her agreement with Appellant Southern Assisted Living, Inc. on July 10, 2010. Julie Jones, Ms. Scheerle's daughter, signed the agreement as "Resident/Legal Representative." (R. p. 364). Ms. Jones also signed a "Statement of Financial Responsibility," wherein she agreed to assist in Ms. Scheerle's care as a "legally responsible person." (R. p. 365). In that statement, she "acknowledge[d] that [she has] received and reviewed a copy of the Residency Agreement, and [has] had an opportunity to ask questions."

Although similar, the Scheerle Agreement is not identical to the O'Meara and Pruett Agreements. The arbitration clause itself is virtually identical, with a few cosmetic differences in phrasing and comma placement, but it has one substantive distinction. Rather than providing that the "Federal Arbitration Act shall govern the procedure," the clause states that the "South Carolina Revised Code concerning arbitration shall govern the procedure[.]" (R. p. 356). Further, written discovery is governed by the South Carolina Rules of Civil Procedure rather than the federal rules. (R. p. 357).

As to the rest of the Scheerle Agreement, it contains no cover page, but the header on the first page states, "THIS AGREEMENT IS SUBJECT TO ARBITRATION." (R. p. 350). The Agreement also contains "Benefits of Arbitration and Limitation of Liability Provisions" that has a sentence encouraging the signing parties "**to discuss this Agreement with an attorney.**" (R. p. 359) (emphasis in original). Above the signature block is another recommendation that "**you consult with legal counsel**

to ensure understanding of this Agreement before signing." (R. p. 362) (emphasis in original).

D. The Interstate Character of the Residency Agreements.

The Residency Agreements are interstate in character because many of the goods and services delivered under the agreements come from out of state. They specify the basic services each resident will receive from the facility, including daily meals, amenities, furnishing, housing, and the ability to further agree to receive medical services from third parties. Specifically, the Agreements provide that residents will receive three meals daily. That food is supplied by Sysco Corporation of Texas. (R. pp. 146-47, ¶4; 300-01, ¶4; 368-69, ¶4). Direct Supply of Wisconsin provides the medical supplies that the residents receive pursuant to the Agreement. Id.

The Agreements also affect interstate commerce because they are between parties residing in two different states. The Respondents are South Carolina residents, while Southern Assisted Living is a North Carolina corporation. The parent company, Brookdale Senior Living, is a Delaware corporation with its headquarters in Tennessee and relevant corporate offices in Wisconsin, Illinois, and Florida. It advertises nationally.

The facility and the Agreements are also involved in interstate commerce in other ways. When a resident pays for the goods, services, and housing provided under the Agreements, a check is written and sent to a Wells Fargo bank in Texas, and the funds are deposited into accounts owned by Brookdale Senior Living, an out-of-state corporation. (R. pp. 146-47, ¶5; 368-69, ¶5; 368-69, ¶7). The facility

also receives and admits out-of-state residents, including residents from Connecticut, Florida, and New York. Id.

STANDARD OF REVIEW

"Appeal from the denial of a motion to compel arbitration is subject to de novo review." New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id.

ARGUMENT

I. THE ARBITRATION AGREEMENTS IN THE RESIDENCY AGREEMENTS ARE VALID AND ENFORCEABLE AGREEMENTS UNDER THE FEDERAL ARBITRATION ACT BECAUSE THE RESIDENCY AGREEMENTS INVOLVE INTERSTATE COMMERCE.

"South Carolina law generally favors arbitration." Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2005). "Any doubts regarding the scope of arbitrable issues should be resolved in favor of arbitration." Zabrinsky v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). "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." Id. "A motion to compel arbitration . . . should only be denied where the [arbitration] clause is not susceptible to any interpretation which would cover the asserted dispute." Id.

A. The Scope of the Federal Arbitration Act.

Under the Federal Arbitration Act ("FAA"), parties may enter pre-injury agreements and arbitrate personal-injury claims. When the FAA governs a dispute, it preempts conflicting state law. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 269 (1995); Soil Remediation Co. v. Nu-Way Environmental, Inc., 323 S.C. 454, 459, 476 S.E.2d 149, 152 (1996).[3]

Section 2 of the FAA states that a "contract evidencing a transaction involving commerce to settle by arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "To ascertain whether a transaction involves interstate commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabrinsky v. Bright Acres Associates, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001).

The basic purpose of the FAA "is to overcome courts' refusal to enforce agreements to arbitrate." Allied-Bruce, 513 U.S. at 270. Because the FAA was intended to enforce arbitration agreements and put them on "the same footing as other contracts," Congress intended the FAA to have a broad scope and for courts to interpret it liberally. Id. at 270, 275. The language of the FAA evidences a strong

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[3] Although the Scheerle Agreement states that the "South Carolina Revised code concerning arbitration shall govern the procedure," the FAA still preempts the South Carolina Uniform Arbitration Act, S.C. Code §§ 15-48-10 *et seq.*, "to the extent [state law] would have invalidated the arbitration agreement." Munoz v. Green Tree Financial Corp., 343 S.C. 531, 539 n.2, 542 S.E.2d 360, 363 n.2 (2001). In Soil Remediation, the Court held that the FAA preempted the South Carolina Act despite the agreement stating, "THIS SUBCONTRACT IS SUBJECT TO ARBITRATION PURSUANT TO SECTION 15-48-10, CODE OF LAWS OF SOUTH CAROLINA (1976)." 323 S.C. at 457, 476 S.E.2d at 150.

federal policy favoring arbitration. Mastrobouno v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995).

Prior to the Supreme Court's decision in Allied-Bruce, many courts refused to apply the FAA to contracts where the parties did not contemplate an interstate transaction, or where the interstate transaction was "too slight." 513 U.S. at 269. In Allied-Bruce, a homeowner had signed a termite-prevention contract containing an arbitration clause. The defendant was a multistate company that used termite-treating and house-repairing materials that came from out of state. The Supreme Court of Alabama upheld a denial of a motion to compel arbitration, finding that, although there was an interstate connection, the connection between the termite contract and interstate commerce was too slight. The Alabama court had held that the FAA applies only if the parties "contemplated substantial interstate activity." Id. at 269.

The United States Supreme Court rejected this narrow interpretation. It held that the FAA applies to transactions that "in fact" involve interstate commerce, "even if the parties did not contemplate an interstate commerce connection." Id. at 281. The FAA's phrase "involving commerce" evidenced "an intent to exercise Congress' commerce power to the full." Id. at 277. There is no requirement that the transaction "substantially" involve interstate commerce, as argued by the Respondent in her Memorandum in Opposition filed in the lower court. (R. p. 73).

Allied-Bruce is significant because since that opinion a decided majority of published opinions in South Carolina have upheld the application of the FAA. Significantly, in Munoz v. Green Tree Financial Corp., 343 S.C. 531, 539 n.3, 542

S.E.2d 360, 363 n.3 (2001), the Court overruled its prior precedent to the extent it considered whether the parties contemplated interstate commerce as a factor in applying the FAA. In that case, the Munoz family signed an installment contract and security agreement with the builder to finance $15,000 in home improvements. Both the Munoz family and the builder were from South Carolina. However, the builder assigned the agreement to a creditor on the same day. The creditor, a Delaware corporation with a principal place of business in Minnesota, had prepared the agreement in Minnesota and forwarded it to the builder in South Carolina. The loan proceeds were disbursed from a bank in Minnesota. "Although the Munozes may not have contemplated an interstate transaction, *their contractual relationship with Creditor* in fact involves interstate commerce and therefore the FAA applies." Id. at 539, 542 S.E.2d at 364 (emphasis added).

In Zabrinsky v. Bright Acres Associates, the Court cited Allied-Bruce and held that the FAA applied to a partnership dispute involving a South Carolina partnership selling and developing land located entirely in South Carolina. 346 S.C. at 595, 553 S.E.2d at 117-18. Although developing South Carolina land is typically an intrastate activity, "the transaction involved interstate commerce as contemplated by the FAA because the partnership utilized out-of-state materials, contractors, and investors." Id.; see also Soil Remediation, 323 S.C. at 461, 476 S.E.2d at 153 (holding contract to remove water and sludge materials from a South Carolina property involved interstate commerce because one party subcontracted with a third-party who would remove the materials to a North Carolina facility).

B. Assisted Living and Nursing Home Admission Agreements Typically Involve Interstate Commerce.

Much like the agreements at issue in Allied-Bruce, Zabrinsky, and Soil Remediation, admission agreements to assisted-living facilities or nursing homes typically involve interstate commerce because the facilities usually fulfill their contractual duties by providing supplies and goods from out-of state. See Pickering v. Urbantus, LLC, 827 F. Supp.2d 1010 (S.D. Iowa 2011); Miller v. Cotter, 863 N.E.2d 537 (Mass. 2007); Briarcliff Nursing Home v. Turcotte, 894 So.2d 661, 667 (Ala. 2004).

In McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 at *5 (D.S.C., Dec. 15, 2011), the District Court of South Carolina (Judge Norton) granted a motion to compel arbitration under the FAA and found "the type of nursing home care involved here affects interstate commerce." The court stressed that the home received food from Sysco Corporation of Texas—the same company supplying food to Appellants in this case—and bought supplies from manufacturers in several other states. Id. "The supplies must be shipped across state lines to reach [the] facility." Id. Because of this, the FAA applied to the admission agreement.

Similarly, in Triad Health Mgmt. of Georgia, III, LLC v. Johnson, 679 S.E.2d 785 (Ct. App. Ga. 2009), the court held that the FAA applied to a nursing home admission contract, where the home bought supplies from out-of-state vendors, treated out-of-state patients, and had patients insured through Medicaid and Medicare. "Given the evidence establishing a nexus between Triad's nursing home operations and interstate commerce, and in light of the United States Supreme Courts' *expansive interpretation of commerce for purposes of the FAA* [in Allied-

Bruce], we conclude that the Admission Contract was a contract evidencing a transaction involving commerce, and the FAA therefore applies." Id. at 788 (emphasis added).

In denying arbitration in these cases, the lower court improperly relied on Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993). In that case, the Court examined the face of the nursing home agreement and held that it did not involve interstate commerce. The Court noted that, although the facility was involved in interstate commerce, there was nothing tying the *agreement* itself to interstate commerce. Id. at 473, 427 S.E.2d at 644.

The lower court's reliance on Timms was misplaced for several reasons. First, Timms was decided almost 20 years ago and before FAA's reach was expanded by Allied-Bruce. Second, Timms is limited in scope because the transaction was confined to South Carolina in that it was a South Carolina home, with no evidence that the agreement involved interstate commerce. In Soil Remediation, the Court recognized that "[t]he present case differs from . . . Timms in that the transaction is not confined to this state[.]" 323 S.C. at 461, 476 S.E.2d at 153. Third, the facts differ from Timms in that the Agreement in this case specifies that residents will receive goods and services. As discussed below, the goods and services specified in the agreement come from out-of-state. Nothing in Timms indicates that the admission agreement referenced any supplies or goods that would ultimately be procured from out-of-state vendors. Timms is factually distinguishable in other ways, including the fact the Agreement in this case was signed on behalf of a North Carolina corporation that owns the facility, and that residents must pay for their

housing and services through payments to a Wells Fargo bank in Texas. In short, Timms concerned a factual record that failed to show *the agreement itself* involved interstate commerce.

Finally, Timms may have applied a standard that is no longer applicable. In Timms, the Court stated that, "[i]n determining whether the contract on its face evidences commerce, we are required to look to the entire contract." 310 S.C. at 472, 427 S.E.2d at 644. By examining merely the face of the contract, Timms seemed to articulate the pre-Allied-Bruce standard, where the contemplation of the parties is a factor. However, as other cases have made clear, "[t]o ascertain whether a transaction involves interstate commerce within the meaning of the FAA, the court must examine the agreement, the complaint, *and the surrounding facts*." Zabrinsky, 346 S.C. at 594, 553 S.E.2d at 117 (emphasis added). In fact, Munoz held the FAA applied to a contract between a South Carolina resident and a South Carolina vendor, because it was later assigned to an out-of-state creditor. 343 S.C. at 539, 542 S.E.2d at 364. To the extent Timms applied a standard that considered only the face of the contract or the parties' contemplation, it has been implicitly overruled by Allied-Bruce.[4]

[4] Mathews v. Fluor Corp., 312 S.C. 404, 440 S.E.2d 880 (1994) cited Timms for the proposition that "the express terms of the contract [must involve] interstate commerce." Munoz, however, expressly overruled Mathews "to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied." 343 S.C. at 363 n.3, 542 S.E.2d at 539 n.3. Presumably, Munoz (and Allied-Bruce) also overruled Timms to the same extent.

C. The Residency Agreements Involve Interstate Commerce and Are Governed by the FAA.

In this case, much like the facts in Allied-Bruce and Zabrinsky, the facility uses goods and materials obtained from out-of-state vendors in order to serve its residents. The Agreements state that residents will receive three meals daily and snacks are available 24 hours a day. (R. pp. 40; 193; 350). The facility fulfills their contractual obligation by providing food it receives from Sysco Company, the same Texas Corporation used by the nursing home in McCutcheon. (R. pp. 146-47, ¶4; 300-01, ¶4; 368-69, ¶4). The facility also receives its medical supplies from One Source, a Wisconsin Corporation, and carpeting from a North Carolina vendor. Id.

Further the residents are required to pay monthly fees, and those fees are specified in the Agreement. (R. pp. 58; 212; 364). To pay those fees, residents draft checks written out to Brookdale Senior Living, Inc. (R. pp. 147, ¶5; 301, ¶5; 369, ¶7). The checks are then sent to a Wells Fargo bank in Texas and deposited into accounts owned by Brookdale Senior Living, Inc., which ultimately receives that money at one of its corporate offices in Milwaukee, Wisconsin. Id. Finally, the Agreements are between Southern Assisted Living, a North Carolina corporation, and the Respondents, who are South Carolina resident. (R. pp. 40; 193; 350).

Thus, the Agreements involve interstate commerce in many ways. Unlike the situation in Timms—where there was no evidence that the agreement involved interstate commerce—there is ample evidence that the Agreements involve interstate commerce. These Agreements are much closer to the agreements in Allied-Bruce and Zabrinsky, where out-of-state vendors supplied the materials in

those agreements. Because the Agreements involve interstate commerce, the lower court erred by failing to compel arbitration under the FAA.

II. RESPONDENTS ELIZABETH O'MEARA AND JANET SUE SCHEERLE, BENEFICIARIES UNDER THE AGREEMENTS, SHOULD BE EQUITABLLY ESTOPPED FROM REFUSING TO COMPLY WITH THE ARBITRATION AGREEMENTS; FURTHER, ISSUES REGARDING ENFORCEABILITY OF THE ENTIRE CONTRACT ARE DECIDED BY AN ARBITER.

This section applies only to Respondents O'Meara and Scheerle. Respondent Pruett never raised this issue in the lower court.

A. Respondents O'Meara and Scheerle Are Beneficiaries of Their Residency Agreements.

The lower court improperly found that Respondents O'Meara's and Pruett's acquiescence to the Agreements was invalid (R. pp. 5; 307). The Agreements were signed by their daughters, Julia Stanton for Mrs. O'Meara and Julie Jones for Mrs. Scheerle. The lower court reasoned that, because they lacked a durable power of attorney, the daughters lacked the authority to bind them to the Agreements. The lower court's reasoning, however, was flawed. It failed to consider that Mrs. O'Meara and Mrs. Pruett were beneficiaries of the Agreement, and they should be estopped from attempting to repudiate an Agreement from which they have already benefitted.

"A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" Pearson v. Hilton Head Hosp., 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999)). In Pearson, which was recently decided, this Court compelled a doctor to arbitrate his claims against the hospital even though he did

not sign the arbitration agreement. The doctor had been placed at the hospital through an employment agency. Although the doctor had signed an arbitration agreement with the agency, and although the agency had signed an arbitration agreement with the hospital, the doctor did not sign an arbitration agreement with the hospital.

Nevertheless, this Court held that the doctor could not claim the benefits of the employment contract and then disown the contract when it suited him. 733 S.E.2d at 605. "[A] party may not 'rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage." Id. at 604. Because of the contract, the doctor received the benefit of working at the hospital and receiving compensation. After receiving the benefits of the contract, he could not disown those parts that did not suit him.

A case on point from the District Court of South Carolina is THI of South Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. Sept. 13, 2011) (unpublished). In that case, a daughter admitted her father to a nursing home and signed the admission agreement as "Fiduciary Party" and "Immediate Family Member." However, her father did not sign the agreement, and the daughter attempted to avoid arbitration, arguing that she lacked authority to bind her father to the admission agreement.

The Court (J. Currie) disagreed. Although the father did not sign the admission agreement, "he is the named resident to be admitted to the facility." Id. at *6. His "care was the essential purpose of the Contract." Id. "Thus, [the father] was an intended third-party beneficiary of the Contract which was signed by [the

daughter] in her capacity as immediate family member." Id. Further, the father's estate was equitably estopped from denying contract formation. The father had received benefits under the admission agreement. "Under these circumstances, it would be inequitable for [the father's estate] . . . to avoid the Contract's Arbitration Provision." Id.; see also McCutcheon, 2011 WL 6318575 at *3 (finding arbitration agreement binding on resident and her estate despite the fact that she did not sign the agreement; she was an intended beneficiary of admission agreement).

In this case, both Julia Stanton (O'Meara) and Julie Jones (Scheerle) signed for their mothers. (R. pp. 50; 263). They both signed as "Responsible Party" or "Legal Representative." Id. Further, Ms. Stanton signed a Responsible Party Agreement, and Ms. Jones signed as "Guarantor" on a Statement of Financial Responsibility. (R. pp. 59; 266).

Mrs. O'Meara and Mrs. Scheerle were the beneficiaries of the Agreements. Under the Agreements, they were the named residents, and received room and board and medical care for dementia and/or Alzheimer's. Because they received the benefit of the Agreement when it came to room, board, meals, and medical attention, they cannot now disown the Agreement when it works to their disadvantage. Therefore, this Court should find that both are beneficiaries under the Agreements and should be equitably estopped from refusing to arbitrate.

B. Challenges to the Validity of the Residency Agreement Should be Decided by an Arbiter.

In the alternative, an arbiter should decide whether the Respondents O'Meara and Pruett are bound by the Residency Agreement. When a party challenges the existence of the entire agreement and not just the arbitration

provision, the arbiter acts as a gateway and determines the contract's validity in the first instance. Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 125-26, 713 S.E.2d 799, 804 (Ct. App. 2011) (citing Buckeye Check Cashing v. Cardegna, 546 U.S. 440 (2006)).

Here, the arbitration provision states that "disputes regarding the interpretation of this Agreement . . . shall be submitted to binding arbitration[.]" (R. pp. 48; 356). Thus, the parties agreed that an arbiter would act as a gateway regarding the interpretation of the Agreement. And the Respondents challenged whether their daughters had the authority to bind them to the Residency Agreements. Such a challenge is to the validity of the Agreement as a whole, and not just a challenge to the arbitration agreement. Therefore, this issue should be raised before an arbiter and not a court.

III. THE ISSUE OF WHETHER THE ARBITRATION CLAUSES IN THE RESIDENCY AGREEMENTS ARE UNCONSCIONABLE IS NOT RIPE BECAUSE THE RESPONDENTS FAILED TO ALLEGE THAT THE SPECIFIC ARBITRATION CLAUSES WERE UNCONSCIONABLE.

When a plaintiff fails to adequately plead that an arbitration clause is unconscionable, the issue of unconscionability "is not yet ripe because an arbitrator has not ruled on the issue." Carolina Care Plan, 361 S.C. at 556-57, 606 S.E.2d at 758-59.

In Carolina Care Plan, the plaintiff, an HMO, entered into an agreement that included an arbitration clause excluding punitive damages. A defendant moved to dismiss or stay the proceedings and compel arbitration. In response, the HMO filed an amended complaint, which included allegations that the arbitration provision was unconscionable and violated public policy because it limited discovery and

certain rights and remedies, including punitive damages. The trial court dismissed the causes of action in the amended complaint related to the making of the arbitration clause and ordered arbitration.

On appeal, the HMO argued, among other things, that the arbitration clause was unenforceable as a matter of law because it sought to limit the HMO's remedies, including punitive damages. The Court, however, affirmed the trial court and held that the unconscionability issue was not ripe, because an arbiter, not a court, must decide whether the clause was unconscionable. Id. The court reasoned that, first, the HMO failed to adequately plead that the arbitration provision was unconscionable. Id. at 554, 606 S.E.2d at 757. Second, it was unclear whether the HMO would prevail on the merits at arbitration and "whether an arbitrator would find that punitive damages are warranted." Id. at 557, 606 S.E.2d at 759; see also Hawkins v. Aid Assn. for Lutherans, 338 F.3d 801 (7th Cir. 2003) (holding that complaints about the unavailability of punitive damages must first be presented to an arbiter) (cited by Carolina Care Plan, 361 S.C. at 557, 606 S.E.2d at 759).

In these cases, the Respondents failed to allege that the arbitration clause itself was unconscionable. In their pleadings, the Respondents fail to mention the arbitration clause. (R. pp. 8; 21; 156; 170; 316; and 330). After Appellants filed Motions to Compel Arbitration, the Respondents served copies of Memoranda in Opposition in the O'Meara and Pruett cases[5], but again the Respondents failed to

[5] Respondent Scheerle did not serve a Memorandum in Opposition.

contest the arbitration clause on the grounds of unconscionability.[6] (R. pp. 71 and 226). The Memoranda argued against the enforceability of arbitration on two grounds unrelated to unconscionability. Id.

Thus, because the Respondents failed to allege that the specific arbitration provision was unconscionable, the issues were not yet ripe.[7] The trial court erred by refusing to compel arbitration on the basis of unconscionability.

IV. IN THE ALTERNATIVE, THE RESIDENCY AGREEMENTS WERE NOT UNCONSCIONABLE, AS THEY GAVE THE RESPONDENTS A MEANINGFUL CHOICE WITH REASONABLE TERMS.

Even assuming for the sake of argument that the issue of unconscionability was ripe, the lower court improperly found that the arbitration and limitations of liability clauses in the Agreements were unconscionable. An agreement is unconscionable only if (a) there was an absence of meaningful choice due to one-sided provisions and (b) the terms are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Munoz, 343 S.C. at 541, 542 S.E.2d at 365.

A. The Respondents Had a Meaningful Choice.

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue."

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[6] Unfortunately, the parties lack a transcript of that hearing, as the court reporter apparently lost her job and abandoned the transcript, requiring the parties to agree to move forward without the transcript.

[7] The Respondents' claim that the provision limiting depositions to experts only is unconscionable is also not ripe, as the Agreement allows the parties to modify the arbitration discovery. The Respondents never asked whether Appellants would have agreed to modify discovery, which they have done at times.

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). In Munoz, the debtors argued that an arbitration clause in an installment contract and security agreement was unconscionable because it was "part of an adhesion contract and they were not advised it was included in the contract." 343 S.C. at 541, 542 S.E.2d at 365. In finding that the arbitration agreement was not unconscionable, the Court stressed that an adhesion contract was not per se unconscionable, and "a person who can read is bound to read an agreement before signing it." Id.

In this case, the Respondents had a meaningful choice. The Agreements contain a clause titled "Benefits of Arbitration and Limitation of Liability Provisions." That clause states that the resident, responsible party, or legal guardian "understands that other assisted living companies' Agreements may not contain an arbitration provision, or limitations of liability provision." (R. pp. 52; 206; and 359). Underneath that provision it states in bold font, "**[t]he undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an attorney.**" Id. (emphasis in original). Julie Stanton and Sam Pruett, as Responsible Parties for Respondents O'Meara and Pruett, initialed this provision indicating that they "read and understood the provisions of section V., subsection C." Id.

Further, the arbitration clauses are not buried inconspicuously in the Agreements. Each Agreement states on the front page in all-caps and underlined font that, "THIS AGREEMENT IS SUBJECT TO ARBITRATION." (R. pp. 38; 191; and 350). The O'Meara and Pruett Agreements also contain a recommendation on the

front page, in bold font, to "**consult your legal counsel to ensure proper understanding of this Agreement before signing.**" (R. pp. 38 and 191). The Scheerle Agreement places a similar warning in bold font just above where Julie Jones signed as legal representative for Ms. Scheerle. (R. p. 362).

The limitations on liability provisions also contain italicized warnings to "*Read Carefully Before Signing.*" (R. pp. 51; 205; and 358). The representatives for Respondents O'Meara and Pruett also initialed as "having read and understood the provisions" of (a) the arbitration provision, (b) the limitations on liability provision, and (c) the benefits of arbitration and limitation of liability provision. (R. pp. 51-52 and 205-206).

In this case, there is no evidence that the Agreements were presented on a take-it-or-leave-it basis. In fact, Respondent Pruett was able to negotiate the move-in fee, which was waived by the executive director, with the changes being initialed by her and Mr. Pruett. (R. p. 199).

The Respondents also failed to present any evidence, via affidavit or otherwise, that they lacked a meaningful choice to either negotiate the arbitration agreement or reside at one of the many other facilities in the Hilton Head area. See Hayes v. Oakridge Home, 908 N.E.2d 408 (Ohio 2009) (finding that nursing home resident failed to satisfy her burden or producing evidence supporting her challenge that the admission agreement was unconscionable). The *only* evidence that the Respondents presented regarding unconscionability were the arbitration provisions.

Thus, because the Agreements had a conspicuous arbitration provision that advised the Respondents to consult an attorney, and because the Agreements informed them that other facilities may not request arbitration in the admission agreement, the Respondents had a meaningful choice. The Respondents never voiced a concern over the provision at the time of signing.

B. The Terms of the Arbitration Agreement Were Not Oppressive and One-Sided.

In finding the arbitration agreement unconscionable, the lower court focused on the provisions that (1) limit discovery and (1) limit damages. (R. pp. 4; 153; and 314). Each is discussed below.

1. The Limitations on Discovery are Relatively Few and Consistent With Keeping Arbitration a Low-Cost, Quick Proceeding and Would Not Prevent a Complainant From Vindicating Her Rights.

The lower court improperly ruled that the limitation on depositions to only expert witnesses, taken with other provisions, rendered the arbitration provision unconscionable. Discovery limitations in arbitration, however, are part of the trade-off for the "simplicity, informality, and expedition of arbitration." In re: Cotton Yarn Antitrust Litigation, 505 F.3d 274, 286 (4th Cir. 2007) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). "Because limited discovery is a consequence of perhaps every agreement to arbitrate, it cannot, standing alone, be a reason to invalidate an arbitration agreement." Id.

In this case, the Respondents bore the burden of establishing that the limits on discovery would prevent them from vindicating their rights. See Id. at 283. The Respondents, however, presented no evidence in this regard.

The arbitration agreements provides for "permissible discovery per the Federal Rules of Civil Procedure" or the South Carolina Rules of Civil Procedure. (R. pp. 49; 203; and 258). Thus, the parties are allowed to serve interrogatories and requests to produce and admit. The Agreements also allow for expert witnesses, an exchange of witness lists, and provide a timeline in order to resolve the arbitration within 180 days. (R. pp. 49-50; 203-204; and 258-259). Further, the Agreements allow the parties to stipulate to expanded or modified discovery. Id. The only discovery "limitation" addressed by the lower court was the limitation of depositions to experts only.

The Respondents failed to carry their burden of showing that this single discovery limitation prevented them from vindicating their rights. Most arbitration agreements provide for less discovery than the provided in the Agreements, as arbitrations are meant to be informal, simple, and quick. A simple limit on deposition discovery alone—when other types of discovery are available—is not enough to render an agreement unconscionable.

2. The Limitations on Damages and Liability are Reasonable and Not a Basis for a Finding of Unconscionability.

First, whether arbitration remedies are inadequate is an analysis separate from the arbitrability of the Respondents' claims. "Because the adequacy of arbitration remedies has nothing to do with whether the parties agreed to arbitrate or if the claims are within the scope of the agreement, these challenges must first be considered by the arbitrator." Hawkins, 338 F.3d at 807 (cited by Carolina Care Plan, 361 S.C. at 557, 606 S.E.2d at 759). Here, the limitations on damages and liability are found in a provision in the Residency Agreements separate from the

arbitration provision. The "Arbitration Provision" is found at Section V(A) of the Agreement and consists of roughly three pages. Although incorporated by reference, the "Limitation of Liability Provision" is a separate provision found at Section V(B) of the Agreement. Thus, an arbiter should decide whether the arbitration remedies are inadequate.

Second, even if this issue were ripe, it should not render the Agreements unenforceable. The Agreements do not exculpate the Appellants from liability. See, e.g., Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 281-223 (1981) (upholding exculpatory contract). The Agreements provide that "[n]et economic damages shall be awardable, including but not limited to, past and future medical expenses[.]" (R. pp. 51; 205; and 358). Although the Agreements limit noneconomic damages to $250,000, offset collateral source payments, and prohibit the award of punitive damages, Sam Pruett and Julie Stanton initialed these sections as "having read and understood" them. (R. pp. 52 and 206).

Regardless, the limitations should not render the Agreements unconscionable, especially where the Respondents will still have the opportunity to raise these issue before an arbiter. See Hayes v. Oakridge Home, 908 N.E.2d 408, 415 (Ohio 2009) (holding arbitration agreement in nursing home excluding punitive damages and attorney fees not unconscionable).

C. In the Alternative, This Court Should Sever Any Portions of the Agreements it Finds Unconscionable and Enforce Arbitration.

If a court determines that a contractual provision is unconscionable, it may sever that provision and enforce the remainder of the contract. See Beach Co. v. Twillman, Ltd, 351 S.C. 56, 64, 566 S.E.2d 863, 866-67 (Ct. App. 2002) (enforcing

contract to extent it required plaintiff to waive jury trial, but severing portion that waived his compulsory counterclaims). Here, the Agreements contain a severability clause, stating that "[s]hould any part of this Agreement be invalid, the validity of the other parts of this Agreement will not be affected." (R. pp. 55; 209; and 361). The Agreements also provide that if any portions of the arbitration provisions or limitation on liability provisions are deemed invalid, the validity of the remaining subsections is not affected. Id., p. 11. Thus, to the extent this Court finds a provision invalid, it should sever that provision and compel the parties to arbitrate on the remaining terms.

Finally, the lower court erroneously relied on Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. at 35, 644 S.E.2d at 674, in refusing to sever the portions of the Agreement it found offensive. In that case, the arbitration clause was an adhesion contract, filled with "oppressive and one-sided provisions contained within the entire clause." The clause waived mandatory statutory remedies under the South Carolina Dealers Act. Such a waiver would have defeated the statutes' "very purposes of punishing acts that adversely affect the public interest." Id. at 30, 644 S.E.2d at 671.

Further, the clause was entirely one-sided in that the dealer's claims for claim and delivery, repossession, injunctive relief, or monies owed for the purchase of the vehicle were not stayed by arbitration. Id. at 31, 644 S.E.2d at 672. Thus, the dealer "may bring a judicial proceeding that completely disregards any pending consumer claims that require arbitration." Id. A dealer could initiate a claim and delivery action, repossess the vehicle, and sell it—all while the consumer's claims

over the same vehicle were still pending in arbitration. The terms in the Simpson agreement were grossly one-sided and oppressive, unlike the terms in this case.

Most importantly, however, is that all of the oppressive terms in Simpson were contained within the lengthy arbitration provision itself. The arbitration provision was one very long paragraph, without breaks, that included the offending provisions "within the entire clause." Id. at 34, 644 S.E.2d at 674. The Court would have been required to re-write the arbitration provision, which it declined to do.

In this case, the basic arbitration clause in the Agreements is the same, separate clause appearing on pages 4 and 5 of this Brief. (R. pp. 48; 202; and 356). Unlike the clause in Simpson, the arbitration clause at Section (V)(A)(1) is clear of any offending terms. Neither the Respondents nor the lower court has indicated that any of the provisions in Section (V)(A)(1) are unconscionable. Although the court referenced Subsection (V)(A)(6)(b) (limiting depositions to experts), the bulk of the lower court's finding of unconscionability rests on the provisions found in the "Limitation of Liability Provision" found in Section (V)(B).

Therefore, in the alternative, this Court may easily sever any portion it finds offending. The allegedly offending portions are found within separate, and easily severable, subsections. Unlike in Simpson, it would not be required to rewrite the contract.

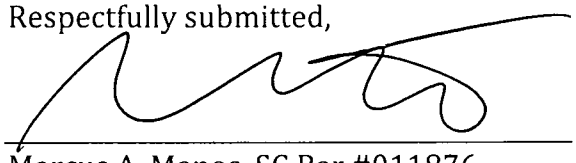
CONCLUSION

The Agreements are governed by the FAA because they involve the provision of goods and supplies that are procured through interstate commerce. As to the O'Meara and Scheerle Agreements, they are binding on Respondents O'Meara and

Scheerle as beneficiaries, and they should be equitably estopped from disowning an agreement when inconvenient to them. Further, the Respondents failed to allege that the arbitration clauses were unconscionable and, therefore, the issue of unconscionability is not ripe until first addressed by an arbiter. Finally, the arbitration and limitation on liability clauses are not unconscionable but, to the extent this Court believes otherwise, the offending provisions should be severed and arbitration ordered on modified terms.

Therefore, this Court should order the parties to proceed to arbitration.

Respectfully submitted,



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June 4, 2013

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Court of Common Pleas of Beaufort County, South Carolina
The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2011-199666

Elizabeth O'Meara,.....Respondent,

v.

Brookdale Senior Living, Inc., Southern Assisted Living, LLC
and Sonia S. King,.....Defendants,

Of Whom Brookdale Senior Living, Inc. and Southern Assisted Living, LLC
.....are the Appellants.

Yvonne Carrie Pruett,.....Respondent,

v.

Brookdale Senior Living, Inc., Southern Assisted Living, LLC
and Sonia S. King,.....Defendants,

Of Whom Brookdale Senior Living, Inc. and Southern Assisted Living, LLC
.....are the Appellants.

Janet Sue Scheerle,.....Respondent,

v.

Brookdale Senior Living, Inc., Southern Assisted Living, LLC
and Sonia S. King,.....Defendants,

Of Whom Brookdale Senior Living, Inc. and Southern Assisted Living, LLC
.....are the Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellants' Final Briefs comply with Rule 211(b), SCACR.

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Columbia, South Carolina

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In The Court of Appeals

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.....are the Appellants.

Yvonne Carrie Pruett,.....Respondent,

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and Sonia S. King,.....Defendants,

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.....are the Appellants.

PROOF OF SERVICE

The undersigned certifies that a copy of the **Certificate Of Counsel** has been

served upon counsel of record by depositing a copy of the same, first-class postage prepaid in the United States Mail, on the 12th day of June, 2013, to the address shown below.

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In The Court of Appeals

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PROOF OF SERVICE

The undersigned certifies that a copy of the **Appellants' Final Brief** has been

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