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 REPLY BRIEF

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Appellants Brookdale Senior Living, Inc. and Southern Assisted Living, LLC reply to Initial Brief of Respondents as follows:

I. THE ARBITRATION AGREEMENTS IN THE RESIDENCY AGREEMENTS INVOLVE INTERSTATE COMMERCE AND ARE GOVERNED BY THE FEDERAL ARBITRATION ACT.

In their Brief, the Respondents fail to acknowledge that courts have liberally interpreted the Federal Arbitration Act ("FAA") since the United States Supreme Court's decision in Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995). In that case, the Court broadly interpreted the scope of the FAA, and 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. Importantly, the Court held that there is no requirement that a transaction "substantially" involve interstate commerce.

Since Allied-Bruce, many courts have held that admissions agreements to assisted-living facilities and nursing homes involve interstate commerce where the facilities fulfill their contractual duties by providing supplies and goods from out of state. See, e.g., McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 (D.S.C., Dec. 15, 2011)[1]; Pickering v. Urbantus, LLC, 827 F. Supp.2d (S.D. Iowa 2011); Triad Health Mgmt. of Georgia, III, LLC v. Johnson, 679 S.E.2d 785 (Ga. Ct. App. 2009); Miller v. Cotter, 863 N.E.2d 537 (Mass. 2007): Briarcliff Nursing Home v. Turcotte, 894 So.2d 661, 667 (Ala. 2004). These cases reflect a growing trend

[1] The Respondents criticize the Appellants' citation to THI of S.C. at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. Sept. 13, 2011), yet they cite and use McCutcheon in support of their arguments. (See Respondents' Brief, p. 27). In any event, the Appellants cite Wiggins and McCutcheon simply to demonstrate how many courts have analyzed the interstate character of admission agreements to assisted-living facilities and nursing homes.

recognizing the interstate character of admission agreements similar to the agreements in this case. *Significantly, the Respondents fail to cite to a single case since Allied-Bruce that has refused to apply the FAA to a similar admission agreement.*

In this case, the Residency Agreements at issue involve interstate commerce because the facility is contractually obligated to provide food to the residents, and such food is procured through Sysco Company from Texas. (R. pp. 40, 146, ¶4; 193; 300, ¶4; 350; and 368, ¶4). The facility also receives its medical supplies from One Source, a Wisconsin Corporation, and residents pay fees that are sent to accounts outside the state of South Carolina. R. pp. 58; 146-147,¶4-5; 212; 300-301, ¶4-5; 364; and 368-369, ¶4-5).

Although the Respondents argue that the "essential character"[2] of the Agreements are for services in South Carolina, this does not matter. The "essential character" of the contract does not matter when the agreement involves interstate commerce in some way. The Appellants are aware of no cases since Allied-Bruce that have applied an "essential character" test in determining whether the FAA applies. So long as the agreement involves interstate commerce—even if that connection is slight—the FAA applies.

Finally, Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993), on which the Respondents heavily rely, is distinguishable in one key way. Timms is a pre-Allied-Bruce decision in which the facility presented evidence that it was engaged in interstate commerce, but it failed to present evidence that the *agreement* itself involved interstate commerce. Despite the facility using interstate commerce to

[2] See Respondents Brief, p. 27 ("It cannot be disputed that the essential character of the transaction . . .").

conduct its business, "*the contract* for patient-residential services with the Center is obscure, if not devoid, of any basis for holding that commerce was involved in the transaction between the parties." Id. At 472, 427 S.E.2d at 644 (emphasis added).

In this case, unlike Timms, the contract itself evidences a transaction involving interstate commerce. As stated above, the contract specifies that the residents will receive meals, and those meals are provided from a Texas corporation, while medical supplies are procured from a Wisconsin company. Payments also travel out of state. Thus, the holding of Timms is narrow because there was simply no evidence—unlike here—that the *agreement* itself involved interstate commerce.

II. WHEN ANALYZING UNCONSCIONABILITY, THE PRIMARY FOCUS IS ON THE CIRCUMSTANCES SURROUNDING THE FORMATION OF THE CONTRACT.

The Appellants believe that the issue of unconscionability was not plead and, therefore, is not ripe. They must first present this issue to an arbiter. See Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 556-57, 606 S.E.2d 752, 758-59 (2005); see also Appellant's Brief, pp. 21-22. However, to the extent the issue is ripe, a recent decision by our Supreme Court sheds further light on how to analyze unconscionability.

Since Appellants filed their Initial Brief, our Supreme Court addressed the issue of unconscionability in Gladden v. Boykin, 2013 WL 1223848 (March 27, 2013) (not yet released for publication; subject to revision or withdrawal). In that case, the Court held that a limitation of liability clause in a home-inspection contract was not unconscionable. Gladden is relevant to this case because the Court stated

that, in analyzing unconscionability, the focus should be more on the formation of the contract and less on the allegedly unreasonable terms.

> Courts should not refuse to enforce a contract on grounds of unconscionability, *even when the substance of the terms appear grossly unreasonable*, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract.

Id. at *2 (emphasis added). Thus, the Court focused on (1) extreme inequality of bargaining power, (2) factors such as lack of basic reading ability, and (3) intent to obscure the term. Each is discussed below.

Admittedly, the Appellants are a corporation and the Respondents are individuals. However, many if not most commercial contracts are entered into by parties of unequal bargaining power, and this alone is insufficient to render an agreement unconscionable. As to the second issue, there is no evidence that the signers lacked the ability to read or understand the terms they were signing. Although the Respondents stated that "were given no opportunity to bargain for the terms of the contract and the process was fundamentally unfair," they have presented no evidence in support of this. (Respondents Brief, p. 16). They presented no affidavits regarding the formation of the contract, and no evidence regarding the bargaining process. In fact, Respondent Pruett was able to negotiate the move-in fee, which was waived by the executive director, with the changes initialed by her and Mr. Pruett. (R. p. 199).

As to the "intent to obscure the term," the Appellants went out of their way to make the terms visible and to encourage the Respondents to seek an attorney. The Agreements informed each Respondent that she "understands that other assisted living companies' Agreements may not contain an arbitration provision or limitations of liability provision." (R. pp. 52; 206; and 359). The Respondents were free to accept the terms, attempt to negotiate the terms, or instead enter one of the many assisted-living facilities or nursing homes in the Beaufort area.

Further, the Agreements state on the front pages in all-caps, underlined font that, "THIS AGREEMENT IS SUBJECT TO ARBITRATION." (R. pp. 38; 191; and 350). The O'Meara and Pruett Agreements recommended in bold fond to "**consult your legal counsel to ensure proper understanding of this Agreement before signing.**" (R. pp. 38 and 191). And all the Agreements reminded the Respondents that "**[t]he undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an attorney.**" (R. pp. 52; 206; and 355) (emphasis in original).

Thus, regardless of the allegedly offensive terms cited by the Respondents, there is little to no evidence that the formation of the contract presents the same concerns that the Court discussed in Gladden.

III. EVEN IF THIS COURT FINDS PARTS OF THE AGREEMENTS UNCONSCIONABLE, THE ARBITRATION PROVISIONS NEED NOT BE RE-WRITTEN AND ARE EASILY SEVERABLE.

If this Court were to find that parts of the Agreement are unconscionable, it may easily sever the offending portions and enforce the arbitration agreement. Beach Co. v. Twillman, Ltd, 351 S.C. 56, 64, 566 S.E.2d 863, 866-67 (Ct. App. 2002).

For example, if the Court believes that Section (V)(B) of the Agreements, the "Limitation of Liability Provisions," is unconscionable, that should not stop the Court from enforcing the arbitration provisions.

Unlike the cumbersome arbitration clause in Simpson v. MSA of Myrtle Beach, Inc., from which the Court refused to sever the offending portions because it would need to re-write the provision, the primary arbitration provision in this case has no allegedly offending terms. 373 S.C. 14, 644 S.E.2d 663 (2007). The clause states:

> **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 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.[3]

[3] This clause is from the O'Meara and Pruett Agreements. The Scheerle arbitration clause is virtually identical, with a few cosmetic differences with comma placement and phrasing, and also provides that "South Carolina Revised Code" rather than the "Federal Arbitration Act" shall govern.

Neither the Respondents nor the lower court has indicated that any of the provision above is unconscionable. Although the Court referenced a subsection below this clause (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" of Section (V)(B). Thus, in the alternative, the Court may easily sever any part it finds offending, such as the limitation of liability provisions, and enforce the remainder without needing to re-write the contracts.

IV. THE "ILLEGAL OR OUTRAGEOUS" EXCEPTION TO ENFORCING ARBITRATION CLAUSES APPLIES ONLY TO ARBITRATION CLAUSES UNDER THE SOUTH CAROLINA ACT; IT DOES NOT APPLY TO CLAUSES GOVERNED BY THE FAA.

The Respondents argue that this Court should decline to enforce the arbitration agreements based on allegedly "illegal and outrageous" conduct. In support, the Respondents cite Chassereau v. Global-Sun Pools, Inc., 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007), which stated that "this Court will refuse to interpret any arbitration agreement as applying to outrageous torts[.]"

The "illegal and outrageous" exception, however, does not apply to contracts involving interstate commerce governed by the FAA. Under the FAA, arbitration clauses "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 (emphasis added). Thus, an arbitration clause subject to the FAA may be unenforceable so long as the grounds apply to *any contract*, and not just an arbitration contract.

The United States Supreme Court recently addressed this issue in Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1201 (2012). In that case, the West Virginia Supreme Court had refused to enforce any arbitration clause in a nursing home admission contract on the basis that such agreements offend public policy. The United States Supreme Court reversed and held that "when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." Id. at 1203 (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011)).

Thus, the South Carolina law concerning "illegal and outrageous" torts is a prohibition against arbitrating certain types of claims. While claims brought solely under the South Carolina Uniform Arbitration Act are subject to this exception, claims brought under the FAA are not. The "illegal and outrageous" exception applies only to arbitration agreements and, therefore, cannot be used as a basis for invalidating an arbitration agreement under the FAA.

V. RESPONDENTS O'MEARA AND SCHEERLE ARE BOUND BY THE AGREEMENTS THROUGH EQUITABLE ESTOPPEL OR OTHERWISE.

It is important to note that the lower court did not invalidate the O'Meara arbitration agreement[4] on the basis that they did not personally sign them. The lower court simply stated that "there is a question whether [Respondent's] acquiescence to the arbitration agreement in the Residency Agreement is valid." (R. p. 4). The lower court concluded that, "[t]o the extent that the parties contest whether [the daughter] had the authority to bind [Respondent] to arbitration, the

[4] Respondent Pruett never challenged whether she was bound by the terms of the Residency Agreement.

parties must engage in discovery regarding the matter, precluding dismissal at this time." Thus, if this Court determines that Ms. O'Meara's daughter lacked authority to bind her, the parties must engage in further discovery to resolve this issue.

Nevertheless, the lower court ruled that, at this time, the authority of the daughters to sign the Agreements on behalf of their mothers was at issue. The Appellants preserved their argument on equitable estoppel because the issue of the daughters' authority to bind their mothers was raised at the trial court level and ruled on by the lower court. An estoppel argument is simply saying that Respondents should not be allowed to claim a lack of authority.

"Error preservation rules do not require a party to use the exact name of the legal doctrine in order to preserve an issue for appellate review." State v. Miller, 397 S.C. 630, 636, 725 S.E.2d 724, 727 (Ct. App. 2012). Further, a trial court's ruling need not be explicit as to the issue addressed on appeal; a trial court may implicitly rule on an issue that is then preserved on appeal. See Elam v. Elam, 275 S.C. 132, 135, 268 S.E.2d 109, 110 (1980) (holding that issue was preserved because, by ruling a statute unconstitutional, the trial court implicitly held no cause of action existed due to the immunity doctrine).

In this case, the trial court ruled that there was an issue whether the daughters had the authority to bind their mothers—Ms. O'Meara and Ms. Scheerle—to the Residency Agreements. Thus, the lower court specifically ruled on the issue of authority. Regardless of whether the Appellants used the exact name "equitable estoppel" below, the issue of the scope of authority has been raised and ruled upon,

and the Appellants have preserved for appeal the issue of whether Respondents O'Meara and Scheerle should be estopped from asserting a lack of authority.

This Court recently issued an opinion addressing a similar authority issue in Pearson v. Hilton Head Hosp., 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012). In that case, although the doctor did not sign the arbitration agreement, he was still bound by its terms. "[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[5]; see also THI of South Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. Sept. 13, 2011) (holding daughter, who signed admission papers, bound her father to an admission agreement to a nursing home).

In this case, Julia Stanton (daughter of Respondent O'Meara) and Julie Jones (daughter of Respondent Scheerle) signed the Residency Agreements for their mothers. They also signed as "Responsible Party" and "Guarantor," respectively. Because their mothers benefitted from the Residency Agreements by receiving room, board, meals, and medical care, they should not be allowed to disown the contracts when convenient. And regardless of whether the Appellants used the words "equitable estoppel" below, the idea is exactly the same—the daughters had the authority to bind their mothers.

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[5] The Respondents suggest that Pearson applies only to breach of contract claims. However, the holding is not so narrowly drawn. It states that "Dr. Pearson benefitted from the contract and should not be able to disclaim the arbitration agreement contained in it." 400 S.C. at 297, 733 S.E.2d at 605. The opinion then states "*[a]dditionally* . . . Dr. Pearson has to rely on his contract or the Hospital's to have a breach of contract action[.]" Id. (emphasis added). Thus, the reference to the breach of contract action was an additional grounds, supporting the argument that he could not benefit from a contract and then disown its arbitration provisions.

Finally, in the alternative, an arbiter should rule on this issue because questions of authority go to the entire contract, and not just the arbitration clause itself. When a party challenges the existence of the *entire* agreement, and not just the specific provision, the arbiter is a gateway who determines the validity of the contract 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). Thus, an arbiter should have first decided whether the Respondents could disown the entire agreements based on allegations of lack of consent and authority.

CONCLUSION

The issue of whether a contract involves interstate commerce is a "low hurdle" which is easily cleared in this case because the agreement specifies items that are ultimately procured through interstate commerce. Thus, the FAA applies. Further, the Respondents presented no evidence suggesting that the formation of the Agreements was tainted which would support an unconscionable claim. And to the extent this Court finds any provision unconscionable, it may easily sever the offending parts and would not have to re-write the Agreements. Further, the "illegal and outrageous" exception does not apply under the FAA, as it does not apply to any contract. Finally, Respondents' O'Meara and Scheerle, who had their daughters sign for them, should not be allowed to claim the benefit of the Agreements and then disown them when convenient. Their daughters had authority to bind them to the Agreements.

Therefore, this Court should reverse the lower court and order the parties to proceed to arbitration.

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June 4, 2013

Columbia, South Carolina

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CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

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

has been served upon counsel of record by depositing three copies of the same, first-class postage prepaid in the United States Mail, on the 4th day of June, 2013, to the address shown below.

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