THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2020-001146

Armando J. Acevedo through his Attorney-in-Fact Marianne Acevedo, …….. Respondent

v.

Hunt Valley Holdings, LLC; THI of South Carolina, LLC; and THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, …… Appellants.

RESPONDENT'S FINAL BRIEF

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2. As an additional sustaining ground, whether a wife had authority to sign an arbitration contract on her husband's behalf when her only authority was limited to "health care" decisions and signing the contract was not required for the husband's admission to Appellants' medical facility

STATEMENT OF THE CASE

Respondent Marianne Acevedo ("Wife") initiated this civil action by filing a Notice of Intent to File Suit ("NOI") and expert affidavit on January 26, 2018, less than a year after her husband Armando Acevedo suffered a preventable fall while a resident at Appellant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post-Acute Care ("Facility"). (R. pp. 172-77). The NOI alleged the care the Facility offered was a joint enterprise among the Facility and two other entities: Appellants Hunt Valley Holdings, LLC ("Hunt Valley") and THI of South Carolina, LLC ("THI"). (R. pp. 175-76). Following an unsuccessful pre-suit mediation, Wife filed a Summons and Complaint in the Spartanburg County Court of Common Pleas. The Complaint named as defendants Appellants as well as Rusty Flathmann, an employee of one of the Facility's parent companies. (R. p. 39 ¶ 30). Mr. Flathmann was dismissed by stipulation on January 15, 2019. The Complaint alleged six causes of action including negligence/recklessness, corporate negligence, and neglect of a vulnerable adult in violation of the Omnibus Adult Protection Act (S.C. Code Ann. § 43-35-5 to -90). (R. pp. 83-90 ¶¶ 267-305).

Appellants responded to the Complaint on November 8, 2018, in three different ways. The Facility filed a motion to dismiss, compel arbitration, and stay state court proceedings. (R. pp. 180-82). Hunt Valley filed a motion to dismiss claiming the circuit court lacked personal jurisdiction. (R. pp. 178-79). THI served an answer which purported to reserve the right to assert arbitration later and pled arbitration as an affirmative defense. (R. p. 101 ¶ 65). Four days later, Hunt Valley filed a motion to stay, asking the circuit court to suspend proceedings against it including discovery obligations pending resolution of the Facility's arbitration-related motion. (R. pp. 184-85). Respondent opposed Hunt Valley and the Facility's motions in memoranda filed in January 2019. (R. pp. 208-34). The Honorable J. Derham Cole heard oral arguments on the motions on February

1, 2019 (R. pp. 124-55) and entered an order denying the Facility's motion on October 21, 2019. (R. p. 1-13).

Appellants filed a motion to alter or amend judgment pursuant to Rule 59(e), SCRCP on October 31, 2019, challenging the circuit court's ruling on arbitration and seeking clarification on Hunt Valley and THI's motions. (R. pp. 242-52) The circuit court partially granted the motion in a Form 4 order that affirmed the court's ruling on arbitration but agreed a clarification was needed on the reasons for denying Hunt Valley and THI's motions. (R. pp. 14-16). One month later, the circuit court issued its final order (1) denying the Facility's arbitration motion; (2) denying as moot THI's motion to stay based on the court's rejection of the Facility's arbitration claim; and (3) denying Hunt Valley's motion to dismiss after finding Respondents made a prima facie showing of personal jurisdiction. (R. pp. 17-30). This order expressly replaced the original October 21, 2019 order. Id. Appellants served their notice of appeal on August 10, 2020.

STATEMENT OF THE FACTS

Armando Acevedo spent just four days as the Facility's resident but suffered permanent injuries caused by poor nursing care. (Compl. ¶¶ 50-51; Pla. Mem. in Opp. to Facility's Mot. to Compel Arb. at 2). Mr. Acevedo was admitted on July 12, 2017, and the Facility presented to Wife a document entitled "Facility-Resident/Representative Arbitration Agreement" ("Arbitration Agreement"). (R. p. 43 ¶ 50; R. p. 183). While purporting to require arbitration for "any controversy or dispute" between Mr. Acevedo and the Facility, the Arbitration Agreement provided few details on how or by whom an arbitration proceeding would be conducted. (R. p. 183). Proceedings were to be conducted by three arbitrators, each of whom was selected from an unspecified "panel having experience and knowledge of the health care industry." Id. The Arbitration Agreement also failed to establish procedural rules for arbitration proceedings. Instead,

it purported to adopt the "South Carolina Alternate Dispute Resolution/Mediation Rules" even though the only procedural provisions of those rules cannot apply to Respondents' claims. Id.; Rule 12(a), SCADR (limiting procedural provisions to non-binding arbitration proceedings).

Wife was not Mr. Acevedo's conservator or guardian when the Arbitration Agreement was presented to her. Her only authority to act on Mr. Acevedo's behalf was pursuant to a "South Carolina Health Care Power of Attorney" ("HCPOA") form Mr. Acevedo executed in August 2010. (R. p. 199-204). In the HCPOA, Wife was appointed as Mr. Acevedo's "health care agent" for the limited purpose of making "health care decisions" in Mr. Acevedo's stead. (R. p. 200). All of the enumerated powers Wife was granted were limited to "health care" matters or to decisions "necessary" to implementing health care decisions. (R. p. 201 § 4). While the HCPOA authorized Wife to admit Mr. Acevedo to a skilled nursing facility, it did not grant any powers relating to arbitration.

Mr. Acevedo's admission paperwork included a note to Facility staff members indicating he posed a high risk of falls. (R. p. 43 ¶ 50). The Complaint alleges that two days into his admission, Facility personnel acted improperly in their attempt to transfer Mr. Acevedo from his bed to a wheelchair. (R. p. 43 ¶ 51). These Facility employees did not utilize any available safety devices (e.g. wheelchair alarm) to prevent falls or to warn that a fall was imminent. (R. p. 43 ¶ 51). The resulting fall broke Mr. Acevedo's hip. (R. p. 43 ¶ 51). Though just 55-years-old, the injury and resulting course of treatment cause permanent damage. (R. p. 209). Mr. Acevedo was hospitalized and has become permanently disabled. Id. The resulting lawsuit alleges the Facility failed to properly supervise Mr. Acevedo, especially given its knowledge of his fall risk. (R. pp. 83-84 ¶ 269). Respondent also alleges the incident leading to Mr. Acevedo's injury was caused by more systemic issues with how the Facility was funded and staffed. (R. pp. 85-86 ¶ 277). In short,

Respondent alleges Mr. Acevedo's fall was attributable in part to financial decisions by Hunt Valley and THI that meant Mr. Acevedo did not have properly qualified or trained medical personnel at his side at the crucial moment. (R. pp. 50, 83-86 ¶¶ 92-93; 269; 277). Respondent seeks compensatory and punitive damages for Appellants' negligent and recklessness.

STANDARD OF REVIEW

Appellate courts apply a *de novo* review to a circuit court's finding on whether a nonsignatory is bound to an arbitration contract. Wilson v. Willis, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) (citing Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) and Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012)). However, under a *de novo* review, the circuit court's factual findings will not be reversed so long as "any evidence reasonably supports those findings." Wilson, 426 S.C. at 335, 827 S.E.2d at 172. While the Federal Arbitration Act ("FAA") imposes a presumption favoring arbitration, the presumption does not apply to the "identity of the parties who may be bound to such an agreement." Id. at 337-38, 827 S.E.2d at 173. In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory. Id.

ARGUMENT[1]

1. The Arbitration Agreement is Unenforceable Because it Lacks Material Terms and is Unconscionable.

Arbitration is a matter of contract and, since the Facility seeks to compel arbitration, it bears the burden of proving the Arbitration Agreement is a valid, enforceable contract. Fici v. Koon, 372 S.C. 341, 642 S.E.2d 602, 604 (2007). This burden is not eased and the substantive requirements of South Carolina contract law are not lessened simply because state law maintains a pro-arbitration policy and the Federal Arbitration Act ("FAA") imposes an equal treatment principle for arbitration contracts. See 9 U.S.C. § 2 (stating that arbitration contracts governed by FAA are subject to many of same state-law defenses applicable to other contracts). The Arbitration Agreement did not form a valid contract under South Carolina law because there was no meeting of the minds on its material terms. The Arbitration Agreement includes an inscrutably vague arbitrator selection process and no guidance on how, when, or under what rules arbitration proceedings will be conducted. Moreover, the Arbitration Agreement is unenforceable because it was presented under circumstances that left Wife with no meaningful choice and its one-sided terms effectively force her to walk into the arbitration hearing without any hope of obtaining the evidence needed to prove his claims.

[1] The Court should also reject two other arguments raised in Appellants' Brief. Contrary to Appellants' Argument 1(D), the circuit court was correct in stating as a matter of fact that Facility and the entity identified in the Arbitration Agreement are not listed by precisely the same name. (R. p. 183) (listing "Lake Emory Post Acute Care" as entity with whom Mr. Acevedo purportedly had duty to arbitrate claims). Appellants' Argument 2 should also fail because, while Appellants fault the circuit court for ruling on Hunt Valley's jurisdiction-based motion, Appellants' motion to alter or amend judgment specifically asked the circuit court to address that motion. (R. p. 243).

a. Several Material Terms are Absent or Too Vague to Form a Valid Contract.

The Arbitration Agreement purports to be a dispute resolution contract but it provides no useful guidance on who will be tasked with resolving Mr. Acevedo's claims or how the accompanying proceedings will be conducted. Parties cannot form a valid contract without forming "a meeting of the minds . . . with regard to all essential and material terms." Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) (citing Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989)). Even if a contract mentions a material term, the contract fails if the term is defined or described in vague terms. Reed v. Boykin, 282 S.C. 614, 320 S.E.2d 68 (Ct. App. 1984) (quoting 1 Corbin on Contracts § 95 (1963) ("Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract")). These are contract formation requirements, and Appellants bear the burden of proving both that the Arbitration Agreement contains all material provisions and that it describes them in definite terms. Allegro, Inc. v. Scully, 418 S.C. 24, 791 S.E.2d 140 (2016) ("Part of proving that some enforceable contract exists is being able to identify the terms thereof").

Arbitrator selection and the rules governing arbitration proceedings are material terms of an arbitration contract. To determine whether a term is material, South Carolina courts consider the "essence of the agreement" Grant, 383 S.C. at 131, 678 S.E.2d at 439 (citing Ex Parte Warren, 718 So.2d 45, 49 (Ala. 1998)). For example, in a lease contract, essential terms include a description of the boundaries of the leased premises, the lease term, as well as the time and manner of payment. Player, 299 S.C. at 105, 382 S.E.2d at 894. For commercial sales contracts, price, time, and place are all indispensable terms. Ross Electric, Inc. v. Cooler Erectors of Atlanta, Inc., 418 S.C. 424, 429, 794 S.E.2d 382, 385 (Ct. App. 2016) (quoting McPeters v. Yeargin Constr. Co,

Inc., 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986)). Similarly, for service contracts, essential terms include the scope of the work to be performed and the amount of compensation. Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014).

Grant identified some essential provisions in a nursing home arbitration contract by recognizing a contract provision stating an exclusive arbitral forum was "integral" to the agreement such that its unavailability rendered the whole contract invalid. 383 S.C. at 131-32, 678 S.E.2d at 438-39. While the Arbitration Agreement does not have an exclusive arbitral forum provision, Grant helps define what constitutes a material term in a nursing home arbitration contract. Grant found a term is "integral" where it has "wide-ranging substantive implications" on the outcome of arbitration proceedings. Id. at 132, 678 S.E.2d at 439 (quoting Singleton v. Grade A Market, Inc., 607 F. Supp. 2d 333, 339 (D. Conn. 2009)). Grant found that arbitrator selection met this standard because it would affect "the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration." Id. Thus, provisions going to the heart of the substantive law applied and the procedures used during the arbitration process are material because they "may substantially affect the substantive outcome of the resolution" of the dispute. Id. at 132, 678 S.E.2d at 439.[2]

Deeming these absent terms material is also consistent with the practical understanding of the "essence" of an arbitration contract—i.e. opting out of civil litigation in favor of a different

[2] Respondent acknowledges York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 83, 749 S.E.2d 139, 147 (Ct. App. 2013) held that an arbitration contract's lack of rules on discovery, arbitration costs, and arbitration initiation procedures were not material terms. However, while York attributes this holding to Grant, the Supreme Court never suggested in Grant that a complete lack of guidance on procedure and evidence is an ancillary matter. Instead, the court strongly implied "the law, procedure, and rules" of arbitration are all matters "that may substantially affect the substantive outcome" of arbitration proceedings. 383 S.C. at 132, 678 S.E.2d at 439.

dispute resolution process. While arbitration is intended to be different and less thorough than litigation, its "essence" includes the same parameters litigation parties would encounter. In litigation, the general parameters of proceedings include commencement of an action (Rules 3-6, SCRCP), motions and other pre-trial proceedings (Rules 7-16, SCRCP), discovery and other opportunities for parties to develop their claims/defenses (Rules 26-36, SCRCP), and trial matters (Rules 38-52, SCRCP). Respondent is not suggesting arbitration much match or imitate the South Carolina Rules of Civil Procedure, but an arbitration contract that does not clearly address *any* of these matters fails in its essence of describing a recognizable dispute resolution process.

Here, the Arbitration Agreement lacks any valid terms on arbitration procedures. There is no guidance on the timetable for arbitration proceedings and no designation of rules to govern procedure or evidence. Confronted with this gap in the Arbitration Agreement, Appellants argue the gap was filled by the Arbitration Agreement's reference to the South Carolina Alternative Dispute Resolution/Mediation Rules. (Appellants' Br. at 15-16). But, the only substantive evidentiary and procedural provisions in those rules for arbitration proceedings are found in Rule 12 which, by its terms, "applies only to non-binding arbitrations." Rule 12(a), SCADR. The Arbitration Agreement states that proceedings under its terms is binding on both parties. (R. p. 183). Moreover, it would not save the Arbitration Agreement for Appellants to argue the parties can negotiate the applicable procedural and evidentiary rules later. Ellis v. Taylor, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1994) ("A contract leaving material terms open for future agreement is void for indefiniteness").

Similarly, the Arbitration Agreement's arbitrator selection process is too vague to permit enforcement. The process must begin with the parties collaborating on a choice of arbitrator culled from "a panel having experience and knowledge of the health care industry." (R. p. 183). The

origin, identity, and composition of this "panel" is not identified in the Arbitration Agreement and is not in any no inferable from its language. It is not clear if this panel currently exists or whether the parties must form it. It is not clear how many individuals comprise the panel or how they are chosen. It is not clear whether the "experience and knowledge" requirement requires a medical education or whether it could include attorneys, judges, insurance adjustors, or individuals from other industries. Without any guidance on the "panel's" composition, it is impossible to implement.[3] Ultimately, when a contract is indefinite on an important term, the proper judicial response is not to imply or infer a term but rather to refuse enforcement. Ebert v. Ebert, 320 S.C. 331, 339, 465 S.E.2d 121, 126 (Ct. App. 1995) (citing 17A Am. Jur. 2d Contracts § 192 (1991)).

b. The Arbitration Agreement is Unconscionable.

If Respondent is required to proceed under the Arbitration Agreement, she will be forced to walk into an arbitration proceeding without the key documents needed to prove her case and with no way to know what testimony key fact witnesses will provide. Appellants, on the other hand, have the relevant documents in their exclusive possession, have an opportunity to learn what the crucial witnesses know, and have even been granted a sneak peek at Respondent's expert witness testimony. In essence, the Arbitration Agreement tilts the process in Appellants' favor and places Respondent at a competitive disadvantage not permitted under South Carolina law.

[3] Appellants may also argue the vagueness of the "panel" is immaterial because both the Arbitration Agreement and the FAA provide an alternative mechanism for arbitrator selection. (R. p. 183) (providing for selection by court); 9 U.S.C. § 5. But, by its terms, this alternative mechanism may not be implemented unless the "panel" process fails. (R. p. 183) (allowing judicial selection only if "the parties cannot reach a mutual decision on the selection" through the "panel" process). The "panel" process cannot fail (or even commence) because its parameters lack the clarity required to be attempted. See also Grant, 383 S.C. at 131, 678 S.E.2d at 438 (finding "great merit" in the rulings of other courts that deem 9 U.S.C. § 5 inapplicable when an arbitration contract designates an unavailable arbitration forum).

The Arbitration Agreement does not permit Respondent any right to discovery before an arbitration hearing. Since the Arbitration Agreement is governed by the FAA which is silent on discovery, the practical result is that there will be no discovery unless Appellants voluntarily consent to it. COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 275 (4th Cir. 1999). If this case is removed from the litigation process, there is no mechanism (before an arbitrator or court) for Respondent to compel the production of important information from Appellants, their agents, or third parties. The FAA permits an arbitrator to compel a witness's attendance at the arbitration hearing but "[n]owhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during pre-hearing discovery." Id.

A contract that purports to compel arbitration in a nursing home negligence case without the possibility of discovery is unconscionable. Under South Carolina law, unconscionability is "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007) (quoting Carolina Care Plan, Inc. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). The "absence of meaningful choice" requirement "speaks to the fundamental fairness of the bargaining process." Simpson, 3873 S.C. at 25, 664 S.E.2d at 669. The key factors on this element include (1) the nature of the injuries suffered by the plaintiff; (2) whether the plaintiff is a substantial business concern; (3) the relative disparity in the parties' bargaining power; (4) the parties' relative sophistication; (5) whether there is an element of surprise in the inclusion of the challenged clause; and (6) the conspicuousness of the arbitration clause. Id. (citing Carlson v. Gen. Motors Corp., 883 F.2d 287, 293 (4th Cir. 1989)).

Applying these factors to the Arbitration Agreement shows the fundamental unfairness of the bargaining process. Initially, the Arbitration Agreement is an adhesion contract in that it was printed on a standardized form, offered to Mr. Acevedo (through Wife) on a take-it-or-leave-it basis, and did not offer any chance to negotiate. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Adhesion contracts are not per se unconscionable but identifying a document as an adhesion contract is a starting point for analyzing the substantive factors. Simpson, 373 S.C. at 27, 644 S.E.2d at 669. The first factor favors Respondent because Mr. Acevedo's injuries were personal and substantial. Appellants' alleged negligence led to a painful broken hip and other serious injuries. (R. p. 43 ¶ 51).

The other factors also favor Respondent. Wife was not a substantial business concern. She was acting only as Mr. Acevedo's representative with the aim of obtaining the nursing care he urgently needed. In contrast, Appellants are sophisticated business entities evidenced in many ways including the complex organization structure they have built to manage the Facility's operations. See R. pp. 35-36 ¶¶ 8-12. Appellants contend the arbitration agreement only applies to the Facility. The disparity in bargaining power is considerable. Appellants operate nursing homes in nearly twenty states and report annual revenues exceeding $ 1 billion. (R. pp. 35, 37 ¶¶ 4, 20). Mr. Acevedo, on the other hand, was a vulnerable man in poor health in need of care to continue from day to day. Additionally, the key language of the Arbitration Agreement was not conspicuous relative to any of the other admission paperwork the Facility presented to Wife. Plus, the lack of conspicuousness and surprise elements relate not only to how prominently an arbitration provision is featured in a contract but also consider whether the way in which the arbitration provision is drafted imposes substantive limitations that would not be immediately apparent to an unsophisticated person. E.g. Simpson, 373 S.C. at 27-28, 644 S.E.2d at 670 (finding arbitration

provision "inconspicuous . . . in light of its consequences" including the deprivation of statutory remedies).

The Arbitration Agreement's discovery bar also meets the second unconscionability requirement because its terms are decidedly oppressive and unfair to Respondent. This Court has signaled its refusal to tolerate arbitration contracts with such extensive discovery restrictions. In Lucey v. Meyer, 401 S.C. 122, 143, 736 S.E.2d 274, 285 (Ct. App. 2012), the court found an employment arbitration contract was not unconscionable, rejecting the "oppressive terms" factor only after finding the contract "places no apparent restrictions on the introduction of depositions of witnesses into arbitration proceedings." The restrictions lacking there are present here. The inescapable reality of the Arbitration Agreement is that Respondent will have no opportunity to conduct depositions. South Carolina's federal district court has found an arbitration contract unconscionable because of "severe discovery limitations." Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582, 614 (D.S.C. 1998). In Hooters of America, the employer went too far when it limited its employee to noticing one deposition unless the arbitrator found a "substantial need" for more. Id. at 601. The Arbitration Agreement poses a far more restrictive view of discovery by excluding all depositions. Several rulings from other jurisdictions have likewise refused to allow nursing homes to shut their former residents out of discovery.[4]

[4] See e.g. Estate of Ruszala v. Brookdale Living Communities, Inc., 1 A.3d 806, 821 (N.J. Super. App. 2010) (limiting plaintiff to expert depositions is "palpably egregious" and "clearly intended to thwart' plaintiffs' ability to prosecute a case involving resident abuse"); Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538, 540, 545 (E.D. Pa. 2006) (discovery limitations were unconscionable when they allowed expert depositions but barred deposition of NH employees or other fact witnesses); Prieto v. Healthcare & Retirement Corp. of Am., 919 So.2d 531, 533 (Fla. App. 2005) (reversing order compelling arbitration since contract included unconscionable discovery restrictions).

Appellants may argue a zero-discovery process is acceptable because it applies with equal force to Appellants. This argument fails for multiple reasons. First, an arbitration proceeding amounting to trial by ambush is hardly consistent with the South Carolina Rules of Alternative Dispute Resolution the Arbitration Agreement purports to incorporate. See Rule 1, SCADR (stating that arbitration "shall be construed to secure the *just*, speedy, inexpensive *and collaborative* resolution" of disputes) (emphasis added). Second, while a zero-discovery rule may seem like an equal burden for both sides, its effects are unequally detrimental to a plaintiff in a nursing home case. However, Respondent was required to provide a Statement of Facts in the Notice of Intent; an expert affidavit listing negligent acts and omissions; and Responses to Standard Interrogatories. Further, nursing home neglect occurs almost exclusively on the nursing home's property, recorded in documents within the home's exclusive control, and performed or witnessed by individuals in the home's employ. If Appellants want to visit the scene, review video of an incident, or speak to the allegedly at-fault individual, they can do so without limitation.

But, without the ability to send a request for production or notice of deposition, Respondent's counsel will have none of this information when the arbitration hearing begins. She will know nothing from Appellants about the incident, witnesses, affirmative defenses, or the operation and management of the Facility. Appellants have no duty to provide documents or to permit inspections. Even attempting to speak with Appellants' employees would present a potential ethical violation. See Rule 4.2, RPC, Rule 407, SCACR. This case shows just how vast the information disparity can be and what a hurdle it poses to a plaintiff's efforts to investigate his claim. Son claims part of Appellants' wrongdoing was in failing to maintain adequate staffing levels to ensure properly qualified personnel were available when Mr. Acevedo was being transferred from his bed and in Appellants' knowledge that its staffing levels were low and

dangerous. (R. pp. 51-52 ¶¶ 99-103). The Complaint further alleges this is more than negligence because Appellants were on notice of these issues but did nothing to address them. (R. pp. 83-86 ¶¶ 269, 277).

To further investigate and prosecute this claim, Respondent needs access to the Facility's records to learn more about its staffing issues. By drafting a contract that prevents discovery, Appellants have made sure Respondent's counsel will have no access to this information and made it far less likely Appellants could face the prospect of punitive damages for alleged reckless misconduct. Finally, the disparity in pre-hearing information is exacerbated further by how South Carolina law required Respondent to initiate the current claims. Pursuant to S.C. Code Ann. § 15-79-125, these claims began not with a Summons and Complaint but rather a Notice of Intent to File Suit which required Respondent to provide an expert affidavit at the earliest possible stage. Thus, Appellants knew the identity of Respondent's expert and an outline of her opinions before the Complaint was even filed. If the Arbitration Agreement is enforced, Respondent will enter the final arbitration hearing known nearly nothing about Appellant's expert witnesses.

Forcing Respondent to arbitrate her claims would also impose on her a substantial, perhaps preclusive, financial burden.[5] While often lauded for its time savings, arbitration proceedings can cost far more than litigating a legal claim because the parties may be called on to compensate the arbitrator and to cover their costs. As the Fourth Circuit recognizes, "it is undisputed that fee splitting can render an arbitration agreement unenforceable where the arbitration fees and costs are so prohibitive as to effectively deny the employee access to the arbitral forum." Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 554 (4th Cir. 2001); see also Green Tree Fin.

[5] The Arbitration Agreement purports to adopt the "South Carolina Alternate Dispute Resolution/Mediation Rules." (R. p. 183). Those rules state that, in the absence of a contrary agreement, parties divide arbitration expenses equally. Rule 9(c), SCADR.

Corp.-Ala. v. Randolph, 531 U.S. 79, 90-91 (2000). The arbitrator-related costs for arbitrating a nursing home negligence action are exponentially greater than court costs for litigating the same claim. (R. pp. 235-36 ¶¶ 5-6). By one estimate, a nursing home resident's family could be expected to pay portion of a $220,000 arbitration bill for a case that, were it filed in state court, would cost the family only a couple hundred dollars in court costs. (R. p. 236 ¶ 6(A)); see e.g. Phillips v. Associates Home Equity Servs., Inc., 179 F. Supp. 2d 840, 846-47 (N.D. Ill. 2001) (finding arbitration costs prohibitive when cost to arbitrate was at least 12 times as much as costs to bring action in federal court). These are expenses Respondent cannot afford to pay. Wife lives on a fixed income and must care for a daughter who is dependent on her for living expenses. (R. pp. 240-41 ¶¶ 8-15). Forcing Respondent to arbitration is an existential threat to the resolution of her claims on their merits.

In sum, the Arbitration Agreement was an adhesion contract offered to a vulnerable man in desperate need of nursing home services under circumstances that deprived him of any meaningful choice. Moreover, the Arbitration Agreement imposes severe discovery restrictions that tilt the arbitration process and outcome dramatically in Appellants' favor. As several other courts have held, contracts like the Arbitration Agreement are unconscionable.

2. As an Additional Sustaining Ground, Mr. Acevedo's Health Care Power of Attorney Did Not Authorize Wife to Execute the Arbitration Agreement.

Appellants contend Wife was expressly authorized to act as Mr. Acevedo's agent when signing the Arbitration Agreement. (Appellants' Br. at 2). However, the instrument Appellants cite for this alleged authority—Mr. Acevedo's "South Carolina Health Care Power of Attorney" ("HCPOA")—designates Wife only as "health care agent" and constrains her authority to "health care decisions." (R. p. 200). The HCPOA's language does not extend Wife's authority to an arbitration contract that concerns only future dispute resolution procedures, not any medical or

nursing services Appellants offered. Moreover, South Carolina statutes and precedent hold that the term "health care" cannot be stretched so far as to include the Arbitration Agreement.

a. The HCPOA's Language Limits its Scope to "Health Care" Decisions.

The HCPOA's language expressly states Wife's limited authority and did not grant her power to sign the Arbitration Agreement on Mr. Acevedo's behalf. Under South Carolina law, the interpretation of a power of attorney is similar to contract interpretation. Watson v. Underwood, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014). Accordingly, contract interpretation principles apply to determine the HCPOA's scope. Stott v. White Oak Manor, Inc., 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019) (citing In re Thames, 344 S.C. 564, 571, 544 S.E.2d 854, 857 (Ct. App. 2001)). Contracts (and powers of attorney) must be interpreted to carry out their parties' intent as determined primarily by the language they chose in the document itself. A court may not read terms into a contract or power of attorney or infer the parties intended a meaning inconsistent with the language they expressed. Radalytic Labs, Inc. v. Culver, 329 S.C. 380, 383, 495 S.E.2d 782, 784 (1997) (citing Blakeley v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976)).

Starting with its title, the HCPOA defines its limited scope. Mr. Acevedo chose to create only a "health care" power of attorney with a specific eye toward his preferences on life-sustaining end-of-life medical treatments ("Advance Directive Regarding a Natural Death"). Wife was appointed not as Mr. Acevedo's general financial or legal representative but only as a "health care agent" to "make health care decisions." (R. p. 200 ¶ 1). Id. Later, the HCPOA enumerated Wife's specific powers but only after reiterating that all such powers must be interpreted as limited to "decisions . . . regarding . . . health care." (R. p. 201 ¶ 4). Wife was empowered to admit and withdraw Mr. Acevedo from locations like the Facility offering medical and nursing services. (R.

p. 201 § 4(C)). However, that section could not have included authority to execute the Arbitration Agreement because Appellants admit that agreeing to arbitration was not required to secure Mr. Acevedo's admission to the Facility. Appellants' Br. at 17.

HCPOA section 4(D) also fails to grant Wife only the authority to enter an arbitration contract. This section only extends to actions "necessary" to the implementation of "health care" decisions. (R. p. 201 § 4(D)). As Appellants admit (Appellants' Br. at 17), executing the Arbitration Agreement could never be "necessary" for Mr. Acevedo to gain admission to the Facility or to receive any of the health services Appellants offer. The remainder of section 4(D) must be construed in light of this overarching limitation on Wife's authority. Wife was permitted to sign a liability release but the HCPOA was silent on waiving Mr. Acevedo's jury trial rights. Wife was empowered to initiate legal actions but only to enforce medical providers' compliance with the medical preferences Mr. Acevedo delineated elsewhere in the HCPOA. (R. p. 201 § 4(D)). The HCPOA never authorized Wife to make decisions related to arbitration and instead went to some lengths to avoid any reference to arbitration. Therefore, the HCPOA did not cover execution of the Arbitration Agreement, and, Wife lacked authority to enter the Arbitration Agreement on Mr. Acevedo's behalf. Since there is no valid arbitration contract, the circuit court correctly denied the Facility's motion to compel arbitration.

b. South Carolina Courts Define "Health Care" to Exclude Execution of an Optional Arbitration Contract.

South Carolina appellate courts have also held that "health care" decisions do not encompass arbitration contracts. In Coleman v. Mariner Health Care, Inc., the South Carolina Supreme Court was tasked with determining whether committing a loved one to arbitration was a "health care" decision. 407 S.C. 346, 755 S.E.2d 450 (2014). Coleman considered this key term as it was defined in South Carolina's Adult Health Care Consent Act ('the Act"), holding that the

statutory definition of "health care" includes medical procedures, nursing care, placement in a nursing home, and agreeing to pay for nursing home services. Id. at 352, 755 S.E.2d at 453. However, a separate arbitration contract—like the Arbitration Agreement Wife signed—was not a "health care" matter because it was (1) not required for the resident's admission to the nursing home; (2) contained no provisions for medical or nursing services; and (3) did not require any financial commitment for medical or nursing services. Id. at 353, 755 S.E.2d at 454. Coleman is directly on point here because, while it construed the term "health care" in the context of the Act, the statute governing health care powers of attorney instructs courts to apply the Act's terms to documents like the HCPOA. S.C. Code Ann. § 62-5-502(c) (stating that generally the Act's provisions "apply to the making of decisions by a health care agent"). This court followed Coleman's lead in Hodge v. Unihealth Post-Acute Care of Bamberg, LLC where it held:

> Even whe[n] a health care power of attorney was present, courts have concluded that the [signatory relative] lacked authority to sign the arbitration agreement . . . because a health care power of attorney granted for medical decisions does not confer authority to sign an arbitration agreement waiving legal rights.

422 S.C. 544, 569-70, 813 S.E.2d 292, 306 (Ct. App. 2018) (citing Curto v. Illini Manors, Inc., 940 N.E.2d 229, 233 (Ill. App. 2010)).

c. Persuasive Authority Recognizes Distinction Between "Health Care" Decisions and Arbitration Contracts.

A number of other jurisdictions have also refused to extend the notion of "health care" to arbitration contracts and have held a health care power of attorney does not authorize an agent to enter an arbitration agreement on a nursing home resident's behalf. Several of these courts have expressly held that, by its nature, agreeing to arbitrate cannot reasonable be considered a "health care" decision. See e.g. Manor Oaks, Inc. v. Campbell, 276 So.3d 830, 834 (Fla. App. 2019) (citing Blankfeld v. Richmond Health Care, Inc., 902 So.2d 296, 300 (Fla. App. 2005) ("waiving the right

to sue for damages in the courts for violations of [state nursing home statute] or common law negligence is not a health care decision"); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 3d 1166, 1170 (N.D. Miss. 2011) (holding that "since the arbitration agreement was not a health care decision," the agent "did not have the authority to bind [the resident] to arbitration"); Texas Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345, 352 (Tex. App. 2007) (finding arbitration contract was a "legal, as opposed to health care decision[]")).

Even when a health care power of attorney contains a broad grant of power to the listed agent, the vast majority of courts have held that authority cannot be stretched so far as to cover an arbitration contract. See e.g. Miller v. Life Care Ctrs. of Am., Inc., ___ P.3d ___, 2020 WL 7416941, at * 8 (Wyo. Dec. 18, 2020) (collecting cases and applying the "majority position" which holds that "execution of an arbitration agreement is not a health care decision"). For these courts, the key factor was the disconnect between admission and arbitration. Fiala v. Bickford Sr. Living Group, LLC, 32 N.E.3d 80, 92 (Ill. App. 2015) ("where the arbitration provision is optional or otherwise not necessary to gain admission to a long-term care facility, the agent acting pursuant to a health-care power of attorney is not authorized to sign the arbitration provision"); Testa v. Emeritus Corp., 168 F. Supp. 3d 1103 (N.D. Ill. 2016) (applying Fiala rule); Life Care Ctrs. of Am. v. Smith, 681 S.E.2d 182, 185-86 (Ga. App. 2009). In other words, even if admitting a resident to a nursing home is a "health care" decision, agreeing to arbitration cannot be where the arbitration contract expressly states that it is not required for admission. Primmer v. Healthcare Indus. Corp., 43 N.E.3d 788, 795 (Ohio App. 2015) ("The decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement"); State ex rel. AMFM, LLC v. King, 740 S.E.2d 66, 75 (W. Va. 2013); see also Morton v. Grace Health & Rehab. of Grenada, LLC, Civil Action No. 4:14-cv-00169-GHD-JMV, 2015

WL 2163827 (N.D. Miss. May 7, 2015). Appellants admit that signing the Arbitration Agreement was not required for Mr. Acevedo's admission. (Appellants' Br. at 17). Therefore, the circuit court followed both South Carolina and persuasive authority in finding the Arbitration Agreement's execution was not a "health care" decision covered by the HCPOA.

This rule applies even to a health care power of attorney with language very similar to the HCPOA. In Estate of Irons v. Arcadia Healthcare, L.C., a Florida appellate court held the broad scope of the health care power of attorney before it did not extend to an arbitration contract. 66 So.3d 396 (Fla. App. 2011). The governing document was titled "Health Care Power of Attorney" and identified the empowered family member as "health care surrogate," which led the court to find its provisions were intended to be limited to decisions that "relate to the direct provision of medical care." Id. at 400. An instrument that so affirmatively limits its scope to health care matters does not extend to matters of "property rights or potential litigation with" a nursing home. Id. To rule otherwise, Irons held, would strain the principal's intent when she executed the health care power of attorney. Id. Similarly, the HCPOA was limited to "health care" decisions in its title and appointed Wife only as "health care agent." (HCPOA at 1). Reading the HCPOA to extend Wife's authority to the optional Arbitration Agreement would strain Mr. Acevedo's intent when he executed the HCPOA and would be inconsistent with substantial South Carolina and persuasive authority.

CONCLUSION

Based on the arguments stated above, Respondent respectfully requests the Court affirm the circuit court's orders denying the Facility's motion to dismiss and compel arbitration. The Arbitration Agreement lacks crucial terms on who would preside over an arbitration proceeding or how that proceeding would be conducted. Moreover, the Arbitration Agreement's restrictions

on discovery and imposition of costs render the Arbitration Agreement unconscionable. Finally, the Court should find, as an additional sustaining ground, that Wife lacked authority to enter the Arbitration Agreement on Mr. Acevedo's behalf. Appellants cite only the HCPOA for Wife's purported authority, and that document limits Wife's power to "health care" decisions, not the execution of a dispute resolution contract.

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April 2, 2021
Rock Hill, SC

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2020-001146

Armando J. Acevedo through his Attorney-in-Fact Marianne Acevedo, …….. Respondent

v.

Hunt Valley Holdings, LLC; THI of South Carolina, LLC; and THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, …… Appellants.

CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), SCACR, Respondent's counsel hereby certifies that Respondent's Final Brief complies with Rule 211(b), SCACR.

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