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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

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2020-CP-42-03818
Case No. 2020-CP-42-03819
Appellate Case No. 2021-000681

Terry Putman, Individually and as Personal Representative of the Estate of Margaret Hensley,

Respondent,

v.

White Oak Estates, Inc., White Oak Management, Inc., and White Oak Manor, Inc.,

Appellants.

APPELLANTS' PETITION FOR REHEARING

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Appellants White Oak Estates, Inc., White Oak Management, Inc., and White Oak Manor, Inc. (collectively, "Appellants"), by and through counsel and pursuant to Rule 221(a), SCACR, petitions this Honorable Court for a rehearing in connection with the unpublished opinion issued in this case on July 24, 2024 and attached hereto that affirmed the circuit court's order denying Appellant's Motion to Compel Arbitration.

INTRODUCTION

This matter arises out of the Respondent's execution of a valid Arbitration Agreement on behalf of her mother, Margaret Hensley, five days before Ms. Hensley's readmission to Appellant White Oak Estates, Inc.'s facility (the "Facility") (R. pp. 118-123; 554). Notably, this was the third time that Respondent had executed an Arbitration Agreement with the Facility on behalf of her mother, and the prior two agreements were substantially similar to the one at issue in this matter. (R. p. 164 – 222; 230 – 264). Moreover, Respondent executed the Arbitration Agreement pursuant to the authority granted to her by her mother in her mother's Durable Power of Attorney. (R. p. 151 – 163).

Based on the foregoing, on February 19, 2021, Appellants filed a Motion to Dismiss, Compel Arbitration, and For a Protective Order, or, Alternatively, to Stay the Action Pending Arbitration as to both cases. (R. pp. 88-89). On April 9, 2021, the circuit court issued its Order denying Appellants' Motion to Dismiss and Compel Arbitration and denied as moot Appellants' Motion for a Protective Order, or, Alternatively, to Stay the Action Pending Arbitration. (R. pp. 1-25). On April 19, 2021, Appellants filed a Motion to Alter or Amend, which was also denied by the circuit court. (R. pp. 26-28; 491-494). This appeal timely followed. (Notice of Appeal, dated June 25, 2021).

On July 24, 2024, this Court affirmed the decision of the circuit court. (Opinion). However, its opinion is based solely on the circuit court's finding of unconscionability. As detailed further below, Appellants respectfully submit that the following points have been overlooked or misapprehended by the Court:

ARGUMENT

I. The Federal Arbitration Act places arbitration agreements on equal footing with all other contracts, so it may not be invalided absent a generally applicable contract defense, but this Court's opinion carves out exceptions specific to arbitration, and, even more specific, to nursing home arbitration.

The Federal Arbitration Act ("FAA"), codified at 9 U.S.C. § 1 (1947) *et seq*., applies to this action. The United States Supreme Court has held that the FAA applies whenever an arbitration agreement involves interstate commerce unless the parties specifically contract otherwise. As previously demonstrated to this Court, the parties agreed that the FAA applied when they entered the Arbitration Agreement. (R. p. 119). Beyond this, the South Carolina Supreme Court, in following other federal and state courts, held that nursing home arbitration agreements like the one personally signed by Respondent involve interstate commerce and are thus controlled by the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (holding that an arbitration agreement signed by a resident's family member upon admission involved interstate commerce because the nursing home is contractually obligated to provide food and medical supplies that are shipped across state lines). Consequently, it establishes the lens through which Appellants' Motion must be viewed. It also prescribes **Respondent's burden of proof**. *See* 9 U.S.C. § 2 (2022) (providing requirements for enforcement of an arbitration agreement). Notwithstanding, neither this Court nor the circuit court gave due regard to the FAA or South Carolina law favoring arbitration. *See Johnson v. Heritage Healthcare of*

Estill, LLC, 416 S.C. 508, 513, 788 S.E.2d 216, 218 (2016) (internal citation omitted) ("South Carolina courts favor arbitration."). Indeed, it is not even mentioned in this Court's opinion. Thus, it is no surprise that both courts reached the wrong conclusion and this Court's opinion warrants a rehearing.

The FAA provides that a "…contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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. In other words, a court may not refuse an arbitration agreement unless the party opposing arbitration establishes "a generally applicable contract defense," and not some defense that singles out arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333, 339 (2011); *see also DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54-59 (2015) (overruling California law that interpreted arbitration agreements in ways that were "unique, restricted to that field . . . [and] focused only on arbitration."). Therefore, in practice, arbitration agreements like the one signed by Respondent enjoy a strong presumption of validity in federal and state courts. *See Brantley v. Republic Mortgage Ins. Co.*, 2004 U.S. Dist. LEXIS 28831, *5 (D.S.C. 2004), *aff'd* 424 F.3d 393 (4th Cir. 2005) (internal citation omitted) ("[D]ue regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration."); *Towles v. United Healthcare Corp*., 338 S.C. 29, 41, 542 S.E.2d 839, 846 (Ct. App. 1999) (stating that South Carolina courts "must address questions of arbitrability with a healthy regard for the federal policy favoring arbitration").

In spite of the foregoing law, this Court took a different approach in its opinion. It did what the FAA and South Carolina law prohibit: it failed to acknowledge the FAA and the guiding policy in favor of arbitration agreements and created a standard for unconscionability that is specific to arbitration agreements, and even more so, nursing home arbitration agreements. In fact, this Court differentiated nursing home arbitration agreements from "high-level" and other arbitration agreements – further removing this Arbitration Agreement from a general contract analysis. (Opinion, p. 4).

Consequently, instead of objectively analyzing whether (i) Respondent had a meaningful choice and (ii) whether the terms were so oppressive that no reasonable person would make them, and no fair and honest person would accept them, as South Carolina courts do in any other context, this Court (like the circuit court) noted that this case involved a nursing home arbitration agreement and then operated under a non-rebuttable presumption that Respondent was not sophisticated, did not have the ability to consult legal counsel, did not have a deep understanding of the arbitration process, and did not have "large sums of money" at her disposal. (*Id.*). It plainly ignored the evidentiary record in order to support this faulty presumption.

Specifically, it favorably cited the circuit court's overly broad generalization that "the decision to place a loved one in a nursing facility is typically made 'in the midst of a crisis brought on by a precipitous deterioration in health status, disability level, or the loss of a caregiver or spouse[,]'" and subsequently accepted the Affidavit of Respondent to that effect although it was contradictory and wholly rebutted by Appellants' evidence.[1] For example, Respondent testified in her Affidavit that she was "required" to sign the Arbitration Agreement but also testified that no

[1] This Court does not have to honor the factual findings of the circuit court if those findings are not reasonably supported by the evidence in the record. *Sanders v. Savannah Highway Auto. Co*., 440 S.C. 377, 382, 892 S.E.2d 112, 114 (2023). Such is the case here.

one from the Facility alerted her to the Arbitration Agreement or explained it to her. (R. pp. 554-55). She also testified that she was under "stress" at the time that she signed it. (*Id.*). However, Appellants established that Respondent signed the Arbitration Agreement five days before her mother's re-admission to the Facility; that this was the third time her mother had been admitted to the Facility; and that this was the third time that Respondent executed an Arbitration Agreement with the Facility. (R. pp. 118-123; 554; 164 – 222; 230 – 264). Thus, Respondent did not execute the Arbitration Agreement on the day of a brand-new admission as is commonly done (and yet enforced, including by this Court) and the circumstances of her execution are distinguishable from the Court's sweeping premise.

Importantly, if all courts begin their analysis from this Court's premise, every nursing home arbitration agreement will be invalidated using the same tactics as Respondent – i.e., submitting an affidavit stating that he or she was under stress when he or she signed the arbitration agreement. In addition to violating the FAA, this sets a dangerous precedent.

In addition to operating under a faulty premise, this Court also considered whether the Arbitration Agreement had been "discussed or explained to [Respondent] prior to signing." (Opinion, p. 5). Yet, in South Carolina, a person signing a document is responsible for reading it and making sure of its components. *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003). Moreover, every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he or she signs it. *Id.* This includes arbitration agreements. *Wachovia Bank v. Blackburn*, 407 S.C. 321, 332-3, 755 S.E.2d 437, 443 (2014) (internal citations omitted) ("[A]lthough the right to a trial by jury is a substantial right, and we 'strictly construe' such waivers, '[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it."). Therefore,

whether the Facility read or explained the Arbitration Agreement to Respondent could not have rendered it unconscionable and holding differently would be specific to this context of a nursing home arbitration agreement.

Finally, this Court also considered Respondent's ability to pay in determining whether the Arbitration Agreement was unconscionable. (Opinion, p. 5). However, neither this Court nor Respondent cited to any South Carolina law that allows a party to a contract to avoid the contract because she cannot satisfy it. Interestingly, it is not even one of the five factors that the Court cited as "key" to the analysis of unconscionability. Accordingly, this consideration, like those above are exclusive to this Arbitration Agreement, which runs afoul of the FAA and South Carolina law.

II. The Arbitration Agreement is not unconscionable because nothing prevented Respondent from declining to sign or altering its terms, including the same terms to which she could be subject in traditional litigation, and the terms applied equally to both parties.

This Court adopted the circuit court's finding of unconscionability based, in part, on the specific procedures in the Arbitration Agreement, such as the time allotted for selecting arbitrators and the provision awarding arbitration costs to the prevailing party.[2] The Court also seemingly concluded that the Arbitration Agreement was an adhesion contract.[3] (Opinion, pp. 5-6). However, the Court neglected that Respondent had a meaningful choice over the terms of the Arbitration Agreement. Moreover, she did not have to sign it in the first place.

The Arbitration Agreement was not required for Ms. Hensley's admission. It expressly and conspicuously stated that, as well as that it was a voluntary agreement, that it afforded Respondent

[2] In its discussions of unconscionability, the Court also cited Respondent's claims that she was under stress when she signed the Arbitration Agreement and that it was never read or explained to her. As detailed above, neither of these two claims can support a finding of unconscionability.

[3] While the Arbitration Agreement was not an adhesion contract because its terms were not "hastily" foisted upon Respondent and were not on a "take it or leave it basis," even assuming *arguendo* that it was, it did not render it unconscionable per se. *Munoz v. Green Tree Fin. Corp*., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding that under South Carolina law, an adhesion contract is not per se unconscionable).

the right to seek counsel about the agreement, and that it afford Respondent the right to revoke within thirty days of its execution. Significantly, Respondent acknowledged that she read this information. Furthermore, this language was identical to the first two Arbitration Agreements that she signed, and this Arbitration Agreement was presented to her well in advance of Ms. Hensely's admission (i.e., at least five days). This not only undermines that Respondent was less familiar with the arbitration process as the Court presumed, but it also shows that this could have been an interactive process had Respondent so desired. Stated another way, nothing prevented Respondent or her counsel from striking, editing, or adding clauses, including the time given to select arbitrators. The fact that she did not does not render the contract unconscionable or transform it into an adhesion contract.

Moreover, Respondent could have struck the clause in the Arbitration Agreement that allows the prevailing party to avoid the costs of the arbitration if successful. Markedly, she would not be afforded the same luxury by the circuit court if she was statutorily liable for costs, which is frequently a possibility in traditional litigation and likely to be more onerous because discovery in traditional litigation is often prolonged and involves multiple experts. *See e.g.*, S.C. Code § 15-37-20 (1962) (allowing recovery of costs from the opposing party if successful in trial). **This is true even if a jury awards her zero dollars.** Therefore, the process, to which Respondent voluntary agreed and under this Arbitration Agreement, is not counter to due process as the Court suggested and the cost of arbitration under this Arbitration Agreement does not outweigh the cost of proceeding to court.

Also, the Court overlooks that Appellants were subject equally to the clauses of which the Court is critical, and that Appellants were equally at risk of having their fate decided by two arbitrators selected by Respondent, as well as having the award submitted by Respondent selected

by the arbitrators. Thus, unlike the Arbitration Agreement in *Huskins v. Mungo Homes, LLC*, cited by the Court and wherein the defendant reduced the statute of limitations in the agreement, the arbitration process in this Arbitration Agreement does not disproportionately affect Respondent as compared to Appellants. 439 S.C. 356, 369-70, 887 S.E.2d 534, 541 (Ct. App. 2023), *cert. granted* (Feb. 7, 2024). If anything, the Arbitration Agreement affords Respondent more authority over her potential award than she would have at a jury trial. Specifically, she may have more decision makers in her corner and may obtain a higher award than a jury would be willing to award. Therefore, the Arbitration Agreement creates a level playing field and there is simply no basis for concluding that the Arbitration Agreement is unconscionable.

III. Respondent failed to meet her burden of proof to prove that the Arbitration Agreement was unconscionable.

In addition to erroneously concluding that the Arbitration Agreement was unconscionable, the Court also incorrectly placed the burden of proof on Appellants. In fact, it wrote that Appellants "did not address" the two-prong test to declare the contract unconscionable. However, as discussed above, the burden of invalidating an arbitration agreement is on the party opposing arbitration. *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016) (internal citation omitted) ("The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration."). Plaintiff has not and will not be able to meet her burden of proof. This likewise supports a rehearing.

CONCLUSION

A proper analysis of the Arbitration Agreement, with deference to the FAA and state law favoring arbitration, will only support one conclusion: that the Arbitration Agreement is a valid contract and that there is no defense to its enforcement. As the above demonstrates, the Arbitration

Agreement is not unconscionable as Respondent had a choice over its contents, as well as to enter into it. Furthermore, it applies equally to both parties and thus promotes a fair resolution of this matter. Moreover, it was voluntarily entered into by Respondent who had entered similar agreements with Appellants at least twice before. Because this Court's opinion reaches the opposition conclusion, a rehearing is appropriate. Accordingly, Appellants respectfully request that this Honorable Court vacate its unpublished opinion and grant their Petition for rehearing.

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August 8, 2024

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Terry Putman, Individually and as Personal Representative of the Estate of Margaret Hensley, Respondent,

v.

White Oak Estates, Inc., White Oak Management, Inc., and White Oak Manor, Inc., Appellants.

Appellate Case No. 2021-000681

Appeal From Spartanburg County
Grace Gilchrist Knie, Circuit Court Judge

Unpublished Opinion No. 2024-UP-278
Submitted June 1, 2024 – Filed July 24, 2024

AFFIRMED

Joshua Tate Thompson, of Boulier Thompson & Barnes, LLC, of Spartanburg for Appellants.

Matthew W. Christian, of Christian & Christian, LLC, of Greenville, and Jordan Christopher Calloway, of McGowan Hood Felder & Phillips, of Rock Hill, for Respondent.

PER CURIAM: In this wrongful death and survival action alleging nursing home negligence, White Oak Estates, Inc., White Oak Management, Inc., and White Oak Manor, Inc. (collectively, Appellants) argue the circuit court erred in denying its Motion to Dismiss, Motion to Compel Arbitration, and Motion for a Protective Order or, alternatively, a Motion to Stay the action pending arbitration. We affirm.

FACTS

Margaret Hensley (Ms. Hensley) granted Terry Putman (Daughter) a comprehensive Durable Power of Attorney (POA) on October 7, 2011. In August 2017, Ms. Hensley was admitted to White Oak Estates (the Facility) for a short-term rehabilitative stay after undergoing a hip arthroplasty at Spartanburg Regional Medical Center. At the time of admission, Ms. Hensley had an articulating brace for her leg to keep it immobilized as a result of the hip surgery. There was a skin abrasion below the edge of the brace. Ms. Hensley died on September 25, 2017 from complications arising from an infection in the wound.

Prior to Ms. Hensley's admission, Daughter signed an Admission Agreement and an Arbitration Agreement presented to her by agents of the Facility. The Arbitration Agreement provides three arbitrators will be on the panel to hear the case. However, two of the arbitrators do not have to be attorneys or have any experience with the subject matter or legal issues. The arbitrators may be anyone the party knows at the time, with few exceptions. Each party is entitled to choose one arbitrator. If the arbitrator chosen by Daughter and the arbitrator chosen by the Facility cannot agree upon a third arbitrator, a coin toss will determine who gets to choose the final arbitrator. Within ninety days of written notice of a claim, the first party may choose their arbitrator. After that arbitrator is chosen, the second party likewise has ninety days to choose their arbitrator. Within ninety days of the second party's notification of the chosen arbitrator, the two arbitrators must meet to choose a third arbitrator. Within ninety days of choosing the third arbitrator, a hearing must be held. The time limits set forth in the Arbitration Agreement allow for several months to pass before the arbitration process even begins. The Arbitration Agreement further provides that twenty-four hours prior to the hearing, each party must submit their demand/offer for settlement. The panel of arbitrators has no discretion to award any amount different from what one of the parties offered.

Daughter filed the Notice of Intent to File Suit on March 25, 2020, and served the Facility on June 9, 2020. The parties engaged in mandatory pre-suit mediation, which was unsuccessful. Daughter filed wrongful death and survival actions on

November 2, 2020, and timely served the Facility. In her Complaint, Daughter alleged because of the Facility's negligence, Ms. Hensley developed a wound near her articulating brace which led to an infection, sepsis, and her ultimate death. The Facility filed a Motion to Compel Arbitration on February 19, 2021. In its order dated April 9, 2021, the circuit court denied the Motion to Compel, finding the arbitration agreement unconscionable. A Motion for Reconsideration was also denied by order dated May 28, 2021. This appeal followed.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Appeal from the denial of a motion to compel arbitration is subject to de novo review. *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). Also, "[w]hether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to de novo review by an appellate court." *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019). "[W]e must honor the factual findings of the circuit court pertinent to its arbitration ruling if those findings are reasonably supported by evidence in the record." *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 382, 892 S.E.2d 112, 114 (2023).

LAW/ANALYSIS

I. Unconscionability

Appellants argue the circuit court erred in finding the Arbitration Agreement unenforceable because it is unconscionable. We disagree.

Appellants argue there is no evidence supporting a claim of unconscionability because the Arbitration Agreement was not an adhesion contract, signing it was not required to gain admission for Ms. Hensley to White Oak Estates, it contained an opt-out clause that Respondent initialed in addition to signing the Arbitration Agreement, and it foreclosed no type of recovery—it only specified a forum. Additionally, Appellants contend Ms. Hensley was "familiar with what she was doing, given ample notice of what she was being asked to sign, and given the opportunity to reflect on her agreement to arbitrate and rescind it. Still, she executed the Agreements and did not rescind her consent to binding arbitration." Further, Appellants argue unconscionability is speculative because it is not developed in the record; however, the circuit court's order specifically addressed

the unconscionable nature of the Arbitration Agreement. Respondent highlights the circuit court found the circumstances surrounding the presentation of the Arbitration Agreement and the inequities in its terms met South Carolina's two-prong test to declare the contract unconscionable. Appellants did not address this test and instead focused on whether (1) the Arbitration Agreement was an adhesion contract and (2) the Arbitration Agreement's terms were reasonable under federal law.

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. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). The "absence of meaningful choice" element "speaks to the fundamental fairness of the bargaining process." *Id.* The key factors for analysis as to 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)). "If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result." *Id.*

This court recently found an arbitration clause unconscionable and thus unenforceable because the final two sentences of the arbitration clause at issue effectively shortened the statutory period to raise an issue following the party's termination of the overarching agreement. This court found "[e]ven though this provision purports to apply equally to both parties, as a practical matter, it would disproportionately affect the homebuyer's ability to bring a claim. Further, it is not "geared towards achieving an unbiased decision by a neutral decision-maker." *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 369–70, 887 S.E.2d 534, 541 (Ct. App. 2023), *cert. granted* (Feb. 7, 2024); *See Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)). The *Hooters* decision

struck down an arbitration clause because it incorporated rules so "warped" and void of due process that any arbitration under them would have been a "sham." *Hooters*, 173 F.3d at 940.

The circuit court found the terms of the Arbitration Agreement were unconscionable and therefore unenforceable because (1) Daughter lacked meaningful choice in the terms of the Arbitration Agreement; (2) the terms of the agreement were unfair and no person would voluntarily agree to them; (3) the Arbitration Agreement allowed for substantial delays in the process, thus defeating the purpose of arbitration; and (4) the arbitrators had no discretion to award anything other than one of the offers presented by the parties, resulting in the cost of arbitration far outweighing the cost of proceeding to court.

In its order, the circuit court notes an arbitration agreement employing this strategy is better suited for sophisticated litigation. Each party must submit one final resolution and the arbitrators have no discretion to change the terms. In other words, it is one outcome or the other. Nursing home arbitration agreements differ from high-level arbitration agreements based on the sophistication level of the parties, the ability to consult legal counsel, the deep understanding of the arbitration process, and the large sums of money at the parties' disposal. The circuit court notes employing this strategy in this line of nursing home arbitration agreements creates a significant disparity in bargaining power because nursing homes tend to be sophisticated entities well versed in arbitration, while the residents and representatives have less knowledge and understanding of the process.

As a result of utilizing this arbitration strategy, the non-prevailing party is then required to pay all of the prevailing party's costs and expenses including, but not limited to, the third arbitrator's fees and any other costs associated with the hearing. The circuit court's order notes this results in the cost of arbitration far outweighing the cost of proceeding in court; thus, rendering the agreement unconscionable. The order further highlights, per Daughter's affidavit, Ms. Hensley's Estate had no assets and no income whatsoever. The amount of money it would cost to begin and proceed through the process of arbitration far exceeds what is available to Respondent. The circuit court's order cites to *Fi-Tampa, LLC v. Kelly-Hall*, 135 So.3d 563 (Fla. App. 2014), which explains:

> Although the costs of arbitration may be a basis for determining that an agreement to arbitrate is substantially unconscionable, since *Green Tree* the issue of the prohibitive costs of arbitration has developed into a

> separate defense to the enforcement of an arbitration agreement. *See Zephyr Haven*, 122 So.3d at 921–22. "[W]here 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'" *Id.* at 921 (quoting *Green Tree*, 531 U.S. at 92, 121 S.Ct. 513). In determining whether the costs of arbitration in a fee splitting arrangement are so prohibitive as to render the agreement unenforceable because it denies the plaintiff access to the arbitral forum, a case-by-case analysis is appropriate. *Id.* at 922. The focus is on the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigating in court, and whether the cost differential is so substantial as to deter the bringing of the claims. *Id.*

We find the circuit court did not err, and we find the Arbitration Agreement was unconscionable. In its order, the circuit court first asserts the decision to place a loved one in a nursing facility is typically made "in the midst of a crisis brought on by a precipitous deterioration in health status, disability level, or the loss of a caregiver or spouse." Often, because of the unplanned nature of admission and time pressures, families lack the ability to consider alternative options for their loved ones. Here, Daughter signed an affidavit stating she was required to sign the Admission Agreement under stress during her mother's hospitalization, and the Arbitration Agreement was never discussed or explained to her prior to signing. Further, Daughter lacked a meaningful choice in the terms of the Arbitration Agreement, and was not involved in the drafting of the Arbitration Agreement. The Arbitration Agreement sets time limits that allow for extensive delays in the process; this ultimately defeats the purpose of arbitration—to promote efficiency and timeliness that is often not possible when the issues proceed to court.

We agree and adopt the circuit court's finding of unconscionability. We find instructive this court's affirmance in *Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020). In *Doe*, this court found the agreement unconscionable for the following reasons:

> [I]t was an adhesion contract [and] it was foisted on Doe "hastily" on a "take it or leave it basis" amidst a transaction by a single consumer with an international

> automotive concern. Doe had no counsel and the injuries she alleges are far removed in time and space. These findings of the circuit court are well anchored by the record.

Id. at 613, 846 S.E.2d at 879-80.

We likewise find the Arbitration Agreement here was unconscionable and unenforceable. Accordingly, the circuit court did not err in denying the motion to compel arbitration.

II. Favorability of Arbitration, Merger, and the Wrongful Death Action as to Defendants White Oak Estates, Inc. and White Oak Manor, Inc.

Because we find the circuit court did not err in denying Appellants' motion to compel arbitration based upon unconscionability, we need not address the additional issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address the remaining issues because its resolution of a prior issue was dispositive).

CONCLUSION

Based on the foregoing, the circuit court's order is

AFFIRMED.[1]

THOMAS, MCDONALD and VERDIN, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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Appellants.

PROOF OF SERVICE

I certify that I have served the Appellants' Petition for Rehearing by electronic mail on August 8, 2024, addressed to their attorneys of record at the below addresses:

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Attorneys for Appellants

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Aug 09 2024
SC Court of Appeals

SMYTH WHITLEY, LLC
ATTORNEYS AT LAW

August 8, 2024

VIA ELECTRONIC FILING
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Clerk of Court
ctappfilings@sccourts.org

Re: Terry Putman, Individually and as Personal Representative of the Estate of Margaret Hensley v. White Oak Estates, Inc., White Oak Management, Inc., and White Oak Manor, Inc.
Spartanburg County Civil Case Nos.: 2020-CP-42-03818 and 2020-CP-42-03819
Appellate Case No.: 2021-000681

Dear Ms. Kitchings:

Enclosed for electronic filing, please find the following regarding this matter:

Notice of Appearance on Behalf of Appellants;
Proof of Service regarding the Notice of Appearance on Behalf of Appellants;
Appellants' Petition for Rehearing and corresponding Exhibit A; and
Proof of Service regarding Appellant's Petition for Rehearing.

The filing fee for this motion of $50.00 is being mailed contemporaneous with these filings.

With warm personal regards, I remain,

Very truly yours,

Joshua S. Whitley

JSW:tmf
Enclosures

cc: Matt Christian, Esquire
Jordan Calloway, Esquire

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