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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Civil Case No. 2023-CP-07-00646

Appellate Case No: 2024—000869

Amber Leigh Lovelace, by and through her
Conservator, Richard Cooler, ...Respondent,

v.

Steven Lovelace, Regions Bank,
Cetera Investment Services D/b/a Regions Investment
Services, and Christopher Lazurek, ... Defendants.

Of whom Regions Bank,
Cetera Investment Services d/b/a Regions Investment
Services, and Christopher Lazurek are,.....Appellants.

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III. Whether the circuit court finding that the language in the arbitration agreements did not encompass the underlying dispute was proper.

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V. Whether the Appellants waived any right to arbitration by availing themselves of the lower court's jurisdiction.

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STATEMENT OF THE CASE

Following the filing of the underlying complaint against Appellants, Appellants filed a Motion to Compel Arbitration. The circuit court denied the Motion in an Order filed December 7, 2023, reasoning that enforcement of the arbitration clauses would be unconscionable, that the agreement failed for lack of consideration, and that Appellants had waived arbitration by entering into a Restricted Account Agreement subjecting them to the court's jurisdiction. (Order Den. Mot. to Compel; R. p. ___). Appellants thereafter filed a Motion to Reconsider, Alter, or Amend on December 18, 2023. (Mot. to Reconsider; R. p. ___). In an Order filed May 7, 2024, the circuit court denied the Motion to Reconsider. Appellants then appealed the circuit court's Order denying their Motion to Compel Arbitration.

STATEMENT OF FACTS

In September 2015, when Amber Leigh Lovelace ("Amber") was just five (5) years old, her mother died tragically in a motor vehicle accident. Consequently, Amber inherited assets including life insurance and proceeds from a settlement for the accident. State law required that Amber have a conservator appointed to handle Amber's assets, and Amber's father Steven A. Lovelace ("Lovelace") was thus appointed by the Beaufort County Probate Court in an Order dated February 3, 2016. As a condition of his appointment, Lovelace was required to place all conservatorship funds into one or more restricted accounts from which no funds could be expended without a prior court order. The financial institutions holding conservatorship funds were also ordered to execute a Restricted Account Agreement, acknowledging the restricted nature of the subject accounts.

Lovelace then opened two conservatorship accounts: (1) an investment account with Cetera Investment Services LLC d/b/a Regions Investment Services ("Cetera") (account number -5218); and (2) a savings account with Regions Bank ("Regions") (account number -3680).

Both Cetera and Regions knew the bank accounts were associated with a conservatorship, and both had notice that the accounts were to be restricted. Regions and Cetera shared the same office location in Beaufort, South Carolina. Defendant Christopher Lazurek, a representative of Cetera who worked at the Beaufort office, signed the required Restricted Account Agreement for these accounts, which set forth that "any and all withdrawal(s) from said account(s) shall be allowed only upon prior written approval of the Beaufort County Probate Court authorizing a specific withdrawal for a specific amount at a specific time or pursuant to a budget which has been pre-approved by the Court...." (Ex. A to Resp't's Mem. in Opp. to Mot. to Compel Arb.; R. p. ___).

The Restricted Account Agreement also addressed transfers, requiring that if transfers were made, the financial institution to which funds were transferred must also have a new and separate Restricted Account prior to any transfers to that institution. While no separate Restricted Account Agreement for Regions has been produced, Regions received a copy of the Conservator's Contract and Order of the Probate Court, which set forth that certain transactions require court approval. Prior to establishing the restricted account, Regions should have also reviewed the Court's Order which set forth the requirement that conservatorship accounts be restricted. While Regions established the account as a conservatorship account, it failed to set up the proper account restrictions.

In July 2017, just over a year after Lovelace's appointment, Regions allowed him to begin withdrawing funds from the Regions account without prior authorization from the Probate Court. When the balance on the Regions account became low, Cetera allowed him to transfer funds from the Cetera account to the Regions account, transferring the funds into an account without proper restrictions. Regions then allowed Lovelace to withdraw the funds from the Regions account. These acts all occurred without prior court order. Between the unauthorized withdrawals, wire fees, and bank fees, $169,044.00 was removed from Amber's conservatorship accounts.

In December 2022, both Cetera and Regions became aware that Lovelace had taken funds from both accounts without authorization from the Probate Court. The banks subsequently froze the accounts so that further funds could not be expended. Shortly after Lovelace's misdeeds were discovered, he left the jurisdiction and Amber was placed in the care and custody of her maternal grandfather, Richard A. Cooler ("Cooler"). Because of the improper actions of Lovelace and the Appellants in disbursing the conservatorship funds without the permission of the Probate Court, Cooler was appointed as Successor Conservator by the Beaufort County Probate Court by Order

dated January 13, 2023. The Order required Cooler to enter a Restricted Account Agreement with Appellants that prohibited any distributions without court permission and provided that, "[a]ny financial institution entering into a restricted Account Agreement in doing so submits itself to the personal jurisdiction of this Court." (Ex. B to Resp't's Mem. in Opp. to Mot. to Compel Arb.; R. p. ___).

Once appointed Successor Conservator, Cooler contacted Regions to have his name substituted on the conservatorship accounts in which Lovelace was the prior Conservator. On January 30, 2023, Cooler and Amber visited the Beaufort branch of Regions and Cetera and met with bank manager Mark Weeks ("Weeks"). During that meeting, Weeks was provided with the Probate Court's Order Appointing Richard A. Cooler as Successor Conservator. (Aff. Richard Cooler ¶10; R. p. ___).

Weeks provided paperwork for both the Cetera account and the Regions account for Cooler to sign in order to add his name on both accounts. For the Cetera account, Weeks provided a document entitled "New Account Application." In a review of the document, it is clear that the form is associated with the initial account opened by Lovelace, including several references to him. The page on which Cooler signed, Page 6, contained the following paragraph:

> By signing below, I acknowledge and agree that (1) I have received, read and understand and agree with all of the information contained within this document; (2) the Internal Revenue Service does not require that I consent to any provision other than the certifications required to avoid backup withholding; (3) I have received, read and understand "Form CRS: Customer Relationship Summary for Cetera Investment Services LLC"; (4) I have read and understand the section labeled "The Big Picture," which describes the differences between commission-based brokerage and fee-based advisory services; (5) I have received, read and understand the separate document entitled "Things to Consider Before Making an IRA Rollover"; (6) I have received, read, and understand the document titled "Regulation Best Interest Supplemental Disclosure for Cetera Investment Services LLC": (7) I have received the brochure titled "Important Information

> About Your Cetera Investment Services Relationship, including Cetera Investment Services' Privacy Policy"; and (8) *I understand that this agreement contains a predispute arbitration clause that is fully set forth in paragraph 20 on page 9 of this form.*

(Ex. A to Appellants' Mot. to Compel Arb.; R. p. ___) (emphasis added). Page 9, which was not provided to Cooler (Aff. Richard Cooler ¶12; R. p. ___), contains the arbitration language at issue in this case. Specifically, the arbitration clause provides "I AGREE THAT ANY DISPUTE BETWEEN ME AND YOU *ARISING OUT OF THIS AGREEMENT* SHALL BE SUBMITTED TO ARBITRATION...." (Ex. A to Appellants' Mot. to Compel Arb.; R. p. ___) (emphasis added).

With regard to the Regions account, Weeks provided a "Fiduciary Account Maintenance and Signature Form." Cooler signed in the "Owner Authorization" section; beside his signature, in very small font, appears the following language:

> By signing, I acknowledge receiving and agree to each and every term, condition, and provision of the Deposit Agreement (including without limitation, the ARBITRATION AND WAIVER OF JURY TRIAL provisions thereof and the provisions for changing the terms thereof) and related disclosures for this account.

(Ex. C to Appellants' Mot. to Compel Arb.; R. p. ___).

The arbitration language Regions seeks to enforce in this case appears in a "Deposit Agreement," which is a separate stand-alone 51-page document. The arbitration language in that document seeks to bring all matters, even those that occurred before the effective date of the agreement, to arbitration.

STANDARD OF REVIEW

The standard for the appellate review of a circuit court's denial of a motion to compel arbitration is a de novo review. *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). A trial court's findings "will not be reversed on appeal if any evidence reasonably supports the findings." *Id.*

ARGUMENT

The determination as to the existence of a valid arbitration agreement is for judicial determination; courts consider general contract defenses including fraud, duress, and unconscionability. *315 Corley CW, LLC v. Palmetto Bluff Dev., LLC,* 2024 WL 4763646, -- S.E.2d -- (Ct. App. 2024); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001).

I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE ARBITRATION CLAUSES IN THE AGREEMENTS WITH CETERA AND REGIONS WERE UNCONSCIONABLE.

The determination of unconscionability must be made on a case-by-case basis. *S.C. Farm Bureau Mut. Ins Co. v. Kennedy*, 398 S.C. 604, 614, 730 S.E.2d 862, 867 (2012) (citing *Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005)). For an arbitration agreement to be unconscionable, two elements must be present: (1) lack of meaningful choice; and (2) oppressive, one-sided terms. *315 Corley*, 2024 WL 3514884, ___, -- S.E.2d ----, ___ (Ct. App. 2024). Both elements do not need to be present to the same extent; the more procedurally unconscionable a contract is, the less substantive unconscionability is required, and vice versa. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 612, 879 S.E.2d 746, 755 (2022) (citing 17A Am. Jur. 2d *Contracts* § 272 (2016)).

In the case at hand, both elements to find unconscionability are satisfied.

A. Cooler lacked any meaningful choice in signing the agreements with Cetera and Regions.

"Whether one party lacks a meaningful choice ... typically speaks to the fundamental fairness of the bargaining process." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016). Parties frequently claim they lack a meaningful choice when, like in the instant case, a contract of adhesion is involved. *D.R. Horton*, 417 S.C. at 49, 790 S.E.2d at 4 (explaining adhesion

contracts as "standard form contracts offered on a take-it or leave-it basis with terms that are not negotiable" (internal alteration marks omitted) (citation omitted)). Because contracts of adhesion are non-negotiable, "[a]n offeree faced with such a contract has two choices: complete adherence or outright rejection." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (citation omitted). Furthermore, this Court just clarified the laws in this State as it relates to meaningful choice in *315 Corley*, wherein this Court explicitly found that contracts which require "automatic and mandatory" agreement to arbitration terms demonstrates a contract of adhesion wherein one side has no "conceivable potential" to bargain the arbitration terms. *315 Corley*, 2024 WL 3514884, at *5. Here, Cooler had no choice but to sign the documents of Appellants to take over as Conservator for his granddaughter's funds. In fact, it appears that Regions would have sought to apply the agreement even if he had not signed the signature card but had simply withdrawn funds from the account. (Ex. D to Appellants' Mot. to Compel Arb.; R. p. ___).

Although contracts of adhesion are not automatically unconscionable, courts tend to view them with "considerable skepticism." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 669 (2007). The existence of a contract of adhesion goes toward the absence of meaningful choice on the part of a party and the overall fundamental fairness of the bargaining process. *Id.* at 25, 644 S.E.2d at 669. Courts then look at several factors in evaluating procedural unconscionability, including: the nature of the plaintiff's injuries; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; and the parties' relative sophistication. *Id.*; *Smith v. D.R. Horton,* 417 S.C. at 49, 790 S.E.2d at 4 (2016); *315 Corley*, 2024 WL 3514884, at *4.

Appellants have substantially argued about the effect of Cooler signing the bank documents when he sought to substitute his name on the accounts. With regard to Regions, Appellants contend that Cooler was bound to the arbitration language contained in a stand-alone 51-page document. Despite there being no testimony that the Deposit Agreement was actually provided to Cooler, only that it should have been provided in the ordinary course of business, Appellants state that the document is available for viewing on-line at https://www.regions.com/-/mediaia/pdf/terms/Deposit-Argreement.pdf?6123. (Appellants' Initial Brief at p. 7). It appears that whether Cooler had simply closed the existing account or substituted his name on the account, Regions would have attempted to subject him to the terms of the "Deposit Agreement." The plain language of the Regions account agreement, the 51-page document not provided to Cooler, sets forth that by "withdrawing funds from" an account or by "using an account," a person becomes bound to the terms of the Agreement. (Ex. D to Appellant's Mot. to Compel Arb.; R. p. ___). This certainly supports the procedural unconscionability of enforcement of the subject arbitration agreement.

In this case, we have a grandfather who steps in as his granddaughter's conservator, in order to manage the funds from his own daughter's death, until his minor granddaughter turns eighteen. Appellants failed to prevent the withdrawal of $169,044 from her accounts and even made money by charging fees on many of the wrongful transactions. Cooler and Amber were not significant business concerns of two large banks, nor was Cooler a sophisticated individual contracting with the banks. Appellants' reliance on Cooler's appointment as a fiduciary does not make him sophisticated. In *Damico*, the Court dealt with a similar situation, wherein a homebuyer and a large home builder entered into two separate contracts each with an arbitration provision: a purchase agreement and sales contract. 437 S.C. at 605, 879 S.E.2d at 751. The Court found that

a homebuyer's sophistication "pales in comparison" to that of the large homebuilder who had sold thousands of homes when the homebuyers might buy only a handful of homes in their lifetime. *Id.* at 614, 879 S.E.2d at 756. Likewise, Cooler's sophistication pales in comparison to that of Regions and Cetera. He might only have a handful of bank accounts in his lifetime.

The contracts with both Regions and Cetera are contracts of adhesion and Cooler lacked any meaningful choice in signing them.

B. The terms of the Cetera and Regions agreements contain oppressive language and one-sided terms.

The record in this case contains significant evidence of substantive unconscionability, which is appropriate for the Respondents to address at this time pursuant to Rule 208(b)(2) and Rule 220(c) SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal").

With regard to substantive unconscionability of an agreement, terms are unconscionable when "no reasonable person would make them and no fair and honest person would accept them." *Damico*, 437 S.C. at 612, 879 S.E.2d at 755 (quoting *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996); 17A Am. Jur. 2d *Contracts* § 272 (2016)). In Cetera's agreement, Cetera retained the exclusive right to amend the agreement at any time. Paragraph 18 of its Agreement sets forth "Amendment. You [Cetera] may amend this Customer Agreement at any time upon notice to me [customer]." (Ex. B to Appellants' Mot. to Compel Arb.; R. p. ___). This Court examined this particular element in *315 Corley*, and found that the ability of one side to modify the contract in its sole discretion is a significant factor that showed unconscionability. *315 Corley*, 2024 WL 3514884, at *5. In *Damico*, the Supreme Court also addressed this one-sidedness and found that the ability for one side to retain a "sole election" of

arbitration is egregious and contradicts the basic legal principle that a Complainant is the master of their own complaint and may choose who or who not to sue. 437 S.C. at 615, 879 S.E.2d at 757.

Furthermore, the Cetera arbitration agreement limits the parties' ability to obtain documents, witness statements, and other discovery; provides that arbitrators are not required to explain their decisions; provides that the panel of arbitrators will typically include a minority of those who are associated with the securities industry; and imposes limitations on the timing to make claims. (Ex. B, App. Motion to Compel Arb; R. p. ___). As a result, this creates the same possibility of "inconsistent factual findings" that the Supreme Court anticipates in *Damico* where the agreement language "precludes [the homeowners] from recovery on a purely procedural (rather than a merit) basis." 437 S.C. at 616, 879 S.E.2d at 757.

Likewise, the Regions Agreement also contains oppressive, one-sided terms. It too retains the ability to modify the agreement unilaterally. Paragraph 1 on Page 3 of its 51-Page Agreement sets forth that by doing any number of things, including "signing any signature maintenance card or other account document . . . , by depositing funds into, or withdrawing funds from, . . . [or] by using an account with us . . . you agree to the terms of this Agreement, as amended." (Ex. D to Appellants' Mot. to Compel Arb.; R. p. ___). The Agreement goes on to provide additional information about changing the agreement in Paragraph 38 on Page 30. It provides:

> We have the right to change the terms of this Agreement . . . [e]xcept as provided by applicable law, and/or except as otherwise provided in any notice we may furnish, any changes to this Agreement will be effective on that date which is 10 days after the date notice is given by either posting the notice in our manned offices where deposits are received or including the notice with or on your statement or in a separate mailing, or any other means or method described in this Agreement . . . . If you do not agree to any change or amendment relating to the terms and conditions of this Agreement or your account, you must terminate your account within 10 days after the date notice is given to you of the change or amendment. By using

> your account after any such change or amendment, you agree to that change or amendment.

(*Id.*). In addition, the agreement explicitly states that it "may not be altered, modified, or amended by you in any way without our express written agreement signed by our authorized officer." (*Id.*). The ability of a customer to modify the terms of the Agreement is not nearly so generous, is arguably illusory, and falls in line with the concerning conduct discussed in *Damico*.

The breadth of the Regions arbitration clauses is also problematic. Regions attempts to cover claims that occurred prior to Cooler's signature on any bank documents. Regions was aware of the misappropriation of funds in violation of its obligation to restrict the distribution of funds from the conservatorship account when Cooler sought to add his name on the signature card. The alleged arbitration language allows Regions to require binding arbitration in any lawsuit with a third party and the bank, and it provides for an automatic review by a second arbitration to review de novo any monetary award in excess of $250,000. The Agreement also purports to exclude a claim such as Respondent's. On Page 16, in Paragraph 10, the Agreement provides: "You agree that each signer to the account is authorized individually to conduct any and all business with respect to the account and to perform any and all account transactions . . . ." (Ex. D to Appellants' Mot. to Compel Arb.; R. p. ___).

Regions knew when Cooler came in to sign the signature forms that the account was supposed to be a restricted conservatorship account from which no funds could be expended without a court order; thus, Regions knew that Cooler was, in fact, not authorized to conduct all business with regard to the account. Further, the Agreement provides that to the maximum extent possible, Regions has no ability to supervise accounts and that the signer agrees to indemnify and hold the bank harmless and pay attorney fees. (Ex. D to Appellants' Mot. to Compel Arb.; R. p.

___). Thus, the enforcement of the Cetera and the Regions arbitration agreements is unconscionable, as both agreements are substantively and procedurally unconscionable.

II. THE SUBSTITUTION OF COOLER AS SUCCESSOR CONSERVATOR ON THE ACCOUNTS IS NOT CONSIDERATION AND THEREFORE RESPONDENT IS NOT BOUND TO THE ARBITRATION LANGUAGE CONTAINED IN THE CETERA AND REGIONS DOCUMENTS.

In the instant case, Respondent did not open new accounts; Cooler merely substituted his name on two existing accounts in response to the Probate Court appointing him as Successor Conservator for his minor granddaughter. This fails to qualify as consideration to make the disputes herein subject to the arbitration language contained in the documents for Cetera and Regions. South Carolina case law requires that there be mutual assent for the parties to be bound to arbitration. *Mart v. Great S. Homes, Inc.*, 441 S.C. 304, 316, 893 S.E.2d 360, 366 (2023). In *Mart*, the Supreme Court found that there must be a meeting of the minds of "all essential and material contract terms" or that the arbitration provision is unconscionable. *Id.* at 316-317, 893 S.E.2d at 366. Cooler could not assent to terms contained within new account documents. He was merely substituted per court order as conservator, was outright not provided complete account documents, and fell prey to unconscionable business practices. Consideration fails here and Respondent is thus not bound to Appellants' arbitration provisions.

In addition, throughout the case at hand, Appellants have never argued that Lovelace, who initially opened the conservatorship accounts in question, entered into arbitration agreements. In fact, their arguments have been based on the assumption that he did not. If there are agreements signed by Lovelace, that information was available to Appellants at the time of the Motion to Compel Arbitration, and that information was not presented. Appellants are unable to raise an argument that could have been raised previously and any argument about documents Lovelace may have signed is not properly preserved for appeal. It is well settled in this State that an issue

unpreserved and not raised at the trial court cannot be raised on appeal. *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691, 694 (2003).

III. IN CONSIDERING THE BREADTH OF ARBITRATION AGREEMENTS AND THE ENFORCEMENT OF SUCH AGREEMENTS, THE TRIAL COURT DID NOT ERR IN FINDING THAT THE LANGUAGE IN THE SUBJECT AGREEMENTS DID NOT ENCOMPASS THE DISPUTE AT HAND.

The circuit court was correct in its finding that Respondent did not enter into a valid arbitration agreement with Appellants. Cooler provided testimony in his affidavit setting forth that he was not provided the portion of the documents from Regions and Cetera pertaining to arbitration. (Aff. Richard Cooler ¶12; R. p. ___). Appellants provided two responsive affidavits, one of which was from Weeks, who met with Cooler when he signed account paperwork to substitute his name on the conservatorship accounts. It is quite significant that neither affidavit disputed Cooler's testimony; rather Appellants' affiants state only *what should have been done* in the ordinary course of business. (*See* Aff. Kenneth Cobb; Aff Mark J. Weeks; R. p. ___). Had the banks been following the ordinary course of business with regard to Amber's conservatorship accounts, she would not have been deprived of $169,044.00. Accordingly, no evidence was submitted that disputed Respondent's testimony and evidence that Cetera and Regions did not provide Respondent with the arbitration provisions.

Both Appellant financial institutions (Regions and Cetera) were aware of the misappropriation of funds in violation of the required restrictions on the accounts and used the opportunity of Cooler signing his name on the signature forms to attempt to bind him to arbitration for acts and omissions that had occurred years before. The Cetera "New Account Agreement" includes a reference to predispute arbitration set forth on Page 9 in Paragraph 20. (Ex. B to Appellants' Mot. to Compel Arb.; R. p. ___). The language on Page 9, which was not provided to Respondent, states that presuit arbitration applies to "any dispute between me and you arising out

of *this agreement.*" (*Id.*) (emphasis added). The trial court correctly determined that a plain reading of the language did not extend to the dispute between Respondent and Appellants concerning actions that well predated Cooler's signature on the "New Account Agreement."

Regions' paperwork, entitled "Fiduciary Account Maintenance and Signature Form," includes a reference to a "Deposit Agreement." The "Deposit Agreement" is a separate 51-page document that contains extensive arbitration language. Respondents assert the language extends to the actions of Appellants long before Cooler's involvement in the conservatorship. Therefore, the trial court did not err in finding that the language in Regions' agreement did not encompass the dispute at hand.

IV. THE FEDERAL ARBITRATION ACT DOES NOT PREEMPT SOUTH CAROLINA LAW FINDING A CONTRACT UNCONSCIONABLE.

Appellants seek to overturn the circuit court's order denying arbitration, in part, because they argue that the court failed to apply the Federal Arbitration Act. Section 2 of the FAA requires that an arbitration provision be enforced except for "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As such, general contract defenses may apply to invalidate arbitration agreements. *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L.E.2d 902 (1996). Our Supreme Court addressed this argument in *Damico*, where the Court specifically acknowledged the application of the FAA but reinstated the circuit court's denial of the motion to compel arbitration on the basis that the underlying contract provisions involving arbitration were nonetheless unconscionable and thus unenforceable. 437 S.C. at 624, 879 S.E.2d at 762.

Appellants argue that the trial court erred to the extent that its order was based on a requirement that arbitration language comply with S.C. Code Ann. §15-48-10. This statute requires that "notice that a contract is subject to arbitration . . . shall be typed in underlined capital letters,

or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." S.C. Code Ann. §15-48-10. Appellants argue that this statutory provision is inapplicable because the FAA, which does not have a similar requirement, must be applied. The trial court's order did not invalidate the arbitration provisions because of the failure to comply with the state law requirement set forth in §15-48-10, however. Instead, it found no arbitration agreement existed. The court was free to evaluate the placement and prominence of the arbitration language as part of its evaluation of Respondent's argument concerning proper notice of the agreement to arbitrate, particularly in light of Respondent's argument that he did not receive the portions of the purported agreement that set forth details concerning arbitration. Further, the court explained in its order that even if the wording had been conspicuous, the arbitration language did not cover the matters in dispute in this case. This notation regarding the placement of the verbiage about arbitration did not constitute reversible error and thus the trial court's order should be affirmed.

Case law further supports the Respondent's position that the trial court's order was proper because the crux of this case is the unconscionability of the arbitration agreements at issue. This Court addressed unconscionability in *315 Corley*, and specifically stated that "if an arbitration provision is challenged on the grounds of unconscionability, the question of the clause's validity is for the courts to decide" because this "bring[s] into question whether an arbitration agreement even existed in the first place." *315 Corley*, 2024 WL 3514884, at *3. The Appellants' reliance on *Cape Romain Contractors, Inc. v. Wando E., LLC* is misguided. While *Cape Romain Contractors, Inc.* states that a court must compel arbitration where there is a valid arbitration agreement and when the underlying issues fall within the scope of the agreement, 405 S.C. 115, 128, 747 S.E.2d

461, 468 (2013), the very issue here is the lack of an enforceable arbitration agreement and the conduct complained of not falling within the purview of the arbitration agreement.

The facts of this case therefore demonstrate that the Appellants failed to provide sufficient proof that a binding arbitration agreement was entered between the parties and that the FAA thus did not apply.

V. EVEN IF AN ENFORCEABLE ARBITRATION PROVISION EXISTED IN THE UNDERLYING PROCEEDINGS, THE APPELLANTS WAIVED ANY RIGHT TO ARBITRATION WHEN THEY AVAILED THEMSELVES OF THE COURT'S JURISDICTION.

Respondent contends that the underlying proceedings in this matter are subject to the circuit court's jurisdiction and that the parties could not contract around that jurisdiction. In the initial order of the Probate Court appointing Defendant Lovelace as Conservator, the court required that the parties enter into a "Restricted Account Agreement." Representing Cetera, Defendant Lazurek signed the Restricted Account Agreement, which was later approved by Probate Judge Kenneth E. Fulp, Jr., on March 1, 2016. That Agreement is the contract document which provides the terms restricting the distribution of funds without order of the court. The Restricted Account Agreement does not contain any arbitration provisions. In fact, the Restricted Account Agreement provides that "[t]his Restricted Account Agreement shall be read and construed *in pari materia* with pertinent Court Orders, and this Agreement and such Court Orders are hereby mutually incorporated by reference, one with the other." (Ex. A to Resp't's Mem. in Opp. to Mot. to Compel Arb.; R. p. ___).

In the Court Order appointing Cooler as Successor Conservator, the Court specified that "[p]ursuant to S.C. Code. Ann. § 62-5-409, the Conservator shall enter into a Restricted Account Agreement with the approved financial institution located within the State of South Carolina. Proof of such shall be submitted to the Court within thirty (30) days of this Order." (Ex. B to Resp't's

Mem. in Opp. to Mot. to Compel Arb.; R. p. ___). The Order further required restricted account agreements be on file, and further clarified that financial institutions signing restricted account agreements are subject to the court's jurisdiction. (*Id.*).

Thus, no arbitration provision exists binding the parties to arbitration. Even by assuming *arguendo* that arbitration provisions could be imputed by vague language in a contract, the Appellants expressly waived arbitration by submitting to and availing itself of the jurisdictions of the probate court and circuit court since the inception of the Restricted Account Agreement entered on February 3, 2016. In fact, the court retained the jurisdiction of Appellants and any contractual provisions to the contract are void *ab initio*.

VI. THE CIRCUIT COURT APPLIED THE CORRECT STANDARD OF CLEAR AND CONVINCING EVIDENCE WHEN IT FOUND THAT THERE WAS NOT AN ENFORCEABLE ARBITRATION AGREEMENT.

A party seeking to enforce an arbitration agreement has the burden of persuasion to show that the parties entered into an enforceable agreement. *Gordon v. TBC Retail Grp., Inc.*, No. 2:14-cv-03365-DCN, 2016 WL 4247738, at *5 (D.S.C. Aug. 11, 2016). Courts rule on a motion to compel arbitration using the summary judgment standard and "[t]hus the question is whether the evidence in the record could support a reasonable jury finding that [the movant] has proven by 'clear and conclusive evidence'...that an agreement to arbitrate exists between the parties." *Hill v. Emp. Res. Grp.*, LLC, 816 F. App'x 804, 809 (4th Cir. 2020). Only after a movant meets its burden does the burden shift to the non-movant to show that the contract should not be enforced. *Gordon*, 2016 WL 4247738, at *5.

Appellants argue that the trial court mistakenly applied a clear and convincing evidentiary standard in this matter and, in turn, the Appellants incorrectly argue that this standard is appropriate *only* in cases where there is a missing or lost arbitration agreement. This is not the correct

application of the law. In the recent case *Beasenburg v. Ultragenyz Pharmaceutical, Inc.*, in which there was no allegation of a lost or missing agreement, the District Court applied the clear and convincing evidentiary standard and reasoned the following:

> Because the Court must "apply the summary judgment standard in deciding whether an arbitration agreement exists ...[it] must "view the evidence presented through the prism of the substantive evidentiary burden." ...Thus, the question is whether the evidence in the record could support a reasonable jury finding that [Defendant] has proven by "clear and conclusive evidence," ... that an agreement to arbitrate exists between the parties."

No. 2:22-CV-04022-BHH-JDA, 2023 WL 6638971, at *5 (D.S.C. Feb. 13, 2023) (citing *Hill v. Emp. Res. Grp., LLC*, 816 F. App'x 804, 809 (4th Cir. 2020)). Nevertheless, our Supreme Court has acknowledged that parties to a case "intend[] the court to decide certain arbitration issues in the absence of "clear and unmistakable evidence to the contrary." *Simpson*, 373 S.C. at 23, 644 S.E.2d at 667-668 (citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S. Ct. 2402 (2003)). It is up to the trial court to decide whether an arbitration agreement exists in the first place, *Id.*, and that is exactly what the trial court did in this case.

The circuit court thus applied the correct evidentiary standard in evaluating the application of the arbitration provisions in this case. Notwithstanding the trial court's determination of the standard of proof, the Appellants simply failed to provide any evidence that an agreement to arbitrate was reached. The only evidence to this issue that Appellants submitted to the court was in their affidavits stating that issuing the arbitration provisions to a customer were standard practices. (Aff. Kenneth Cobb ¶6; Aff Mark J. Weeks ¶5; R. p. ___). These assertions in the affidavit still do not provide evidence that meets the clear and convincing standard because even if the documents had been provided to Cooler, the court found that the language in the agreements was unconscionable. Thus, the evidence and record in this case support a prima facie case that an

arbitration agreement was never reached between the parties. Therefore, there exists no valid arbitration agreement binding the parties to arbitrate the underlying allegations and the trial court's order denying the Appellants' Motion to Compel was proper.

CONCLUSION

Pursuant to the foregoing, Respondent requests that this Court affirm the trial court's Order denying the Appellants' Motion to Compel Arbitration.

Respectfully submitted,

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November 18, 2024
Beaufort, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Civil Case No. 2023-CP-07-00646

Appellate Case No: 2024—000869

Amber Leigh Lovelace, by and through her
Conservator, Richard Cooler, ...Respondent,

v.

Steven Lovelace, Regions Bank,
Cetera Investment Services D/b/a Regions Investment
Services, and Christopher Lazurek, ...Defendants.

Of whom Regions Bank,
Cetera Investment Services d/b/a Regions Investment
Services, and Christopher Lazurek are,.....Appellants.

PROOF OF SERVICE

I certify that on November 19, 2024, I served the Respondents' *Initial Reply Brief* on Appellants by emailing a copy of the same to their counsel of record using the email address listed in the Attorney Information System:

Cory E. Manning: Cory.manning@nelsonmullins.com

Andrew Rawl: Andrew.rawl@nelsonmullins.com

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Respectfully submitted,

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Nov 19 2024
SC Court of Appeals

November 19, 2024

By Electronic Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court
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RE: *Amber Leigh Lovelace, by and through her Conservator, Richard Cooler, Respondent, v. Steven Lovelace, Regions Bank, Cetera Investment Services d/b/a Regions Investment Services, and Christopher Lazurek, Defendants*,
of which Regions Bank, Cetera Investment Services d/b/a Regions Investment Services, and Christopher Lazurek are the Appellants.
Appellate Case No. 2024-000869

Dear Ms. Kitchings:

Attached for filing in the above matter, please find Respondents Initial Reply Brief and Proof of Service.

Counsel for Appellate is copied on this filing.

Very truly yours,

HARVEY & BATTEY, P.A.

Thomas A. Holloway

TAH/cw