

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS)
THIRTEENTH JUDICIAL CIRCUIT)

Estate of Virginia Parsons, by and through)
her Personal Representative, Sandra P.)
White, Individually and on behalf of)
statutory beneficiaries,)

C. A No. 2024-CP-23-06777

Plaintiffs,)

**ORDER DENYING DEFENDANTS'
MOTION TO COMPEL ARBITRATION
AND STAY PROCEEDINGS**

vs.)

Atlas Senior Living, LLC; Atlas Senior)
Living II, LLC; AFF18 Oakview Park ALF,)
LLC d/b/a Oakview Park Assisted Living;)
AFF18 Oakview Park PropCo, LLC;)
AFF18 Greenville Borrower, LLC;)
Oakview Park Developer, LLC;)



Defendants.)

Hearing: August 28th, 2025
Judge: Honorable Patrick C. Fant III
Court Reporter: WebEx
Plaintiffs' Attorney: Gary W. Poliakoff
Defendants' Attorney: Timothy Maio

This matter is before the Court on Defendants' Motion to Compel Arbitration and Stay Proceedings filed on **July 3, 2025**. Plaintiff alleges that, on **August 22, 2023**, Ms. Parsons suffered a traumatic incident causing her to fall and sustain both a displaced intertrochanteric fracture of her right femur and right hip fracture requiring surgical repair. She passed away on **October 5, 2023**, after 44 days of medical treatment.

Having considered the parties' memoranda, heard oral arguments from counsel, and reviewed the applicable law and evidence, the Court hereby **DENIES** Defendants' Motion to Compel Arbitration and Stay Proceedings.

The burden of proving unconscionability lies with the party asserting it. *See Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016) (“The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration.”); *Doe v. TCSC, LLC*, 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020). The Court finds that burden has been met.

This wrongful death action arises from the death of Virginia Parsons. It appears from the memorandum and the arguments of counsel of both sides, that Ms. Parsons was admitted to Defendants' memory care facility, Oakview Park Assisted Living, on **March 17, 2023**. Virginia Parsons was a vulnerable adult with advanced dementia and Alzheimer's disease who, per the records, was "oriented to person only" and lacked capacity to understand complex legal agreements. The admission paperwork was approximately 20 pages, in which was an arbitration agreement. Ms. Parsons' daughter signed these papers as part of the admission process.

The court notes that there exists a significant inherent disparity in bargaining power between a family member making emergency placement decisions for a vulnerable adult and sophisticated corporate healthcare providers with extensive experience in these transactions. The arbitration agreement was prepared by the Defendants and was presented as a standardized form with no opportunity for negotiation, which is consistent with other cases finding procedural unconscionability in similar circumstances. The arbitration provisions are located on pages 7 to 11 of the 20-page residency agreement, and are not in bold type, nor is arbitration noticed on the first page. Further, the equal cost sharing of the arbitration's fees and costs places a greater burden on an individual plaintiff than on a corporate defendant.

"In South Carolina, unconscionability is defined as 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."¹ The "[a]bsence of meaningful choice" requirement "speaks to the fundamental fairness of the bargaining process in the contract at issue."² Courts should consider "the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative

¹ *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007); *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004).

² *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause."³ Even if an arbitration clause is technically conspicuous, it may be unconscionable if it is "sprung on [a consumer] along with a flurry of other" documents during a hasty transaction.⁴

The Court also finds the arbitration agreement to be substantively unconscionable due to oppressive, one-sided terms. These terms include, among others, the following: (a) Severely restricted caps on "non-economic damages"; (b) regarding "economic damages", a carefully worded provision, the effect of which likely would result in no payment at all, or a miniscule payment, to a Plaintiff injured by Defendant's negligence in a long-term care situation. Further, such provision seeks to invalidate South Carolina's well-established Collateral Source Rule; (c) complete elimination of punitive damages; (d) serious limitations on discovery, which include disallowance of all lay person depositions (allowing depositions of experts only), and late presentation of witness lists, exhibit lists, and sworn recorded statements to be relied upon at the arbitration hearing (to be provided 14 working days before the hearing); all of which appears to strongly favor the Defendant, and effectively it would prevent a Plaintiff from obtaining normal discovery and information, particularly in a long-term care negligence case. As Plaintiff emphasizes, in a long-term care negligence case such as the case at hand, all or nearly all of the evidence of the incident/occurrence in question, and the evidence leading to it or underlying it, especially including documents and information, is in the possession and control of the Defendant facility, and all or nearly all of the witnesses having knowledge of relevant events are/were employees of the Defendant facility and are under the facility's control. The effect of this is likely to favor and protect the Defendant, while impeding the Plaintiff, who bears the burden of proof, in its obligation to gather information, documents, evidence, and witness testimony; (e) Delegation of complete authority to the arbitrator, including gateway issues of arbitrability, and elimination of right of appeal.

In order to determine whether or not an agreement is unconscionable, a case by case analysis is necessary. In the case at hand, the combined effect of the one-sided provisions of the

³ *Id.*

⁴ *Doe v. TSDC, LLC*, 430 S.C. 605, 613-14, 846 S.E.2d 871, 879-80 (2019).

arbitration agreement strongly favors the Defendant and severely limits and/or prevents the Plaintiff from ability to prove its case, and likely impedes reasonable recovery to the Plaintiff for damages. The combination of these one-sided provisions renders this arbitration agreement unconscionable.

Following *Simpson vs. MSA* 373 S.C. 14, 644 S.E.2d 663 (2007), arbitration clauses that prevent recovery of statutorily established damages are unconscionable. As in *Simpson*, this agreement contains restrictions that "effectively preclude the Plaintiff from obtaining the information and evidence necessary to prove her case" while the "culpable party...typically holds, possesses and controls all or nearly all of the evidence." Such limitations are unconscionable when defendants "possess all or nearly all of the pertinent information regarding the incidents in question." The agreement in the case at hand restricts depositions to "experts only," effectively precluding Plaintiff from obtaining information and evidence necessary to prove her case. This asymmetrically benefits Defendants, who possess all or nearly all pertinent information regarding the incident, while hampering Plaintiff's ability to discover crucial facts and information, such as staffing, supervision, and circumstances of Virginia's fall. The \$400,000 limitation on non-economic damages would likely be insufficient, if Plaintiff is able to prove Plaintiffs' allegations such as, Virginia's endurance of 44 days of severe conscious pain and suffering, requiring extensive pain management with morphine and oxycodone, leading to her death. The agreement expressly prohibits punitive damages, eliminating any deterrent effect for gross negligence or willful misconduct, despite the alleged reckless disregard of vulnerable adult rights. The requirement for equal cost-sharing of arbitration fees creates prohibitively expensive barriers to individual Plaintiffs. The agreement's provision limiting economic damages is worded so as to eliminate nearly any payment by the Defendant, and likely would result in no recovery for economic damages, or perhaps a miniscule recovery only. Also, this arbitration agreement is not geared towards achieving an unbiased decision by a neutral decision-maker. Further, this provision nullifies South Carolina's well-established collateral source rule.

After careful consideration of the arguments, submissions of the parties, and review of law, this Court finds that the arbitration agreement is unconscionable, both procedurally and substantively, and therefore unenforceable. Defendants have failed to meet their burden of proving the existence of a valid and enforceable arbitration agreement. The combination of procedural

unconscionability arising from the vulnerable population, crisis-driven admission process, and significant bargaining power disparity, together with substantive unconscionability from oppressive one-sided terms, renders this arbitration agreement unenforceable under South Carolina law.

The arbitration agreement in this case was prepared by Defendant, contained within Defendant's 20-page residency agreement, and is a contract of adhesion. The court in *Damico vs Lennar Carolinas, LLC*, 437 S.C. 596, S.E. 2d7 4b (2022), having found unconscionability, declined to sever the unconscionable provisions, finding that the unconscionable terms infected the entire agreement sufficiently that it was more appropriate to refuse enforcement of the entire agreement, rather than the Court attempting to re-write the offending terms. In the present case there are multiple offending provisions which combine to render the agreement unconscionable. As stated in *Damico*, the Court should not attempt to re-write the unconscionable terms, and instead finds this unconscionable arbitration agreement to be unenforceable. Plaintiff also argued that various delays and occurrences in this case are such that the Defendants should be deemed to have waived any right they may have had to assert the arbitration agreement. The Court finds that Defendants have not waived their contractual right to arbitration. The court's findings that the arbitration agreement is unconscionable are not based on waiver.

IT IS THEREFORE ORDERED that Defendants' Motion to Compel Arbitration and Stay Proceedings is hereby **DENIED**.

IT IS FURTHER ORDERED the arbitration agreement in this case is unconscionable and unenforceable.

IT IS SO ORDERED.



Greenville Common Pleas

Case Caption: Virginia Parsons Estate , plaintiff, et al vs. Atlas Senior Living LLC ,
defendant, et al
Case Number: 2024CP2306777
Type: Order/Other

So Ordered

Patrick C. Fant, III