THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Patrick Cleburne Fant, III, Circuit Court Judge

Appellate Case No. 2025-002427
Circuit Court Case No. 2024-CP-23-06777

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

v.

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, ... Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

Timothy Maio, Esquire
Holcombe Bomar, PA
PO Box 1897
Spartanburg, SC 29304
(864) 594-5300

Counsel for Appellants

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I. Preservation.

First, Respondent argues that Appellants had to ask the Circuit Court to do something that it lacked the legal authority to do, namely, to overrule Supreme Court precedent. (Respondent's Brief p. 6). However, "[t]his Court does not require parties to engage in futile actions in order to preserve issues for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000).

Indeed, like the Circuit Court, this Court also does not have the authority to overrule Supreme Court of South Carolina precedent. *See Blyth v. Marcus*, 322 S.C. 150, 155, 470 S.E.2d 389, 392 (Ct. App. 1996) ("Regardless, we have no authority to overrule Supreme Court precedent."). There are only two courts that do possess this power: the Supreme Court of South Carolina and the United States Supreme Court.

However, also like the Circuit Court, this Court must choose which unconscionability standard to apply here. Appellants repeatedly urged the Circuit Court to apply the unconscionability standard contained in *Gladden*.

II. The *Simpson* unconscionability standard has only been applied in cases involving arbitration provisions.

Respondent argues that there is only one standard for unconscionability in South Carolina, as evidenced by the fact that "Gladden defines unconscionability ***by quoting*** Simpson." (Respondent's Brief p. 8). The quotation Respondent is presumably referring to here is the following:

> 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. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007).

Gladden v. Boykin, 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013).

While this particular quotation from *Simpson* can be read as blurring the distinction between procedural and substantive unconscionability, Appellants do not contend that it is necessarily arbitration-specific or violative of the FAA.

Rather, compare, for example, the varying explanations/standards for what constitutes procedural unconscionability contained within *Simpson* and *Gladden*.

Simpson states that:

> In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative 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.

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

Whereas *Gladden* provides that:

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

Gladden, 402 S.C. at 145, 739 S.E.2d at 884-85.

Simpson's substantive unconscionability standard is also very different from the generally applicable standard. According to *Simpson*, substantive unconscionability exists when a contract provision is "oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C at 30, 644 S.E.2d at 671.

However, the substantive unconscionability standard that applies to contracts generally requires a contract to be "so oppressive that no reasonable person would make it and no fair and honest person would accept it." *Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005).

The only South Carolina cases that apply or rely upon *Simpson*'s unique formulations of procedural and substantive unconscionability are cases in which arbitration provisions were at issue.

Respondent claims that the *Gladden* procedural unconscionability standard is mere dicta. (Respondent's Brief p. 14). While it has been said that "those who disregard dictum, either in law or in life, do so at their peril" *Gordon v. Lancaster*, 425 S.C. 386, 393, 823 S.E.2d 173, 177 (2018), in any case, the procedural unconscionability standard contained in *Gladden* is certainly not an aberration. To the contrary, it is consistent with the American Jurisprudence 2d (Second Edition), Contracts, Volume 17A, and with the holdings of cases both within and without South Carolina. The *Gladden* procedural unconscionability standard accurately reflects the generally applicable contract law doctrine of procedural unconscionability.

III. The Arbitration Provision was not procedurally unconscionable.

Respondent then proceeds to use *Simpson*'s arbitration-specific unconscionability standard to argue that the Arbitration Provision here was unconscionable. (Respondent's Brief p. 11).

Respondent simply asserts, without any evidence, that "the Agreement is an adhesion contract in that it was printed on a standardized form, offered to Mother (through Daughter) on a take-it-or-leave-it basis, and did not offer any chance to negotiate." (Respondent's Brief p. 11).

Next, Respondent argues that because Virginia Parsons' injuries were substantial, this weighs in favor of finding that the Arbitration Provision was unconscionable. However, "Courts are limited to considering the facts and circumstances that exist at the time of the execution of the contract when determining unconscionability." *Hudson v. Hudson*, 408 S.C. 76, 83, 757 S.E.2d 727, 730 (Ct. App. 2014). Virginia Parsons was not injured at the time the Residency Agreement was signed.

Respondent argues that there was a substantial disparity in bargaining power because Virginia Parsons "was a vulnerable woman suffering from dementia." (Respondent's Brief p. 12). Of course, though, Virginia Parsons did not sign the Residency Agreement; rather, her daughter and appointed agent, Sandra Parsons White, signed the Residency Agreement on her behalf. Sandra Parsons White was not a vulnerable woman and did not suffer from dementia.

Next, Respondent argues that a contract is only enforceable to the extent the signer fully understands the implications of the language contained within it. (Respondent's Brief p. 13). That notion is contrary to basic axiomatic principles of contract law.

It is well-established that the FAA preempts any requirement that an arbitration provision must be any more prominent or "conspicuous" than other contract provisions. *See Hill v. Gateway 2000, Inc.,* 105 F.3d 1147, 1148 (7th Cir. 1997) ("[T]he Federal Arbitration Act is inconsistent with any requirement that an arbitration clause be prominent."); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 681 (1996) (holding that Montana's first-page notice requirement for arbitration agreements was preempted by the FAA); *Phillips v. Renu Energy Sols., LLC*, No. 2024-000338, 2025 WL 1825501, at *1 (S.C. Ct. App. July 2, 2025) ("We further find any alleged inconspicuousness of the arbitration provisions did not deprive Phillips of a meaningful choice. The FAA does not require an arbitration provision to be bolded, underlined, or typed in all caps.").

Respondent appears to imply that the *Gladden* Court only found that no procedural unconscionability was present in that case because there the offeror was a "self-employed home inspector operating out of his home." (Respondent's Brief, page 14). However, the *Gladden* opinion states otherwise:

> Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident

> intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract. *See Williams v. Walker–Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C.Cir.1965).
>
> In this case, a self-employed home inspector operating out of his home had no significantly greater bargaining power or cognizably more sophistication than a trained though not practicing real estate agent, and there is no allegation that Mrs. Gladden lacks the education to understand the terms of a contract or protect her own interests. On the contrary, the record demonstrates that Mrs. Gladden directly engaged in sophisticated negotiations throughout the process of buying the home, even urging the seller to forego the use of a real estate agent. Moreover, we have no record on which to find that home inspection contracts without exculpatory clauses are unavailable in the market.

Gladden, 402 S.C. at 145-46, 739 S.E.2d at 884-85.

Here, the signer of the agreement was also a licensed real estate agent and the only evidence in the record is that assisted living residency agreements without arbitration clauses were *available* in the market. (*See* Exhibits 4 and 7 to Appellants' Reply to Respondent's Memorandum in Opposition to Appellants' Motion to Compel Arbitration).

IV. The Arbitration Provision was not substantively unconscionable.

The difference between the *Simpson* and the generally applicable substantive unconscionability standards is large and consequential. If one can simply show that a contract provision is one-sided, that alone may be sufficient to satisfy the *Simpson* formulation of substantive unconscionability.

However, the generally applicable substantive unconscionability standard is much more demanding. One has to prove that, by agreeing to the contract, *both* parties to the contract did something that no reasonable or morally upright person

would ever do. That is, the contract must be "so oppressive that no reasonable person would make it and no fair and honest person would accept it." *See Holler*, 364 S.C. at 269, 612 S.E.2d at 476.

Respondent's argument on the issue of substantive unconscionability is essentially that the Arbitration Provision is substantively unconscionable because it is one-sided. However, that is not the legal standard for substantive unconscionability. Rather, the standard is whether any of the provisions were "so oppressive that no reasonable person would make it and no fair and honest person would accept it."

A. The discovery provisions.

Respondent again claims that "the Agreement permits the Facility to withhold basic information about the witnesses and documents on which its defense will be based until just two weeks before trial." (Respondent's Brief, page 15). If that were true, then the South Carolina Rules of Civil Procedure would themselves be unconscionable. As has been stated previously, the Agreement provides that the South Carolina Rules of Civil Procedure apply to the arbitration proceeding. If Respondent chooses not to serve Appellants with any interrogatories or requests for production in the arbitration proceeding, that is not the fault of Appellants or of the Arbitration Provision.

The district court *Hooters* case that Respondent cites to was appealed to the Fourth Circuit Court of Appeals. (Respondent's Brief, pages 15-16). On appeal,

the Fourth Circuit found that the arbitration procedure contemplated by Hooters' arbitration agreement was deficient and unenforceable because, among other reasons, the agreement required that the entire arbitration panel had to be selected from a list of potential arbitrators created exclusively by Hooters. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999). Nowhere in the Fourth Circuit's opinion is the agreement's deposition limit even mentioned or discussed.

In *Gilmer*, the Supreme Court held that, under the FAA, the NYSE discovery provisions were adequate, appropriate, and not unconscionable. *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991). Under the NYSE discovery provisions, neither party would be entitled to conduct *any* depositions here: be they fact witnesses or expert witnesses. *See* FINRA Rule 12510, Code of Arbitration Procedure for Customer Disputes (FINRA), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12510.

If the FAA required the arbitration provision in *Gilmer* to be enforced, it requires the arbitration provision here to be enforced as well.

B. Alleged lack of mutuality.

Next, Respondent argues that the Agreement lacks mutuality because the "Agreement expressly carves out 'any action for eviction,' thereby reserving access to the courts for Defendants while denying it to residents." (Respondent's Brief, page 2). Such arguments have been disposed of both by South Carolina state courts and by the United States Supreme Court.

In *Munoz*, the Court held that an arbitration clause that allowed a creditor to seek foreclosure on a mortgage, but denied the other party the right to litigate any counterclaims in the foreclosure action was not unconscionable because "under state law, a lack of mutuality of remedy does not invalidate a contract." *Munoz v. Green Tree Fin. Corp*., 343 S.C. 531, 542, 542 S.E.2d 360, 365 (2001).

The United States Supreme Court has also repeatedly held that arbitration agreements must be enforced according to their own terms and that parties are free to limit by contract which issues they will and will not arbitrate. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ*., 489 U.S. 468, 478 (1989) ("Accordingly, we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." (cleaned up)).

C. The damages provisions.

Respondent states that "Appellants' only defense for the economic damages restrictions is to note other jurisdictions do not recognize the collateral source rule. Appellants' point here is hard to determine." (Respondent's Brief, page 19).

The point is that for the economic damages provision here to be substantively unconscionable, it must be true that it is so morally outrageous that no reasonable person would ever propose or agree to such a provision. That is a difficult conclusion to reach given that so many learned individuals (including a sizable and growing

portion of the country's state legislatures and judiciaries) believe that something like the economic damages provision at issue here ought to be the law of the land.

D. The cost-sharing provision.

Respondent argues that the Arbitration Provision is unconscionable because it limits the amount of discovery the parties can conduct. Respondent then appears to simultaneously argue that the Arbitration Provision is also unconscionable because Respondent lacks the financial means to conduct the extensive discovery Respondent believes it is entitled to conduct in the arbitration proceeding. Respondent can't have it both ways.

If Respondent lacks the financial wherewithal to be able to pay her own retained expert witnesses to sit for a deposition in an arbitration proceeding, presumably she also cannot afford to pay those experts to testify in a deposition in a court proceeding.

If Respondent is concerned that she may not be able to afford the 25 cent per page charge that the Agreement contemplates, Appellants can agree to waive that charge. The Agreement states that that charge (as well as every other provision contained within the discovery provisions) can be modified (or waived) by agreement of the parties. (*See* Residency Agreement 000008).

Furthermore, if Respondent truly is indigent, then under the terms of the Arbitration Provision itself Respondent is not required to pay for half of the arbitrator's fees and costs. (Resident Agreement 000010 ("The arbitrator's fees and

costs associated with the arbitration shall be divided equally among the parties, unless the Resident Party is proven indigent.")).

There is no evidence here that Respondent is likely to incur prohibitive expenses if this matter is referred to arbitration. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000) ("[W]e believe that where, as 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.")).

V. Rulings from other jurisdictions.

Respondent cites to a case called *Ostroff* in support of her unconscionability arguments. (Respondent's Brief, page 21). However, unlike the Circuit Court here, the *Ostroff* Court had at least some evidence before it to support Plaintiff's contention that the contract was one of adhesion. *See Ostroff v. Alterra Healthcare Corp*., 433 F. Supp. 2d 538, 544 (E.D. Pa. 2006) ("She requested that she be given an opportunity to have an attorney review the Agreement before she signed it, but was told such review was 'pointless' because defendant would not accept any changes to the Agreement."). No such evidence exists here.

The *Ostroff* Court also incorrectly found that the "discovery provisions in the instant case are more restrictive than the provisions in *Gilmer*, which allowed for document production, information requests, depositions, and subpoenas." *Ostroff v. Alterra Healthcare Corp*., 433 F. Supp. 2d 538, 545 (E.D. Pa. 2006). The discovery provisions in *Gilmer* allowed for depositions only in "very limited circumstances" to

include preserving the testimony of a dying witness. *See* FINRA Rule 12510, Code of Arbitration Procedure for Customer Disputes (FINRA), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12510.

Respondent also cites to a case called *Ruszala* to support her arguments. (Respondent's Brief, page 22). However, in *Ruszala*, the Court found that the FAA required it to enforce the agreement's severability clauses. *See Est. of Ruszala ex rel. Mizerak v. Brookdale Living Communities, Inc*., 415 N.J. Super. 272, 300, 1 A.3d 806, 822-23 (App. Div. 2010). Accordingly, the *Ruszala* Court merely severed the provisions that it found to be unconscionable and then enforced the remainder of the agreement. *See id.* ("[T]he remedy here is to enforce our federal policy in favor of arbitration, while excising the unconscionable restrictions that we have concluded are unenforceable under N.J.S.A. 30:13–8.1.").

VI. The scope of the Arbitration Provision.

Finally, Respondent takes issue with the fact that a number of corporate entities she has sued here took part in the motion to compel arbitration. (Respondent's Brief, page 25). Respondent named AFF18 Oakview Park ALF LLC as a defendant in this case and it is undisputed that AFF18 Oakview Park ALF LLC was a party to the Residency Agreement.

It has also never been disputed that Sandra Parsons White had the express authority, pursuant to a duly executed general durable power of attorney, to sign the Residency Agreement on behalf of Virginia Parsons. (See Exhibits 2 and 3 to Appellants' Motion to Compel Arbitration).

The Arbitration Provision states that:

> Any and all claims or controversies arising out of, or in any way relating to, this Agreement or your stay at the Community, excluding any action for eviction, and including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law.

(Residency Agreement 000008).

The claims brought against Appellants here clearly arise out of and relate to Virginia Parson's stay at the Oakview Park community. *Arguendo*, if there somehow was a genuine dispute as to how to properly interpret the scope of the Arbitration Provision here, that dispute must be determined by an arbitrator, and not by a court, in accordance with the Arbitration Provision's delegation clause.

CONCLUSION

For the reasons set forth herein, and that were set forth in Appellant's Initial Brief and arguments before the Circuit Court, Appellants respectfully request that this Court reverse the judgment of the Circuit Court and grant Appellants' Motion to Compel Arbitration and Stay Proceedings.

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Respectfully Submitted,

HOLCOMBE BOMAR, PA

s/Timothy Maio
Timothy Maio (S.C. Bar No. 105171)
PO Box 1897
Spartanburg, SC 29304
(864) 594-5300
tmaio@holcomebomar.com

Counsel for Appellants

April 13, 2026
Spartanburg, South Carolina

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PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellants on all attorneys of record, by sending it by email on April 13, 2026, to the following:

Gary W. Poliakoff (S.C. Bar No. 4488)
Raymond P. Mullman, Jr. (S.C. Bar No. 8662)
Poliakoff & Associates, P.A.
215 Magnolia Street
P.O. Box 1571
Spartanburg, SC 29304
atty@gpoliakoff.com

rmullmanjr@gmail.com

AND

Jordan C. Calloway
McGowan, Hood, Felder & Phillips, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
jcalloway@mcgowanhood.com

Counsel for Respondent

Respectfully Submitted,

HOLCOMBE BOMAR, PA

s/Timothy Maio
Timothy Maio (S.C. Bar No. 105171)
PO Box 1897
Spartanburg, SC 29304
(864) 594-5300
tmaio@holcomebomar.com

Counsel for Appellants

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Spartanburg, South Carolina