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SC Court of Appeals

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.

**APPELLANTS’ REPLY TO RESPONDENT’S RETURN TO
APPELLANTS’ MOTION TO STRIKE**

Since the August 28, 2025 hearing, Respondent has acted as if the Circuit Court’s order striking the two affidavits can be nullified by simply acting as though it never occurred.

In Respondent’s Memorandum in Opposition to Appellants’ Rule 59(e) Motion, Respondent casually cites to the affidavits as though they were never stricken. (See

Exhibit 1, page 11). However, as Appellants pointed out in their Reply, it is well-settled that a party cannot submit new evidence in a Rule 59(e) motion. *See Spreeuw v. Barker*, 385 S.C. 45, 68-69, 682 S.E.2d 843, 855 (Ct. App. 2009) (finding the court could not consider a document that was submitted to the family court “only as an attachment to [the father's] Rule 59(e) motion”); *Obriecht v. Raemisch*, 517 F.3d 489, 494 (7th Cir. 2008) (“As for the new evidence, motions under Rule 59(e) cannot be used to present evidence that could have been presented before judgment was entered.”); *Green v. Johnson*, No. 2020-001254, 2024 WL 180690, at 4 (S.C. Ct. App. Jan. 17, 2024), *aff'd in part, rev'd in part*, 446 S.C. 326, 919 S.E.2d 894 (2025) (“[W]e hold the master erred in considering the evidence presented for the first time at the Rule 59(e) hearing . . .”); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (“A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.”); *see also Exhibit 2*, pages 2-3.

On Appeal, Respondent continues to rely upon and cite to the affidavits as though they were never stricken. (See Respondent’s Initial Brief, pages 20-21). They were stricken, though, and simply acting as though the ruling never occurred does not change that fact.

Ironically, the reason why they were stricken is because Respondent waited until an hour and fifteen minutes prior to the commencement of the August 28, 2025 hearing to file its Memorandum in Opposition and accompanying exhibits. In other words, Respondent attempted to win the hearing by ambush – a tactic that, on appeal,

Respondent claims to take great moral offense to. (See Respondent’s Initial Brief, pages 15-17).

Rule 6(d), SCRCF exists to help prevent “trials by ambush.” Respondent violated Rule 6(d) by choosing to wait until about an hour before the hearing to file and serve the affidavits. Respondent has never challenged the Circuit Court’s order granting the motion to strike either via a Rule 59(e) motion or on appeal. The Circuit Court’s order granting the motion to strike is the law of the case. *See Transportation Ins. Co. & Flagstar Corp. v. S.C. Second Inj. Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) (“An unappealed ruling is the law of the case and requires affirmance.”).

Nevertheless, if this Court is inclined to allow Respondent to submit, cite to, and rely upon affidavits that were never considered by the Circuit Court, Appellants simply ask that the same privilege be extended to them as well. As previously stated, Appellants relied upon the Circuit Court’s ruling granting Appellants’ motion to strike – if the motion to strike had not been granted, Appellants would have asked the Circuit Court to continue the hearing to permit the submission of responsive affidavits.

Respondent should not be permitted to benefit from its attempted “trial by ambush,” which is the very tactic Respondent now characterizes to this Court as unconscionable.

[signature on next page]

Respectfully Submitted,

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April 27, 2026
Spartanburg, South Carolina

STATE OF SOUTH CAROLINA)
)
 GREENVILLE COUNTY)
)
 Estate of Virginia Parsons, by and)
 through her Personal Representative)
 Sandra P. White, Individually and on)
 behalf of statutory beneficiaries,)
)
 Plaintiff,)
)
 v.)
)
 Atlas Senior Living, LLC; Atlas Senior)
 Living II, LLC; AFF 18 Oakview Park)
 ALF, LLC d/b/a Oakview Park Assisted)
 Living; AFF 18 Oakview Park PropCo,)
 LLC; AFF 18 Greenville Borrower,)
 LLC; Oakview Park Developer, LLC)
)
 Defendants.)
)

COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2024CP2306777

**PLAINTIFF’S MEMORANDUM
 OF LAW IN OPPOSITION TO
 DEFENDANTS’ MOTION TO
 RECONSIDER, ALTER,
 AND AMEND**

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Plaintiff the Estate of Virginia Parsons, by and through her Personal Representative Sandra P. White respectfully submits her memorandum of law in opposition to the Rule 59(e), SCRC motion of Defendants Atlas Senior Living, LLC; Atlas Senior Living II, LLC; AFF 18 Oakview Park ALF, LLC d/b/a Oakview Park Assisted Living (“the Facility”); AFF 18 Oakview Park PropCo, LLC; AFF 18 Greenville Borrower, LLC; and Oakview Park Developer, LLC.

KEY CONTRACT TERMS

A number of unconscionable and otherwise unenforceable legal provisions are buried within the twenty-page “Oakview Park Residency Agreement” (“the Agreement”). Section V(A) is the Agreement’s “Arbitration Provision” which begins on page 7 and contains the following unfair provisions:

- **Lack of Mutuality (1):** While the Facility’s residents are purportedly required to arbitrate any legal claim related to their residency, Defendants’ legal rights are not

equally curtailed. The Agreement expressly carves out “any action for eviction,” thereby reserving access to the courts for Defendants while denying it to residents.

- **Onerous Discovery Limitations (6):** The Agreement flatly refuses to offer residents the same level of access to key information that they would have in litigation (“discovery shall be modified . . .”). The improper discovery provisions include:
 - (b): A per-page charge to the resident for every document Defendants produce
 - (c): A blanket prohibition on non-expert depositions
 - (i): A pre-hearing schedule that prevents the resident from knowing Defendants’ witness and exhibit list until just 14 days before the arbitration hearing.
- **Appeal Waiver (10):** The Agreement purports to waive any right to appeal an arbitrator’s decision.
- **Attorney Fee Waiver (11):** A resident is purportedly barred from recovering attorneys’ fees even if such recovery is permitted or even required by statute.

The Agreement’s Section V(B) is titled “Limitation of Liability Provision,” and it sets out to systematically eliminate a number of statutorily protected damages in a manner that no reasonable person in Defendants’ position would expect a resident to accept. Specifically:

- **Economic Damages Limit (2(a)):** A resident may only recover “net economic damages” with a requirement that the recovery be “offset by any collateral source payments,” which is directly at odds with South Carolina’s long-standing collateral source rule.
- **Noneconomic Damages Limit (2(b)):** A resident may only recover \$ 400,000 for noneconomic damages even though South Carolina law imposes no noneconomic damages limits for most tort claims. This purported limitation is also well beneath the noneconomic damages limitation for medical malpractice claims (\$ 580,461). S.C. Code Ann. § 15-32-220; S.C. Revenue & Fiscal Affairs Office Mem., dated Feb. 3, 2025 (adjusting statutory damage limit for inflation). Moreover, the Agreement’s purported limit would limit a resident to \$ 400,000 for recovery from all Defendants even though South Carolina’s statutory noneconomic damages limitation functions on a per-claimant, per-provider basis allowing each claimant a recovery up to \$ 1,741,383. Id.
- **Punitive Damages Exclusion (2(d)):** The Agreement purports to bar punitive damages, another component of damages made available by South Carolina statute for instances of reckless misconduct.

COURT'S ORDER DENYING MOTION TO COMPEL ARBITRATION

After considering the parties written submissions and oral arguments at the August 28, 2025 WebEx hearing, the Court entered its order on September 24, 2025, denying Defendants' motion to compel arbitration and stay proceedings. The Court concluded the Agreement was unconscionable and, therefore, invalid. (Order at 5). The Court offered specific legal reasoning to support its conclusion on both procedural and substantive unconscionability. The Agreement was procedurally unconscionable because the conditions under which it was presented and entered indicated a lack of meaningful choice in the transaction. Specifically, the Court found a "significant" disparity in the bargaining power of Virginia Parsons (through her daughter Sandra P. White) and the Facility, a sophisticated business entity. (Order at 2). As for the Agreement, the Court found it was offered on a take-it-or-leave-it basis with "no opportunity for negotiation" and concluded the disputed arbitration/liability limitation provisions were not conspicuous within the document (on pages 7-11 of 20, not in bold type). (Order at 2).

The Agreement was also substantively unconscionable based on its one-sided and unfair terms. The Court made special note of the Agreement's "severe[]" noneconomic damages cap as well as its attempt to limit a resident's economic damages by eliminating the collateral source rule recognized by South Carolina law. (Order at 2). The total bar of punitive damages was also highlighted as a term no reasonable resident should be expected to accept. But, it was not just the damage issues that proved the Agreement was unconscionable, it was also the way in which it altered pre-hearing procedures. Barring a resident from obtaining lay witness testimony was determined to be especially egregious because, since the Facility is likely to control the key fact witnesses, the practical effect of the deposition ban is to ensure a resident would enter the arbitration hearing with an informational and strategic disadvantage. (Order at 3).

Finally, the Court recognized the unfair terms cover basically the entire arbitration process from the way in which a party prepares for the hearing to the way in which the hearing is conducted to the types of remedies that are available and even what recourse a losing party can pursue. Since the improper provisions are so pervasive, the Court concluded they could not be severed from the Agreement itself. (Order at 5). Accordingly, all of the Agreement's Section V was declared invalid. Without a valid arbitration contract on which they could rely, Defendants' motion to compel arbitration and to stay proceedings was denied. (Order at 5).

ARGUMENT

Defendants seek to force a former resident's family to arbitrate based on a contract that would deny her access to the information needed to prove her claim and slash the amount of compensatory damages available to cover her losses. The Court's order refusing to enforce this grossly unfair contract was well supported by the record and South Carolina law. The Agreement is procedurally unconscionable because Defendants used their grossly superior bargaining power to sneak the arbitration and damage limitation provisions into a twenty-page contract Ms. Parsons had no power to negotiate. The Agreement was also substantively unconscionable because, as South Carolina's appellate courts have recognized, eliminating core discovery devices and whole categories of damages are not the kind of contract provisions a reasonable nursing facility should demand or a reasonable resident should be made to accept.

1. Defendants' objections to the Court's procedural unconscionability ruling are incomplete and incorrect.

While Defendants ask the Court to reconsider its procedural unconscionability ruling, they neither cite nor attempt to apply all of the key factors for that doctrine. They argue mostly just that Sandra White was capable of reading the Agreement. (Defs.' Mot. at 3-4). However, procedural unconscionability is a much more extensive inquiry than Defendants' motion suggests. Under

South Carolina law, unconscionability is “the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007) (quoting Carolina Care Plan, Inc. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). The procedural unconscionability or “absence of meaningful choice” requirement “speaks to the fundamental fairness of the bargaining process.” Simpson, 373 S.C. at 25, 664 S.E.2d at 669. The key factors on this element include (1) the nature of the injuries suffered by the plaintiff; (2) whether the plaintiff is a substantial business concern; (3) the relative disparity in the parties’ bargaining power; (4) the parties’ relative sophistication; (5) whether there is an element of surprise in the inclusion of the challenged clause; and (6) the conspicuousness of the arbitration clause. Id. (citing Carlson v. Gen. Motors Corp., 883 F.2d 287, 293 (4th Cir. 1989)).

Applying these factors to the Agreement shows the fundamental unfairness of the bargaining process. Initially, the Agreement is an adhesion contract in that it was printed on a standardized form, offered to Virginia Parsons (through her daughter) on a take-it-or-leave-it basis, and did not offer any chance to negotiate. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Adhesion contracts are not per se unconscionable but identifying a document as an adhesion contract is a starting point for analyzing the substantive factors. Simpson, 373 S.C. at 27, 644 S.E.2d at 669. The first factor favors Ms. Parsons because her injuries were personal and substantial. Defendants’ alleged negligence led to a fall, painful broken hip and ultimately her death.

The other factors also favor Ms. Parsons’s position. Sandra White was not a substantial business concern. Defendants presented no evidence that she had any experience or familiarity

with arbitration or the nursing home admission process. She was acting only as Ms. Parsons' daughter and representative with the aim of obtaining the nursing care she urgently needed. In contrast, Defendants are sophisticated business entities evidenced in many ways including the complex organization structure they have built to manage the Facility's operations. See Compl. 12. The disparity in bargaining power is considerable. Defendants own, operate, or otherwise control the Facility and routinely draft and present contracts like the Agreement to potential residents. Ms. Parsons, on the other hand, was a vulnerable woman in poor health in need of care to continue from day to day. Additionally, the key language of the Agreement was not conspicuous relative to any of the other admission paperwork the Facility presented to Sandra White. The offending provisions are buried on pages 7-11 of the twenty-page Agreement with nothing to distinguish them from terms related to dining services, the Facility's pets policy, and other miscellaneous provisions.

Plus, the lack of conspicuousness and surprise elements relate not only to how prominently an arbitration provision is featured in a contract but also consider whether the way in which the arbitration provision is drafted imposes substantive limitations that would not be immediately apparent to an unsophisticated person. E.g. Simpson, 373 S.C. at 27-28, 644 S.E.2d at 670 (finding arbitration provision "inconspicuous . . . in light of its consequences" including the deprivation of statutory remedies). Therefore, strong evidence of substantive unconscionability can bolster the types of procedural unconscionability described above. Damico v. Lennar Carolina, LLC, 437 S.C. 596, 612, 879 S.E.2d 746 (2022) ("the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable").

In sum, Defendants' procedural unconscionability arguments should be rejected because the Court's order correctly determined Defendants had greater bargaining power than Ms. Parsons and used that power to present to Sandra White—a layperson seeking nursing care for her mother—a form contract of adhesion with an inconspicuous arbitration provision.

2. The Court correctly cited discovery limitations and damages exclusions to find the Agreement is substantively unconscionable.

Defendants take a similarly selective view of substantive unconscionability. (Defs.' Mot. at 4-5). They incorrectly argue the Agreement's arbitration fee and noneconomic damages limit are fair but offer no defense of the Agreement's discovery limits or its exclusion of punitive and certain compensatory damages that are a core part of personal injury claims. Properly considering the full scope of the Agreement's questionable terms, the Court followed South Carolina law in finding the Agreement substantively unconscionable. In fact, courts in multiple jurisdictions have reached the same conclusion on this contract.

South Carolina courts have found substantive unconscionability where a contract includes limitations or prohibitions on statutory and punitive damages, a lack of mutuality in the rights of the parties, and terms aimed at curtailing claims rather than finding a more efficient or efficacious resolution of disputes. Simpson, 373 S.C. at 29, 644 S.E.2d at 670. The Agreement contains all of these prohibited provisions. Punitive damages are declared non-recoverable (Agreement § V(B) 2(d)) and actual damages are severely limited. Defendants overlook the fact that the Agreement's noneconomic damages cap goes far beyond what is permissible in South Carolina law. For one, the Agreement purports to apply the limitation to all claims, while South Carolina's statutory cap is limited to medical malpractice claims. S.C. Code Ann. § 15-32-220(A). Plus, the Agreement's limitation is a total cap for all individuals seeking noneconomic damages related to Ms. Parsons'

death from all Defendants. That is a substantial departure from the South Carolina statutory cap that works on a per claimant, per provider basis. Id.

Defendants' motion also offers no argument that the Agreement is reasonable in limiting Ms. Parsons' *economic* damages. The Agreement purports to cancel out South Carolina's common-law collateral source rule (Agreement § V(B) 2(a))—a move that could reduce Ms. Parsons' actual damages to nearly nothing. In fact, the probable effect of this provision is that Defendants would rarely have to pay anything of significance for economic damages. The collateral source rule has a rich history in South Carolina law and it serves important policy purposes. As the South Carolina Supreme Court has held, the rule ensures a tortfeasor does not “take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received” is an insurance company or any other source. Covington v. George, 359 S.C. 100, 103, 597 S.E.2d 142 (2004) (citing Pustaver v. Gooden, 350 S.C. 409, 413, 566 S.E.2d 199, 201 (Ct. App. 2002)). These exclusions would not apply to a traditional negligence claim by a nursing home resident. There is simply no benefit to Ms. Parsons in accepting these sorts of terms.

Defendants also fail to account for the Agreement's lack of mutuality. The purported arbitration requirement applies to all claims Ms. Parsons could ever file but not to all claims the Facility could pursue against her. Defendants—as the Agreement's sole drafter—sought fit to expressly carve out the right to pursue an eviction action against Ms. Parsons in court rather than in arbitration. Non-mutual arbitration burdens coupled with wholesale damage exclusions are precisely the type of grossly unfair terms recognized in Simpson. Another court labeled these types of provisions the dictionary definition of unconscionable contract language. Byrd Motor Lines, Inc. v. Dunlop Tire & Rubber Corp., 304 S.E.2d 773, 777 (N.C. App. 1983) (citing Black's Law

Dictionary 1367 (5th ed. 1979) (citing “gross one-sidedness of a term . . . limiting damages” as typical example of unconscionability)).

Moreover, Defendants’ motion offers no discussion of the Agreement’s discovery limitations which were a core part of the Court’s substantive unconscionability analysis. (Order at 3). The Agreement flatly bars arbitration parties from taking non-expert depositions. (Agreement § V(A) 6). South Carolina appellate courts have signaled their refusal to tolerate arbitration contracts with such extensive discovery restrictions. In Lucey v. Meyer, 401 S.C. 122, 143, 736 S.E.2d 274, 285 (Ct. App. 2012), the court found an employment arbitration contract was not unconscionable, rejecting the “oppressive terms” factor only after finding the contract “places no apparent restrictions on the introduction of depositions of witnesses into arbitration proceedings.” The restrictions lacking there are present here. The inescapable reality of the Arbitration Agreement is that Respondent will have no opportunity to conduct depositions. South Carolina’s federal district court has found an arbitration contract unconscionable because of “severe discovery limitations.” Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582, 614 (D.S.C. 1998). In Hooters of America, the employer went too far when it limited its employee to noticing one deposition unless the arbitrator found a “substantial need” for more. Id. at 601. The Arbitration Agreement poses a far more restrictive view of discovery by excluding all non-expert depositions. Several rulings from other jurisdictions have likewise refused to allow nursing homes to shut their former residents out of discovery.¹

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

Defendants may argue a zero-deposition process is acceptable because it applies with equal force to them. This argument fails for multiple reasons. First, an arbitration proceeding amounting to trial by ambush is hardly consistent with the South Carolina Rules of Alternative Dispute Resolution the Arbitration Agreement purports to incorporate. See Rule 1, SCADR (stating that arbitration “shall be construed to secure the *just, speedy, inexpensive and collaborative* resolution” of disputes) (emphasis added). Second, while a zero-deposition rule may seem like an equal burden for both sides, its effects are unequally detrimental to a plaintiff in a nursing home case. Nursing home neglect occurs almost exclusively on the nursing home’s property, recorded in documents within the home’s exclusive control, and performed or witnessed by individuals in the home’s employ. If Defendants want to speak to the allegedly at-fault individuals, they can do so without limitation.

But, without the ability to send a notice of deposition to any of the Facility’s employees, Ms. Parsons’ counsel would be at a significant informational disadvantage when the arbitration hearing begins. She will know nothing from the Facility’s employees about the incident or the operation and management of the Facility. The absence of fact witness depositions is especially harmful here because all of the relevant fact witnesses are Defendants’ employees. That means attempting to speak with the key witnesses outside the deposition context would present a potential ethical violation. See Rule 4.2, RPC, Rule 407, SCACR. This case shows just how vast the information disparity can be and what a hurdle it poses to a plaintiff’s efforts to investigate her claim. Plaintiffs (who bear the burden of proof) face a contractually-imposed hurdle to crucial evidence and a defendant is given cover to obscure key evidence adverse to its interests.

App. 2005) (reversing order compelling arbitration since contract included unconscionable discovery restrictions).

Forcing Respondent to arbitrate her claims would also impose on her a substantial, perhaps preclusive, financial burden. While often lauded for its time savings, arbitration proceedings can cost far more than litigating a legal claim because the parties may be called on to compensate the arbitrator and to cover their costs. As the Fourth Circuit recognizes, “it is undisputed that fee splitting can render an arbitration agreement unenforceable where the arbitration fees and costs are so prohibitive as to effectively deny the employee access to the arbitral forum.” Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 554 (4th Cir. 2001); see also Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90-91 (2000). The arbitrator-related costs for arbitrating a nursing home negligence action are exponentially greater than court costs for litigating the same claim. G. Poliakoff Aff. 5-6. By one estimate, a nursing home resident’s family could be expected to pay portion of a \$220,000 arbitration bill for a case that, were it filed in state court, would cost the family only a couple hundred dollars in court costs. G. Poliakoff Aff. 6(A), **attached as EXHIBIT 1**; see e.g. Phillips v. Associates Home Equity Servs., Inc., 179 F. Supp. 2d 840, 846-47 (N.D. Ill. 2001) (finding arbitration costs prohibitive when cost to arbitrate was at least 12 times as much as costs to bring action in federal court). These are expenses Ms. Parsons’ family cannot afford to pay. S. White Aff. 10-12, **attached as EXHIBIT 2**. Forcing Sandra to arbitration is an existential threat to the resolution of her claims on their merits.

Finally, the court is far from the first to find these specific arbitration and liability limitation provisions unconscionable. A federal district court in Pennsylvania reached the same conclusion in Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538, 540, 545 (E.D. Pa. 2006). Discussing the fact witness deposition ban, the court first noted that a discovery restriction in an arbitration agreement does not render the agreement unconscionable unless the restriction denies the plaintiff “a fair opportunity to present their claims.” Id. at 545 (quoting Gilmer v. Interstate/Johnson Lane

Corp., 500 U.S. 20, 31 (1991)). The deposition ban denied the plaintiff a fair opportunity because it denied access to two of the most vital sources of information, Alterra employees and the nursing home’s other residents. While the plaintiff’s attorney may have been able to convince some of the residents to speak voluntarily, the ban took away any means of compelling their testimony. As for Alterra employees, the plaintiff’s lawyer was prevented from speaking with them by legal ethics rules. Ostroff, 433 F. Supp. 2d at 545; see also Rule 4.2, RPC, Rule 407, SCACR (“a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer”). The deposition ban put the plaintiff at a sizable disadvantage in the arbitration because the plaintiff will have “only limited information as to how the accident in question occurred.” Ostroff, 433 F. Supp. 2d at 545.

The Ostroff court also pointed to the lack of mutuality evident from the arbitration agreement. This provision subjects every claim between the nursing home and the resident to arbitration except for “any action for eviction.” This provision demonstrated that the nursing home “crafted an arbitration procedure that favored it over residents.” 433 F. Supp. 2d at 547. The lack of mutuality combined with the grossly unfair discovery restriction rendered the contract unconscionable. Id.

Similarly, a New Jersey appellate court found the same arbitration and limitation of liability provisions to be unconscionable in Estate of Ruszala v. Brookdale Living Communities, Inc., 1 A.3d 806 (N.J. Super. Ct. App. Div. 2010). Ruszala called the fact witness deposition ban “palpably egregious” and “clearly intended to thwart plaintiff’s ability to prosecute a case” against the nursing home. 1 A.3d at 821. Also, the noneconomic damages cap had the “insidious effect of permitting nursing home operators to budget potential liability as a mere cost of doing business”

and prevented plaintiffs from full recovery for their losses. Id. Additionally, by prohibiting punitive damages, the contract took away the public vindication and deterrent benefit justifying punitive damages as a measure of judicial relief. Ruszala, 1 A.3d at 821-22. As a whole, the contract “form[ed] an unconscionable wall of protection for nursing home operators seeking to escape the full measure of accountability for tortious conduct that imperils a discrete group of vulnerable consumers.” Id. at 822. Based on the binding South Carolina authority and persuasive authority from other jurisdictions, the Agreement’s arbitration and limitation of liability provisions are unconscionable and invalid.

In sum, the Arbitration Agreement was an adhesion contract offered to a vulnerable woman in desperate need of nursing home services under circumstances that deprived her of any meaningful choice. Moreover, the Agreement imposes severe discovery restrictions that tilt the arbitration process and outcome dramatically in Defendants favor. Thus, the Court correctly determined the Agreement is substantively unconscionable.

3. The Court correctly refused to sever the Agreement’s unconscionable arbitration and damage provisions because they cover ever part of the proposed arbitration process.

Once an illegal contract provision is identified, severing it from the contract’s remaining terms is not always feasible or proper. Simpson, 373 S.C. at 34, 673 S.E.2d at 673. The parties’ intent is the primary factor in determining whether the offending provision is severable. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). If the offending provision “pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts,” then severance looks more like rewriting the contract than effectuating the parties’ intent. Simpson, 373 S.C. at 34, 673 S.E.2d at 673 (quoting Booker v. Robert Half Int’l Inc., 413 F.3d 77, 84-85 (D.C. Cir. 2005)); see also Alexander v. Anthony Intern., LP, 341 F.3d 256, 271 (3d Cir. 2003) (concluding court “cannot give effect to an agreement to

arbitrate afflicted by so much fundamental and pervasive unfairness”). The Simpson court refused to sever an arbitration agreement’s offending provisions and instead invalidated the entire agreement because it contained multiple unconscionable provisions that denied statutory rights and violated established public policy. 373 S.C. at 35, 644 S.E.2d at 674 n. 9.

The previous sections of this memo discuss several items within the Agreement’s arbitration and limitation of liability provisions that are unconscionable and inconsistent with South Carolina public policy. The Agreement contains a severability provision, but Simpson shows severability clauses are ineffective if unconscionable provisions permeate the overall arbitration provision. This case is similar to Simpson, and the court correctly refused to enforce the entire arbitration provision rather than attempting to excise the multiple unconscionable items within the provision. Like Simpson, the arbitration provision contains multiple unconscionable items including the discovery restriction and damages cap. Therefore, the Agreement’s arbitration and liability limitation provisions were correctly invalidated in full.

CONCLUSION

Based on the arguments above and those in her earlier briefing, Plaintiff respectfully requests the Court deny Defendants’ motion to reconsider, alter, or amend.

Respectfully submitted,

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October 17, 2025
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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

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

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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;

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2024-CP-23-06777

**DEFENDANTS' REPLY TO
PLAINTIFF'S MEMORADUM IN
OPPOSITION TO DEFENDANTS'
RULE 59(e) MOTION**

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Atlas Senior Living, LLC, Atlas Senior Living II, LLC, AFF 18 Oakview Park ALF, LLC d/b/a Oakview Park Assisted Living, AFF 18 Oakview Park PropCo, LLC, and AFF 18 Greenville Borrower, LLC (collectively, "Defendants") reply to Plaintiff's Memorandum in Opposition to Defendants' Rule 59(e) Motion as follows.

I. The burden of proving unconscionability lies with the party asserting it.

In Plaintiff's Memorandum in Opposition to Defendants' Rule 59(e) Motion, Plaintiff does not dispute that the Court's September 24, 2025 order(s)¹ incorrectly state that Defendants have the burden of *disproving* unconscionability. The burden of proving unconscionability lies with the party asserting it – which here is Plaintiff.

¹ The Court appears to have signed and filed two identical Orders on September 24, 2025.

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.”); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 38 n.3, 524 S.E.2d 839, 844 n.3 (Ct. App. 1999) (finding that the party resisting arbitration bears the burden of showing that “the prevailing law would release him from a contractual obligation to arbitrate.”); *Youmans ex rel. Elmore v. S.C. Dep’t of Transp.*, 380 S.C. 263, 281-82, 670 S.E.2d 1, 10 (Ct. App. 2008) (“The [party] asserting an affirmative defense bears the burden of its proof.”).

II. The Court cannot consider affidavits that were submitted to the Court for the first time in a Rule 59(e) Motion.

Without offering any explanation or argument as to the propriety of doing so, Plaintiff attached two affidavits to her Memorandum in Opposition to Defendants’ Rule 59(e) Motion.

However, it is well-settled that a party cannot submit new evidence in a Rule 59(e) motion. See *Spreeuw v. Barker*, 385 S.C. 45, 68-69, 682 S.E.2d 843, 855 (Ct. App. 2009) (finding the court could not consider a document that was submitted to the family court “only as an attachment to [the father’s] Rule 59(e) motion”); *Obriecht v. Raemisch*, 517 F.3d 489, 494 (7th Cir. 2008) (“As for the new evidence, motions under Rule 59(e) cannot be used to present evidence that could have been presented before judgment was entered.”); *Green v. Johnson*, No. 2020-001254, 2024 WL 180690, at 4 (S.C. Ct. App. Jan. 17, 2024), *aff’d in part, rev’d in part*, 446 S.C. 326, 919 S.E.2d 894 (2025) (“[W]e hold the master erred in considering the evidence presented for the first time at the Rule 59(e) hearing . . .”); *Hickman v. Hickman*, 301

S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (“A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.”).

A court cannot “reconsider” what it never had occasion to consider in the first instance. Because the two affidavits that were attached to Plaintiff’s Memorandum in Opposition to Defendants’ Rule 59(e) Motion were not properly before the Court at the hearing on August 28, 2025 and were not considered by the Court in reaching its Form 4 Order of September 5, 2025, or more formal order(s) of September 24, 2025, the Court cannot consider these affidavits when evaluating Defendants’ Rule 59(e) Motion.

III. Plaintiff has not met her burden of proving procedural unconscionability.

Procedural unconscionability must be present for a contract to be unconscionable. As the *Gladden* Court explained: “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 v. Boykin*, 402 S.C. 140, 145, 739 S.E.2d 882, 884-85 (2013) (emphasis added).

Even if the Court feels that the terms of the arbitration provision here are “grossly unreasonable” it cannot deem the arbitration provision unconscionable if

there is no procedural unconscionability present, which the *Gladden* Court defined as 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.”** *Id.* (emphasis added).

There is no evidence here of an “extreme inequality of bargaining power.” Nor is there any evidence that Defendants intended to “obscure” the arbitration provision, or that Sandra Parsons White lacked the “basic reading ability” to understand and consent to the arbitration provision.

There is no evidence of any medical emergency or any other exigency that would have made it impossible, or even difficult, for Sandra Parsons White to consider placing her mother at a different assisted living facility. There is no evidence that assisted living residency agreements without arbitration provisions are unavailable in the market. That is significant because the *Gladden* court held that the market availability of home inspection contracts without exculpatory clauses defeated Plaintiff’s contention that she lacked a meaningful choice in accepting the exculpatory clause of the contract. *See id.* at 146, 739 S.E.2d at 885 (“Moreover, we have no record on which to find that home inspection contracts without exculpatory clauses are unavailable in the market Thus, the record does not support a conclusion that the Gladdens lacked a meaningful choice whether to accept the terms of the contract.”).

There is no evidence that Sandra Parsons White ever objected to, attempted to negotiate, or attempted to make pen-changes to the Residency Agreement or the arbitration provision therein. There is no evidence to support a finding that Sandra Parsons White lacked a meaningful choice in agreeing to the arbitration provision or that there was an “extreme inequality of bargaining power.”

The *Gladden* court found that because Ms. Gladden was a licensed real estate agent, she was a sophisticated party capable of understanding the contract she signed and capable of protecting her own interests. *Id.* Likewise, here, it is undisputed that Sandra Parsons White was a licensed real estate agent who had received formal instruction on, and demonstrated her understanding of, South Carolina contract law and agency law. Real estate agents are licensed professionals whose job it is to negotiate the terms of contracts on behalf of their clients.

The language of the arbitration provision was just as conspicuous as every other provision of the Agreement. To require an arbitration provision to be more conspicuous than any other contract provision is a violation of the FAA. *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.”); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (holding that under the FAA, “courts must place arbitration agreements on **an equal footing** with other contracts and enforce them according to their terms.” (emphasis added) (internal citations omitted)).

Plaintiff appears to imply in her Memorandum in Opposition to Defendants' Rule 59(e) Motion that the Agreement was procedurally unconscionable merely because it was an adhesion contract. However, adhesion contracts are not procedurally unconscionable in and of themselves. *See Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1175 (W.D. Wash. 2002) (finding “[t]hat an agreement constitutes a contract of adhesion is insufficient alone to support a finding that the agreement is procedurally unconscionable”); *Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284, 302 (D. Mass. 2016), *aff'd*, 918 F.3d 181 (1st Cir. 2019) (“Finally, to the extent that Bekele contends that contracts of adhesion in employment contexts are always procedurally unconscionable, that argument is without merit.”).

Indeed, as the United States Supreme Court has noted, “the times in which consumer contracts were anything other than adhesive are long past.” *AT&T Mobility LLC*, 563 U.S. at 346-47. Given that many Americans can now live their entire lives without ever encountering or signing anything other than adhesion contracts, if it were true that all adhesion contracts were *per se* procedurally unconscionable, the practical effect would be to require the Judiciary to review, approve of, and endorse each and every term of each and every contract (via a substantive unconscionability analysis) before any contract could be enforced. Such an approach would upend centuries of foundational Anglo-American contract law principles.

“People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the

effects of a bad bargain.” *Carlson v. Hamilton*, 8 Utah 2d 272, 274-75, 332 P.2d 989, 990-91 (1958).

The requirement that procedural unconscionability must be present, regardless of how foolhardy or “grossly unreasonable” a court feels the substantive terms may be, exists to preserve the bedrock freedom of contract principles that have undergirded Anglo-American contract law for hundreds of years. Without the requirement of procedural unconscionability, the exception of unconscionability would swallow the rule of freedom of contract.

The *Gladden* court understood this when it held 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.

Plaintiff has not met her burden of demonstrating procedural unconscionability. Adhesion contracts are not *per se* procedurally unconscionable. Sandra Parsons White was a sophisticated party. The arbitration provision was not hidden or concealed in any way. Defendants did not engage in any fraud, duress, misrepresentation or other “bargaining naughtiness.” *See* 17A Am. Jur. 2d Contracts § 272 (“Procedural unconscionability involves ‘bargaining naughtiness’ in contract

formation.”). There is no evidence that Sandra Parsons White lacked meaningful choice in assenting to the arbitration provision.

Because the requirement of procedural unconscionability has not been met, the arbitration provision cannot be unconscionable, regardless of how “grossly unreasonable” the Court may feel the substantive terms to be.

IV. Plaintiff has not met her burden of demonstrating substantive unconscionability.

Substantive unconscionability has been defined as terms that 1) are so oppressive that no reasonable person would make them, and 2) are so oppressive that no fair and honest person would accept them. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007).

South Carolina courts have expressly held that terms similar to many of the provisions present here are *enforceable*. There is no South Carolina caselaw indicating that any of the terms of the Agreement here are unenforceable. Regarding the terms for which South Carolina caselaw is silent as to their enforceability, should the Court determine that they are unenforceable, the Court should sever them in accordance with the Agreement’s severance clauses.

a. The limitation on liability provisions.

The limitation of liability provisions bar punitive damages and cap recoverable damages at \$400,000. In *Maybank*, the Court held that punitive damages waivers are neither unconscionable nor violative of public policy. *Maybank v. BB&T Corp.*, 416 S.C. 541, 576, 787 S.E.2d 498, 516 (2016). Similarly, in *Gladden*, the Court held that a contract provision that limited damages only to the amount paid for a home

inspection (which would have likely been less than \$1,000) was neither unconscionable nor violative of public policy. *Gladden*, 402 S.C. 140, 739 S.E.2d 882. Given *Gladden* and *Maybank*, it is difficult to conclude that no reasonable person would offer or accept the limitation of liability provisions present here.

In her Memorandum in Opposition to Defendants' Rule 59(e) Motion, Plaintiff notes that the limitation of liability provisions also limit recoverable medical expenses to those amounts actually incurred by Plaintiff. Undersigned counsel is not aware of any South Carolina caselaw that addresses the enforceability of such a provision, and Plaintiff cites to none. Accordingly, if the Court should find this provision unenforceable, Defendants ask that the Court sever this provision in accordance with the Agreement's severance provisions.

However, given the significant and learned differences of opinion that have existed, and continue to exist, as to the prudence of allowing plaintiffs to recover for medical bills they never actually incurred (sometimes called "phantom charges"), it is difficult to conclude that a contract provision limiting recovery only to medical bills actually incurred is so absurd or oppressive that no reasonable person would offer or accept it. Several judiciaries and state legislatures, outside of South Carolina, have limited the amount of medical bills a plaintiff may recover in a lawsuit to the amounts actually incurred by the plaintiff. Indeed, in *Haselden*, our own Supreme Court of South Carolina discussed the issue of "phantom charges" in the world of healthcare, and, in a dissenting opinion, Justice Burnett and Justice Pleicones wrote that:

The majority of courts to consider this issue predicate their holdings on the central tenet of compensatory damages: awards are intended to

make an injured person whole by placing him in the position enjoyed prior to the injury and no more. Allowing a plaintiff to recover for the amount billed to Medicaid does injury to this principle of law.

The Medicaid program provides individuals with medical treatment by doctors who agree to accept such patients in exchange for payment at a predetermined rate schedule. The patient not only receives medical care, but also incurs no liability for the cost of the care once the doctor accepts payment. The difference between the amount billed and the amount paid, the amount in issue in this case, is “phantom” money in that no one has paid the amount and no one will incur a debt for the amount.

....

Because the plaintiff has never paid nor will ever be liable for the written-off difference between the billed and paid amount, it is unconscionable to permit the taxpayers to bear the expense of providing free medical care to a person and then allow that person to recover damages for medical services from a tort-feasor and pocket the windfall.

....

The amount Medicaid pays is a collateral source to benefit a plaintiff who has a right to recover that amount. The excess between the amount billed to and the amount paid by Medicaid, for which a plaintiff is no longer liable, is not protected by the [collateral source] rule. It is not reasonable, under principles of compensatory damage law, to allow Plaintiff to receive a windfall in damages of amounts for which no entity is liable.

Haselden v. Davis, 353 S.C. 481, 486-88, 579 S.E.2d 293, 296-97 (2003).

If Justice Burnett and Justice Pleicones can reasonably disagree about the propriety of applying the collateral source rule in such contexts, I would not wish to argue that a contract provision that limits recoverable medical bills to the amounts Plaintiff actually incurred is so oppressive that no reasonable person would ever propose or agree to such a thing.

b. Alleged lack of mutuality.

Next, in her Memorandum in Opposition to Defendants' Rule 59(e) Motion, Plaintiff alleges 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."

However, a similar argument was disposed of by the Court in *Munoz*. In *Munoz*, Plaintiff contended that "the arbitration clause lacks mutuality and is therefore invalid because it allows Creditor to seek foreclosure on the mortgage given by the Munozes and denies the Munozes the right to litigate any counterclaim in the foreclosure action." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541-42, 542 S.E.2d 360, 365 (2001).

The *Munoz* court held that "[w]e find the doctrine of mutuality of remedy does not apply here. An agreement providing for arbitration does not determine the remedy for a breach of contract but only the *forum* in which the remedy for the breach is determined." *Id.* at 542, 542 S.E.2d at 365 (emphasis in original). "The Munozes have not been deprived of a remedy—they simply must seek their remedy through arbitration rather than through the judicial system. Moreover, under state law, a lack of mutuality of remedy does not invalidate a contract." *Id.*

c. The discovery provisions.

In her Memorandum in Opposition to Defendants' Rule 59(e) Motion, Plaintiff also takes issue with the Agreement's barring of non-expert witness depositions.

The benefit of arbitration has always been understood to be its potential for faster and more efficient dispute resolution. Realizing this benefit is not possible if the extent of discovery in arbitration must be identical to that afforded to civil litigants in the judicial system.

“Plaintiff next contends that the limited scope of discovery in arbitration proceedings inhibits her ability to pursue her claims. In this respect, Plaintiff attacks the very foundations of arbitration as a method for dispute resolution, and both the Supreme Court and the Eleventh Circuit reject this species of argument.” *Hopkins v. World Acceptance Corp.*, 798 F. Supp. 2d 1339, 1349 (N.D. Ga. 2011). “Discovery limitations promote the goals of the FAA, and such limitations are rarely grounds for avoiding an arbitration agreement.” *Id.* at 1350.

Plaintiff has not met her burden of demonstrating that she will be unable to adequately pursue her claims in arbitration. Under the Agreement, all parties must, via written interrogatory responses, disclose the identities of all individuals who may be witnesses or have knowledge relevant to the claims, and provide a summary of what each witness knows, well in advance of the arbitration proceeding. The parties can then subpoena the witnesses they wish to call at the arbitration proceeding. Under the Agreement, the parties are also entitled to serve requests for the production of relevant documents, pursuant to the South Carolina Rules of Civil Procedure, and can file motions to compel discovery responses with the arbitrator.

Criminal defendants who have their very life and liberty at stake are afforded no greater discovery apparatus than that present in the Agreement. It cannot be the

case that for an arbitration proceeding to be “conscionable” it must give civil litigants access to greater discovery tools than are afforded even to criminal prosecutors and criminal defendants. Nor can it be the case that for an arbitration proceeding to be “conscionable” it must have the same extent of discovery as would be available to civil litigants in the judicial system, as such a requirement would defeat the very purpose of arbitration.

“The cry of ‘unconscionable!’ just repackages the tired assertion that arbitration should be disparaged as second-class adjudication. It is precisely to still such cries that the Federal Arbitration Act equates arbitration with other contractual terms.” *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004).

d. Costs of arbitration.

Plaintiff continues to contend that it will incur prohibitively expensive costs should this case be referred to arbitration. This is despite the fact that the arbitration provision itself provides that if Plaintiff is indigent (as Plaintiff appears to allege), Plaintiff will not incur *any* arbitration costs.

Given the plain language of the arbitration provision itself, Plaintiff has not met her burden of showing that she is likely to incur prohibitively expensive costs should this case be referred to arbitration. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 81 (2000) (“[A] party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs.”).

IV. The Court should sever any provisions it deems unenforceable.

If any “illegality” is present here at all, it certainly does not “pervade” the Agreement “such that only a disintegrated fragment would remain after hacking away the unenforceable parts.” *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (quoting *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 84-85 (D.C. Cir. 2005)).

In *Booker*, the Court found that severing an unenforceable provision was appropriate, rather than invalidating the entire agreement, because there was no caselaw at the time the contract was executed indicating that the offending provision was unenforceable. *Booker*, 413 F.3d at 85.

The same is true here. There is no South Carolina caselaw indicating that any of the provisions of the Agreement are unenforceable, and, to the contrary, there is caselaw indicating that terms similar to many of the provisions present here are *enforceable*. Regarding the terms for which South Carolina caselaw is silent as to their enforceability, should the Court determine that they are unenforceable, the Court should sever them in accordance with the Agreement’s severance clauses.

Defendants here have not engaged in “an integrated scheme to contravene public policy” for which they ought to be punished. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 617, 879 S.E.2d 746, 758 (2022).

The *Damico* court cited with approval to 17A Am. Jur. 2d Contracts § 314, which provides that:

To determine whether an entire contract should be invalidated or whether only a particular term or set of terms should be severed, a court considers whether—

- the illegality is central or collateral to the purpose of the contract.
- the illegal provision involves moral turpitude.
- the agreement is an integrated scheme to contravene public policy.
- the party seeking enforcement has engaged in serious misconduct.
- the provision can be eliminated without frustrating the basic purpose of the contract.
- the contract would have been entered into independently of the invalid portion.
- the considerations from both sides are sufficient for performance absent the invalid provision.
- the invalid provision does not constitute the main or essential purpose of the agreement.
- the allegedly unenforceable clause can easily be severed from the remainder of the contract without reforming the substance of the contract.

17A Am. Jur. 2d Contracts § 314.

All of these factors weigh in favor of severing any term(s) that the Court deems unenforceable here, rather than invalidating the entire arbitration provision. The essential purpose of the arbitration provision was to memorialize the parties' agreement to settle disputes via arbitration. This is not an illegal purpose; in fact, this is a purpose and an endeavor that Congress sought to encourage and protect by enacting the FAA. The arbitration provision does not involve any moral turpitude. Defendants have not engaged in any serious misconduct or perpetrated an integrated scheme to contravene public policy. Any terms regarding how the arbitration is to be

conducted or what damages are recoverable therein can easily be severed without frustrating the essential purpose of the arbitration provision.

Finally, the language of the arbitration provision evinces the parties' intent to sever any provisions that a Court may deem unenforceable. (See the severance clauses contained in **Exhibit 1** to Defendants' Memorandum in Support of Defendants' Motion to Compel Arbitration). The intent of the parties should be enforced. See *Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (holding that "[t]he entirety or severability of a contract depends primarily upon the intent of the parties.").

Conclusion

For the foregoing reasons, as well as those previously raised in oral argument and in previous memorandums of law, Defendants respectfully request that this Honorable Court reconsider, alter, and amend its Order(s) of September 24, 2025 and grant Defendants' Motion to Compel Arbitration.

[signature on next page]

Respectfully Submitted,

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October 31, 2025
Spartanburg, South Carolina

RECEIVED

Apr 27 2026

SC Court of Appeals

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.

PROOF OF SERVICE

I certify that I have served the Appellants' Reply to Respondent's Return to Appellants' Motion to Strike, and accompanying exhibits, on all attorneys of record, by sending it by email on April 27, 2026, to the following:

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April 27, 2026
Spartanburg, South Carolina