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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

Vernon F. Dunbar, Circuit Court Judge

Appellate Case No.: 2025-001290

Marvin Barborek,.....Respondent,

v.

Cascades Nursing, LLC and Cascades Retirement, LLC,.....Appellants.

FINAL APPELLANTS' BRIEF

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STATEMENT OF THE ISSUE ON APPEAL

Did the circuit court err in denying the motion to compel arbitration, where a binding arbitration agreement exists between the parties and any questions about its validity and enforceability must be determined by an arbitrator?

STATEMENT OF THE CASE

This case arises from an injury that Respondent Marvin Barborek ("Barborek") claims to have sustained while he was a resident at a nursing care facility owned and/or operated by Appellants Cascades Nursing, LLC and Cascades Retirement, LLC (collectively "Cascades"). Barborek filed a Summons and Complaint in the Court of Common Pleas for Greenville County on January 24, 2025. [R. pp. 4-11] Cascades filed a timely Motion to Dismiss and Compel Arbitration on February 19, 2025. [R. pp. 12-24] Cascades then filed an Answer the following day. [R. pp. 25-30]

After the parties received notice of a hearing on Cascades' Motion to Dismiss and Compel Arbitration, Barborek filed a memorandum in opposition on May 16, 2025. [R. pp. 31-43] The hearing, with the Honorable Vernon F. Dunbar presiding, took place on May 20, 2025. [R. pp. 80-105] Judge Dunbar heard oral arguments from both parties' counsel and took Cascades' motion under advisement. [R. pp. 103-104]

On May 30, 2025, Judge Dunbar filed a Form 4 order denying the motion. The order included the following "findings of fact and conclusions of law":

> 1) Defendant seeks to establish that there exists a contractual waiver of a jury trial in favor of arbitration. Thus, Defendant has the burden of proof to establish that the waive [sic] was signed knowingly, voluntarily, and intentionally. A jury trial right is fundamental and cannot be waived absent clear evidence.

> 2) This Court is mindful that arbitration agreements enjoy a strong presumption of validity in federal and state courts. See Simpson v. MSA of Myrtle Beach, Inc., 373 SC 19, 24, 644 S.E.2d 663, 558 [sic] (2007).
>
> 3) Sufficient genuine issues giving rise to the waiver of a jury trial and the applicability of the arbitration agreement cannot be adjudicated by this Court at this particular point in the proceedings absent sufficient discovery.
>
> Therefore, Defendant's motion to Dismiss is hereby DENIED. Plaintiff has pled facts sufficient to constitute a cause of action.

[R. pp. 1-3] Judge Dunbar did not request or file any subsequent formal order, and Cascades filed and served a timely Notice of Appeal on June 27, 2025.

STATEMENT OF THE FACTS

Barborek came to Cascades' facility after being discharged from a hospital on March 6, 2025. As part of the facility's intake process, Barborek signed an Admission Agreement that included an attached Arbitration Agreement. [R. pp. 50-58] Although he has raised arguments about his mental state since that time, Barborek has not expressly denied that he signed the admission and arbitration agreement. Nor has Barborek presented any actual evidence of a mental impairment at the time he signed the agreement.

Under the heading "YOUR RESPONSIBILITIES AS A RESIDENT", the Admission Agreement included the following: "**ARBITRATION**. See full **"ARBITRATION AGREEMENT"** attached separately." [R. p. 55.] The Admission Agreement also contained the following language under the heading "INTERPRETATION": "This Agreement shall inure to the benefit of, and be binding upon, the heirs, successors, permitted assigns, and legal and personal representatives of the parties." [R. p. 57]

The Arbitration Agreement, which Barborek signed separately, but on the same date as the Admission Agreement, includes the following provisions that are relevant to the issue on appeal:

> (b) Any disputes concerning the scope, validity or enforceability of this Arbitration Agreement shall be decided by an arbitrator, not a court. ...
>
> (c) Resident and Community acknowledge and agree that the relationship between Resident and Community involves interstate commerce; therefore, the Federal Arbitration Act is applicable to this Arbitration Agreement.
>
> (d) This Arbitration Agreement is an integral and essential part of the Residency Agreement between Resident and Community.
>
> (e) You, the Resident (or Resident's representative), are not required to sign this Arbitration Agreement as a condition of Resident's admission to, or as a requirement for Resident to continue to receive care at, this facility.

[R. pp. 58-59]

In addition, the Arbitration Agreement states that it applies to "[a]ny and all controversies, claims, disputes, disagreements or demands of any kind that Resident may have against Community, its employees or agents, or Community's affiliates (including, **but not limited to**, Maxwell Group, Inc. or Senior Living Communities) or their employees or agents ...." [R. p. 58 (all emphasis added)]

STANDARD OF REVIEW

"An order denying a motion to compel arbitration ... is immediately appealable." *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626, 667 S.E.2d 1, 4 (Ct. App. 2008) (citing S.C. Code §15-48-200(a)(2) ("An appeal may be taken from an order denying application to compel arbitration.")). "An appeal from the denial of a

motion to compel arbitration is subject to de novo review." *Estate of Mary Solesbee v. Fundamental Clinical and Operational Servs., LLC*, 438 S.C. 638, 645, 885 S.E.2d 144, 147 (2023).

ARGUMENT

The circuit court erred in denying Cascades' Motion to Dismiss and Compel Arbitration. Although the order did not specify the "genuine issues" that the circuit court relied upon in denying the motion, the written and oral arguments presented by the parties demonstrate the issues raised to, and necessarily ruled upon, by the circuit court. Regardless of whether the circuit court relied on any one of Barborek's arguments in opposition, or all of them, the end result was legal error. A binding agreement to arbitrate exists in this case, and any questions relating to its enforceability and applicability are issues for an arbitrator to decide. Therefore, exercising its broad standard of review, this Court should reverse and remand with instructions to grant Cascades' motion, compel arbitration and dismiss this action.

I. The Arbitration Agreement merged with the Admission Agreement.

In opposition to Cascades' motion, Barborek asserted that the Cascades entities did not sign the Arbitration Agreement and were not parties to it, and that no consideration existed for the Arbitration Agreement. Those arguments depend upon a conclusion that the Arbitration Agreement and the Skilled Care Residency Agreement ("the Admission Agreement") were legally separate and distinct. Under the common law doctrine of merger, however, those agreements must be seen as two parts of the same whole. Thus, Barborek's

arguments are incorrect, and the circuit court erred to the extent it relied upon them in denying Cascades' motion.[1]

As the South Carolina Supreme Court has explained:

> The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together. The theory is that the instruments are effectively one instrument or contract. ... Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated.

Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). "Where one of the contracts explains, amplifies, or limits the other, those provisions will be given effect between the parties so that the whole agreement, as actually contracted by the parties, may be effectuated." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 92, 594 S.E.2d 492-93 (Ct. App. 2004). "This rule applies even where the parties are not the same, if the several instruments were known to all the parties and were delivered the same time to accomplish an agreed purpose." *Id.* at 93, 594 S.E.2d at 493. This Court has called the merger doctrine "well established." *Edward Pinckney Associates, Ltd. v. Carver*, 294 S.C. 351, 354, 364 S.E.2d 473, 474 (Ct. App. 1987).

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[1] As discussed in section II below, Cascades contends that an arbitrator, not the circuit court, had the exclusive authority to rule on issues relating to the "validity" and "enforceability" of the Arbitration Agreement. Those issues would include whether or not the doctrine of merger applies. By discussing the merits of the merger issue separately in this section, Cascades does not waive or abandon its position that the circuit court lacked authority to rule on this issue, which constitutes another, independent basis for reversal.

There is no question that Barborek signed the Admission Agreement and the Arbitration Agreement on the same date, that the same (or related) parties were involved, and that both agreements dealt with Barborek's stay at Cascades' facility. Thus, unless a sufficient "contrary intention" exists, which it does not, the doctrine of merger applies, and the two agreements are one for all relevant purposes.

In the circuit court, Barborek relied on *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), as support for his argument that the Admission Agreement and the Arbitration Agreement did not merge. Although the agreements in that case do bear some similarities to the ones in the present case, sufficient differences exist to make *Hodge* inapplicable.

The primary legal issue in *Hodge* was whether or not the decedent's husband had the legal authority to bind the decedent (or her estate) to an arbitration agreement. Yet, this Court also addressed arguments by the appellant care facility that the merger doctrine applied to the separate admission and arbitration agreements that the husband signed for the decedent. Concluding that merger did not apply, this Court stated:

> [T]he Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. Like in *Coleman* [*v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014)], the Arbitration Agreement recognized a separateness as it referenced the two documents separately, stating "[a]ny and all claims arising out of or in any way *relating to this Agreement or the Patient/Resident's Admission Agreement.*" Also, the Arbitration Agreement stated it could be revoked within thirty days, whereas the Admission Agreement contained no such indication and instead provided the Admissions Agreement could only be amended by the patient with written agreement executed by the Facility and the patient in the same manner as the Admissions Agreement was executed or if the Facility sent a notice of the amendment to the patient and the patient did

> not reject the amendment within thirty days. Further, each document was separately paginated and had its own signature page. Additionally, the Arbitration Agreement stated signing it was not a precondition to admission. **Based on all of this**, we find the Admissions Agreement and Arbitration Agreement did not merge.

442 S.C. at 562-63, 813 S.E.2d at 302 (italics in original; boldface added).

As Barborek argued in the circuit court, the Arbitration Agreement that he signed was revocable within thirty days, had its own signature page, and was not a condition to admission to Cascades' facility. Those statements, while accurate as far as they go, do not tell the entire story. This Court in *Hodge* plainly stated that it based its decision on "all" of the factors discussed in the passage quoted above. Here, not "all" of those factors are present, and, in fact, significant differences exist.

First, the Admission Agreement and the Arbitration Agreement do not contain any conflicting provisions about the controlling law. The Arbitration Agreement expressly states that it is subject to the Federal Arbitration Act, while the Admission Agreement is silent on the question of controlling law for purposes of interpreting the contract. This fact removes one of the bases for the Court's decision in *Hodge*.

Second, nothing in the Admission and Arbitration Agreements in this case "recognized a separateness" between the two. Unlike the contract in *Hodge*, the Admission Agreement here contains an express, and inclusive, reference to the Arbitration Agreement. Specifically, the Admission Agreement states: "**ARBITRATION.** See full **"ARBITRATION AGREEMENT"** attached separately." [R. p. 55] The use of the word "separately" in that context does not demonstrate that the Admission Agreement and Arbitration Agreement were to be distinct and unrelated contracts. Rather, the Admission

Agreement clearly contemplates the terms of the Arbitration Agreement, which is an attachment to the Admission Agreement.

The language of the Arbitration Agreement supports and reinforces this reading of the Admission Agreement. Subsection (d) of the Arbitration Agreement states: "This Arbitration Agreement is an integral and essential part of the Residency Agreement between the Resident and Community." [R. p. 58 (emphasis added)] Again, this does not support any conclusion that the two agreements are meant to be separate and distinct contracts. Instead, the provision demonstrates that the Arbitration Agreement and Admission Agreement are two parts of one comprehensive contractual arrangement involving the parties.

Third, the language of the actual arbitration provision here is different than the one in *Hodge*. This arbitration provision applies to "[a]ny and all controversies, claims, disputes, disagreements or demands of any kind that Resident may have against Community …". [R. p. 58] The provision in *Hodge* referenced "[a]ny and all claims arising out of or in any way *relating to this Agreement or the Patient/Resident's Admission Agreement*." 442 S.C. at 562, 813 S.E.2d at 302 (emphasis in original). As the emphasized language demonstrates, the arbitration agreement in *Hodge* plainly referred to the two agreements as separate and distinct things. Nothing similar appears in the Arbitration Agreement or the Admission Agreement in the present case.

Fourth, although this Arbitration Agreement, like the one in *Hodge*, was revocable within thirty days, that similarity is a red herring. In *Hodge*, there is no indication that the admission agreement, as opposed to the arbitration agreement, was revocable by the resident. Rather, it contained a complicated process for the resident to seek amendment of

the admission agreement. Here, the Admission Agreement affords Barborek an unconditional right to terminate the contract merely by giving thirty days' notice. Thus, unlike in *Hodge*, Barborek had similar termination rights with respect to both the Admission Agreement and the Arbitration Agreement.

Fifth, Barborek's arguments about separate pagination and signature pages are also unavailing. The agreements in the present case contain no identifiable page numbers, which obviously means they cannot be seen as being numbered separately. In addition, as previously noted, the Admission Agreement refers to the Arbitration Agreement as an attachment. As for the separate signature pages, that point standing alone cannot possibly support a conclusion that merger does not apply. It is difficult to conceive of a situation invoking the merger doctrine that would not involve separately signed agreements. If that were all it took to prevent merger of agreements, the exception would almost always swallow the rule.

Sixth, the fact that Barborek could have declined the Arbitration Agreement and still gained admission to the facility does not mean the Admission Agreement and Arbitration Agreement did not merge. Although the *Hodge* court listed that as one of the factors it relied upon, nothing in that opinion gives any indication that it was a primary consideration, or that standing alone it could (let alone must) prevent merger of the agreements. If everything else in this case were the same as in *Hodge*, the "non-required" language of the Arbitration Agreement might support the circuit court's decision. However, the opposite is true when one considers the numerous differences between the agreements at issue in *Hodge* and the ones in this case.

This Court in *Hodge* relied heavily on the Supreme Court's decision in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014). *Coleman* is also distinguishable from the present case, and it does not provide any support for the circuit court's decision. In *Coleman*, the Supreme Court concluded merger did not apply to an admission agreement and an arbitration agreement, and it referenced the resident's ability to revoke the arbitration agreement, but not the admission agreement. Yet, the primary basis for the Court's decision was an "entirety of agreement" section that referenced the admission and arbitration agreements as separate and distinct contracts. As previously discussed, no such language appears in the agreements in this case. To the contrary, the agreements refer to each other and indicate that they are part of the same overall contractual relationship with the resident. Thus, any attempt by Barborek to rely on *Coleman* must fail.

Furthermore, *Coleman* and *Hodge* cannot stand for the proposition that merger is inapplicable in cases involving arbitration agreements. In *Sentry Engineering and Contr., Inc. v. Mariner's Cay Develop. Corp.*, 287 S.C. 346, 338 S.E.2d 631 (1985), the Supreme Court affirmed the circuit court's conclusion that two construction contracts between the parties constituted one agreement under the merger doctrine. As a result, an arbitration provision was valid and enforceable, even though it only appeared in one of the two contracts. Clearly, then, the involvement of an arbitration agreement should have no bearing on the issue of whether the merger doctrine applies in a given scenario.

There is no support for any conclusion by the circuit court that the Admission Agreement and Arbitration Agreement failed to merge. The cases Barborek cited to the circuit court are distinguishable, and the present facts present a much clearer and stronger example of the merger rule. Regardless of whether or not the circuit court intended to rule

on the merger question, such a ruling was necessary for the court to accept Barborek's arguments in opposition to Cascades' motion. Therefore, the circuit court erred in not concluding that merger applies, and this Court should reverse.

Barborek has never argued that there was no consideration for the Admission Agreement. He has only argued that no separate consideration existed for the Arbitration Agreement. But because merger applies to the two agreements, Barborek's argument on this point becomes irrelevant. The consideration for the Admission Agreement is sufficient for both agreements, which are merely two parts of the same whole.

The same reasoning applies to Barborek's arguments about the absence of Cascades' signature on the Arbitration Agreement and Cascades not being listed specifically as a party to that agreement. There is no question that a corporate representative signed the Admission Agreement, which merged with the Arbitration Agreement. That one signature was sufficient to bind the company to both parts of the overall agreement.[2]

The lack of a specific reference to either Cascades entity in the Arbitration Agreement is also inconsequential. It has been long established that "[a] contract is good between the parties, no matter how incorrect the names used in the paper may be, if it appears they were intended as the names of the parties to be bound by the contract or to receive its benefits." *Cobb & Seals Shoe Store v. Aetna Ins. Co.*, 78 S.C. 388, 389, 58 S.E. 1099 (1907). "A corporation, as well as individuals, may have or be known by several names in the transaction of its general business so that it may enforce, as well as be bound

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[2] Here, it should be noted that the absence of a corporate signature line on the Arbitration Agreement actually provides further support for merger. If the Arbitration Agreement had been intended as a truly separate and distinct contract, logic dictates that it would have included a place for a corporate representative to sign. The absence of such a signature line is telling.

by, contracts entered into in an adopted name other than the regular name under which it was incorporated." *Long v. Carolina Baking Co.*, 190 S.C. 367, 377, 3 S.E.2d 46, 50 (1939). "If a corporation has acquired a name by usage, an adjudication against it by the name so acquired is valid and binding." *Id.* (emphasis omitted).

In the present case, the Admission Agreement used the name of the facility, or community, which was "Cascades Verdae." [R. p. 52] Under the rules quoted above, it makes no legal difference that the agreement used the trade name of the facility rather than the exact corporate name of that facility's owner and/or managing entity. The agreement clearly bound those responsible companies, especially since, as Barborek noted in the circuit court, Cascades Verdae is not an actual legal entity. Thus, the signature of a corporate representative on the Admission Agreement was sufficient to create a binding and merged contract, even if neither agreement named the actual ownership or management companies.

Barborek voluntarily signed and entered into an arbitration agreement as part of his overall contractual relationship with the facility's owners and/or managers. Barborek's arguments to the contrary cannot change that basic fact, and the circuit court erred in relying on any of those arguments to deny Cascades' motion. Therefore, this Court should reverse and remand with instructions to grant the motion and enter an order compelling arbitration and dismissing the action.

II. The circuit court erred in failing to enforce the Arbitration Agreement's delegation clause.

The circuit court's order referenced "sufficient genuine issues giving rise to waiver of a jury trial" as the basis for its denial of Cascades' motion. If the circuit court did not base that decision solely on Barborek's arguments regarding the existence of a binding

contract, which are addressed in the preceding section of this brief, then it necessarily accepted one or more of Barborek's claims that the contract was unenforceable. Cascades respectfully asserts that those arguments (lack of mental capacity and/or unconscionability) are erroneous on the merits and should be reversed for that reason. Regardless of the merits, however, reversal is warranted because an arbitrator, not the circuit court, should have addressed those issues, as well as the dispute concerning the merger rule.

The Arbitration Agreement contains the following provision: "(b) Any disputes concerning the scope, validity or enforceability of this Arbitration Agreement shall be decided by an arbitrator, not a court." [R. p. 58] As this Court has noted, "[o]ur role in interpreting a contract is to enforce the parties' intent. We look first to the language of the contract. If that language is clear and unambiguous, 'the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect.'" *McCord v. Laurens Cty. Healthcare System*, 429 S.C. 286, 292, 838 S.E.2d 220, 223 (Ct. App. 2020) (quoting *Beaufort Cty. Sch. Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011)).

As a threshold matter, Cascades asserts that an arbitrator, rather than the circuit court, also should have decided the issues raised in section I of this Appellant's Brief. Subsection (b) gives the arbitrator sole authority to decide issues relating to the "scope" and "validity" of the Arbitration Agreement. [R. p. 58] By discussing the merits of the "merger" issue, Cascades does not concede that the circuit court had proper authority to decide that question. Under the plain language of the contract, that was the province of the arbitrator. Cascades' arguments on the merits of that issue merely demonstrate that even if

the circuit court had the authority to rule on that issue, its decision was erroneous and is reversible in any event.

Subsection (b) also plainly states that an arbitrator, not a court, should decide all issues relating to the Arbitration Agreement's "validity or enforceability". [R. p. 58] That language could not be any clearer. Thus, it was the circuit court's obligation and duty to enforce the contract as written and to defer to an arbitrator to rule on any disputes over the Arbitration Agreement's enforceability in this case. The circuit court's failure to do so constitutes error, and this Court should reverse and remand with instructions compel arbitration and dismiss this action.

Parties to an arbitration agreement are free to give authority to an arbitrator to decide "gateway issues" such as the scope and enforceability of the agreement itself. *See DOE v. TSCS, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995)). For that reason, "a court may not override the contract" and address things like "gateway issues" issues when the arbitration agreement delegates such authority to the arbitrator. *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 699-70, 869 S.E.2d 859, 864 (Ct. App. 2022) (concluding the delegation clause was valid and enforceable and prevented the court from ruling on gateway issues). This rule comports with South Carolina law that "arbitration is a matter of contract, and courts must enforce contracts according to their terms." *Id.* at 699, 869 S.E.2d at 864.

Furthermore, this Court has noted the rule that a court can only address the validity and enforceability of an arbitration agreement's "delegation clause" if "the party resisting arbitration has made a direct and discrete challenge to the validity and enforceability of the

delegation clause specifically, rather than the arbitration agreement as a whole." *TSCS, LLC*, 430 S.C. at 608, 846 S.E.2d at 877 (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010)) (emphasis added). Here, Barborek did not challenge the validity or enforceability of the Arbitration Agreement's delegation clause. He only challenged the agreement as a whole. Thus, under this Court's precedent, the circuit court erred by not enforcing the delegation clause and not allowing an arbitrator to rule on the agreement's "scope, validity or enforceability."

Barborek's arguments against application of the merger doctrine, discussed above, certainly go to the "validity" of the Arbitration Agreement. His basic position is that no valid agreement existed because the Arbitration Agreement did not merge into the Admission Agreement. As previously noted, however, the parties agreed that all disputes concerning the Arbitration Agreement's validity are for an arbitrator to decide. The circuit court erred in failing to enforce the parties' agreement in that respect.

In addition, Barborek cannot seriously contend that his arguments about lack of mental capacity and alleged unconscionability do not involve the "validity" or "enforceability" of the Arbitration Agreement. Barborek asked the circuit court not to enforce the Arbitration Agreement due to his alleged, but unproven, mental condition at the time of his admission. He also asked the court not to enforce the agreement because he claims its terms are unconscionable. If those contentions do not involve the agreement's enforceability, then what other purpose do they serve?

The language of the Arbitration Agreement's delegation clause is unambiguous. The parties agreed that all gateway issues regarding the agreement's "scope, validity and enforceability" go to an arbitrator, not the court. The circuit court erred in ruling on those

issues and in failing to enforce this clear contractual provision. Therefore, this Court should reverse and remand with instructions to compel arbitration and dismiss this action. Barborek can then raise his arguments about the agreement's enforceability in that forum.

III. Even if the circuit court had authority to rule on the mental capacity or unconscionability issues, no basis existed for the court to deny Cascades' motion on those grounds.

The circuit court had no authority under the controlling contract to address any issues related to its enforceability. For that reason, this Court need not examine the merits of Barborek's arguments about his mental capacity or the alleged unconscionability of the Arbitration Agreement. Yet, assuming for the sake of this argument that those issues were properly before the circuit court, reversal is still warranted because there is no record support for any decision to deny Cascades' motion on these grounds.

Barborek argued he did not have sufficient mental capacity to enter into the Arbitration Agreement because he was 79 years old, was recovering from hip surgery, and had been prescribed oxycodone. Cascades respectfully asserts that most people who are admitted to nursing care facilities are older, recovering from or dealing with some sort of medical problem, and taking prescription medications. If those things, by themselves, were sufficient to create a lack of mental capacity, very few admission agreements for nursing care facility residents could ever be binding. Not surprisingly, Barborek has not cited any legal authority for that proposition.

Even if one were to accept that assertion in principle, however, Barborek's position would still fail because the record does not contain any actual evidence upon which the circuit court could have based a valid decision. Barborek submitted a memorandum and exhibits to the circuit court, but those exhibits did not include any sworn statements from

Barborek or any medical provider regarding his mental condition at the time of his admission. Although the circuit court arguably could have taken judicial notice of Barborek's age, there was no evidence regarding the exact nature of his hip surgery or any impacts of that surgery and the recovery process on his mental state. There was also no evidence of oxycodone use, only an assertion in the memorandum. And there certainly was no information about the specific dosage or exactly when Barborek had last taken the drug prior to his admission. In short, there was absolutely no evidentiary foundation for any decision by the circuit court that Barborek lacked mental capacity to enter into the Arbitration Agreement.

If the circuit court believed that discovery about Barborek's mental condition was necessary, the proper course of action would have been to grant Cascades' motion and send the case to arbitration.[3] The parties could have then engaged in discovery in that forum, and the arbitrator could have ruled on the issue. Given the clear delegation clause, that was the only proper manner in which to deal with Barborek's arguments about lack of mental capacity. Therefore, the circuit court erred to the extent that it denied the motion based on this issue, and this Court should reverse and remand with instructions to grant Cascades' motion.

Similarly, Barborek did not present the circuit court with any basis for determining that the Arbitration Agreement was unconscionable. After setting forth general statements about how South Carolina law defines unconscionability, Barborek gave only the following argument as to why this specific Arbitration Agreement met that standard:

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[3] The circuit court's order does not specifically state that discovery on this issue is warranted, but it can be read that way. The order clearly references the need for discovery, although it does not specify which issue(s) created that need in the court's opinion.

> Mr. Barborek's need for post-acute nursing care was brought on by a precipitous deterioration in health status. The need to find placement arose quickly and was unplanned. There was little time to investigate options. The pressure of time, along with physical and mental pain, and narcotic pain medication, significantly impaired Mr. Barborek's ability to seek and consider alternatives. Mr. Barborek did not have time to read and deliberate on the terms of the arbitration agreement. He was focused on trying to recover from his significant injury. Further, Mr. Barborek was only in town visiting friends. He had no family in the area to assist him and had no familiarity with the area at all.
>
> The defendants are the superior, experienced party. In a time of crisis, Mr. Barborek was presented with nearly thirty pages of intake documents to review and sign. The arbitration agreement was buried amongst those nearly thirty pages and would function to contract away one of Mr. Barborek's most significant rights, the right to a jury trial, while requiring the defendants to give up nothing. ...

[R. p. 42]

The same flaws present in Barborek's mental capacity arguments also exist for this issue. As an initial matter, there was no evidentiary basis for anything contained in Barborek's summary argument. Indeed, other than the fact that a health problem necessitated his admission to Cascades' facility, nothing from that summary even appears as allegations in the Complaint. Thus, any conclusion by the circuit court based on that passage in Barborek's memorandum would have been pure speculation. The evidence to support any such conclusion simply did not exist in the record. If the circuit court believed discovery on that issue was necessary, the proper procedure was to grant Cascades' motion, allow discovery to proceed in the arbitration forum, and have the arbitrator make a ruling.

Even if such evidence had been in the record, it would not have warranted any ruling that the Arbitration Agreement was unconscionable. Barborek argues the Arbitration Agreement was unconscionable because it was a standard contract presented to him with

other intake documents. This appears to be an assertion that the Arbitration Agreement was akin to a contract of adhesion, which he had no choice but to sign. Cascades disputes any such description, but whether the agreement was or was not an adhesion contract is ultimately irrelevant in this case.

As the South Carolina Supreme Court has explained, "Adhesion contracts are not per se unconscionable." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 613, 879 S.E.2d 746, 756 (2022) (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 669 (2007)). In order for an adhesion contract to be unconscionable, it must be established that the party seeking to avoid the contract had an absence of meaningful choice and that the contract contains oppressive, one-sided terms. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669. The reviewing court's focus should "generally [be] on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Id.* at 25, 644 S.E.2d at 668.

Here, the Arbitration Agreement does not satisfy either prong of the test for unconscionability. As Barborek noted in his arguments to the circuit court about lack of consideration, signing the Arbitration Agreement was not a condition for admission to Cascades' facility. He easily could have declined to sign the Arbitration Agreement and still received care at that facility. Furthermore, the Arbitration Agreement gave Barborek 30 days after he signed it to rescind the agreement. Those facts prevent any credible argument or conclusion that Barborek lacked a meaningful choice when he decided to sign the Arbitration Agreement. It further calls into question whether the Arbitration Agreement can even be seen as a contract of adhesion, as it was not presented to Barborek on a "take it or leave it" basis.

In addition, the terms of the Arbitration Agreement are not oppressive and one-sided. The Arbitration Agreement did not seek to limit any substantive claims or remedies that would otherwise be available to Barborek. It only established an agreed-upon forum in which any such claims could be asserted and in which any available remedies could be awarded. If that fact alone were sufficient to establish oppressive and one-sided terms, it would be difficult to imagine when an agreement to arbitrate would ever be valid and enforceable. In that scenario, arbitration agreements would be per se disfavored, and there would be few, in any, examples of courts upholding them. Cascades respectfully asserts that is not the law of South Carolina, even in cases involving adhesion contracts. *See*, *e.g.*, *Mart v. Great Southern Homes, Inc.*, 441 S.C. 304, 893 S.E.2d 304 (Ct. App. 2023) (finding arbitration agreement valid and enforceable, despite being part of an adhesion contract); *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013) (same).

There was nothing unconscionable about the Arbitration Agreement. Barborek could have chosen not to sign it, and doing so would not have impacted his ability to gain admission to Cascades' facility. He did not surrender any substantive claims or remedies by signing the agreement, and there is nothing in the record to suggest that he cannot receive fair and impartial consideration of his claims by a neutral arbitrator. Although he did waive his right to a jury trial by signing the Arbitration Agreement, the same is true in every agreement to arbitrate. Thus, that fact, in and of itself, cannot support any finding of unconscionability.

CONCLUSION

The Arbitration Agreement is valid and enforceable. None of the arguments raised by Barborek provided a legitimate basis for the circuit court to reach any other conclusion,

and the decision to deny Cascades' motion was erroneous. Therefore, this Court should reverse and remand with instructions to grant Cascades' motion and enter an order compelling arbitration and dismissing the action.

Respectfully submitted,

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