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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.

BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

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II. Whether the Federal Arbitration Act ("FAA") preempts *Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 644 S.E.2d 663 (2007), and its progeny.

STATEMENT OF THE CASE

This is an appeal from a denial of a motion to compel arbitration. On November 19, 2024, Respondent, Sandra Parsons White, filed a Complaint against Appellants and the Oakview Park assisted living facility. (R. 23).

Respondent is the daughter of the decedent, Virginia Parsons. (R. 165). Respondent alleges that the Oakview Park facility negligently failed to prevent another resident from assaulting Virginia Parsons on or about August 22, 2023 and that this resident-on-resident assault caused injuries to Virginia Parsons that contributed to her death on or about October 5, 2023. (R. 23). The Oakview Park facility maintains that it met the standard of care and did not cause Virginia Parsons' death. (R. 35).

The Residency Agreement. On or about March 21, 2023, Sandra Parsons White signed the Oakview Park Residency Agreement on behalf of Virginia Parsons. (R. 144). The Residency Agreement contained an arbitration provision. (R. 144).

Motion for Production of Other Resident Records. On July 2, 2025, Respondent filed a motion seeking the production of records relating to two residents of the Oakview Park facility who Respondent believes may have assaulted Virginia Parsons. (R. 121).

Motion to Compel Arbitration. On July 3, 2025, Appellants filed a motion to compel arbitration and a motion to stay discovery pending resolution of the motion to compel arbitration. (R. 126). On August 13, 2025, Appellants filed a memorandum in support of their motion to compel arbitration. (R. 132).

On August 28, 2025, a hearing was held on the three motions before the Honorable Patrick Cleburne Fant, III. (R. 44). Respondent filed a memorandum in opposition to Appellants' motion to compel arbitration approximately one hour and fifteen minutes before the hearing was scheduled to begin. (R. 176). In response, Appellants filed a reply memorandum approximately thirty minutes before the hearing. (R. 218).

At the hearing, Appellants moved to strike two affidavits that were included as exhibits to Respondent's memorandum in opposition because they were not served more than two days prior to the hearing, as required by Rule 6(d), SCRCP. (R. 62-63). The Court granted the motion to strike. (R. 62-63, 66).

Respondent argued that Appellants had waived their contractual right to arbitration because several months had elapsed from the time the Answer was filed to the time the motion to compel arbitration was filed. (R. 108-109). In response, Appellants argued that they had done nothing to participate in litigation between the time the Answer and the motion to compel arbitration were filed and had not acted in a matter inconsistent with their right to arbitrate. (R. 67-71). The Honorable Judge Fant indicated at the hearing that he did not believe Appellants had waived their contractual right to arbitration. (R. 118).

Respondent also argued that the arbitration provision was unconscionable and that it was a "despicable clause" drafted by a "soulless, cunning attorney." (R. 87). Respondent argued that procedural unconscionability was present because the arbitration provision was inadequately disclosed and because there was an inequality in bargaining power between the parties. (R. 110). In response, Appellants referred to the legal standard for procedural unconscionability contained in *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013) and noted that, as in *Gladden*, here there was no evidence of "an extreme inequality of bargaining power," the signer's "lack of basic reading ability," the "drafter's intent to obscure the terms" or any other misconduct on the part of Appellants that could support a finding of procedural unconscionability. (R. 72-77). Appellants further noted that, as in *Gladden*, the signer of the agreement here, Sandra Parsons White, was a licensed real estate agent and therefore a sophisticated party. (R. 73-74).

Next, Respondent argued that substantive unconscionability was present because the arbitration provision allegedly eliminated any statutory right to appeal, placed limitations on discovery, contained a cost-sharing provision, and contained limitation of liability provisions. (R. 84-108).

In response, Appellants disagreed that the arbitration provision disclaimed any statutory right to appeal the arbitrator's award, argued that limitations on discovery are appropriate and to be expected in arbitration, and that the equal cost-sharing provision was appropriate and did not even apply to a party who was indigent. (R. 78-82, 114-118). Appellants also noted that no South Carolina caselaw exists indicating that any of the limitation of liability provisions were unenforceable or unconscionable. (R. 78-82, 114-118).

Respondent has never disputed that Sandra Parsons White had the express authority, pursuant to a duly executed general durable power of attorney, to sign the

Residency Agreement on behalf of Virginia Parsons. (*See* R. 165-175).

On September 3, 2025, an order was filed granting Respondent's motion for production of the other residents' records. (R. 16).

On September 5, 2025, a Form 4 order was filed finding that while Appellants had not waived their contractual right to arbitration, the arbitration provision was both procedurally and substantively unconscionable. (R. 13). The Form 4 order directed Respondent to prepare a more formal proposed order. (R. 13).

On September 24, 2025, a more formal order was entered by the Court. (R. 7). In fact, the Order appears to have been filed twice on that date, perhaps by mistake. In the September 24, 2025 order, among other things, the Court stated that Appellants bore the burden of proving the "enforceability of the arbitration agreement" and that Appellants had not met their burden. (R. 8).

On October 3, 2025, Appellants timely filed a Rule 59(e) motion in which Appellants argued, among other things, that the Court's September 24, 2025 order effectively stated, incorrectly, that Appellants bore the burden of disproving unconscionability, when, in fact, the burden of proving unconscionability belonged to Respondent, as the party asserting it. (R. 279).

On November 10, 2025, the Court filed a revised formal order in which it stated that the "burden of proving unconscionability lies with the party asserting it" and that the "Court finds that burden has been met." (R. 1).

The Order stated that procedural unconscionability was present because:

> The Court notes that there exists a significant inherent disparity of bargaining power between a family member making emergency

> placement decisions for a vulnerable adult and sophisticated corporate healthcare providers with extensive experience in these transactions. The arbitration agreement was prepared by the [Appellants] and was presented as a standardized form with no opportunity for negotiation, which is consistent with other cases finding procedural unconscionability in similar circumstances. The arbitration provisions are located on pages 7 to 11 of the 20-page residency agreement, and are not in bold type, nor is arbitration noticed on the first page.

(R. 2-3).

On the issue of substantive unconscionability, the Order stated as follows:

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

(R. 3-4).

The Order declined to sever any of the offending provisions:

> The arbitration agreement in this case was prepared by [Appellant], contained within [Appellant's] 20-page residency agreement, and is a contract of adhesion. The court in *Damico vs Lennar Carolinas, LLC*, 437 S.C. 596, S.E. 2d7 4b (2022), having found unconscionability, declined to sever the unconscionable provisions, finding that the unconscionable terms infected the entire agreement sufficiently that it was more appropriate to refuse enforcement of the entire agreement, rather than the Court attempting to re-write the offending terms. In the present case there are multiple offending provisions which combine to render the agreement unconscionable. As stated in *Damico*, the Court should not attempt to re-write the unconscionable terms, and instead finds this unconscionable arbitration agreement to be unenforceable.

(R. 5).

On December 8, 2025, Appellants timely filed and served the Notice of Appeal. (R. 319).

STANDARD OF REVIEW

"Determinations of arbitrability are subject to de novo review." *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003). "Whether a contract clause is unconscionable is determined by the court as a matter of law after considering all the facts and circumstances of the case." 17A Am. Jur. 2d Contracts § 273. "Questions of law may be decided with no particular deference to the trial court." *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008).

ARGUMENT

I. The Federal Arbitration Act ("FAA") requires Courts to place arbitration agreements on an equal footing with all other contracts, and to enforce them according to their terms.

"The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The FAA provides that all agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2.

"We have described this provision as reflecting both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract." *Concepcion*, 563 U.S. at 339 (cleaned up). "In line with these principles, courts must place arbitration agreements on an **equal footing** with other contracts, and enforce them **according to their terms**." *Id.* (emphasis added) (cleaned up).

"The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* (cleaned up). "This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but **not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue**." *Id.* (emphasis added) (cleaned up).

"When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* at

341. "But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration." *Id.*

"[A] court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what the state legislature cannot." *Id.*

"An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery." *Id.* at 341-42. "The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in *Discover Bank*. A court might reason that **no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing**." *Id.* at 342 (emphasis added). "Or the court might simply say that such agreements are exculpatory—**restricting discovery would be of greater benefit to the company than the consumer**, since the former is more likely to be sued than to sue." *Id.* (emphasis added).

"And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to 'any' contract and thus preserved by § 2 of the FAA." *Id.* "In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well." *Id.*

"Other examples are easy to imagine." *Id.* "The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence . . ." *Id.* "Such examples are not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in a great variety of devices and formulas declaring arbitration against public policy." *Id.* (cleaned up).

"[W]e have held that parties may agree to limit the issues subject to arbitration, **to arbitrate according to specific rules**, and to limit with whom a party will arbitrate its disputes." *Id.* at 344 (emphasis added) (cleaned up). "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Id.* "And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." *Id.* at 345.

"Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343.

A. The Arbitration Provision was not unconscionable under generally applicable contract law principles.

The Arbitration Provision here was not unconscionable under the generally applicable common law doctrine of unconscionability, *i.e.*, the version of the doctrine that applies to all contracts, not just arbitration provisions.

However, under current South Carolina law, there are essentially two different legal standards for unconscionability: one that applies to contracts generally and the other that applies only to arbitration provisions. The unconscionability standard that appears in *Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007), and its progeny, is a modified version of unconscionability that applies only to arbitration provisions and significantly lowers a party's burden of proving unconscionability. Accordingly, the *Simpson* formulation of unconscionability is preempted by the FAA.

In *Concepcion*, the United States Supreme Court held that the FAA preempted a California state law "refinement" to the generally applicable contract law doctrine of unconscionability, called the *Discover Bank* Rule, because it made it easier for a party to establish unconscionability and its application, *de facto*, had a disproportionate impact on the enforcement of arbitration agreements. *See Concepcion*, 563 U.S. 333.

As the Ninth Circuit later remarked, "[w]e take *Concepcion* to mean what its plain language says: Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1159 (9th Cir. 2013).

First, I will discuss why the Arbitration Provision here was not unconscionable under the generally applicable doctrine of unconscionability. Then, I will discuss why *Simpson* and its progeny is preempted by the FAA.

1. **Procedural unconscionability, as understood by the generally applicable doctrine of unconscionability.**

The party asserting unconscionability has the burden of proving both procedural and substantive unconscionability. *See* 17A Am. Jur. 2d Contracts § 272 ("Substantive unconscionability appears in the content of the contract per se, while procedural unconscionability entails an examination of the contract formation process, and both are generally necessary to establish unconscionability.").

"Procedural unconscionability involves 'bargaining naughtiness' in contract formation. It is determined by analyzing the respective bargaining power of the contracting parties, and the ability of the particular contracting party, in light of **education, intelligence, or lack thereof, to understand the terms of the contract**." *Id.* (emphasis added).

> Absent a strong law or a transgression of strong public policy, however, parties to a contract are basically free to make whatever agreement they wish, no matter how unwise it might appear to third parties. Thus, in the absence of any mistake, fraud, or oppression, the courts, as such, are not interested in the wisdom of contracts and agreements voluntarily entered into between competent parties. The fact that one of the parties to a contract made a hard bargain will not alone avoid the contract, and courts will not lend themselves to striking down a contract, otherwise valid, simply because the vicissitudes of time proved it to be a "bad" bargain for one of the parties.

17A Am. Jur. 2d Contracts § 271.

The generally applicable legal standard for procedural unconscionability was discussed by the *Gladden* Court as follows:

> 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).

Under the generally applicable doctrine of unconscionability, it is extremely difficult for a party to successfully demonstrate that procedural unconscionability was present.

For example, consider *Hudson v. Hudson*, 408 S.C. 76, 757 S.E.2d 727 (Ct. App. 2014). In *Hudson*, Husband sought to enforce the terms of a prenuptial agreement in which Wife waived her right to receive alimony and Wife claimed the prenuptial agreement was unconscionable. *Id.*

The prenuptial agreement was drafted by Husband's attorney and had terms that were more favorable to Husband than to Wife. *Id.* at 78-82, 757 S.E.2d at 728-30. Husband was a wealthy licensed attorney, a business owner, and an investor. *Id.* Conversely, Wife had only an associate's degree in fashion merchandising. *Id.* Wife testified that she never read the agreement. *Id.* Wife spoke to Husband's close friend, Solomon, who was an attorney, for about an hour about the agreement but Solomon gave her no legal advice regarding the agreement, never told wife that the agreement included an alimony waiver, and "merely told her Husband was a good guy." *Id.*

Even under these facts, the Court found the prenuptial agreement was not unconscionable – either procedurally or substantively. *Id.* at 82-86, 757 S.E.2d at 730-32. The Court noted that "Courts are limited to considering the facts and circumstances that exist at the time of the execution of the contract when determining unconscionability." *Id.* at 83, 757 S.E.2d at 730. The Court further explained that:

> Wife argues the high pressure exerted on her due to the impending wedding and the parties' unequal bargaining power rendered the Agreement unconscionable. We disagree.
>
> Wife testified she would have signed the Agreement regardless of its fairness, so long as it was not fraudulent. Although we have concern regarding Husband's referral of Wife to a friend for legal counsel, we find Wife willingly agreed to use Solomon as her counsel, and she knew of his failure to adequately advise her when she signed the Agreement. Wife admitted Solomon did not discuss the details of the Agreement and merely told her Husband was a good guy. Additionally, her psychologist testified Wife was capable at the time she signed the Agreement. We find the circumstances when the Agreement was signed did not render the Agreement unconscionable.

Id. at 84, 757 S.E.2d at 731 (Ct. App. 2014).

To take another example in the prenuptial context, consider *Hardee v. Hardee*, 355 S.C. 382, 585 S.E.2d 501 (2003). In *Hardee*, Husband sought to have the terms of a prenuptial agreement enforced in which Wife had agreed to waive her right to alimony and attorney's fees. *Id.* Wife argued that the prenuptial agreement was unconscionable. *Id.*

The Court held, rather emphatically, that "[c]learly, Wife here had a meaningful choice: she could have refused to sign the agreement and opted against marrying Husband if he insisted on a prenuptial agreement." *Id.* at 390, 585 S.E.2d at 505.

For a rare example of a situation in which a South Carolina court has found that procedural unconscionability was present (outside the context of an arbitration provision, of course), consider *Holler v. Holler*, 364 S.C. 256, 612 S.E.2d 469 (Ct. App. 2005). In *Holler*, Wife was a Ukrainian woman who could not read or speak English. *Id.* Husband, who was a US citizen, lied to her and falsely told her that she needed to sign a prenuptial agreement before they got married because it was required "under the law of South Carolina." *Id.* at 260, 612 S.E.2d at 471. Wife was unable to read or understand the prenuptial agreement because it was written in English and she could only read Russian. *Id.* Nevertheless, Wife signed the prenuptial agreement and married Husband because she was pregnant with Husband's child, and her visa was to expire in three days and she needed to get married or else face deportation back to Ukraine. *Id.* Under these extraordinary facts, the Court held that not only was procedural unconscionability present, but that the prenuptial agreement was also the product of duress. *Id.* at 265-270, 612 S.E.2d at 474-77.

Even in the context of "consumer" transactions where a contract is between a large corporation and a lowly "consumer," courts rarely find that procedural unconscionability is present (that is, of course, at least when arbitration provisions are not at issue).

For example, in *Fanning*, the Court held that a procurement fee placed on a customer automobile transaction was not unconscionable because "the Fannings were free to negotiate prior to obligating themselves under the contract. Clearly they had a meaningful choice in accepting the fee, such that it was not unconscionable . . ." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996).

In *Jones Leasing*, allegedly harsh and one-sided provisions of an automobile lease were found to not be unconscionable because "Phillips testified he understood the terms of the leases at the time they were executed and defaulted under those terms due to his subsequent financial problems." *Jones Leasing, Inc. v. Gene Phillips & Assocs.*, 282 S.C. 327, 332, 318 S.E.2d 31, 33 (Ct. App. 1984).

In *Centura Bank*, an alleged adhesion contract and loan agreement were found to not be procedurally unconscionable because "Cox could have easily gone elsewhere to obtain the loan." *Centura Bank v. Cox*, No. 2004-UP-348, 2004 WL 6331130, at *3 (S.C. Ct. App. May 25, 2004).

Under the generally applicable doctrine of unconscionability, if a party asserting unconscionability alleges that a contract was an adhesion contract, that party bears the burden of actually proving that allegation through the presentation of evidence. *See Todd v. Brereton*, No. 2007-UP-002, 2007 WL 8324253, at *2 (S.C. Ct. App. Jan. 9, 2007) ("There is no evidence in the record that this was a contract of adhesion. There is no evidence the terms of the release were not negotiable; in fact, the release itself indicated the key term of the release, the consideration to be paid to Todd, was negotiated and he had the right to reject the amount offered.").

All of these principles were on display in *Gladden*. In *Gladden*, the Plaintiff alleged that a limitation of liability provision in a home inspection contract that limited the home inspector's liability to the amount paid for the inspection was unconscionable. *Gladden*, 402 S.C. 140, 739 S.E.2d 882.

The Court did not find that there was an inherent gross disparity in bargaining power because one party to the contract was a business entity and the other a mere "consumer." Rather, the Court considered who the actual individuals involved with the transaction were. The Court noted that Mrs. Gladden was a licensed real estate agent and that "there is no allegation that Mrs. Gladden lacks the education to understand the terms of a contract or protect her own interests." *Id.* at 145-46, 739 S.E.2d at 885.

The Court also considered whether Gladden could have simply said "no" to the contract and taken her business elsewhere: "we have no record on which to find that home inspection contracts without exculpatory clauses are unavailable in the market." *Id.* at 146, 739 S.E.2d at 885. The Court further noted that "the contract consisted of one page, the heading of the limitation clause was in all capital letters and in bold, and the clause and its heading were in the same print as the contract's other terms." *Id.* "Thus, the record does not support a conclusion that the Gladdens lacked a meaningful choice whether to accept the terms of the contract." *Id.*

a. The Arbitration Provision was not procedurally unconscionable.

Having surveyed the law regarding procedural unconscionability, as understood by the generally applicable doctrine of unconscionability, let us now apply it to the facts of this case.

Respondent was the party who asserted unconscionability here and was therefore the party who bore the burden of proving that procedural unconscionability was present. However, there was no evidence properly before the

Circuit Court upon which it could have found that any procedural unconscionability was present here.

A finding of procedural unconscionability requires evidence demonstrating that at the time a contract was signed, there existed "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.* at 145, 739 S.E.2d at 884-85.

There is no evidence here of any of the *Gladden* factors. There is no evidence of an "extreme inequality of bargaining power." To the contrary, the undisputed evidence before the Court is that Sandra Parsons White could have simply said "no" to the Oakview Park facility and taken her business to one of the many other assisted living facilities located nearby. (*See* R. 244-265, 278).

There is no evidence that Sandra Parsons White lacked the ability to read or understand the English language or the Residency Agreement she signed. To the contrary, the undisputed evidence before the Court is that Sandra Parsons White was a licensed real estate agent who had received specialized education and training on South Carolina contract law and agency law. (*See* R. 265-277). Indeed, a real estate agent is a licensed professional whose duty it is to read, interpret, and negotiate contracts on behalf of their clients.

There is no evidence that Respondent was unable to negotiate, or make pen-changes to, the terms of the Residency Agreement, or its arbitration provision, or that she attempted to do so, or had any desire or inclination to attempt to do so.

There is no evidence that the circumstances surrounding Virginia Parsons' admission to the Oakview Park facility was in any sense an emergency. Oakview Park is an assisted living community, not a hospital emergency department or even a skilled nursing facility.

There is no evidence that anyone at the Oakview Park facility obscured or lied about the Residency Agreement or any of its provisions. There is no evidence that Sandra Parsons White did not consent to the Arbitration Provision or lacked meaningful choice in consenting to the Arbitration Provision.

There is no evidence of procedural unconscionability here, as defined and understood by the generally applicable contract law doctrine of unconscionability.

2. Substantive unconscionability, as understood by the generally applicable doctrine of unconscionability.

Under the generally applicable doctrine of unconscionability, terms of a contract are substantively unconscionable when they are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Holler*, 364 S.C. at 269, 612 S.E.2d at 476.

Accordingly, a party asserting unconscionability has an incredibly high burden to demonstrate substantive unconscionability: the contract term must be so morally outrageous that no reasonable person would have the audacity to even ask someone to accept the term, and no reasonable person ever would accept the term.

Substantive unconscionability must be considered only at the time of contracting. *See Hudson*, 408 S.C. at 83, 757 S.E.2d at 730 ("Courts are limited to considering the facts and circumstances that exist at the time of the execution of the contract when determining unconscionability.").

With this in mind, let us consider the substantive terms of the Residency Agreement at issue here. We will start by analyzing the provisions of the Arbitration Provision.

a. The Arbitration Provision was not substantively unconscionable.

The Arbitration Provision is comprised of fourteen numbered paragraphs. However, of the fourteen paragraphs, the Circuit Court's Order only appears to take issue with four of them: paragraphs 1, 6, 10, and 11.

i. The delegation clause.

The Circuit Court's Order decries the Arbitration Provision for delegating "complete authority to the arbitrator, including gateway issues of arbitrability." (R. 3). The Arbitration Provision does state that any and all claims, "including disputes regarding interpretation of this Agreement" must be submitted to arbitration. (R. 152). However, the Arbitration Provision does not appear to delegate gateway issues of enforceability or unconscionability to the arbitrator. In any case, it is well-settled that the FAA requires Courts to enforce delegation clauses according to their terms.

See Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 72 (2010).

ii. The right to appeal.

Paragraph ten of the Arbitration Provision states that the "arbitrator's decision shall be final and binding without the right to appeal." (R. 154). The Circuit Court evidently interpreted this to mean that the Arbitration Provision eliminated any and all statutory rights to appeal the arbitrator's award. (R. 3). That has never been the Appellants' understanding of that paragraph, however. The Appellants' understanding of paragraph ten is that it is simply stating that the *merits* of the arbitrator's decision are final and unappealable, not that the parties are waiving any statutory right to appeal.

Appellants' interpretation is supported by federal caselaw. *See Southco, Inc. v. Reell Precision Mfg. Corp.*, 331 F. App'x 925, 927 (3d Cir. 2009) (holding that "generally, a contract provision stating that arbitration is 'non-appealable' signifies that the parties to the contract may not appeal the merits of the arbitration; not that the parties agree to waive a right to appeal the district court's judgment confirming or vacating the arbitration decision."); *see also Rollins, Inc. v. Black*, 167 Fed.Appx. 798, 799 n. 1 (11th Cir.2006) (holding that a "binding, final, and non-appealable arbitral award does not mean the award cannot be reviewed. It simply means the parties have agreed to relinquish their right to appeal the merits of their dispute; it does not mean the parties relinquish their right to appeal an award resulting from an arbitrator's abuse of authority, bias, or manifest disregard of the law.").

To the extent there is a dispute here between the parties as to the proper interpretation of paragraph ten, such dispute must be decided by the arbitrator, and not by a court, in accordance with the Arbitration Provision's delegation clause. (*See* R. 152 ("Any and all claims or controversies arising out of, or in any way relating to, this Agreement . . . including disputes regarding interpretation of this Agreement . . . shall be submitted to binding arbitration . . .")).

iii. The cost-sharing provision.

Paragraph eleven of the Arbitration Provision states that the "arbitrator's fees and costs associated with the arbitration shall be divided equally among the parties, unless the Resident Party is proven indigent." (R. 154).

"[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." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).

There is no evidence here that Respondent is likely to incur prohibitive expenses if this matter is referred to arbitration. Indeed, if it is true that Sandra Parsons White is indigent, under the terms of the Arbitration Provision itself, she is not required to pay for half of the arbitrator's fees and costs.

iv. The discovery provisions.

Paragraph 6 of the Arbitration Provision provides as follows:

1. Discovery in the arbitration proceeding shall be governed by the South Carolina Rules of Civil Procedure. However, discovery

shall be modified by the following, unless agreed to otherwise by the party to whom the request is made:

a. The Resident Party shall provide us with permissible discovery per the South Carolina Rules of Civil Procedure within twenty (20) days after Demand for Arbitration is received (and we shall reimburse Resident Party $0.25 per page.)

b. We shall provide the Resident Party with permissible discovery per the South Carolina Rules of Civil Procedure within twenty (20) days after the Demand for Arbitration is received (and Resident Party, unless proven indigent, shall reimburse us $0.25 per page).

c. The only depositions allowed shall be of experts. No other individuals may be deposed.

d. Resident Party shall designate any and all expert witnesses within sixty-five (65) days after Demand for Arbitration is submitted.

e. We shall have thirty (30) days after Resident Party's expert designation is received in which to depose such experts.

f. We shall designate any and all experts one hundred and fifteen (115) days after Demand for Arbitration is submitted.

g. Resident Party shall have thirty (30) days after our expert designation is received in which to depose such experts.

h. Any report or affidavit of an expert, and a list of all records contained in the expert's file, must be exchanged by the parties no later than then (10) working days before the date of the expert's deposition.

i. The following shall be exchanged no later than fourteen (14) working days before the arbitration hearing:

    1) List of witnesses to be called at the arbitration hearing (full name, title, address and phone number if known) and an outline of each witness' intended testimony;

2) List of documents to be relied upon at the arbitration hearing;

3) Any sworn recorded statements to be relied upon at the arbitration hearing and included therewith the full name, title, address and phone number of the person making the sworn statement.

j. The arbitration hearing shall be held no later than one hundred and eighty (180) days after Demand for Arbitration is submitted, or within a reasonable time thereafter if a conflict arises with the arbitrator's calendar.

(R. 152-153).

One of the defining characteristics and fundamental attributes of arbitration is its more informal and streamlined nature. It is not possible for arbitration to be more streamlined if it must have a scope of discovery equal in every respect to that of the rules of civil procedure. Limitations on discovery in arbitration are expected and desired.

"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.

The United States Supreme Court has repeatedly and expressly stated that the FAA requires courts to enforce arbitration provisions according to their terms and that it is appropriate for parties to an arbitration agreement to contract for more limited discovery procedures than would be available in the court system.

"[W]e have held that parties may agree to limit the issues subject to arbitration, **to arbitrate according to specific rules**, and to limit with whom a party will arbitrate its disputes." *Concepcion*, 563 U.S. 333, 344 (emphasis added) (cleaned up). "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Id.* "And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." *Id.* at 345.

In *Gilmer*, Plaintiff filed a lawsuit alleging discrimination in violation of the ADEA. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). When Defendant filed a motion to compel arbitration, Plaintiff argued that arbitration should not compelled because "discovery allowed in arbitration is more limited than in the federal courts, which he contends will make it difficult to prove discrimination." *Id.* at 31. The United States Supreme Court did not agree. The Court held that, "[i]t is unlikely, however, that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as **RICO and antitrust claims**." *Id.* (emphasis added).

"Moreover, there has been no showing in this case that the NYSE discovery provisions, which allow for document production, information requests, depositions, and subpoenas will prove insufficient to allow ADEA claimants such as Gilmer a fair opportunity to present their claims." *Id.* "Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.*

The United States Supreme Court held in *Gilmer* that, under the FAA, the NYSE discovery provisions were adequate, appropriate, and not unconscionable. *Id*. That is significant because the scope of discovery provided by the Arbitration Provision here is more expansive than the NYSE discovery provisions. For example, the NYSE discovery provisions, then and now, state that "[d]epositions are strongly discouraged in arbitration" and are only available at all, in "very limited circumstances" to include preserving the testimony of a dying witness. FINRA Rule 12510, Code of Arbitration Procedure for Customer Disputes (FINRA), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12510. Under the Arbitration Provision here, the parties are entitled to take depositions of any and all expert witnesses. No such right exists under the NYSE discovery provisions. Under the NYSE discovery provisions, no depositions at all, even for expert witnesses, can be had unless extraordinary circumstances are proven to exist, such as the impending death of a witness.

The United States Supreme Court has held that, under the FAA, the discovery available in arbitration is sufficient for plaintiffs to be able to pursue claims for employment discrimination, RICO, and even antitrust actions. It cannot be true that the amount of discovery Respondent needs here to prove her allegations of negligence exceed those needed to prove a typical employment discrimination, RICO, or antitrust law case.

In the Circuit Court's Order, reference is made to the "late presentation of witness lists, exhibit lists, and sworn statements to be relied upon at the arbitration hearing (to be provided 14 working days before the hearing)." (R. 3). However, this appears to be based on a misreading of the discovery provisions.

The discovery provisions state that the South Carolina Rules of Civil Procedure apply. (R. 8). Accordingly, the parties are free to exchange written interrogatories and requests for production. If a party wants to know the identity of potential witnesses or wants relevant documents to be produced, the party can simply serve an interrogatory or a request for production. Both parties can file motions to compel discovery responses with the arbitrator. Here, the Circuit Court has already ordered that records relating to the other residents at issue in this case must be produced. (R. 16). Both parties can call any and as many live witnesses as they want at the arbitration proceeding.

That the discovery provisions here require the parties to produce all relevant documents, before even receiving a discovery request, within twenty days of the initiation of the arbitration, is more expansive and expeditious than what the parties would be entitled to under the South Carolina Rules of Civil Procedure. Similarly, many South Carolina Circuit Court judges do not require the parties to exchange pre-trial briefs, which name trial exhibits and witnesses, until mere days before the start of trial, whereas the discovery provisions here require that information to be disclosed at least 14 days prior to the arbitration proceeding.

None of the terms of the Arbitration Provision, including the discovery provisions, are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Gladden*, 402 S.C. at 145, 739 S.E.2d at 884. The Arbitration Provision is not unconscionable, either procedurally or substantively.

3. The Limitation of Liability Provisions were not substantively unconscionable.

The majority of the Circuit Court's Order on the issue of substantive unconscionability pertained to the Limitation of Liability Provisions, which provide as follows:

> **A. <u>LIMITATION OF LIABILITY PROVISION.</u>** *Read Carefully Before Signing.*
>
> 1. The parties to this Agreement understand that the purpose of this "Limitation of Liability Provision" is to limit, in advance, each party's liability in relation to this Agreement.
>
> 2. Liability for <u>any</u> claim brought by a party to this Agreement against the other party, including but not limited to a claim by us for unpaid Basic Service Rate or other charges, or a claim by, or on behalf of you, Resident Party or your estate, agent or legal representative, arising out of the care or treatment received by you or your occupancy or presence at the Community, including, without limitation, claims for medical negligence, shall be limited as follows:
>
>   a. Net economic damages shall be awardable, including but not limited to, past and future medical expenses, offset by any collateral source payments such as payments made by medical insurance.

b. Non-economic damages, such as pain and suffering, shall be limited to a maximum of $400,000.00.

c. Interest and/or late fees on unpaid assisted living charges shall not be awarded.

d. Punitive damages shall not be awarded.

3. Should sub-sections a, b, c and/or d, provided above, be deemed invalid, the validity of the remaining sub-sections will not be affected.

(R. 154).

However, Appellants have never sought to enforce any of the Limitation of Liability Provisions. Appellants filed a motion to compel arbitration, not to enforce any of the Limitation of Liability Provisions. Indeed, from the outset, Appellants have offered to not enforce any of the Limitation of Liability Provisions. (R. 233-237, 239-243).

Accordingly, the Court need not rule on the enforceability of any of the Limitation of Liability Provisions, as the issue is not yet ripe. Appellants have not asked any Court, or any arbitrator, to enforce the Limitation of Liability Provisions and have not shown any inclination to do so in the future. A finder of fact has also not yet determined whether *any* damages should be awarded here, be they punitive, economic, or non-economic.

In *Carolina Care Plan*, the Supreme Court of South Carolina held that the issue of whether an arbitration provision was unenforceable because it forbade the awarding of punitive damages was not yet ripe because it was unclear whether the arbitrator would award any damages, much less punitive damages. *See Carolina*

Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 557, 606 S.E.2d 752, 759 (2004) ("CCP is also seeking punitive damages in several common law causes of action. We hold that this issue is also not ripe for two reasons. First, it is unclear whether CCP will prevail on the merits in arbitration. Second, it is unclear whether an arbitrator would find that punitive damages are warranted.").

As will be discussed later in this brief, all of the Limitation of Liability provisions can also easily be severed from the Arbitration Provision, and, indeed, must be severed in accordance with the FAA and the agreement's severance clauses if it were to be determined that any of its provisions are unenforceable.

However, if this Court is inclined to determine whether any of the Limitation of Liability provisions were substantively unconscionable, the generally applicable unconscionability standard must be applied to the analysis. Under the generally applicable standard of unconscionability, contract terms are substantively unconscionable only when they are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Holler*, 364 S.C. at 269, 612 S.E.2d at 476. None of the Limitation on Liability Provisions here were "so oppressive that no reasonable person would make them and no fair and honest person would accept them."

a. The punitive damages provision.

The Limitation of Liability Provisions state that "[p]unitive damages shall not be awarded." (R. 155). However, under generally applicable South Carolina law, contractual disclaimers of punitive damage awards are enforceable. *See Maybank v. BB&T Corp.*, 416 S.C. 541, 787 S.E.2d 498, (2016).

In *Maybank*, a financial advisor named Maybank sued a number of defendants, including BB&T Corporation, for allegedly providing him with negligent financial investment advice, among other things. *Id.* BB&T sought to have a provision of the services contract enforced in which punitive damages were disclaimed. *Id.* Maybank claimed this provision was both unconscionable and violative of public policy. *Id.*

The Court held that "[w]hen a contract is entered into freely and voluntarily, contractual limitations are normally enforced. This Court has generally upheld limitations of liability and exculpatory clauses, finding they are commercially reasonable." *Id.* at 573, 787 S.E.2d at 515 (cleaned up).

The Court continued that while "[i]t is true that a contract for services between an individual and a large corporation will frequently involve some disparity of bargaining power" there was not a significant disparity between Maybank and BB&T because Maybank was himself a sophisticated party. *Id.* at 575, 787 S.E.2d at 515.

The Court concluded that "we find the clause is neither violative of public policy nor unconscionable. Under its terms, it does not deprive Maybank of all damages arising under the contract but merely limits the type of damages he is entitled to recover." *Id.* at 576, 787 S.E.2d at 516.

The FAA also requires Courts to enforce arbitration provisions as they are written, even if they include disclaimers for punitive damages. In *Mastrobuono*, the

United States Supreme Court attempted to interpret an ambiguously written arbitration provision to determine whether the provision did or did not disclaim recovery of punitive damages. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995). While the Court struggled somewhat to decipher the parties' intent based upon the ambiguous language of the contract, the Court held that the FAA required the Court to give effect to the parties' agreement, whatever the agreement might have been, *i.e.* whether the agreement did or did not disclaim recovery of punitive damages. *See id.* The Court held that:

> Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S., at 479, 109 S.Ct., at 1256.
>
> Relying on our reasoning in *Volt*, respondents thus argue that the parties to a contract may lawfully agree to limit the issues to be arbitrated by waiving any claim for punitive damages. On the other hand, we think our decisions in *Allied–Bruce*, *Southland*, and *Perry* make clear that if contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration. **Thus, the case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages.**

Id. at 57-58 (cleaned up) (emphasis added).

The punitive damages provision is not "so oppressive that no reasonable person would make them and no fair and honest person would accept them." The punitive damages provision was not substantively unconscionable.

b. The noneconomic damages provision.

The Limitation of Liability Provisions provide that "Non-economic damages, such as pain and suffering, shall be limited to a maximum of $400,000.00." (R. 155).

However, as previously discussed, in the *Gladden* case, the Court found that a contractual provision that limited a home inspector's liability to only the amount paid for the inspection (which was likely less than $1,000) was neither unconscionable nor violative of public policy. See *Gladden*, 402 S.C. 140, 739 S.E.2d 882.

The Court held that "[l]imitation of liability and exculpation clauses are routinely entered into. Moreover, they are commercially reasonable in at least some cases, since they permit the provider to offer the service at a lower price, in turn making the service available to people who otherwise would be unable to afford it." *Id*. at 144-145, 739 S.E.2d 882, 884. "We cannot say that a limitation of liability clause in a home inspection contract is so oppressive that no reasonable person would make it and no fair and honest person would accept it." *Id*.

The South Carolina General Assembly has also recognized the reasonableness and appropriateness of caps on recoverable damages. The General Assembly has imposed caps on non-economic damages in medical malpractice cases, and caps on all damages against governmental and charitable entities. *See* S.C. Code Ann. § 15-32-220; S.C. Code Ann. § 15-78-120; S.C. Code Ann. § 33-56-180.

The non-economic damages provision is not "so oppressive that no reasonable person would make it and no fair and honest person would accept it."

c. The economic damages provision.

The Limitation of Liability Provisions provide that "Net economic damages shall be awardable, including but not limited to, past and future medical expenses, offset by any collateral source payments such as payments made by medical insurance." (R. 154).

There is an ongoing scholarly debate as to the propriety of applying the collateral source rule to medical bills, especially to medical bills that were never actually paid or incurred by anyone (so-called "phantom charges") or that were paid by the taxpayer via Medicare or Medicaid.

For just a few examples of the scholarly discourse on this issue, *see* Cori Ast, *Overcharged: Why Medical Insurance Write-Offs Are Not Collateral Sources and Should Not Be Recoverable As Medical Expenses in Tort*, 30 Geo. Mason L. Rev. 381 (2022) ("The amount billed approach is at odds with the realities of health care finance because chargemaster rates are fictional prices never paid by insured or uninsured patients - only by tortfeasors in majority jurisdictions."); Todd R. Lyle, *Phantom Damages and the Collateral Source Rule: How Recent Hyperinflation in Medical Costs Disturbs South Carolina's Application of the Collateral Source Rule*, 65 S.C. L. Rev. 853-54 (2014) ("Indeed, in light of recent medical pricing inflation, coupled with the complexities of the health care and insurance reimbursement systems, the time has come for South Carolina to change its current approach for determining compensatory damages."); Guillermo Gabriel Zorogastua, *Improperly Divorced from Its Roots: The*

Rationales of the Collateral Source Rule and Their Implications for Medicare and Medicaid Write-Offs, 55 U. Kan. L. Rev. 463-64 (2007) ("Dubbed an 'oddit[y] of American accident law,' the collateral source rule travels the path to extinction. Currently, only twelve states retain the rule's immaculate common law form. Reacting to a perceived medical malpractice crisis, twenty states have modified the rule, and, in even more ambitious attempts at tort reform, fourteen states have simply abrogated the rule.").

Several state legislatures have enacted statutes limiting recoverable medical expenses to the same or similar extent as the economic damages provision here. For some examples, *see* Fla. Stat. Ann. § 768.0427; Tex. Civ. Prac. & Rem. Code Ann. § 41.0105 ("recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant."); Mont. Code Ann. § 27-1-308; La. Stat. Ann. § 9:2800.27 ("the claimant's recovery of medical expenses is limited to the amount actually paid"); Mo. Ann. Stat. § 490.715; Md. Code Ann., Cts. & Jud. Proc. § 3-2A-09.

Indeed, esteemed members of our own Supreme Court of South Carolina have expressed the opinion that recoverable medical expenses should be limited to those amounts actually incurred or paid by the patient. In a dissenting opinion in *Haselden*, 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).

There is an ongoing learned scholarly debate regarding the propriety of applying the collateral source rule to medical bills, with many reasonable and respected individuals and arguments on both sides. The economic damages provision here, which reflects one side of an ongoing policy debate, is not "so oppressive that no reasonable person would make it and no fair and honest person would accept it." Indeed, several state legislatures, including those of Florida, Texas, Montana, Louisiana, Missouri, and Maryland, have already determined that something like the economic damages provision here ought to be the law of the land.

Under generally applicable contract law principles, the Arbitration Provision was not unconscionable, either procedurally or substantively.

4. The severance clauses must be enforced.

The Residency Agreement contained multiple severance clauses that must be enforced. The first sentence of the Arbitration and Limitation of Liability Provision states that "[s]hould any of sub-sections A, B or C provided below, or any part thereof, be deemed invalid, the validity of the remaining sub-sections, or parts thereof, will not be affected." (R. 151).

The last sentence of the Limitation of Liability Provision provides that "[s]hould sub-sections a, b, c and/or d, provided above, be deemed invalid, the validity of the remaining sub-sections will not be affected." (R. 155).

Finally, Paragraph I. of the Residency Agreement provides that "[s]hould any part of this Agreement be invalid, the validity of the other parts of this Agreement will not be affected." (R. 157).

The FAA requires courts to enforce arbitration provisions according to their own terms, which includes severance clauses. *See Concepcion*, 563 U.S. 333, 344 ("The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms."). Furthermore, under the *Prima Paint* doctrine, as a matter of law and pursuant to the FAA, arbitration provisions are severable. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.").

The Agreement's severance clauses must also be enforced pursuant to generally applicable contract law principles. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Maybank, 416 S.C. at 576, 787 S.E.2d at 516.* Under generally applicable contract law principles, "[t]he entirety or severability of a contract depends primarily upon the intent of the parties." *Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980).

> A contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent.
>
> A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. The entirety or severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject, although the latter aids in determining the intention."

Id. (quoting *Packard & Field v. Byrd*, 73 S.C. 1, 6, 51 S.E. 678, 679 (1905)).

"[A] severable contract is one that is susceptible of division and apportionment, while a contract that is not severable has material provisions and consideration that are common each to the other and interdependent." 17A Am. Jur. 2d Contracts § 394.

> The parties' intent to enter into a divisible contract may be expressed in the contract directly, through a severability clause. **A severability clause indicates the intent of the parties where the remainder of the contract can exist without the void portion**. The intent of the parties determines whether a contract is severable such that the remaining contract provisions will survive even if one or more provisions of the contract are void. Generally, the court will give effect to a severability clause when the clause being severed is not a necessary part of the contract. The absence of a severability clause tends to indicate that a contract is entire and not severable.

17A Am. Jur. 2d Contracts § 395 (emphasis added).

By its plain language the Residency Agreement clearly, repeatedly, and unambiguously indicates that it was the intent of the parties to sever any and all provisions that may be deemed invalid.

The essence and fundamental purpose of the Arbitration Provision was to memorialize the parties' agreement to submit their disputes to arbitration. Provisions that pertain to how, precisely, the arbitration is to be conducted and what damages may be awarded therein can easily be severed without frustrating the essential purpose of the Arbitration Provision.

If this Court were to find that there is some ambiguity or genuine dispute as to the proper interpretation of the Arbitration Provision, or the agreement's severance clauses, in accordance with the Arbitration Provision's delegation clause, such a dispute must be resolved by an arbitrator and not by a Court. (*See* R. 152, stating that any and all claims, "including disputes regarding interpretation of this Agreement" must be submitted to arbitration).

The Arbitration Provision was not unconscionable, either procedurally or substantively, under the generally applicable contract law doctrine of unconscionability. *Arguendo*, even if a provision within the Arbitration Provision were to be deemed unconscionable, the FAA and generally applicable principles of contract law require a Court to sever the offending provision and to enforce the remainder of the Arbitration Provision.

II. ***Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 644 S.E.2d 663 (2007)*, and its progeny, is preempted by the FAA.**

As previously discussed, the FAA's "saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but **not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue**." *Concepcion*, 563 U.S. at 339 (emphasis added).

"When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id*. at 341. "But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration." *Id*.

A. ***AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011).**

In *Concepcion*, a class action was brought against AT&T in which it was alleged that AT&T wrongfully charged its customers sales tax on phones. *Id*. at 336. The service contract signed by the class members included a provision requiring all disputes to be arbitrated individually and not collectively. *Id*. The trial court held that the entire arbitration provision was unconscionable, as defined by the California Supreme Court in a case called *Discover Bank*, because it included a class action waiver. *Id*. at 338.

Under the *Discover Bank* rule, class-action waivers were unconscionable when 1) they are present in consumer adhesion contracts and 2) "it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Id*. (quoting *Discover Bank v. Superior Ct*., 36 Cal. 4th 148, 162, 113 P.3d 1100, 1110 (2005)).

On appeal, AT&T pointed out that the *Discover Bank* rule made it significantly easier for a party to establish unconscionability than would otherwise be the case under the generally applicable common law doctrine of unconscionability. *See AT&T Mobility LLC v. Concepcion*, 2010 WL 3017755.

For example, under California's generally applicable doctrine of unconscionability, a party must prove both procedural and substantive unconscionability. *See, e.g., Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000). Procedural unconscionability involves "oppression" or "surprise" in the making of the agreement. *See Belton v. Comcast Cable Holdings*, LLC, 60 Cal. Rptr. 3d 631, 649-50 (Ct. App. 2007). For a term to be substantively unconscionable, the term in question must be so "overly harsh" or "one-sided" as to "shock the conscience" and be such that "no man in his senses, and not under delusion, would make on the one hand, and that no honest and fair man would accept on the other." *Herbert v. Lankershim*, 71 P.2d 220, 257 (Cal. 1937) (cleaned up); *see also Aron v. U-Haul Co*., 49 Cal. Rptr. 3d 555, 564 (Ct. App. 2006).

AT&T argued that while procedural unconscionability ordinarily requires a showing of "oppression" or "surprise" in the making of the agreement, this was not so under the *Discover Bank* Rule. *See AT&T Mobility LLC v. Concepcion*, 2010 WL 3017755. Rather, under *Discover Bank*, all that was needed to satisfy the procedural unconscionability requirement was evidence that the agreement was an adhesion contract.[1] *See id.*

Similarly, AT&T argued that while under the generally applicable doctrine of unconscionability, substantive unconscionability only exists when terms of an agreement are so one-sided that they "shock the conscience" and are such that "no man in his senses, and not under delusion, would make on the one hand, and that no honest and fair man would accept on the other," this was absolutely *not* the legal standard under the *Discover Bank* rule. *See id.* Rather, to satisfy the substantive unconscionability requirement under the *Discover Bank* rule, it had to merely be *alleged*, not even proven, that "the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *See id.*

Because the *Discover Bank* rule significantly lowered the burden of proof required to establish unconscionability and had a disproportionate effect on the enforcement of arbitration agreements, the United States Supreme Court held that the FAA preempted the *Discover Bank* rule. *See Concepcion*, 563 U.S. at 352 ("Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California's *Discover Bank* rule is pre-empted by the FAA.").

[1] The United States Supreme Court was not impressed by this and remarked, "[t]he rule is limited to adhesion contracts, but the times in which consumer contracts were anything other than adhesive are long past." *Concepcion*, 563 U.S. at 346-47.

B. South Carolina's two doctrines of unconscionability.

Under current South Carolina law, there is a body of caselaw that discusses and applies the generally applicable contract law doctrine of unconscionability, and then there is a separate body of caselaw, beginning with *Simpson*, that discusses and applies a different formulation of the doctrine of unconscionability that applies only to arbitration agreements.

1. Procedural unconscionability.

The legal standard for procedural unconscionability contained within *Simpson* is as follows:

> In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

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

This is a significant departure from the generally applicable doctrine of unconscionability that was discussed earlier in this brief.

Simpson **requires** a court to "take into account the nature of the injuries suffered by the plaintiff" when considering whether a contract was unconscionable; conversely, the generally applicable doctrine of unconscionability **forbids** a court from doing so. *See Hudson*, 408 S.C. at 83, 757 S.E.2d at 730 ("Courts are limited to considering the facts and circumstances **that exist at the time of the execution of the contract** when determining unconscionability." (emphasis added)).

Additionally, it is well-established that the FAA preempts any requirement that an arbitration provision must be any more prominent or "conspicuous" than other contract provisions. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 681 (1996) (holding that Montana's first-page notice requirement for arbitration agreements was preempted by the FAA); *Phillips v. Renu Energy Sols., LLC*, No. 2024-000338, 2025 WL 1825501, at *1 (S.C. Ct. App. July 2, 2025) ("We further find any alleged inconspicuousness of the arbitration provisions did not deprive Phillips of a meaningful choice. The FAA does not require an arbitration provision to be bolded, underlined, or typed in all caps.").

The *Simpson* standard does not specify how large of a disparity in bargaining power or sophistication between the parties is needed to support a finding of procedural unconscionability, but it appears that even a small disparity may suffice. The generally applicable version of the doctrine, however, requires not just a mere disparity in bargaining power, but 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.**" *Gladden* at 145, 739 S.E.2d at 884-85.

According to *Simpson*, it is appropriate to subject consumer contracts for "necessities", such as automobiles, to special, heightened scrutiny. *See Simpson*, 373 S.C. at 26, 644 S.E.2d at 669. However, such public policy considerations are foreign to the generally applicable doctrine of unconscionability, and *de facto*, have a disproportionate impact on the enforcement of arbitration provisions.

Finally, while the *Simpson* court found it significant that Simpson alleged that "the contract was 'hastily' presented for her signature," the notion that one can avoid a contract simply by claiming that one didn't read it before signing is utterly foreign to axiomatic principles of contract law and to the generally applicable doctrine of unconscionability. *See Simpson*, 373 S.C. at 27, 644 S.E.2d at 670.

A survey of all citing references on Westlaw appears to indicate that the *Simpson* formulation of procedural unconscionability, as quoted above, has only *ever* been cited to and relied upon by South Carolina appellate courts in cases in which an arbitration provision was at issue.

2. Substantive unconscionability.

Under *Simpson*, substantive unconscionability exists when a contract provision is "oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker." *Id.* at 30, 644 S.E.2d at 671.

That is a much easier standard to satisfy than the generally applicable substantive unconscionability standard, which requires a contract provision to be "so oppressive that no reasonable person would make it and no fair and honest person would accept it." *See Holler*, 364 S.C. at 269, 612 S.E.2d at 476.

Again, a survey of all citing references on Westlaw appears to indicate that the *Simpson* formulation of substantive unconscionability, as quoted above, has only *ever* been cited to and relied upon by South Carolina appellate courts in cases in which an arbitration provision was at issue.

3. Severability.

In *Simpson*, the Court declined to sever any of the provisions that it deemed unconscionable and/or violative of public policy by citing with approval to a D.C. Circuit case called *Booker* for the proposition that "[i]f illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *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).[2]

However, as was discussed earlier in this brief, there is a well-established and generally applicable body of contract law that discusses when contract terms should and should not be severed. To comply with the FAA, the *Simpson* Court should have applied generally applicable contract law principles to determine whether it was the parties' intent to sever the offending provisions.

An unconscionable contract is also not an illegal contract and vice versa. The doctrines of unconscionability and illegality are distinct. An illegal contract is a contract for an illegal purpose, such as prostitution or gambling. *See Berkebile v. Outen*, 311 S.C. 50, 52, 426 S.E.2d 760, 761 (1993); *see also* 17A Am. Jur. 2d Contracts

[2] This language and rationale was later cited to and relied upon in *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022).

§ 217 ("An agreement to do an illegal act is itself illegal, and a contract should not be enforced where its performance would make the parties guilty of a crime . . . . However, the fact that a contract serves a legally prohibited purpose does not necessarily make the contract unenforceable."). An agreement to arbitrate disputes is certainly not illegal, or in furtherance of an illegal purpose.

Furthermore, the doctrine of unconscionability was never even discussed in the *Booker* case. Rather, at issue in *Booker* was whether an unenforceable provision barring the award of punitive damages should be severed from the arbitration agreement that contained it. *See Booker,* 413 F.3d 77. The punitive damages provision was not unenforceable under the doctrine of unconscionability, but rather as against public policy pursuant to caselaw that was published *after* the arbitration agreement at issue in *Booker* had been signed. *Id.*

The *Booker* Court did not invalidate the entire arbitration provision but merely severed the offending punitive damages provision and then enforced the remainder of the arbitration provision. *Id.* The Court found that "severance is inappropriate when the entire clause represents an integrated scheme to contravene public policy" but noted that "[t]here is no evidence of that here" because when the contract was signed "the law of this circuit was unclear as to whether bars on punitive damages in arbitration clauses were enforceable in this context." *Id.* at 85 (cleaned up).

Simpson, and its progeny, violates the FAA's mandate to "place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Concepcion*, 563 U.S. at 339 (cleaned up).

The unconscionability standard contained in *Simpson* is very different from the generally applicable unconscionability standard and, in every respect, makes it easier for the party asserting unconscionability to meet her burden of proving it. The *Simpson* unconscionability standard also appears to have only ever been applied in cases in which arbitration provisions were at issue.

Accordingly, the *Simpson* unconscionability standard is preempted by the FAA because it singles out arbitration provisions for special, disfavored treatment, has a disproportionate impact on the enforcement of arbitration agreements, interferes with the FAA's goals, and is not a generally applicable contract defense.

CONCLUSION

For the reasons set forth herein, and that may be set forth in oral argument or in a Reply Brief, Appellants respectfully request that this Court reverse the judgment of the Circuit Court and grant Appellants' Motion to Compel Arbitration and Stay Proceedings.

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Respectfully Submitted,

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