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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

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

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.

RESPONDENT'S BRIEF

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COUNTERSTATEMENT OF THE ISSUES ON APPEAL

1. Whether Appellants may claim Simpson v. MSA of Myrtle Beach, Inc. is preempted by federal law and argue South Carolina courts apply “two different legal standards for unconscionability” when no such arguments were raised during circuit court proceedings.
2. Whether the circuit court was correct in joining several other jurisdictions to find Appellants’ form adhesion contract is unconscionable because it denies Respondent access to the materials needed to fairly present her claims and the opportunity to pursue the damages to which she is entitled by South Carolina law.

STATEMENT OF THE CASE

Sandra P. White (“Daughter”), appointed as personal representative of the Estate of her mother Virginia Parsons (“Mother”), filed a Summons and Complaint in the Greenville County Court of Common Pleas on November 11, 2024. (R. p. 24 ¶ 1). The Complaint alleged negligence/recklessness, negligence per se, breach of fiduciary duty, and wrongful death claims against Appellant Atlas Senior Living, LLC, Atlas Senior Living II, LLC; AFF 18 Oakview Park ALF, LLC d/b/a Oakview Park Assisted living, AFF 18 Oakview Park PropCo, LLC, AFF18 Greenville Borrower, LLC, and Oakview Park Developer, LLC—all as entities responsible for the operations of Oakview Park Assisted Living & Memory Care (“the Facility”) where Mother was a resident. (R. pp. 24-26 ¶¶ 1-13). Appellants answered jointly on February 7, 2025 (R. pp. 35-43) and moved to stay Ms. Parsons’s suit and to compel arbitration on July 3, 2025. (R. pp. 126-27). A hearing on the motions was held before the Honorable Patrick C. Fant, III on August 28, 2025. On September 5, 2025, the circuit court entered a Form 4 order denying the motion to stay/compel arbitration. (R. pp. 13-15). A formal order denying the motion to compel arbitration was entered on September 24, 2025. (R. pp. 16-22). Appellants moved to reconsider on October 3, 2025 (R. pp. 279-87) which was denied in substance in an order dated November 10, 2025. (R. pp. 1-6). Appellants served a notice of appeal on December 8, 2025. (R. p. 319).

STATEMENT OF THE FACTS

Oakview Park Assisted Living admitted Mother to the Facility, an institution specializing in memory care, on March 17, 2023. (R. p. 176). Five months later (August 22, 2023), Mother suffered a serious incident at the Facility under concerning circumstances. (R. p. 27 ¶¶ 27-28). One or more of her fellow residents yanked Mother's walker away as she was grasping it for support. Ms. White's Complaint alleges this was not an unfortunate accident but a foreseeable and inevitable result of lack of supervision and understaffing. Appellants had known for a while that these residents were aggressive, combative, even violent such that they posed a danger to residents like Mother if not properly supervised. (R. p. 28 ¶ 30).

Shortly after Mother's admission to the facility, Facility employees presented Ms. White with the twenty-page "Oakview Park Residency Agreement" ("the Agreement"), which the Facility employees requested she sign on Mother's behalf. A number of unconscionable and otherwise unenforceable legal provisions are buried within Section V(A)'s "Arbitration Provision" which begins on page 7 (R. p. 151):

- **Lack of Mutuality (R. p. 152 ¶ 1):** While the Facility's residents are purportedly required to arbitrate any legal claim related to their residency, the Facility's legal rights are not equally curtailed. The Agreement expressly carves out "any action for eviction," thereby reserving access to the courts for the Facility while denying it to residents.
- **Onerous Discovery Limitations (R. pp. 152-53 ¶ 6):** The Agreement flatly refuses to offer residents the same level of access to key information that they would have in litigation ("discovery shall be modified . . ."). The improper discovery provisions include:
 - (b): A per-page charge to the resident for every document the Facility produce
 - (c): A blanket prohibition on non-expert depositions
 - (i): A pre-hearing schedule that prevents the resident from knowing the Facility's witness and exhibit list until just 14 days before the arbitration hearing.

- **Appeal Waiver (R. p. 154 ¶ 10):** The Agreement purports to waive any right to appeal an arbitrator's decision.
- **Attorney Fee Waiver (R. p. 154 ¶ 11):** A resident is purportedly barred from recovering attorneys' fees even if such recovery is permitted or even required by statute.

The Agreement's Section V(B) (R. pp. 154-55) is titled "**Limitation of Liability Provision**," and it sets out to systematically eliminate a number of statutorily protected damages in a manner that no reasonable person in the Facility's position would expect a resident to accept. Specifically:

- **Economic Damages Limit (R. p. 154 ¶ 2(a)):** A resident may only recover "net economic damages" with a requirement that the recovery be "offset by any collateral source payments," which is directly at odds with South Carolina's long-standing collateral source rule.
- **Noneconomic Damages Limit (R. p. 155 ¶ 2(b)):** A resident may only recover \$ 400,000 for noneconomic damages even though South Carolina law imposes no noneconomic damages limits for most tort claims. This purported limitation is also well beneath the noneconomic damages limitation for medical malpractice claims (\$ 580,461). S.C. Code Ann. § 15-32-220; S.C. Revenue & Fiscal Affairs Office Mem., dated Feb. 3, 2025 (adjusting statutory damage limit for inflation). Moreover, the Agreement's purported limit would limit a resident to \$ 400,000 for recovery from all Appellants even though South Carolina's statutory noneconomic damages limitation functions on a per-claimant, per-provider basis allowing each claimant a recovery up to \$ 1,741,383. Id.
- **Punitive Damages Exclusion (R. p. 155 ¶ 2(d)):** The Agreement purports to bar punitive damages, another component of damages made available by South Carolina statute for instances of reckless misconduct.

As a result of the August 22, 2023 assault, Mother fell on her right side, striking her head on the floor. She was hospitalized and diagnosed with a fractured right hip for which she required surgery. (R. p. 177). Unfortunately, Mother passed away on October 5, 2023, with "blunt force trauma" and the resulting hip surgery cited as contributing factors in her death. Id. This lawsuit alleges Appellants' ignored the fellow residents' history of aggressive behavior and failed to properly monitor Mother while she was under their care. (R. p. 27 ¶ 27). The problem was not merely any individual Facility worker's negligence but also a broader institutional failure by

Appellants to hire and retain a sufficiently number of properly trained staff members to keep residents safe. (R. p. 27 ¶ 25).

Citing the Agreement, Appellants moved to compel Ms. White's claims to arbitration. The circuit court concluded the Agreement was unconscionable and, therefore, invalid. (R. p. 5). The Court offered specific legal reasoning to support its conclusion on both procedural and substantive unconscionability. The Agreement was procedurally unconscionable because the conditions under which it was presented and entered indicated a lack of meaningful choice in the transaction. Specifically, the Court found a "significant" disparity in the bargaining power of Mother (through Daughter) and the Facility, a sophisticated business entity. (R. p. 2). As for the Agreement, the Court found it was offered on a take-it-or-leave-it basis with "no opportunity for negotiation" and concluded the disputed arbitration/liability limitation provisions were not conspicuous within the document (on pages 7-11 of 20, not in bold type). (R. p. 2).

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

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

For the reasons discussed below, the circuit court correctly ruled the Agreement's grossly unfair arbitration provisions were unconscionable and unenforceable.

STANDARD OF REVIEW

Appellate courts apply a *de novo* review to a circuit court's finding on a motion to compel arbitration. Wilson v. Willis, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) (citing Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) and Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012)). However, under a *de novo* review, the circuit court's factual findings will not be reversed so long as "any evidence reasonably supports those findings." Wilson, 426 S.C. at 335, 827 S.E.2d at 172. "There is . . . no public policy—federal or state—'favoring' arbitration." Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021); see also Lampo v. Amedisys Holding, Inc., 445 S.C. 305, 317, 914 S.E.2d 139, 146 (2025) ("remind[ing] our litigants and lower courts that we dispensed with this incorrect notion" of a pro-arbitration policy in Palmetto Construction Group) In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory. Wilson, 426 S.C. at 335, 827 S.E.2d at 172.

ARGUMENT

1. Appellants’ Simpson challenge and preemption argument are not preserved for review.

Appellants devote a substantial portion of their brief to challenging the foundations of South Carolina’s unconscionability jurisprudence. (App. Br. at 1, 11, 40-48). They argue South Carolina appellate courts have been applying “two different legal standards for unconscionability” and pinpoint a 2007 Supreme Court case as where things began to go wrong. (App. Br. at 11) (citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007)). Simpson, they insist, represents a view of this contract defense “that applies only to arbitration provisions.” (App. Br. at 11). Appellants go on to argue Simpson and progeny cannot stand because, by unfairly targeting or disproportionately affecting arbitration, they are preempted by provisions of the Federal Arbitration Act (“FAA”). (App. Br. at 11, 40, 43, 48). For reasons discussed below, Appellants err in their characterization and interpretation of South Carolina’s unconscionability cases. Yet, Appellants’ argument suffers from a more fundamental flaw. None of these assertions were made during the circuit court proceedings which means there is no circuit court ruling to review and no need for this Court to consider Appellants’ attempt to fundamentally reorder how South Carolina courts address unconscionable contracts.

Appellate courts are courts of review, “not of first view,” and an aggrieved party must present and receive a ruling on an argument to later cite it as a legal error in the appellate courts. State v. Williams, 439 S.C. 620, 623, 889 S.E.2d 562, 563 (2023) (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n. 7 (2005)). Issue preservation consists of four core components. The issue must be “(1) raised and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity.” Rummage v. BGF Indus., 434 S.C. 441, 865 S.E.2d 380 (Ct. App 2021) (citing S.C. Dep’t of Transp. v. First Carolina

Corp of S.C., 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2001); see also Jean Hoefer Toal et al. Appellate Practice in South Carolina 57 (2d ed. 20002). Error preservation rules serve an important function in that they enable trial courts to rule on matters after consideration of all relevant facts, law, and arguments. Miller v. Dillon, 432 S.C. 197, 207, 851 S.E.2d 462, 467 (Ct. App. 2020). So, as a bottom line, “[a] trial court must have the chance to decide on an issue for it to be preserved on appeal.” Thompson v. Killian, 447 S.C. 177, 195, 924 S.E.2d 606, 615 (2025).

None of Appellants’ circuit court filings include the arguments they make now. Their motion to compel arbitration simply cited the Agreement’s arbitration provision and asked the circuit court to enforce it. (R. pp. 126-27). Their supporting memorandum did not reference unconscionability at all. (R. pp. 132-42). In response to Ms. White’s unconscionability argument, Appellants’ reply memo never argued South Carolina has two different unconscionability standards and never even hinted that the FAA preempts Simpson’s unconscionability analysis. (R. pp. 218-32). Additionally, while initially raising this issue in connection with a Rule 59(e), SCRCF, motion would be insufficient for preservation purposes, it is notable that neither memo Appellants filed in relation to that motion contain their current arguments either. (R. pp. 279-87; 302-18).

Plus, it is not just that Appellants failed to challenge the Simpson analysis below, they were actively asking the circuit court to apply that analysis to this case. Simpson was always the first cases Appellants cited to define unconscionability and to define its parameters. In the circuit court, their argument was that the Simpson analysis favored their desired outcome. (R. pp. 223-24) (quoting Simpson extensively as the “rubric” courts use to “determine whether a contract provision is unconscionable”); (R. pp. 281, 309). Perhaps less convinced of that now, Appellants try to

dismantle Simpson with a wholly new preemption argument. That argument is unpreserved and should be rejected without even reaching its merits.

2. South Carolina law applies the same unconscionability analysis to an arbitration agreement that it applies to any other contract.

Even if the Court reached this argument on its merits, the case law Appellants cite does not show South Carolina appellate courts have developed an arbitration-specific unconscionability analysis that varies from the way unconscionability is viewed in all other contractual contexts. Appellants rely primarily on Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882 (2013), going so far as to call for application of the “Gladden factors.” (App. Br. at 18). But, to suggest Gladden and Simpson represent divergent paths for unconscionability under South Carolina law does not withstand scrutiny. Gladden defines unconscionability *by quoting Simpson*. Gladden, 402 S.C. at 144, 739 S.E.2d at 884 (quoting Simpson, 373 S.C. at 24-25, 644 S.E.2d at 668). South Carolina law recognizes a single, unified doctrine of unconscionability, and Appellants’ attempt to divide that doctrine into arbitration and non-arbitration strands is contradicted by the very cases they cite.

Appellants’ argument is just as flawed with the other cases cited to represent the “generally applicable doctrine of unconscionability.” (App. Br. at 12). Appellants rely on a series of family court cases addressing pre-nuptial agreements and suggest they represent a clear break from the arbitration-specific unconscionability standard our Supreme Court opted for in Simpson. (App. Br. at 13-17) (citing Hardee v. Hardee, 355 S.C. 382, 585 S.E.2d 501 (2003), Hudson v. Hudson, 408 S.C. 76, 757 S.E.2d 727 (Ct. App. 2014), and Holler v. Holler, 364 S.C. 256, 612 S.E.2d 469 (Ct. App. 2005)). But, tracing the origin of the unconscionability analysis through these cases disproves Appellants’ theory. Hudson took its unconscionability analysis from Hardee and Holler, the pre-nuptial cases that preceded it. 408 S.C. at 83, 757 S.E.2d at 730. Both of those cases took their analyses from cases addressing arbitration contracts. Hardee drew its unconscionability analysis

from a Supreme Court case considering the arbitration provision in a home construction contract. 355 S.C. at 390, 585 S.E.2d at 505 (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001)). Holler looked to Supreme Court precedent on a health insurance services agreement's arbitration provision to identify the key components of an unconscionable contract. 364 S.C. at 269, 612 S.E.2d at 476 (citing Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 606 S.E.2d 752 (2004)). The notion of “two different legal standards for unconscionability”—one for arbitration cases, the other for every other type of contract—just is not borne out in the cases Appellants cite.

Beyond the prenuptial agreement cases, what remains of Appellants' argument is easily distinguished. (App. Br. at 15-16) (citing Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 472 S.E.2d 242 (1996) and Jones Leasing, Inc. v Gene Phillips & Assocs., 282 S.C. 327, 318 S.E.2d 31 (Ct. App. 1984)). While Appellants cannot show any real substantive difference in how these cases define or apply unconscionability, any perceived difference is explained by the fact that these cases applied *statutory* unconscionability rules limited to specific types of contracts not relevant here. Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 611, 879 S.E.2d 746 (2022) (citing Fanning and concluding its “description of unconscionability applies to all contract terms, not merely arbitration provisions”). Fanning applied an express unconscionability standard for “consumer credit” transactions in the South Carolina Consumer Protection Code. 322 S.C. at 403, 472 S.E.2d at 245 (citing S.C. Code Ann. § 37-5-108). Jones Leasing interpreted the description of unconscionability in S.C. Code Ann. § 36-2-302, a provision within South Carolina's codification of the Uniform Commercial Code Article 2 that applies only to contracts for the sale

of goods. 282 S.C. at 329, 318 S.E.2d at 32 (citing S.C. Code Ann. § 36-2-302); S.C. Code Ann. § 36-2-102 (providing that all of Article 2 is limited to “transactions in goods”).¹

In short, even if Appellants’ Simpson challenge was preserved, it would fail on the merits. South Carolina has applied the same unconscionability standard before and after Simpson both in and out of the arbitration context. Citing this universal standard does not conflict or invade the province of the FAA but rather is expressly permitted by the statute. 9 U.S.C. § 2 (stating that a proposed arbitration agreement may be invalidated “upon such grounds as exist at law or in equity for the revocation of any contract . . .”).

3. The Facility’s use of its grossly superior bargaining position to prevent depositions, impose exorbitant costs, and to outlaw statutorily-protected remedies renders the Agreement unconscionable.

The Agreement’s arbitration language bears all the hallmarks of an unconscionable contract provision. It lies buried seven pages in to an Agreement drafted exclusively by a sophisticated business entity and presented to the relative of an elderly dementia patient in need of memory care. Within the Agreement, the Facility exploited its superior bargaining position by imposing provisions that could only be designed to avoid liability for its misconduct. These provisions did far more than just remove an aggrieved resident’s injury claim from litigation. They made the pursuit of a resident’s claim less informed, more expensive, and less valuable. And, on top of all of that, the Facility managed to reserve for itself the right to litigate should it decide to

¹ The unreported opinions Appellants cite are equally unhelpful in showing a two-tiered unconscionability system. Todd took its unconscionability analysis from an arbitration contract case, and Centura Bank considered only the statutory unconscionability provision in the Consumer Protection Code. Todd, 2007 WL 8324253, at * 2 (citing Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998); Centura Bank, 2004 WL 6331130, at * 3 (citing S.C. Code Ann. § 37-5-108).

pursue eviction. Multiple courts from across the country have declared this precise contract language to be unconscionable, and the circuit court was correct in joining them here.

a. The Agreement’s structure and the way in which the Facility presented it shows the required procedural unconscionability.

In both the arbitration and non-arbitration contexts, unconscionability is “the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Simpson, 373 S.C. at 24-25, 644 S.E.2d at 668 (quoting Carolina Care Plan, 361 S.C. at 554, 606 S.E.2d at 757); Gladden, 402 S.C. at 144, 739 S.E.2d at 884. The “absence of meaningful choice” requirement “speaks to the fundamental fairness of the bargaining process.” Simpson, 373 S.C. at 25, 644 S.E.2d at 669. The key factors on this element include (1) the nature of the injuries suffered by the plaintiff; (2) whether the plaintiff is a substantial business concern; (3) the relative disparity in the parties’ bargaining power; (4) the parties’ relative sophistication; (5) whether there is an element of surprise in the inclusion of the challenged clause; and (6) the conspicuousness of the arbitration clause. Id. (citing Carlson v. Gen. Motors Corp., 883 F.2d 287, 293 (4th Cir. 1989)).

Applying these factors to the Agreement shows the fundamental unfairness of the bargaining process. Initially, the Agreement is an adhesion contract in that it was printed on a standardized form, offered to Mother (through Daughter) on a take-it-or-leave-it basis, and did not offer any chance to negotiate. Retreat at Charleston Nat’l Country Club Home Owners Ass’n, Inc. v. Winston Carlyle Charleston Nat’l, LLC, 445 S.C. 566, 598, 915 S.E.2d 736, 753 (Ct. App. 2025). Adhesion contracts are not per se unconscionable but identifying a document as an adhesion contract is a starting point for analyzing the substantive factors. Simpson, 373 S.C. at 27, 644 S.E.2d at 669. South Carolina courts have always viewed adhesion contracts with “considerable

skepticism” because they give rise to “considerable doubt that any true agreement ever existed to submit disputes to arbitration.” Smith v. DR Horton, Inc., 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) (quoting Simpson, 373 S.C. at 26-27, 644 S.E.2d at 669-70).

The first factor favors Respondent because Mother’s injuries were personal and substantial. Appellants’ alleged negligence led to a painful broken hip and other serious injuries ultimately resulting in Mother’s death. The other factors also favor Respondent. Daughter was not a substantial business concern. She was acting only as Mother’s representative with the aim of obtaining the nursing care he urgently needed. In contrast, Appellants are sophisticated business entities evidenced in many ways including the complex organization structure they have built to manage the Facility’s operations. (R p. 25 ¶¶ 5-12). The disparity in bargaining power is also considerable. Appellants operate more than thirty residential facilities for elderly individuals across ten states. Mother, on the other hand, was a vulnerable woman suffering from dementia and in need of memory care to continue from day to day.

Appellants contend this factor favors them, arguing there is no unequal bargaining power because Daughter is a real estate professional with the ability to read the Agreement’s terms. (App. Br. at 18-19). However, the inherent inequality of bargaining power in situations like this is a matter beyond reasonable dispute. In fact, the South Carolina Supreme Court has even taken judicial notice of the disparity between home buyers and sellers. Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989). That disparity only rises when the person seeking housing suffers from dementia, and the party from which it is sought is a memory care center. As for Appellants’ other argument, the fact that Daughter holds a real estate license and could read the Agreement does not allow Appellants to side step the “meaningful choice” analysis. As this Court recently held, that analysis is not limited to questions of generalized reading

comprehension but instead considers whether Daughter “understood the implications of the language in these agreements.” Retreat at Charleston, 445 S.C. at 598, 915 S.E.2d at 753. As discussed in more detail below, being a real estate agent does not mean Daughter understood the implications of a fact witness deposition ban, economic damages cap, or collateral source rule alteration on the viability and value of a potential negligence claim.

Additionally, the key language of the Agreement was not conspicuous relative to any of the other paperwork the Facility presented to Daughter. The arbitration and limitation on liability provisions begin on page 7 of 20 and are indistinguishable in formatting from any of the other section headings throughout the contract. Plus, the lack of conspicuousness and surprise elements relate not only to how prominently an arbitration provision is featured in a contract but also consider whether the way in which the arbitration provision is drafted imposes substantive limitations that would not be immediately apparent to an unsophisticated person. E.g. Simpson, 373 S.C. at 27-28, 644 S.E.2d at 670 (finding arbitration provision “inconspicuous . . . in light of its consequences” including the deprivation of statutory remedies).

Appellants largely ignore these established procedural unconscionability factors, choosing instead to rely on their unpreserved and unsupported challenge to Simpson and insisting the absence of “Gladden factors” dooms Respondent’s unconscionability claim. (App. Br. at 17-19). But, the comparison between this case and Gladden is inapt for multiple reasons. First, there is zero binding authority on procedural unconscionability in Gladden. The majority there rejected an unconscionability defense because it found no grossly unfair terms. 402 S.C. at 145, 739 S.E.2d at 884 (“we need not consider whether the Gladdens lacked meaningful choice . . .”). That means everything Gladden says about procedural unconscionability is dicta and non-precedential. Hampton v. Richland Cnty. Council, 296 S.C. 72, 72, 370 S.E.2d 714, 714 (1988) (describing dicta

as a statement in a legal opinion that was “clearly unnecessary to a resolution of the issue before the court”); Welborn v. Dixon, 70 S.C. 108, 49 S.E. (1904) (dicta is not binding as precedent). Second, the relationship between the parties in Gladden was very different. The court found no extreme bargaining inequity there because the offeror was a “self-employed home inspector operating out of his home” which meant he was neither more sophisticated nor more powerful than the consumer with which he was dealing. Gladden, 402 S.C. at 145, 739 S.E.2d at 885. That is a far cry from the region-wide elder care corporation that presented the Agreement to Daughter. Thus, even if Gladden’s procedural unconscionability analysis were not dicta, it would offer no support to Appellants’ attempt to equalize the Facility and Daughter’s relative bargaining positions.

In short, the circuit court correctly determined the Facility’s hurried presentation of a form adhesion contract with non-distinct arbitration and damage limitation provisions to a woman seeking a memory care facility for her mother with Alzheimer’s Disease met the generally-applicable elements of procedural unconscionability.

b. The Agreement contains several unfair and one-sided terms designed to prevent Respondent from fairly investigating, presenting, and recovering for her losses.

The second component of the unconscionability analysis is more substantive, analyzing whether the challenged contract contains terms so one-sided or unfair that no reasonable person under the circumstances would offer then and no reasonable counterparty could be expected to accept them. Gladden, 402 S.C. at 144, 739 S.E.2d at 884. South Carolina courts have found substantive unconscionability where a contract includes limitations or prohibitions on statutory and punitive damages, a lack of mutuality in the rights of the parties, and terms aimed at curtailing claims rather than finding a more efficient or efficacious resolution of disputes. Simpson, 373 S.C.

at 29, 644 S.E.2d at 670. Since the Agreement contains all of these prohibited provisions, the circuit court correctly determined it is unconscionable.

i. Discovery restrictions

The Agreement's unfair terms begin with its information gathering restrictions. For example, the Agreement permits the Facility to withhold basic information about the witnesses and documents on which its defense will be based until just two weeks before trial. (R. p. 153 ¶ (i)). On top of that, perhaps the Agreement's most egregious term is the categorical bar on fact witness depositions. (R. p. 153 ¶ (c)) ("The only depositions allowed shall be of experts. No other individuals may be deposed"). Rules like these strike at the heart of any form of legal dispute resolution. Whether the proceedings take place in a courthouse or an arbitrator's conference room, reasonable information exchange rules are essential to "prevent a trial from becoming a guessing game or one of ambush for either party." Scott v. Greenville Hous. Auth., 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003).

South Carolina appellate courts have signaled their refusal to tolerate arbitration contracts with extensive discovery restrictions like those in the Agreement. In Lucey v. Meyer, 401 S.C. 122, 143, 736 S.E.2d 274, 285 (Ct. App. 2012), the court found an employment arbitration contract was not unconscionable, rejecting the "oppressive terms" factor only after finding the contract "places no apparent restrictions on the introduction of depositions of witnesses into arbitration proceedings." The restrictions lacking there are present here. The inescapable reality of the Arbitration Agreement is that Respondent will have no opportunity to conduct depositions. South Carolina's federal district court has found an arbitration contract unconscionable because of "severe discovery limitations." Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582, 614 (D.S.C. 1998). In Hooters of America, the employer went too far when it limited its employee to noticing

one deposition unless the arbitrator found a “substantial need” for more. Id. at 601. The Arbitration Agreement poses a far more restrictive view of discovery by excluding all non-expert depositions. Several rulings from other jurisdictions have likewise refused to allow nursing homes to shut their former residents out of discovery.²

Appellants argue these restrictions cannot show unconscionability because streamlined discovery is an inherent component of alternative dispute resolution. (App. Br. at 24-27) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) and Hopkins v. World Acceptance Corp., 798 F. Supp. 2d 1339, 1349 (N.D. Ga. 2011)). However, there is a big difference between streamlining discovery and prohibiting information gathering. Neither case Appellants cite can be read to support a fact witness deposition ban. Gilmer specifically cited the availability of depositions as a reason why limited arbitration discovery was not too restrictive. 500 U.S. at 31 (noting governing arbitration rules “allow for document production, information requests, depositions and subpoenas”). Similarly, Hopkins addressed a deposition limitation provision, not a fact witness deposition ban like the one the Facility seeks to impose on Respondent here. 798 F. Supp. 2d at 1350 (noting applicable rules “allows for a limited number of depositions . . .”). As Gilmer recognized, even in arbitration, plaintiffs must be afforded information gathering procedures that yield “a fair opportunity to present their claims.” 500 U.S. at 31.

² See e.g. Estate of Ruszala v. Brookdale Living Communities, Inc., 1 A.3d 806, 821 (N.J. Super. App. 2010) (limiting plaintiff to expert depositions is “palpably egregious” and “clearly intended to thwart’ plaintiffs’ ability to prosecute a case involving resident abuse”); Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538, 540, 545 (E.D. Pa. 2006) (discovery limitations were unconscionable when they allowed expert depositions but barred deposition of NH employees or other fact witnesses); Prieto v. Healthcare & Retirement Corp. of Am., 919 So.2d 531, 533 (Fla. App. 2005) (reversing order compelling arbitration since contract included unconscionable discovery restrictions).

Appellants may argue a zero-deposition process is acceptable because it applies with equal force to them. This argument fails for multiple reasons. First, an arbitration proceeding amounting to trial by ambush is hardly consistent with the South Carolina Rules of Alternative Dispute Resolution the Arbitration Agreement purports to incorporate. See Rule 1, SCADR (stating that arbitration “shall be construed to secure the *just*, speedy, inexpensive *and collaborative* resolution” of disputes) (emphasis added). Second, while a zero-deposition rule may seem like an equal burden for both sides, its effects are unequally detrimental to a plaintiff in a nursing home case. Nursing home neglect occurs almost exclusively on the nursing home’s property, recorded in documents within the home’s exclusive control, and performed or witnessed by individuals in the home’s employ. If Appellants want to speak to the allegedly at-fault individuals, they can do so without limitation. See e.g., Kinney v. United HealthCare Servs., Inc., 70 Cal. App. 4th 1322, 1332 (Cal. App. 4th Dist. 1999) (finding facially mutual discovery limitation unconscionable in practice because defendant “is presumably in possession of the vast majority of evidence that would be relevant to . . . claims against it”).

But, without the ability to send a notice of deposition to any of the Facility’s employees, Respondents’ counsel would be at a significant informational disadvantage when the arbitration hearing begins. Respondent will know nothing from the Facility’s employees about the incident or the operation and management of the Facility. The absence of fact witness depositions is especially harmful here because all of the relevant fact witnesses are the Facility’s employees. That means attempting to speak with the key witnesses outside the deposition context would present a potential ethical violation. See Rule 4.2, RPC, Rule 407, SCACR. This case shows just how vast the information disparity can be and what a hurdle it poses to a plaintiff’s efforts to

investigate her claim. Plaintiffs (who bear the burden of proof) face a contractually-imposed hurdle to crucial evidence and a defendant is given cover to obscure key evidence adverse to its interests.

ii. Lack of mutuality

Appellants also fail to account for the Agreement's lack of mutuality. The purported arbitration requirement applies to all claims Mother could ever file but not to all claims the Facility could pursue against her. The Facility—as the Agreement's sole drafter—sought fit to expressly carve out the right to pursue an eviction action against Mother in court rather than in arbitration. Non-mutual arbitration burdens coupled with wholesale damage exclusions are precisely the type of grossly unfair terms recognized in Simpson. Another court labeled these types of provisions the dictionary definition of unconscionable contract language. Byrd Motor Lines, Inc. v. Dunlop Tire & Rubber Corp., 304 S.E.2d 773, 777 (N.C. App. 1983) (citing Black's Law Dictionary 1367 (5th ed. 1979) (citing “gross one-sidedness of a term . . . limiting damages” as typical example of unconscionability)).

iii. Damages limitations

The circuit court also correctly cited the Agreement's one-sided damages provisions as further evidence of substantive unconscionability.³ Punitive damages are declared non-recoverable (R. p. 155 ¶ 2(d)) and actual damages are severely limited. Appellants overlook the fact that the Agreement's noneconomic damages cap goes far beyond what is permissible in South Carolina

³ Appellants err in arguing Respondent's damage provision challenges are not ripe. (App. Br. at 30) (citing Carolina Care Plan). Carolina Care Plan held only that challenging certain damage limits on public policy grounds was premature. 361 S.C. at 557, 606 S.E.2d at 759. That holding was not aimed at an unconscionability defense. The ripeness objection has also been rejected in cases challenging wholesale damage bans and when an arbitration contract eliminates statutory remedies. 315 Corley CW LLC v. Palmetto Bluff Dev., LLC, 444 S.C. 521, 535 and n. 5, 908 S.E.2d 892, 899 and n. 5 (Ct. App. 2024). The Agreement purports to eliminate all appellate rights (Agreement at 10 ¶ 10) in violation of state and federal statutes. 9 U.S.C. § 16; S.C. Code Ann. § 15-48-200.

law. For one, the Agreement purports to apply the limitation to all claims, while South Carolina's statutory cap is limited to "medical malpractice" claims. S.C. Code Ann. § 15-32-220(A). Plus, the Agreement's limitation is a total cap for all individuals seeking noneconomic damages related to Mother's death from all Appellants. That is a substantial departure from the South Carolina statutory cap that works on a per claimant, per provider basis. Id.

Appellants' brief also offers no persuasive argument that the Agreement is reasonable in limiting Mother's actual damages. The Agreement purports to cancel out South Carolina's common-law collateral source rule (R. p. 154 ¶ 2(a))—a move that could reduce Mother's actual damages to nearly nothing. In fact, the probable effect of this provision is that Defendants would rarely have to pay anything of significance for economic damages. The collateral source rule has a rich history in South Carolina law and it serves important policy purposes. As the South Carolina Supreme Court has held, the rule ensures a tortfeasor does not "take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received" is an insurance company or any other source. Covington v. George, 359 S.C. 100, 103, 597 S.E.2d 142 (2004) (citing Pustaver v. Gooden, 350 S.C. 409, 413, 566 S.E.2d 199, 201 (Ct. App. 2002)).

Appellants' only defense for the economic damages restrictions is to note other jurisdictions do not recognize the collateral source rule. (App. Br. at 34-37). Appellants' point here is hard to determine. Whether there is an "ongoing scholarly debate" about the collateral source rule's merits is irrelevant to this case since Appellants do not dispute the rule is the law of the land in South Carolina. Simply put, the Agreement's economic damage limitations would not apply to a traditional negligence claim by a nursing home resident, they do not affect any claim the Facility would ever be likely to bring against Ms. Parsons, and there is simply no benefit to Ms. Parsons

in accepting these sorts of terms. Like the discovery restrictions, the damage limitations are designed to deter and devalue meritorious claims for resident injuries.

iv. Undue cost burden

Forcing Respondent to arbitrate her claims would also impose on her a substantial, perhaps preclusive, financial burden. While often lauded for its time savings, arbitration proceedings can cost far more than litigating a legal claim because the parties may be called on to compensate the arbitrator and to cover their costs. As the Fourth Circuit recognizes, “it is undisputed that fee splitting can render an arbitration agreement unenforceable where the arbitration fees and costs are so prohibitive as to effectively deny the employee access to the arbitral forum.” Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 554 (4th Cir. 2001); see also Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90-91 (2000). The arbitrator-related costs for arbitrating a nursing home negligence action are exponentially greater than court costs for litigating the same claim. See e.g. Phillips v. Associates Home Equity Servs., Inc., 179 F. Supp. 2d 840, 846-47 (N.D. Ill. 2001) (finding arbitration costs prohibitive when cost to arbitrate was at least 12 times as much as costs to bring action in federal court); see also Putman v. White Oak Estates, Inc., Op. No. 2024-UP-278, 2024 WL 3519647, at * 3-4 (S.C. Ct. App. July 24, 2024) (affirming unconscionability finding as to nursing home arbitration contract based in part on its cost-shifting provision).

Plus, it is not just the costs of the arbitration proceedings themselves that impose an undue burden here. The Agreement also calls for imposing a 25 cent charge on every page Respondent seeks in discovery. (R. p. 153 ¶ (b)). So, as Respondent investigates the Facility’s allegedly deficient funding and staffing levels that allowed Mother to be assaulted by her fellow residents, every staffing census, every financial document, and every incident report Respondent will need to prove her case will come at a substantial price. Like the unjust deposition ban, the effect (and

perhaps purpose) of these financial provisions is to discourage claims or to make them prohibitively difficult to prosecute. Simply put, these arbitration costs and discovery charges are expenses Ms. Parsons' family cannot afford to pay. Forcing Respondent to arbitration is an existential threat to the resolution of her claims on their merits.

v. Unconscionability rulings from other jurisdictions

Finally, the circuit court is far from the first to find these specific arbitration and liability limitation provisions unconscionable. A federal district court in Pennsylvania reached the same conclusion in Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538, 540, 545 (E.D. Pa. 2006). Discussing the fact witness deposition ban, the court first noted that a discovery restriction in an arbitration agreement does not render the agreement unconscionable unless the restriction denies the plaintiff "a fair opportunity to present their claims." Id. at 545 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991)). The deposition ban denied the plaintiff a fair opportunity because it denied access to two of the most vital sources of information, Alterra employees and the nursing home's other residents. While the plaintiff's attorney may have been able to convince some of the residents to speak voluntarily, the ban took away any means of compelling their testimony. As for Alterra employees, the plaintiff's lawyer was prevented from speaking with them by legal ethics rules. Ostroff, 433 F. Supp. 2d at 545; see also Rule 4.2, RPC, Rule 407, SCACR ("a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer"). The deposition ban put the plaintiff at a sizable disadvantage in the arbitration because the plaintiff will have "only limited information as to how the accident in question occurred." Ostroff, 433 F. Supp. 2d at 545.

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

Similarly, a New Jersey appellate court found the same arbitration and limitation of liability provisions to be unconscionable in Estate of Ruszala v. Brookdale Living Communities, Inc., 1 A.3d 806 (N.J. Super. Ct. App. Div. 2010). Ruszala called the fact witness deposition ban “palpably egregious” and “clearly intended to thwart plaintiff’s ability to prosecute a case” against the nursing home. 1 A.3d at 821. Also, the noneconomic damages cap had the “insidious effect of permitting nursing home operators to budget potential liability as a mere cost of doing business” and prevented plaintiffs from full recovery for their losses. Id. Additionally, by prohibiting punitive damages, the contract took away the public vindication and deterrent benefit justifying punitive damages as a measure of judicial relief. Ruszala, 1 A.3d at 821-22. As a whole, the contract “form[ed] an unconscionable wall of protection for nursing home operators seeking to escape the full measure of accountability for tortious conduct that imperils a discrete group of vulnerable consumers.” Id. at 822. Based on the binding South Carolina authority and persuasive authority from other jurisdictions, the Agreement’s arbitration and limitation of liability provisions are unconscionable and invalid.

In sum, the Arbitration Agreement was an adhesion contract offered to a vulnerable woman in desperate need of memory care under circumstances that deprived her of any meaningful choice. Moreover, the Agreement imposes severe discovery restrictions that tilt the arbitration

process and outcome dramatically in Appellants' favor. Ultimately, the substantive unconscionability question comes down to whether a reasonably informed person in Daughter's position would knowingly accept the terms discussed above. Where the answer is "no," the proponent of an unconscionability defense has met her burden. See Retreat at Charleston, 445 S.C. at 598, 915 S.E.2d at 753 ("We find it inconceivable that a [party] with even a semblance of bargaining power who understood the implications of the language in these agreements would sign them unless there existed a total absence of meaningful choice"). No reasonable resident would be expected to agree that, should she be injured at the Facility, she would be barred from reasonably investigating the source of her injuries or recovering what South Carolina law plainly allows for her losses. Thus, the circuit court correctly ruled the Agreement was unconscionable and unenforceable.

4. The circuit court correctly refused to sever the Agreement's unconscionable provisions because they cover every part of the proposed arbitration process.

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

agreement because it contained multiple unconscionable provisions that denied statutory rights and violated established public policy. 373 S.C. at 35, 644 S.E.2d at 674 n. 9.

Several items within the Agreement's arbitration and limitation of liability provisions are substantively unconscionable. The Agreement contains a severability provision, but Simpson shows severability clauses are ineffective if unconscionable provisions permeate the overall arbitration provision. Retreat at Charleston, 445 S.C. at 598, 915 S.E.2d at 753 (citing Simpson, 373 S.C. at 33-36, 644 S.E.2d at 673-74 (refusing severance due to the "cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause"). This case is similar to Simpson, and the court correctly refused to enforce the entire arbitration provision rather than attempting to excise the multiple unconscionable items within the provision. Like Simpson, the arbitration provision contains multiple unconscionable items including the discovery and damage restrictions. Since the unconscionable terms are so pervasive, to sever would effectively rewrite the contract in the offending party's favor—a result South Carolina courts especially disfavor in the nursing home context. Damico, 437 S.C. at 622, 879 S.E.2d at 760-61 (citing Shotts v. OP Winter Haven, Inc., 86 So.3d 456, 478 (Fla. 2011) (refusing to sever unconscionable nursing home contract's arbitration provisions because, "given the nature of the relationship between a nursing home and its patient, the courts ought to expect nursing homes to proffer form contracts that fully comply with [the law], not to revise them when they are challenged to make them compliant. Otherwise nursing homes have no incentive to proffer a fair form agreement.")). Therefore, the Agreement's arbitration and liability limitation provisions were correctly invalidated in full.

5. The non-Facility Appellants may not compel arbitration because the Agreement is limited to claims between its narrowly-defined parties.

Appellants Atlas Senior Living, LLC, Atlas Senior Living II, LLC, AFF18 Oakview Park PropCo, LLC, AFF18 Greenville Borrower, LLC, and Oakview Park Developer, LLC are entities involved with the Facility's operations (R. p. 25 ¶¶ 6-11), but they are not parties to the Agreement. South Carolina law presumes a contract's duties and benefits are exclusive to its parties, and this is not one of the very limited instances where a non-party may enforce contract provisions. To grant these entities enforcement rights, the Agreement would have to unambiguously extend its benefits to them and unambiguously subject to arbitration Respondent's claims against these entities. Since the Agreement's language does not meet these requirements, the failure to form a binding arbitration agreement stands as an additional sustaining ground for the circuit court's refusal to compel arbitration.

What separates contractual duties from their statutory or tort-based counterparts is that they are imposed only on parties that affirmatively manifest assent to them. Accordingly, South Carolina law presumes contracts may only be enforced by their parties. Touchberry v. City of Florence, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988); Wilson, 426 S.C. at 335, 827 S.E.2d at 172 (finding presumption against non-party enforcement of arbitration contract). This presumption may be overcome only if the contract's language unambiguously extends its benefits to third parties. Thompson v. Pruitt Corp., 416 S.C. 43, 57, 784 S.E.2d 679, 687 (Ct. App. 2016). Here, the Agreement does not extend to third persons. (R. p. 152 ¶ 1) ("*The Parties to this Agreement* further understand that a jury will not decide their case") (emphasis added).

The Agreement's "parties" are specifically identified in its first sentence. The Agreement is "made by and between" Mother/Daughter and "AFF18 Oakview Park ALF LLC dba Oakview Park." (R. p. 145). The Agreement never purports to make the Corporate Entities a "party," and

the Agreement unambiguously limits arbitration to the contract's "parties." (R. p. 152). By choosing to limit arbitration to the "parties" and to define the Agreement's parties in a narrow manner, the Facility unambiguously excluded the remaining appellants from enforcing the Agreement's arbitration provision.⁴

CONCLUSION

Based on the arguments above, the circuit court's order denying Appellants' motion to compel arbitration should be affirmed. Appellants' attempt to uproot South Carolina's unconscionability jurisprudence through a facial challenge to Simpson is not preserved for review. Even if it were, there is no basis for applying preemption because South Carolina has always defined unconscionability the same way and analyzed it the same way regardless of the subject matter of the challenged contract. Applying that analysis here, the circuit court correctly determined Daughter lacked a meaningful choice in signing the Agreement, a form adhesion contract with inconspicuous arbitration and damage limitation provisions that no reasonable layman would understand. The circuit court also followed South Carolina law in finding the Agreement's ban on fact witness depositions, damage limitations, and other grossly one-sided terms were so unfair that no reasonable resident would be expected to accept them.

⁴ Whether Mother/Daughter formed an arbitration contract with these Appellants is not covered by the limited delegation clause in the Agreement's arbitration provision. See (R. p. 152 ¶ 1). First, that provision covers "interpretation" questions, not the "enforceability" of arbitration. Second, not even the broadest delegation clause can confer contract formation questions to an arbitrator. Sanders v. Savannah Highway Automotive Co., 440 S.C. 377, 388, 892 S.E.2d 112, 118 (2023) ("the court is always the proper body to determine whether the parties agreed to arbitrate in the first instance" and "[i]t is clear courts must determine issues of contract formation").

Respectfully submitted,

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